Supreme Court No. 93187-9
COA No. 72067-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEBORAH JEAN LJUNGHAMMAR,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Deborah Jean Ljunghammar requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Ljunghammar, No. 72067-8-I, filed April 25, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to prove first degree theft where it did not prove Ms. Ljunghammar had "control" over Shelarose's property, or that the transfers of property were not "authorized" by Shelarose?

2. Did the State violate Ms. Ljunghammar's constitutional right to silence where she exercised her right to silence, and the State commented in her criminal trial on her decision to exercise the right?

3. Does the Court of Appeals' opinion affirming the exceptional sentence conflict with this Court's decision in State v. Hayes and present an issue of substantial public interest, where Ms. Ljunghammar was convicted as an accomplice and the jury was not instructed, nor did it find, that she knew the crime was a major economic offense?

4. Does the Court of Appeals' opinion affirming joint and several restitution conflict with the controlling statute and present an issue of substantial public importance warranting review?

C. STATEMENT OF THE CASE

Deborah Ljunghammar is the wife of Ivan Ljunghammar, whose mother is Shelarose Ljunghammar. 2/11/14RP 46. Ivan and Deborah helped Shelarose with her bookkeeping and maintaining her properties. 2/11/14RP 56-57; 2/12/14RP 4-5, 21, 26, 44-45, 79-81. Shelarose executed a power of attorney naming Ivan as attorney in fact and Deborah as "alternate Attorney in fact." Exhibit 1. There is no evidence Deborah ever acted as "alternate Attorney in fact."

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

Shelarose purchased and signed a cashier's check for $13,500, which was payable to Deborah. Exhibit 12. Deborah cashed the check and deposited the money into her account. 2/19/14RP 5-6; Exhibit 13.

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

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

Over time, Ivan's brothers began to believe Ivan and Deborah were mishandling Shelarose's funds. They called Adult Protective Services (APS) and the police. 2/11/14RP 72-76; 2/12/14RP 103.

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

The court ordered the guardian to pursue the funds unaccounted for. 2/13/14RP 131. On the eve of trial in the guardianship proceeding, Ivan and the guardian agreed on a settlement of $160,000. 2/13/14RP 131, 140. Ivan signed a confession of judgment for that

amount. 2/13/14RP 132; Exhibit 6. Deborah never signed a confession of judgment.

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

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

Prior to trial, both Ivan and Deborah moved to preclude the State from presenting evidence or commenting on their exercise of their Fifth Amendment right to silence. CP 96-114; 2/04/14RP 94. The court denied the motion, ruling the defendants did not have a right to be silent during the guardianship proceeding. 2/11/14RP 32-33.

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

The jury found both defendants guilty of first degree theft as charged. CP 115. The jury answered "yes" on the special verdict form regarding the two aggravating factors. CP 116. At sentencing, the court imposed an exceptional sentence based on the two aggravators. CP 118, 120. At a later hearing, the court ordered Deborah to pay restitution in the amount of $160,000, "joint and several" with Ivan. CP 174. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

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

The Due Process Clause requires the State to prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435

(2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

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

> having any property in one's possession, custody, or control, as attorney, or person authorized by agreement to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

CP 154; RCW 9A.56.010(22)(b).

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

not enough to prove that she had "possession, custody, or control" of Shelarose's money. 2/11/14RP 56; 2/12/14RP 4-5, 44-45, 79.

The State also did not prove Deborah was guilty as an accomplice because it did not prove the transfers of money were not authorized by Shelarose. Shelarose plainly wanted Ivan to have control over her finances—she designated him as her attorney in fact. Exhibit 1. There is no question Shelarose was competent and capable, and knew what she was doing, when she executed the document. 2/12/14RP 113, 120-26. In fact, she was not deemed *in*competent until the guardian was appointed in 2010, after the charging period in this case. 2/13/14RP 103.

Shelarose signed many of the checks that the State relied upon to prove the theft, suggesting she authorized the payments. 2/18/14RP 156; 2/19/14RP 42; Exhibit 10, 12. The State did not prove who withdrew or transferred the money from Shelarose's accounts or used her credit card, whether it was Shelarose herself or Ivan acting as attorney in fact. 2/18/14RP 33, 138-40, 151-52; 2/19/14RP 13; Exhibit 5, 7. But even if Ivan performed those actions, the State did not prove they were not authorized by Shelarose. In sum, the State did not prove Deborah was guilty of theft either as a principal or an accomplice.

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

The state and federal constitutions guarantee a defendant the right to be free from self-incrimination, including the right to silence. State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009); U.S. Const. amend. V; Const. art. I, § 9. The right to silence exists prior to arrest. State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). "[W]hen the State invites the jury to infer guilt from the invocation of the right to silence, the Fifth Amendment and article I, section 9 are violated." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

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

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

The constitutional protection against self-incrimination includes the right of an individual not to be compelled to give incriminating

answers in any proceeding, whether "civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The right against self-incrimination protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. Id.

Thus, a person may refuse to answer questions posed during an official investigation of a civil matter, if it is possible that the investigation will lead to a criminal prosecution. E.g., Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968); State v. Nason, 96 Wn. App. 686, 981 P.2d 866 (1999).

Here, Deborah was subject to compulsion to "answer official questions" sufficient to trigger her Fifth Amendment right against self-incrimination. See Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). The guardian was not acting as a private individual but was conducting an official investigation as "an officer of the court." Seattle First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977) ("guardian is deemed to be an officer of the court"); RCW 11.92.010 (providing that a guardian "shall at all times be under the general direction and control of the court"). Moreover,

when the guardian testified at the criminal trial about Deborah's refusal to answer questions or provide an accounting, the guardian was acting as "an agent of the State." See Estelle v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981)..

Deborah's Fifth Amendment right to silence came into play because she was subjected to the "cruel trilemma of self-accusation, perjury or contempt." Doe v. United States, 487 U.S. 201, 212, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988) (citation omitted). Deborah was under direct compulsion from the guardianship court to answer the guardian's questions. The court issued orders requiring her to provide an accounting, under threat of contempt. 2/13/14RP 108-10; 2/18/14RP 104, 130; CP 104. Further, the court had statutory authority to commit Deborah to jail if it suspected she had concealed, embezzled, conveyed or disposed of Shelarose's property and refused to answer questions about those matters. RCW 11.48.070.

Deborah had a reasonable basis to conclude that any incriminating information she provided to the guardian would ultimately be used against her in a criminal trial. Thus, she had a constitutional right to be silent in response to the guardian's questions and demands for an accounting.

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

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

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

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

"[W]hen the State invites the jury to infer guilt from the invocation of the right to silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated." Burke, 163 Wn.2d at 217.

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

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

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

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

The trial court imposed an exceptional sentence based on the statutory aggravator that the crime was a "major economic offense." CP 122; RCW 9.94A.535(3)(d). That was improper because Deborah was convicted as an accomplice and the jury did not find that she *knew* the offense was a "major economic offense." CP 116, 166; State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015).

In Hayes, Hayes was convicted as an accomplice of first degree identity theft. 342 P.3d at 1146. The trial court imposed an

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

Hayes requires reversal of Deborah's exceptional sentence. Deborah was convicted as an accomplice to first degree theft. Yet the jury was not asked to find whether her individual conduct informed the "major economic offense" aggravator. Further, the special verdict form does not show "a finding of knowledge that indicates that the jury found the aggravating factors on the basis of [Deborah's] own conduct." Hayes, 342 P.3d at 1148. The special verdict form merely states the jury found that the crime was "a major economic offense or series of offenses." CP 116. Therefore, the aggravating factor cannot apply to Deborah and the exceptional sentence must be vacated. Hayes, 342 P.3d 1148.

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

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

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

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

examining closely related statutes, because legislators enact legislation in light of existing statutes." Campbell & Gwinn, 146 Wn.2d at 11-12.

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

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

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

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

Moreover, a comparison of the restitution provisions of the SRA to the restitution provisions of the Juvenile Justice Act further supports the conclusion that the Legislature did not intend to authorize joint and several restitution at adult felony sentencings. It is an "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a different legislative intent." United Parcel Serv., Inc. v. Dept. of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984). Thus, in Enstone, the Court concluded that because the Legislature has frequently used the term

"foreseeability" in other statutes but did not include an express "foreseeability" requirement in the restitution statute, the Legislature "did not intend to require a sentencing court to find that a victim's damages are foreseeable before ordering a defendant to pay restitution" under the SRA. Enstone, 137 Wn.2d at 680.

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

The Juvenile Justice Act provides: "If the respondent participated in the crime with another person or person, all such participants shall be jointly and severally responsible for the payment of restitution." RCW 13.40.190(1)(f). This "provision for joint and several responsibility demonstrates the legislature's intent: an individual's actual conduct does not determine the extent of his responsibility for [juvenile] restitution; instead, all acts which form the crime are imputed, for restitution purposes, to any participant." State v. Hiett, 154 Wn.2d 560, 565, 115 P.3d 274 (2005).

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

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

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

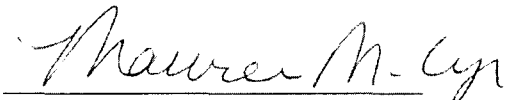
As discussed, the Legislature did not intend punishment for accomplices to be "coextensive with liability." Hayes, 342 P.3d at 1145-46. Instead, the Legislature intended that punishment be individualized and proportionate to the seriousness of the offender's own conduct. Id. A court should not impose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

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

E. CONCLUSION

The State did not prove the elements of the crime beyond a reasonable doubt, the State violated Ms. Ljunghammar's constitutional right to silence, the court erred in imposing an exceptional sentence, and the restitution award is not authorized by statute. For these reasons, this Court should grant review.

Respectfully submitted this 24th day of May, 2016.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. IVAN D. LJUNGHAMMAR, and DEBORAH JEAN LJUNGHAMMAR, and each of them, Appellants.	No. 72067-8-I (Consolidated with No. 72069-4) DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2016

APPELWICK, J. — Ivan and Deborah Ljunghammar were convicted of theft in the first degree for embezzling from Ivan's mother while acting under her power of attorney. The trial court imposed an exceptional sentence for each defendant based on the fact that the crime was a major economic offense and that the victim was particularly vulnerable. Both Ivan and Deborah contend that the State's evidence was insufficient to prove they committed first degree theft, that the State violated their right to silence by emphasizing their failure to provide financial records, and that the trial court erred in imposing exceptional sentences and joint and several restitution. Deborah contends that she was prejudiced by their joint trial. We affirm.

FACTS

Shelarose Ljunghammar was born on October 19, 1928. She was married to Nils Ljunghammar until he passed away in 1998. The couple had four sons: Ralph,[1] Ivan, Keith, and Daryl.

Shelarose owned several rental properties. She handled the bookkeeping for these properties. Shelarose began falling behind in her bookkeeping for the rental properties in the early 2000s. Around 2005, Ivan and his wife, Deborah, started helping Shelarose with her bookkeeping. Ivan also helped Shelarose maintain the rental properties, and he was paid for his work.

In 2007, Shelarose and several of her sons met with Shelarose's attorney to discuss her estate plans. The attorney discussed the possibility of giving someone power of attorney, but Shelarose wanted additional time to consider this possibility. Shortly afterward, on June 13, 2007, Shelarose signed a document giving her son Ivan a general durable power of attorney over her property and finances. The document named Ivan's wife, Deborah, as the alternate in the event that Ivan became unable or unwilling to act. At that time, Ivan and Deborah did not inform Daryl, Ralph, or Keith about the power of attorney.

After Ivan became Shelarose's attorney-in-fact, Ivan and Deborah began limiting Shelarose's interactions with the rest of the family. Shelarose stopped attending family functions. Ralph and Daryl became concerned that Ivan and Deborah were screening their calls to Shelarose—they were unable to reach their

[1] We refer to members of the Ljunghammar family by their first names for clarity. No disrespect is intended.

mother by phone. Ivan and Deborah did not notify the rest of the family when Shelarose was hospitalized. And, Ivan and Deborah changed the locks on Shelarose's home.

In 2009, Ralph and Daryl became concerned that Shelarose was no longer living at her home. Ralph contacted Adult Protective Services (APS). Daryl called the police.

On September 24, 2009, Detective Pamela St. John of the Seattle Police Department went to Shelarose's home to do a welfare check. No one answered when Detective St. John knocked on the door. While Detective St. John was looking around the house, Ivan and Deborah arrived. Detective St. John identified herself and asked where Shelarose was. According to Detective St. John, Ivan and Deborah were confrontational and uncooperative, but they eventually revealed that Shelarose was with her caregiver.

Detective St. John returned to Shelarose's home on September 29, 2009 to interview Shelarose in the company of her attorney. On this occasion, she was accompanied by Heidi Wilson from APS. During that interview, Shelarose appeared confused—she could not answer any of Detective St. John's questions about what day of the week it was, who the president was, or her children. And, she did not appear to understand who Wilson or Detective St. John were.

After an investigation, APS petitioned to appoint a guardian for Shelarose. On January 19, 2010, the court appointed Puget Sound Guardians (PSG) to be Shelarose's guardian. The court order also required Ivan and Deborah to provide

an accounting of Shelarose's finances for the time period that Ivan had power of attorney. Ivan and Deborah did not provide an accounting despite multiple court orders directing them to do so.

PSG conducted an independent investigation of Shelarose's finances by collecting records from the banks with which Shelarose had accounts. Then, they attempted to discern what funds may have been misappropriated when Ivan was attorney-in-fact by identifying questionable transactions.

PSG and Ivan reached a settlement agreement in March 2011. And, Ivan confessed to judgment in the amount of $160,000. Judgment was entered against him in the guardianship proceeding.

On August 22, 2012, Ivan and Deborah were charged with first degree theft. The State presented the testimony of numerous witnesses, including members of the Ljunghammar family and employees of PSG.[2] And, a financial analyst for the King County Prosecuting Attorney's Office testified regarding her analysis of Ivan's and Deborah's financial records. Her summaries regarding the transfers of money from Shelarose's accounts to Ivan and Deborah's accounts, and the correlation between these transfers and Ivan and Deborah's mortgage payments, were admitted as exhibits.

The jury convicted both Ivan and Deborah as charged. And, the jury found by special verdict that the crime was a major economic offense and that Ivan and Deborah either knew or should have known that the victim was particularly

[2] Shelarose was unavailable for either party to call as a witness at trial.

vulnerable. Accordingly, the trial court imposed an exceptional sentence for each defendant. The trial court also ordered Ivan and Deborah to pay restitution in the amount of $160,000, and it made the restitution obligation joint and several. Ivan and Deborah appeal.

DISCUSSION

Ivan and Deborah challenge the sufficiency of the evidence supporting their convictions for first degree theft. They also argue that the State violated their right against self-incrimination by inviting the jury to infer guilt from the fact that they failed to provide an accounting to PSG. Both assert that the trial court erred in imposing their exceptional sentences and joint and several restitution. And, Deborah contends that she was prejudiced by their joint trial.

I. Sufficient Evidence of First Degree Theft

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the elements beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. Id.

Under RCW 9A.56.020(1)(a), theft means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." A person exerts unauthorized control over property by having it in one's "possession, custody or

control" as attorney or other person authorized to hold possession and appropriating that property to one's own use or the use of someone other than the true owner or person entitled to the property. RCW 9A.56.010(22)(b).

Here, Deborah contends that the State did not present evidence to show that Shelarose's property was in Deborah's possession, custody, or control. She argues that she did not sign any of the checks written on Shelarose's accounts, withdraw or transfer money from Shelarose's accounts, or use Shelarose's credit card. And, she points out that the power of attorney document named her as " 'alternate attorney in fact,' " which gave her power of attorney only if Ivan was unable to exercise his authority.

But, numerous witnesses testified that they observed Deborah assisting Shelarose with her bookkeeping. Ralph recalled a time when Deborah and Shelarose were working on the bookkeeping, and Deborah was writing checks for Shelarose. He testified that Deborah appeared to be covering up the checks as she was writing them. Daryl often saw Deborah helping Shelarose write checks, and he also observed Deborah covering up the books on one occasion. Keith noticed Deborah writing Shelarose's checks for her. Daryl's wife, Kerie, also testified that Deborah would often have Shelarose sign checks, but that Ivan never helped with the bookkeeping.

The evidence also showed that Deborah took possession of Shelarose's funds. Checks from Shelarose to Deborah were deposited in Deborah and Ivan's joint account. Several of these checks contributed to the total amount of

questionable transfers that were identified in the confession of judgment as a breach of fiduciary duty. And, a cashier's check in the amount of $13,500 was made out to Deborah alone and deposited in the joint account.

And, multiple witnesses testified that Deborah represented herself as sharing the power of attorney with Ivan. Ralph testified that in early 2008, Deborah told him and Daryl that she and Ivan had power of attorney. Wilson from APS testified that when she went to Shelarose's home with Detective St. John, Deborah showed them the power of attorney she and Ivan had—she carried the document in her purse. From this evidence, a rational trier of fact could conclude that Deborah exerted control over Shelarose's finances.[3]

Deborah and Ivan both assert that even if they exerted control over Shelarose's finances, the State failed to prove that the money transfers were unauthorized. They contend that Shelarose gave Ivan power of attorney because she wanted him to control her finances. And, they argue that Shelarose herself signed many of the checks in question, and it is unclear who performed many of the other transactions. Moreover, they contend that the State did not prove that any transfers to Ivan and Deborah were not merely gifts from Shelarose.

[3] We also note that the jury received an instruction on accomplice liability. Therefore, the fact that only Ivan had power of attorney is of no consequence. A person may be an accomplice in the commission of a crime by soliciting, commanding, encouraging, or requesting the other person to commit the crime, or by aiding or agreeing the other person in planning or committing the crime, if the person knows that their actions will facilitate the commission of a crime. RCW 9A.08.020(3). Here, even if the jury did not believe that Deborah herself exerted unauthorized control over Shelarose's finances, the State's evidence still showed that Deborah aided Ivan in taking money from Shelarose by holding herself out as having power of attorney along with Ivan and by depositing checks into her and Ivan's joint account.

But, the State admitted into evidence Ivan's signed confession of civil judgment. This confession of judgment acknowledged that Ivan acted as attorney-in-fact for Shelarose and breached the fiduciary duties he owed to her. He admitted that he unjustly benefitted by distributing money from Shelarose's assets to himself, in an amount at least equal to $160,000.[4]

The State also produced evidence of Shelarose's previous manner of gift-giving to her relatives. The power of attorney document gave Ivan the authority to give gifts only in amounts consistent with Shelarose's previous manner of giving. Ralph, Keith, and Daryl testified that Shelarose did give them gifts in the past, but only in small amounts and on special occasions. Yet, Shelarose's and Ivan and Deborah's bank records show "gifts" and "loans" to Ivan and Deborah in amounts much larger than that.[5] Thus, under the power of attorney document, Ivan was not authorized to give these kinds of gifts and loans.

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[4] Ivan, in a statement of additional grounds, contends that the court erred in admitting the confession of judgment against him, because he signed it under duress. Deborah also contends that the trial court erred in admitting this document.

Ivan moved to exclude the confession of civil judgment before trial. But, the trial court denied this motion, because the confession of judgment is relevant to the issues in this case and it is an admission of a party opponent. The court also instructed the jury that the standard of proof in a civil guardianship proceeding is preponderance of the evidence.

The court did not err in admitting this document. Ivan was given the opportunity to discuss the confession of judgment with a lawyer before signing it. Ivan acknowledged this fact in the confession of judgment itself. He was not forced to admit that he breached his fiduciary duty to Shelarose. And, this document was highly relevant in the criminal case against both Ivan and Deborah.

[5] The notes on many of the checks paid to Ivan and Deborah from Shelarose's accounts involve loans or work. Other checks or transfers were not labeled. These money transfers range in amounts, with several loans of $3,000 or $5,000, an unlabeled check of $7,500, and a cashier's check made out to Deborah in the amount of $13,500.

Ivan and Deborah's secretive behavior provided additional evidence that these takings were unauthorized. They failed to keep records of their involvement in Shelarose's finances. Ivan and Deborah took steps to isolate Shelarose from her other sons by keeping her from attending family parties, changing the locks on her home to prevent the other sons from entering, refusing to let Daryl, Ralph, or Kerie talk to Shelarose when they called, and withholding information about her hospital visits. And, Ralph and Daryl witnessed Deborah covering up the checks she was writing for Shelarose.

We hold that there was sufficient evidence to support both Ivan's and Deborah's convictions.

II. Right to Silence

Deborah and Ivan argue that the State violated their constitutional right to silence by urging the jury to find them guilty based on their exercise of this right. They argue that they exercised their right to remain silent by failing to provide an accounting to PSG. And, Ivan contends that the trial court erred in denying his motion for a mistrial on this basis.

Both the United States and the Washington Constitutions protect the criminal defendant's right to be free from self-incrimination, which includes the right to silence. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. We interpret these provisions similarly, and liberally construe the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

At trial, the defendant's right against self-incrimination includes the right not to testify. Id. at 236. And, the State is prohibited from eliciting comments from witnesses or making closing arguments related to a defendant's silence such that would encourage the jury to infer guilt from that silence. Id. Nor may the State use evidence of the defendant's prearrest silence as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 215, 181 P.3d 1 (2008).

Here, Deborah and Ivan moved pretrial to exclude evidence of their failure to provide an accounting. They argued that a guardian is deemed to be an officer of the court, and, therefore, the fifth Amendment did attach in the guardianship proceedings. Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). They assert that responding to the court orders with answers or documents could have incriminated them. Consequently, they argue they were entitled to invoke the Fifth Amendment right to remain silent. Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (the Fifth Amendment applies in any proceeding where the answers could be used against the person in a later criminal prosecution). The State asserted pretrial, and the trial court agreed, that the Fifth Amendment protections did not attach in these proceedings, because the guardian was acting as a private individual, not a state actor. The trial court denied the motion. It ruled that the Fifth Amendment had not attached at the time, because the investigation was conducted in the context of a civil proceeding, and the defendants did not show that the guardian was a state actor.

At trial, the State presented evidence that Ivan and Deborah failed to provide financial documents to PSG, even after multiple court orders. In closing argument, the State emphasized that Ivan and Deborah refused to provide any records or give an accounting. The State further said that Ivan and Deborah were given multiple opportunities to provide an accounting and explain that Shelarose had gifted or loaned them money, yet they did not ever provide an accounting. Both Ivan and Deborah objected to this line of argument as burden-shifting and commenting on their silence, and they moved for a mistrial. The trial court denied their motion.

We need not decide if the Fifth Amendment applies. Assuming it did apply, Ivan and Deborah did not expressly invoke their right to remain silent. Instead, they simply did not respond to the court orders. The State argues that Ivan and Deborah's failure to explicitly invoke the right means that they waived it. In response, Ivan and Deborah contend that they invoked the right by remaining silent.

A person who seeks the protection of the Fifth Amendment right to remain silent must claim it at the time he or she relies on it. Salinas v. Texas, ___ U.S. ___, 133 S. Ct. 2174, 2179, 186 L. Ed. 2d 376 (2013). One does not expressly invoke the Fifth Amendment by standing mute. Id. at 2181. The United States Supreme Court has recognized two limited exceptions: when a defendant decides not to testify at trial, and when governmental coercion makes waiving the right involuntary. Id. at 2179-80. And, where assertion of the right would itself

incriminate the person, silence is sufficient. Id. at 2180. These exceptions all recognize that a witness need not expressly invoke the right "where some form of official compulsion denies him 'a free choice to admit, to deny, or to refuse to answer.' " Id. (internal quotation marks omitted) (quoting Garner v. United States, 424 U.S. 648, 656-57, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976))

Deborah and Ivan argue that responding to the request for an accounting by invoking the Fifth Amendment would have incriminated them. But, only answers that "would furnish a link in the chain of evidence needed to prosecute" the person for a crime are incriminating. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Here, invoking the right to remain silent would not have provided substantive evidence of the crime. Ivan and Deborah were not subject to official compulsion that denied them the free choice to invoke the right to remain silent.

We conclude that Deborah and Ivan failed to invoke their right to remain silent in the guardianship proceedings. Because they did not invoke this right, the trial court did not err in admitting evidence pertaining to Ivan and Deborah's failure to provide an accounting. Nor did the State err in referring to this failure in closing argument. Therefore, the trial court did not err in denying Ivan and Deborah's motion for a mistrial.

III. Exceptional Sentence

Deborah argues that the trial court erroneously imposed an exceptional sentence based on a major economic offense aggravating factor. She asserts this

is so, because she was convicted as an accomplice, but the jury did not find that she knew the offense was a major economic offense. Ivan also argues that the trial court erred in imposing his exceptional sentence based on the major economic offense aggravating factor.

RCW 9.94A.535(3) permits the trial court to impose an exceptional sentence based on aggravating circumstances considered by the jury. One of these aggravating factors is if the current offense was a major economic offense or series of offenses. RCW 9.94A.535(3)(d). A major economic offense is one which involved multiple victims or multiple incidents per victim, attempted or actual monetary loss substantially greater than is typical for the offense, a high degree of sophistication or planning or a lengthy amount of time, or was facilitated by the defendant's position of trust, confidence, or fiduciary responsibility. Id.

Appellants argue that State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015) requires reversal of their exceptional sentences. In Hayes, the defendant was convicted as an accomplice, and he appealed his exceptional sentence based on the major economic offense aggravating factor. Id. at 562-63. On appeal, the court noted that it looks to whether the defendant's own misconduct satisfies the language of the statute in reviewing a sentence aggravator. Id. at 563. The court held that when the aggravating factor relates to "the current offense" and the defendant is an accomplice, the jury must find that the defendant had knowledge that informs the aggravating factor. Id. at 566. For example, whether the defendant knew that the offense would have multiple victims, involve a high degree

of sophistication, or take place over a long period of time. Id. Because the court could not tell from the jury's special verdict whether it found that Hayes had any knowledge informing the major economic offense factor, it vacated his exceptional sentence and remanded for resentencing. Id. at 566-67.

Here, Deborah's actions showed that the crime was facilitated by her own position of trust, confidence, or fiduciary responsibility. The power of attorney document named her as the alternate attorney-in-fact, and she held herself out as sharing the power of attorney with Ivan.[6] She wrote checks for Shelarose to sign. She received significant amounts of money from Shelarose during the time Ivan was attorney-in-fact. She isolated Shelarose by screening her family members' calls, preventing her from attending family functions, and changing the locks on Shelarose's home. And, she failed to respond to multiple court orders requesting an accounting of Shelarose's funds during this time period. Therefore, the evidence clearly allowed the jury to find that Deborah's own actions satisfied the major economic offense aggravator whether she was a principal or an accomplice.

Moreover, the trial court also imposed Deborah and Ivan's exceptional sentences based on another aggravating factor: that the defendants knew that the victim was particularly vulnerable or incapable of resistance. Neither Deborah nor Ivan argues that the particularly vulnerable victim factor was an invalid basis for an exceptional sentence. And, the court noted in the findings of fact associated with each exceptional sentence, "Each one of these aggravating circumstances is a

[6] Nothing in the record suggests that Deborah actually served as attorney-in-fact under the power of attorney.

substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed." It is appropriate for this court to affirm an exceptional sentence where the trial court expressly states that the same exceptional sentence would be imposed based on any of the aggravating factors standing alone. State v. Weller, 185 Wn. App. 913, 930, 344 P.3d 695, review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015).

But, Deborah asserts that the trial court's statement was a "boilerplate finding" that is insufficient to support the exceptional sentence. We do not agree. This finding was supported by the trial court's comments during the sentencing hearing emphasizing, "[W]hat was proved beyond a reasonable doubt was the taking advantage of an infirm person, who is infirm by their age and their dementia. And why? For money. For greed. That crime is repugnant." Taken together, the trial court's statements and written findings indicate that the same exceptional sentence would be imposed based on either of the aggravating factors.

Thus, these exceptional sentences stand regardless of whether the major economic offense aggravating factor was proper. We affirm both appellants' exceptional sentences.

IV. Joint and Several Restitution

Deborah further argues that the trial court was not authorized to impose joint and several restitution on Deborah and Ivan. Ivan adopts this argument.

This court reviews a trial court's order of restitution for an abuse of discretion. State v. Grantham, 174 Wn. App. 399, 403, 299 P.3d 21 (2013). The

trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Cawyer, 182 Wn. App. 610, 616, 330 P.3d 219 (2014). We review de novo whether the trial court applied the wrong legal standard or based its decision on an erroneous view of the law. Id.

The trial court's authority to impose restitution is derived from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). The governing statute here, RCW 9.94A.753(3), provides, "[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury."

The broad language of the restitution statutes indicates legislative intent to give the courts broad powers of restitution. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). As such, this court does not give restitution statutes an overly technical construction that would permit a defendant to avoid just punishment. Id. at 922.

Restitution may be ordered only for losses incurred as a result of the crimes charged. State v. Raleigh, 50 Wn. App. 248, 252, 748 P.2d 267 (1988). The trial court need find only that a victim's injuries were causally connected to a defendant's crime before ordering a defendant to pay restitution for the resulting expenses. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

Both Ivan and Deborah contend that the other is the more culpable party, and therefore joint and several restitution is not commensurate with their individual

conduct. But, the evidence shows that Ivan and Deborah acted together to deprive Shelarose of her property by writing checks on Shelarose's accounts and depositing the money into their joint bank account. Clearly, the victim's injury was causally connected to each of them. The court had authority to impose the full amount of restitution on each of them individually. Because they acted in concert to perpetrate the theft, a joint and several restitution order is appropriate to the husband and wife team. They fail to articulate any way in which this order imposes a burden on them in excess of what the statute allows. RCW 9.94A.753(3) gives trial courts broad powers to impose restitution. Davison, 116 Wn.2d at 920. We do not interpret it as prohibiting joint and several restitution.

We hold that the trial court did not err in imposing joint and several restitution here.

V. Joint Trial

In a statement of additional grounds, Deborah contends that she was prejudiced by the State's decision to try her and Ivan together. CrR 4.3(b) provides that two or more defendants may be joined in the same charging document when each is charged with the same offense or with offenses so closely related that it would be difficult to separate proof of one offense from proof of others.

Deborah appears to raise this issue on the first time on appeal. Accordingly, she must demonstrate that the joint trial was so manifestly prejudicial that it outweighed the concern for judicial economy. State v. Embry, 171 Wn. App. 714, 731, 287 P.3d 648 (2012).

Deborah contends that because she did not have power of attorney for Shelarose, she was prejudiced by being tried with Ivan. But, the State's evidence showed that Deborah assisted Ivan with the theft—her involvement was not limited to depositing funds into their joint accounts. The evidence showed that Deborah and Ivan worked together to deprive Shelarose of her property. Therefore, Deborah has not established the necessary threshold of prejudice.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72067-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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