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NO. 62774-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
THOMAS DELANTY,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CHRIS WASHINGTON

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**BRIEF OF RESPONDENT**

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I. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred when it ordered State's witnesses Ralph and Susan Boyer, who initially refused to be interviewed by the defense then agreed to interviews on condition that their interviews would not be recorded, to submit to depositions by the defense under CrR 4.6 because the witnesses had an absolute right to refuse the interviews and to refuse to be recorded and because there was no showing as required under CrR 4.6 that the witnesses had refused to speak to either party and that the depositions were necessary to prevent a failure of justice.

II. ISSUES RAISED ON APPEAL

Whether the trial court abused its discretion when it refused defense exhibits 355 and 376A, B and C when the exhibits were cumulative and irrelevant, when Delanty failed to make an adequate offer of proof for exhibit 355, and when exhibits 376A, B and C contained inadmissible hearsay?

### III. STATEMENT OF FACTS

#### A. FACTS PERTAINING TO ISSUES ON APPEAL

Nancy Elizabeth Huegli was born January 3, 1916. She was known to friends and family as "Betty." She had two children, James and Susan. Her husband of 50 years, Douglas P. Huegli, died in 1992. During their marriage they purchased rental homes, stocks, and made other investments. In his will Douglas Huegli established two trusts for his wife. After Douglas Huegli's death Nancy Huegli managed her own finances and took care of the rental homes with help from her daughter and son-in-law Ralph Boyer. Nancy Huegli enjoyed investing in the stock market and buying jewelry. RP (10/29/08) 4-12; (10/30/08) 169-72.<sup>1</sup>

Appellant Thomas Delanty married Vida Smith who grew up next door to Nancy Huegli. RP (11/13/08) 99. Sometime after Mr. Huegli's death Delanty began preparing Nancy Huegli's federal income tax returns and paying her bills with a joint checking account they opened for that purpose. RP (10/29/08) 15, 26-28. Nancy Huegli talked about Delanty in glowing terms and kept a picture of him on her mantle. She told her children that she had

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<sup>1</sup> Report of Proceedings on dates and at pages indicated.

known him for 20 years and trusted him. Delanty told Nancy Huegli, James Huegli, and Susan Boyer that he had an MBA from Harvard and a Masters degree in taxation, that he had been a CPA with a large firm and was a financial planner, and that he was the president of a large corporation called "Sawyer Development and Investment Company" which had thousands of employees and offices around the world. RP (10/29/08) 21-23, 33-4; Exhibits 3, 4.<sup>2</sup>

Nancy Huegli broke her ankle in 2002 and was unable to walk without a walker. RP (10/29/08) 18-20. She began to lose her eyesight and to deteriorate mentally and eventually became housebound. RP (10/29/08) 29-30; (11/3/08) 95-100. In 2003 Delanty began forging Nancy Huegli's name to checks drawn against her various bank accounts. RP (10/29/08) 26-8, 35. He moved her investments from her long-time broker to an account at Charles Schwab and persuaded her to sign a power of attorney authorizing him to buy and sell her securities. RP (10/29/08) 38-40, 106-08; (10/30/08) 20-23; (11/3/08) 3-5, 152-64; Exhibits 19, 22. He moved her jewelry collection to a new safety deposit box and refused to give her a key. RP (10/29/08) 48-50, 54-55. He took her

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<sup>2</sup> Indicates exhibits at trial.

to an auto licensing business to notarize her signature on an amendment to her trust that removed James Huegli and Susan Boyer as trustees and substituted himself as co-trustee with Nancy Huegli and as successor trustee in the event that she became incompetent. RP (10/30/08) 17-19; (11/4/08) 64-65; Exhibit 21.

On October 25, 2005 Delanty became enraged after James Huegli returned his mother's 1991 Cadillac to her garage. He began shouting at Nancy Huegli, frightening her. RP (10/29/08) 53-54; Exhibit 48. After he left she told Ralph and Susan Boyer and a friend Harriet Oakley about Delanty's outburst and said that she wanted to fire Delanty. RP (11/3/08) 8, 70, 111-12. She also told them about the Charles Schwab account and the power of attorney and the new safety deposit box. When James Huegli asked Delanty about her complaints he accused Nancy Huegli of "fiction" and denied any wrongdoing. RP (10/29/08) 59-63; Exhibit 6. On November 2, 2005 Delanty used his position as trustee of Nancy Huegli's trust to file a deed of trust for \$52,500 against Nancy Huegli's home naming himself beneficiary. RP (10/29/08) 79-80; Exhibits 11, 12.

On November 4, 2005 family members took Nancy Huegli to visit a retirement home. When they returned to her home they

discovered all of her financial records were missing. Delanty had a key to Nancy Huegeli's home. RP (10/29/08) 65-66; (11/3/08) 10-11, 71-4; (11/10/08) 50-51. On November 6, 2005 Ralph Boyer advised Delanty by e-mail that they had hired a CPA to audit Nancy Huegeli's checking and investment accounts and asked him to return any of her records he might have. Exhibit 7. Delanty complained to James Huegeli that Boyer's e-mail was "offensive and laced with innuendo," claimed that Nancy Huegeli owed him money for his services, and conditioned his return of Nancy Huegeli's safety deposit box keys and records on "appropriate releases." Exhibit 8.

James Huegeli asked Delanty for a final bill. RP (10/29/08) 64. Delanty sent James Huegeli an invoice dated November 8, 2005 for \$93,620 for the 22-month period from January 1, 2004 through October 26, 2005. In his invoice, he claimed that he had spent 748.96 hours working for Nancy Huegeli including 22,895 minutes on the telephone with her, that she had paid him \$71,465, and that she still owed him \$22,155. RP (10/29/08) 72-3; Exhibit 10. On November 10, 2005 Delanty sent James Huegeli an e-mail advising him that he would return Nancy Huegeli's records if she paid his invoice in full with a cashier's check and executed signed releases, indemnifications, and hold harmless agreements. Exhibit 11.

James Huegeli obtained copies of his mother's financial records from her banks. He discovered that Delanty had forged Nancy Huegeli's signature to checks drawn against her Schwab One account, used checks Nancy Huegeli signed payable to the IRS to pay his own federal income taxes instead of hers,<sup>3</sup> and otherwise wrote unauthorized checks against her bank accounts including checks payable to himself, to his businesses, and to his daughter, Emily. RP (10/29/08) 94-124; (10/30/08) 9-12, 33-40. Ralph Boyer discovered that Delanty also embezzled from Nancy Huegeli by taking \$6,600 in cash back from rent checks he deposited to Nancy Huegeli's trust account. RP (11/3/08) 76-77; Exhibits 2, 17, 18, 23. James Huegeli estimated that Delanty had stolen approximately \$150,000 from his mother. RP (10/29/08) 101.

Nancy Huegeli retained attorney Wesley L. Edmunds who sent Delanty a letter on November 21, 2005 asking him to return Nancy Huegeli's financial records and the keys to her safety deposit box and for time records supporting his invoice. Delanty responded

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<sup>3</sup> For example, the carbon copy of check number 172 for \$1,000 payable to the Internal Revenue Service and bearing Nancy Huegeli's true signature has Nancy Huegeli's social security number written on the memo line. A copy of the check obtained from the bank shows her social security number was crossed out and the social security numbers of Delanty and his wife were written in its place. Exhibits 2, 18.

by threatening to sue Nancy Huegli for personal injury, to file liens against her home and rental properties, and by claiming that Nancy Huegli owed him an additional \$4,500 for services rendered since the date of his previous invoice. Exhibit 14. Mr. Edmunds sent Delanty a second letter demanding that Delanty return Nancy Huegli's financial records and safety deposit box keys and produce billing detail to support his invoice. Delanty produced nothing. Nancy Huegli had to have the lock on her safety deposit box drilled. RP (10/29/08) 84-93; (11/4/08) 4-23; Exhibits 13, 15.

James Huegli called the Bellevue Police Department. RP (10/29/08) 96. On March 16, 2006, detectives served a search warrant at Delanty's home. They discovered Nancy Huegli's financial records in his basement and took them into evidence along with his computers, computer storage devices, and other evidence. RP (10/29/08) 98-100; (11/4/08) 148-53; (11/5/08) 28-9; Exhibit 29. They found a few invoices from Delanty to Nancy Huegli in her records and others on his computer but no time records supporting his November 8, 2005 invoice. RP (11/4/08) 159-64; Exhibits 30, 31, 32. Data on Delanty's home computer showed that he had drafted the November 8, 2005 invoice during a seven-hour period on November 9, 2005. RP (11/5/08) 37-45,

54-55. His computer also contained the amendment to Nancy Huegli's trust which Delanty drafted using an "Amending a Living Trust" kit. Exhibit 31.

James Huegli retained attorney Renea Saade to sue Delanty. RP (10/29/08) 94-5. Delanty was ordered to produce an accounting. In an April 20, 2006 declaration Delanty claimed that he was unable to produce an accounting because the Bellevue police had seized all of the records he possessed relating to Nancy Huegli with the exception of a few documents he attached to his declaration. Those documents included several new invoices for services performed and a gift letter Nancy Huegli had purportedly signed giving \$25,000 to his daughter. The invoices were different than the computer-generated invoices found in Nancy Huegli's records and on Delanty's computer and appear to have been created on a typewriter.<sup>4</sup> Exhibits 25, 32. The gift letter also appears to be typed and is a photocopy on which Nancy Huegli's signature is blurred. Delanty was unable to produce the original signed gift letter. RP (11/4/08) 89-97; (11/10/08) 150; Exhibits 24, 25. In response to interrogatories Delanty stated that he

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<sup>4</sup> A photograph taken during the search of Delanty's home shows what appears to be a typewriter. Exhibit 29.

possessed no documents regarding his education, qualifications, or credentials as a professional in accounting or finance and that "Sawyer Development & Investment Co." does not exist. RP (11/4/08) 102-04, 108-09; Exhibit 28.

Delanty also produced his telephone records in the civil case. He used a felt marking pen to redact all telephone calls from his records except those he claimed were to or from Nancy Huegli. RP (11/4/08) 97-100; Exhibit 26. Analysis of telephone records show that Delanty spoke to Nancy Huegli on the telephone for no more than 9,458 minutes in 2004 and 2005, substantially less than the 22,895 minutes he claimed in his November 8, 2005 invoice. Of the 9,458 minutes 7,178 were incoming calls Delanty identified in his records as calls from Nancy Huegli for which it is impossible to identify the caller. RP (10/30/08) 23-31; (11/5/08) 122-32; Exhibits 27, 33, 34.

A few months before trial Delanty produced two pocket calendars for 2004 and 2005. RP (11/10/08) 40-41; Exhibits 35A, 35B. Notations in the calendars purport to show time Delanty spent meeting with Nancy Huegli or talking to her on the telephone. Those notations are inconsistent with the time Delanty recorded on his November 8, 2005 invoice. RP (11/5/08) 136-40; Exhibit 36.

Forensic analysis of the 190 Nancy Huegli entries in the calendars shows that the ink used in 186 of those entries is chemically indistinguishable indicating that they were all made with the same pen or type of pen. Of the other four Nancy Huegli entries three were made with a different ink and one was made in pencil. Other entries in the calendars unrelated to Nancy Huegli were made in different inks. RP (11/5/08) 79-94.

The Washington State Patrol Crime Laboratory compared the signatures on the 28 checks charged as thefts with examples of Nancy Huegli's known signature. They concluded that it is highly probable that the signatures on the checks in counts 1, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 17, 19, 21, 23 and 24 were not made by Nancy Huegli and are "simulations" defined as an imitation attempting to pass for a genuine signature. All of these checks were drawn against Nancy Huegli's Schwab One checking account for which Delanty had no check signing authority. They concluded that the other checks charged as thefts either bear the genuine signatures of Nancy Huegli or are not comparable due to poor copy quality. RP (11/5/08) 115-16; Exhibits 40, 43.

Nancy Huegli's video deposition was played for the jury. In her deposition she testified that she hired Delanty to do her taxes

and to pay her bills. She testified that she didn't remember signing an amendment to her living trust and that when Delanty took her to the auto licensing business she thought it was to sign documents for her car. She testified that she gave Delanty a key to her home for emergencies and when she returned from visiting the nursing home all her records were gone. She denied signing the gift letter giving Delanty's daughter \$25,000. She confirmed that the signatures on many of the checks charged in the information were not hers. Exhibits 45, 48, 49.

The State charged Delanty with 28 counts of first and second-degree theft and attempted theft for 28 checks made payable to himself, his businesses, and his daughter drawn from Nancy Huegeli's bank accounts between July 11, 2003 and October 25, 2005. CP<sup>5</sup> 596-610; Exhibit 1. During his case Delanty offered exhibits 376A, B and C, three binders containing a collection of approximately 4,000 pages of documents that supported his PowerPoint presentation. RP (11/6/08) 15-19. Among these documents were several e-mail exchanges between Delanty, James Huegeli, Susan Boyer, and Ralph Boyer that were not

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<sup>5</sup> Clerk's papers at pages indicated.

admitted during the State's case. Delanty argued that the e-mails were admissible to show his state of mind under ER 803(a)(3), to prove notice, and to corroborate his in-court testimony under ER 801(d)(1)(ii):

What I'm offering these e-mails for is to show that my client is telling the truth when he put Jim Huegli and Ralph and Sue Boyer on notice in October and November and December of 2004. I'm charging a lot for my time. This is taking up a huge amount of my time, showing his state of mind, showing his frustration, showing his attempts to get them to hire someone to replace him. Those are verbal acts. They're not offered for the matter asserted.

RP (11/10/08) 10-11. The State objected to the admission of the exhibits because they were offered by Delanty to prove the truth of the statements in the e-mails and were therefore hearsay and because they memorialized Delanty's in-court testimony.

RP (11/10/08) 1-10. The court ruled that Delanty could testify about the e-mails and could show them to the jury but they could not be admitted as evidence. The court suggested that the rest of the documents in the notebooks might be admissible if the e-mails were removed. RP (11/10/08) 21-23. Delanty showed the jury the documents in the exhibits during his PowerPoint presentation including the e-mails between himself and James Huegli, Ralph Boyer, and Susan Boyer. RP (11/10/08) 26-9; (11/12/08) 91-147.

Delanty did not remove the e-mails from the exhibits and reoffer them.

Delanty also offered exhibit 355 containing several invoices to Nancy Huegli and corresponding checks most of which were either already in evidence or were dated before the time period of the charged counts. Among the invoices were two that were dated November 29, 2004 and January 23, 2005 which were not found during the search or attached to Delanty's April 20, 2006 declaration but were produced in discovery before trial. Judge Washington refused the exhibit:

MR. HANSEN: Your honor, I would like to offer the exhibit, but I'm afraid I'll get the same response.

THE COURT: You will. You can offer it for the purpose of the record. It's been testified to. My decision is to try to keep the paperwork for the jury at a minimum.

MR. HANSEN: I totally understand, Your Honor.

RP (11/12/08) 26-41; Exhibit 355. Delanty made no offer of proof describing the relevance of the exhibit to his defense.

Delanty's expert forensic accountant explained to the jury how she reconciled several of the invoices in exhibit 355 including the invoices dated November 29, 2004 and January 23, 2005 with

the 28 checks charged as thefts. RP (11/13/08) 55-67. On cross-examination the State used a blow-up exhibit to demonstrate for the jury how the expert matched the checks charged as thefts to eight of the invoices contained in exhibit 355. The blow-up exhibit also included the invoices dated November 29, 2004 and January 23, 2005. RP (11/13/08) 78-86; Exhibit 46.

During his testimony Delanty claimed for the first time that Nancy Huegli signed a power of attorney on August 15, 2001 granting him authority to make withdrawals from her Schwab One account. RP (11/12/08) 56-58; Exhibit 377. Delanty did not offer this power of attorney into evidence. RP (11/12/08) 51-183. Seventeen of the checks charged as thefts were drawn against Nancy Huegli's Schwab One account. Exhibits 1, 2. On cross-examination Delanty admitted that he had created the August 15, 2001 power of attorney by completing a photocopy of a power of attorney Nancy Huegli had signed in blank that he obtained from her documents during discovery. RP (11/13/08) 4-25; Exhibits 52, 53. Charles Schwab did not have the August 15, 2001 power of attorney in its records. RP (11/13/08) 125-26.

The jury convicted Delanty of 26 of the 28 charged counts and found aggravating facts.<sup>6</sup> CP 740-43. During its deliberations the jury sent out two questions, one asking for copies of checks Delanty completed for Nancy Huegeli's household expenses and one asking for the invoices dated November 29, 2004 and January 23, 2005. Judge Washington responded to both questions that the jury would have to rely on the evidence and testimony admitted at trial. CP 744-47.

**B. FACTS PERTAINING TO ISSUES ON  
CROSS-APPEAL**

The case was pre-assigned for trial to the Hon. Joan DuBuque on October 15, 2007, reassigned to the Hon. Dean Lum on March 6, 2008, and reassigned again to the Hon. Chris Washington on September 8, 2008. CP 66, 226, 511. The State provided the defense with the recorded statements of Ralph and Susan Boyer who after initially refusing to be interviewed by the defense agreed to an interview on condition that it would not be recorded. CP 434-37. During pre-trial motions before Judge Lum

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<sup>6</sup> The jury found Delanty not guilty of counts 9 and 16 two counts for which Nancy Huegeli's signature on the corresponding checks was verified as genuine by the State's expert.

Delanty moved the court for an order compelling the depositions of Ralph and Susan Boyer. On August 15, 2008 Judge Lum granted the motion over the State's objection:

THE COURT: I think, obviously, a criminal case is different than a civil case. In a civil case you get to depose everybody. But I think in this particular case, what you have are folks who have vacillated. And I don't think the defense is required to be jerked out 20 days from Sunday.

RP (8/15/08) 14-20; CP 454-57.

#### IV. SUMMARY OF ARGUMENT

##### A. SUMMARY OF ARGUMENT ON APPEAL

1. The trial court acted within its discretion when it refused exhibits 355 and 376A, B and C because Delanty failed to make an offer of proof sufficient to establish the relevance or admissibility of exhibit 355 and exhibits 376A, B and C contained inadmissible hearsay.

2. Even if the trial court erred when it refused exhibits 355 and 376A, B and C the error was harmless because the content of the exhibits was shown to the jury so Delanty cannot show prejudice and because the evidence of Delanty's guilt was overwhelming.

B. SUMMARY OF ARGUMENT ON CROSS-APPEAL

The trial court erred when it ordered the depositions of Ralph and Susan Boyer under CrR 4.6 because the witnesses had a right to refuse to be interviewed or recorded and because there was no showing that the witnesses refused to speak to either party or that the depositions were necessary to prevent a failure of justice as required by CrR 4.6, particularly when the State had provided their statements to the defense and the witnesses had agreed to give the defense an interview.

V. ARGUMENT

A. ARGUMENT ON APPEAL

A trial court's decision on the admissibility of evidence is reviewed under the abuse of discretion standard. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). An aggrieved party must clearly establish manifestly unreasonable or untenable grounds for the trial court's decision to establish abuse of discretion. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). The right to present testimony of witnesses is not absolute, and a defendant has no right to offer testimony inadmissible under applicable evidence rules. Taylor v. Illinois, 484 U.S. 400, 410,

108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

ER 103(2) provides that when evidence is excluded the party offering the evidence must make an offer of proof unless the substance of the evidence is apparent from the record:

An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.

State v. Ray, 116 Wn.2d 531, 538-39, 806 P.2d 1220, 1225 (1991) (citations omitted).

Delanty argues that the court abused its discretion in refusing exhibit 355, a collection of several invoices most of which were either dated before the charged crimes or had already been admitted and two of which were produced by Delanty in discovery before trial. He argues that the trial court's refusal of exhibit 355 was particularly egregious because the jury asked a question during deliberations about the two invoices he produced in discovery.

However, Delanty's attempt to admit the exhibit was tepid at best.<sup>7</sup> He made no offer of proof of the relevance or admissibility of the exhibit or of any of the invoices contained in it. Without this offer of proof the trial court had no basis for assessing the purpose for which exhibit 355 was offered or its admissibility. Because Delanty failed to make an adequate offer of proof to the trial court of the relevance and admissibility of this exhibit and to preserve this issue for appeal it should be rejected.

Even if the trial court had erred in excluding exhibit 355, the error was harmless. A trial court's evidence exclusion error that does not result in prejudice to the defendant is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Thacker, 94 Wn.2d 276, 283, 616 P.2d 655 (1980). An error "is not prejudicial unless, within reasonable probabilities,

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<sup>7</sup> This may have been a tactical decision. Delanty was later shown a bundle of power of attorney documents including one dated August 15, 2001 purportedly giving him authority to make withdrawals from Nancy Huegeli's Schwab One account. Inexplicably, Delanty did not offer the August 15, 2001 power of attorney into evidence. On cross-examination the State established that it was a forgery. Similarly, the two invoices the jury asked about were combined with others and Delanty testified about them as a group. The authenticity of the two invoices was questionable because they were not found during the search of his home and computers or attached to his declaration in the civil case. It is possible that, like the August 15, 2001 power of attorney, he did not want to draw attention to the invoices by testifying about them separately or offering them into evidence because they were also forged. It may also explain the jury's curiosity about the invoices.

the outcome of the trial would have been materially affected had the error not occurred.” Bourgeois, 133 Wn.2d at 403 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Despite the court’s ruling excluding exhibit 355, Delanty testified about the invoices and his forensic accounting expert was allowed to discuss several of them including the two the jury asked about to explain her analysis of how the invoices matched the checks that were charged as thefts in the information. Because that information was before the jury Delanty cannot show that he was prejudiced by the trial court’s decision. The outcome of his trial was not materially affected by exclusion of this evidence given his testimony and the testimony of his expert.

Delanty also claims that the trial court erred when it refused exhibits 376A, B and C, a conglomeration of over 4000 documents supporting his PowerPoint presentation.<sup>8</sup> But the exhibits were

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<sup>8</sup> The exhibits contain checking, credit card, and investment account statements, check registers, checks, deposit items, account agreements, telephone records, travel documents, pocket calendars, correspondence to and from Nancy Huegli and between Delanty and tenants in her rental homes, property management, real estate, federal income tax, vehicle title, and insurance documents, Nancy Huegli’s will, the addendum to her trust, inventories of her jewelry, the gift letter, handwritten notes, newsletters, receipts for coffee, restaurants, groceries, and house wares, transcripts of voice mail messages from James Huegli and Susan Boyer, and e-mails between Delanty, James Huegli, Ralph Boyer, Susan Boyer, and one unknown recipient whose identity is redacted. The documents are comingled and organized chronologically with a title page for each week of the two-year period stating “Nancy Huegli Related Tasks—Performed by Delanty.”

inadmissible because they contained e-mail exchanges with James Huegli, Ralph Boyer, and Susan Boyer that repeated and memorialized his prior out-of-court statements. The prior statement of a witness is excluded from the definition of hearsay when it is

(ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .

ER 801(d)(1)(ii). Delanty did not offer the e-mails to rebut an express or implied charge of recent fabrication or improper influence or motive but to bolster the credibility of his testimony. As Delanty's counsel told the court during argument they were offered to corroborate his in-court testimony that he was doing a great deal of work for Ms. Huegli and expected to be paid. Moreover, Delanty offered exhibits 376A, B and C before he testified and before the credibility of his testimony was in question. To the extent that the exhibits contained hearsay they were inadmissible. The trial court did not err in excluding them as offered.

Delanty claims that exhibits 376A, B and C contained detail supporting his November 8, 2005 invoice that was critical to rebut the State's evidence that no such detail exists. However, the relevance to that issue of many of the documents contained in the

exhibits is not apparent. Many of the documents relevant to that issue or other issues at trial, for example Delanty's pocket calendars, telephone records, the gift letter, the amendment to the trust, etc., were admitted into evidence during the State's case. Many of the other documents in the exhibits, for example the bank account statements, licensing records, tax records, insurance documents, receipts, and correspondence to and from Nancy Huegli and third parties do not logically prove that Delanty did any work for Nancy Huegli that entitled him to compensation.

Under the rules of evidence, a trial court may exclude relevant evidence if the probative value is outweighed by the dangers of confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403. The trial court's ruling is afforded great deference and is reviewed under an abuse of discretion standard.

State v. French, 157 Wn.2d 593, 605, 141 P.3d 54, 60 (2006).

Exhibits 376A, B and C were objectionable for all of the reasons stated in ER 403. Delanty was not entitled to admission of the exhibits as they were constituted.

Delanty again claims that the trial court's error in refusing the exhibits is particularly egregious because during deliberations the jury asked to see copies of checks he had written for Nancy

Huegli's household expenses. But Delanty made no attempt to remove the e-mails from the exhibits and reoffer them despite the court's suggestion that the remaining documents in the exhibits might have been admissible. Nor did he offer the checks that he had written to pay Nancy Huegli's household expenses separately. Delanty's failure to get these exhibits into evidence was self-inflicted.

Delanty claims that the trial court improperly rushed the defense case to accommodate the jury's schedule. However, a trial court has discretion to exclude evidence when its relevance is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403; French, supra. The trial court acted within its discretion when it sustained objections to lines of questioning during Delanty's case for these reasons. Despite Delanty's claim that the trial court restricted his ability to put on a case he was able to call ten witnesses including four experts. Delanty was not prejudiced by the trial court's rulings.

Even if the trial court had erred in refusing the exhibits, the error was harmless. Delanty was allowed to show the exhibits including the checks and e-mails to the jury during his testimony and his PowerPoint presentation. Because the evidence was

shown to the jury Delanty cannot show prejudice from the court's ruling. Moreover, the evidence against Delanty was overwhelming. The jury heard and saw evidence that he forged dozens of checks and stole cash from Nancy Huegli during a period of nearly three years. They heard Nancy Huegli testify that she did not authorize any of the checks and the signatures on many of them were not hers. They heard and saw evidence of his attempts to gain control over Nancy Huegli's finances and trust and to isolate her as she deteriorated physically and mentally. They heard and saw evidence of his attempt to conceal his thefts by forging invoices, a gift letter, his pocket calendars, and the power of attorney for her Schwab One account. Any error resulting from the court's decisions is harmless given the overwhelming evidence of his guilt.

#### B. ARGUMENT ON CROSS-APPEAL

Although a defendant has a right to interview the State's witnesses a witness has an equal right to refuse to give an interview:

"[A] defendant's right of access to a witness "exists co-equally with the witnesses' right to refuse to say anything." United States v. Rice, 550 F.2d 1364, 1374 (5th Cir.) cert denied, 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977).

United States v. Black, 767 F.2d 1337 (9th Cir.), cert denied, 474 U.S. 1022 (1985). This opinion was cited with approval in State v. Hofstetter, 75 Wn. App. 390, 878 P.2d 474 (1994), review denied, 125 Wn.2d 1012 (1995). The Hofstetter court made it clear that a witness has the right to choose whether to give a pretrial interview:

Nothing herein is intended to imply that a prosecutor may not inform a witness of his or her right to choose whether to give an interview, or of his or her right to determine who shall be present at the interview . . .

Hofstetter, at 402. In State v. Wilson, 108 Wn. App. 774, 31 P.3d 43 (2001), the court cited Hofstetter with approval holding that

In this case, the prosecutor could not have compelled the witness to speak to defense counsel because the witness was under no obligation to talk to anyone outside of court. . . .

Id. at 779.

Mr. Delanty moved the trial court to order Ralph and Susan Boyer to submit to depositions under CrR 4.6 because they first refused to submit to pretrial interviews with the defense and then refused to be recorded during their interviews. But CrR 4.6 does not authorize a court to order a witness to submit to a deposition whenever the witness refuses to give a party an interview or

refuses to allow the interview to be recorded. The rule authorizes court-ordered depositions in criminal cases only when the witness refuses to speak to either counsel and when the party seeking the deposition can demonstrate that a deposition is necessary to prevent a failure of justice:

**When Taken.** Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition . . . .

CrR 4.6(a).

The requirement that a witness must refuse to discuss the case with either counsel requires a showing that the witness refuses to speak to *either* the prosecution or the defense before a deposition is warranted. It does not authorize a deposition whenever a witness refuses to speak to *both* the prosecution and the defense. When a witness in a criminal case has discussed the case with one party who has provided a recorded statement or the substance of the witness's statement to the opposing party as required by CrR 4.7 the witness has not refused to discuss the case with either counsel.

The additional requirement that the deposition must be necessary to prevent a “failure of justice” raises a high bar for a party moving for a deposition in a criminal case. Even when a potential witness has refused to speak to either counsel a deposition is not warranted unless there is a showing that justice will fail without it. Use of this strong language demonstrates that the rule was drafted to make depositions in criminal cases the rare exception. It was not meant to authorize depositions whenever a party wants to speak to a witness in person, to record a witness, or to ask a witness questions they have already answered.

Mr. and Ms. Boyer had an absolute right to refuse the defense interview. Each gave statements which were provided to the defense in discovery. Each later agreed to a defense interview on condition that it would not be recorded.<sup>9</sup> Mr. Delanty cannot claim they had refused to speak to either counsel in these circumstances. Moreover, Mr. Delanty made no attempt to explain to the trial court why their depositions were necessary to prevent a failure of justice. Mr. Delanty was not entitled to court-ordered depositions under CrR 4.6 on these facts.

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<sup>9</sup> Mr. and Mrs. Boyer also had a right to refuse to be recorded. Under Washington law no person may record a private conversation without the consent of all persons recorded. RCW 9.73.030(1)(b).

The trial court did not order Ralph and Susan Boyer to submit to depositions because they had refused to speak to either the prosecution or the defense and because the depositions were necessary to prevent a failure of justice. Instead, the court ordered them to submit to depositions because the witnesses at first refused to give the defense an interview and then agreed to an interview on condition it would not be recorded. “[W]hat you have are folks who have vacillated. And I don’t think the defense is required to be jerked out 20 days from Sunday.” The trial court then signed orders compelling the depositions that stated as reasons only that Ralph and Susan Boyer were material witnesses endorsed by the prosecution who had refused to give the defense an interview. CP 454-57. The court did not have authority under CrR 4.6 to order Mr. and Mrs. Boyer to submit to depositions for these reasons.

Requiring counsel to make the showings required under CrR 4.6 will promote professionalism and courtesy towards witnesses. When counsel must acknowledge the right of a witness to refuse an interview and to set the conditions of an interview they will have an incentive to be professional and respectful toward the witness. When the consequence for making unreasonable demands of a witness, asking inappropriate questions, wasting a witness’s time, or otherwise

causing a witness to refuse to give an interview or to terminate an interview is a court-ordered deposition there is no such incentive.

Delanty may argue that because Mr. and Mrs. Boyer have already submitted to depositions this court cannot provide an adequate remedy and the issue is moot. Ordinarily a reviewing court will not decide a moot issue but it may do so if the case involves matters of continuing and substantial public interest,

Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.,

131 Wn.2d 345, 351, 932 P.2d 158 (1997), or when the issues are of public interest that are capable of repetition yet easily evade review.

In re Dependency of H., 71 Wn. App. 524, 527, 859 P.2d 1258

(1993); State v. Clark, 91 Wn. App. 581, 584, 958 P.2d 1028,

1030 (1998).

A trial court's authority to order victims and witnesses to submit to depositions under CrR 4.6 is a matter of continuing and substantial public interest since it is members of the public, as witnesses to and victims of crime, who are the subject of deposition orders in King County Superior Court when they decline to be interviewed or to be recorded during their interviews. Moreover, this issue will always evade review because victims and witnesses will likely have submitted to the court-ordered depositions before

the State has the opportunity to cross-appeal. CrR 4.8(a)(1) provides that a trial court may issue a warrant for the arrest of a witness who has refused to submit to a deposition ordered under CrR 4.6. This court should decide this issue.

VI. CONCLUSION

For these reasons, Delanty's appeal should be denied and his judgment and sentence upheld and the State's cross-appeal should be granted.

DATED this 13<sup>th</sup> day of April, 2010.

Respectfully submitted,

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