

NO. 69952-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMANTHA J. PIERCE,

Appellant.

COPIES OF THIS DOCUMENT  
FILED IN THE COURT OF APPEALS  
DIVISION I  
JAN 30 PM 2:13  
[Signature]

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

LINDSEY M. GRIEVE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	21
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING SUMMARIES OF BANK RECORDS .....	21
a. Relevant Facts .....	22
b. The Trial Court Did Not Abuse Its Discretion By Admitting Summaries Of Bank Records...	26
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEPOSITION OF G. JOHN DOCES .....	30
a. Relevant Facts .....	30
b. The Court Did Not Err In Admitting G. John’s Deposition Where There Was Sufficient Evidence Of Personal Knowledge .	32
D. <u>CONCLUSION</u> .....	37

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Delaware v. Fensterer, 474 U.S. 15,  
106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)..... 35

Washington State:

Carson v. Fine, 123 Wn.2d 206,  
867 P.2d 610 (1994)..... 26, 27

Christensen v. Munsen, 123 Wn.2d 234,  
867 P.2d 626 (1994)..... 29

Henderson v. Tyrell, 80 Wn. App. 592,  
910 P.2d 522 (1996)..... 33, 35

State v. Garrison, 71 Wn.2d 312,  
427 P.2d 1012 (1976)..... 32

State v. Gatalski, 40 Wn. App. 601,  
699 P.2d 804, review denied,  
104 Wn.2d 1019 (1985)..... 27

State v. Gould, 58 Wn. App. 175,  
791 P.2d 569 (1990)..... 27

State v. Hamlet, 133 Wn.2d 314,  
944 P.2d 1026 (1997)..... 33

State v. Rice, 48 Wn. App. 7,  
737 P.2d 726 (1987)..... 27

State v. Vaughn, 101 Wn.2d 604,  
682 P.2d 878 (1984)..... 33

Yurkovich v. Rose, 68 Wn. App. 643,  
847 P.2d 925 (1993)..... 32

Statutes

Washington State:

RCW 30.22.090..... 8

Rules and Regulations

Washington State:

ER 403 ..... 1, 24, 26, 27  
ER 404 ..... 23  
ER 602 ..... 1, 32, 33

Other Authorities

5D Tegland, Wash. Prac., Handbook on  
Wash. Evid. (2013-14 ed.)..... 32, 33

**A. ISSUES PRESENTED**

1. Under ER 403, a trial court may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of needless presentation of cumulative evidence. Here, the trial court admitted bank record summaries after finding that they were highly probative to the central issue of the case regarding whether Pierce had G. John Doces' consent to make the charged transactions. The court also found that any danger of prejudice to Pierce was minimal where the summaries were accurate and would assist the jury in understanding the evidence. Has Pierce failed to show that the trial court's admission of evidence was an abuse of discretion?

2. Under ER 602, a witness may not testify to a matter unless there is sufficient evidence introduced to support a finding that the witness has personal knowledge of the matter. Here, the trial court found that, during a deposition, G. John Doces had personal knowledge of the facts testified to despite demonstrating some memory loss and an understandable lack of memory for various acts done by Pierce. Has Pierce failed to show that the court's admission of the deposition was an abuse of discretion?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Samantha Pierce was charged by Amended Information with Count I: theft in the first degree and Count II: misdemeanor violation of a vulnerable adult protection order. CP 23-24. Specifically, Count I charged that between September 25, 2007 through June 11, 2009, Pierce wrongfully obtained control over property belonging to G. John Doces by color and aid of deception, and that the theft consisted of a series of transactions that were part of a common scheme or plan, continuing course of conduct, and a continuing criminal impulse. CP 23. In addition, Count I alleged two aggravating factors: 1) Pierce knew or should have known that the victim was particularly vulnerable or incapable of resistance; and 2) Pierce used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense. CP 23-24.

After a month-long trial, the jury found Pierce guilty of theft in the first degree and not guilty of misdemeanor violation of a vulnerable adult protection order. CP 181-82. The jury found both aggravating factors for the charge of theft. CP 183-84. The trial court sentenced Pierce to an exceptional sentence of 12 months

and one day of incarceration and ordered that she pay restitution in the amount of \$167,923.32. CP 186-88. Pierce was released from the custody of the Department of Corrections pending this appeal. Supp. CP 666-68.

## 2. SUBSTANTIVE FACTS.

G. John Doces<sup>1</sup> was born in Albania in 1916. 7RP<sup>2</sup> 896. He immigrated to the United States as a young man, where he married Sophia. 7RP 896. G. John owned a successful furniture business in the Seattle area. 7RP 901. While G. John ran the business, Sophia was in charge of their house and household finances; G. John did not actively participate in the day-to-day household finances or bill paying. 7RP 898. As G. John and Sophia advanced in years, they were no longer able to take care of their large home and yard, and they hired live-in housekeepers.

---

<sup>1</sup> To avoid confusion, all Doces family members, G. John Doces, Sophia Doces, Dr. John Doces, Helene Senn, Dean Doces, and Johnny Doces, are referred to by their first names.

<sup>2</sup> There are 21 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Oct. 23, 2012); 2RP (Oct. 24, 2012); 3RP (Oct. 25, 2012); 4RP (Oct. 29, 2012); 5RP (Oct. 30, 2012); 6RP (Oct. 31 and Nov. 5, 6, 7, 8, 13, and 14, 2012); 7RP (Nov. 15, 2012); 8RP (Nov. 19, 2012); 9RP (Nov. 20, 2012); 10RP (Nov. 26, 2012); 11RP (Nov. 27, 2012); 12 RP (Nov. 28, 2012); 13RP (Nov. 29, 2012); 14RP (Dec. 3, 2012); 15RP (Dec. 4, 2012); 16RP (Dec. 5, 2012); 17RP (Dec. 6, 2012); 18RP (Dec. 10, 2012); 19RP (Dec. 11, 2012); 20RP (Dec. 12, 2012); and 21RP (Jan. 25, 2013).

7RP 915. The Doces also owned a home in Rancho Mirage, California where they stayed in the winter. 7RP 896.

G. John and Sophia had three adult children: John, Helene, and Dean. 7RP 897. John worked as a cardiologist, Helene lived in Yakima with her husband, and Dean worked for the Washington Liquor Control Board. 7RP 897. G. John and Sophia were close with their children and grandchildren and would see family frequently. 7RP 902; 8RP 1005; 10RP 1385. Although G. John and Sophia were financially successful, family members called them "frugal," noting that they did not spend much money on updates around their homes or on expensive gifts. 8RP 994. One of G. John's favorite sayings was, "There is nothing worse than waste." 8RP 995.

In June of 2005, while searching for a new housekeeper for his parents, Dean contacted Samantha Pierce through an advertisement she had placed under caregiving services on Craigslist. 7RP 918; 10RP 1394. After an interview with G. John, Helene, and Dean, G. John decided to hire Pierce. 7RP 918. Pierce was hired as a full-time, live-in employee; her responsibilities included preparing meals, caring for the home and yard, and providing transportation for Sophia and G. John. 8RP 1121. Pierce

was provided room and board, use of a vehicle, medical expenses, and a salary of \$1000 per month. 7RP 919-20.

When Pierce was hired, G. John was 89 years old and had multiple serious, but stable, health concerns. 9RP 1188-89. Among his health concerns at the time, G. John had high blood pressure, left eye blindness, serious hearing impairment, and leg and back conditions that resulted in him requiring the assistance of a walker to be mobile. 7RP 918; 9RP 1188-89. Additionally, G. John was losing his ability to make decisions and his judgment. 9RP 1189. Sophia also had serious, but stable, health concerns at the time Pierce was hired. 7RP 917. After Pierce was hired, Sophia's health deteriorated. 7RP 924-25. Although Pierce was not hired to be a caregiver, when Sophia's health declined, Pierce took on caregiving responsibilities. 8RP 1133-34.

Due to Sophia's need for a skilled, medically-trained caregiver, John, Helene, and Dean were concerned with Pierce's ability to care for their mother. 9RP 1193; 10RP 1400. As Sophia's health declined, Pierce devoted more attention to G. John. 10RP 1403. Pierce would drink alcohol with G. John, allowed G. John to smoke cigars, and created a "party atmosphere." 7RP 929; 9RP 1197; 10RP 1400-01. G. John and Pierce's

relationship became more social than professional, and G. John “seemed to be kind of caught up in the moment and enjoy[ed] the attention.” 7RP 929; 9RP 1199. G. John enjoyed Pierce’s companionship and trusted her to assist him with his needs. 7RP 935-36.

When the family members raised their concerns with Pierce, she was not receptive. 7RP 925; 8RP 1134-35; 9RP 1197. In front of G. John, Pierce would cry, get defensive, “throw temper tantrums,” and tell G. John that his children did not like her. 7RP 925; 8RP 1134-35; 9RP 1197. While G. John’s children did not want Pierce as a caregiver for Sophia because of her medical needs, they were not against Pierce working for G. John in another capacity. 8RP 1132.

In May of 2006, Pierce decided to leave G. John and Sophia’s employment. 7RP 923; 10RP 1404. Several months later, G. John rehired Pierce as his personal assistant. 7RP 923; 10RP 1404. During this period, Sophia’s declining health resulted in multiple hospitalizations and eventually she was moved to a nursing facility. 9RP 1197. As Sophia became seriously ill, G. John’s decision-making became “muddled.” 7RP 931. For the first time, G. John was in charge of the household and he trusted

Pierce to take care of the house and his affairs. 9RP 1194. As G. John aged, his “greatest fear” was living out his final days in a nursing home. 8RP 1046.

In February of 2007, Sophia passed away. 7RP 932; 9RP 1197. Sophia’s death was “a huge loss” to G. John, who became depressed and very anxious to maintain his “day-to-day health and life requirements.” 9RP 1200. At the age of 91, G. John could no longer drive, had limited ability to write and walk, and had a full-time catheter. 7RP 938-39.

As G. John increasingly relied on Pierce to take care of the home and his affairs, his family felt less comfortable visiting him due to conflict with Pierce, and family visits became less frequent. 7RP 935-36; 8RP 1026. As G. John was seeing less of his family, Pierce told G. John, “Your children do not love you; I am the only one that cares.” 10RP 1407.

On September 25, 2007, G. John went to his bank accompanied by Pierce. 11RP 1542-44. Julie Castro, the bank manager, knew G. John and knew that he conducted his bank transactions in person. 11RP 1554. That day, Castro assisted G. John in opening a new account. 11RP 1544. G. John told Castro that he wanted Pierce to have a way to pay for his

expenses. 11RP 1545. G. John had thought he could give Pierce blank checks for her to use to fill prescriptions and other expenses, but because businesses did not want to accept blank checks without his presence, he was looking for another option.

11RP 1548. Due to the large balance on G. John's account, Castro suggested that Pierce not be put on G. John's pre-existing accounts. 11RP 1547.

G. John decided to open a separate joint bank account that Pierce could use for his expenses and that he could transfer money into when necessary. 11RP 1547, 1553. When opening the account, G. John was explicit that the money was to be used for his benefit.<sup>3</sup> 11RP 1545, 1553. G. John also opened a credit card associated with the account so Pierce could pay for his expenses. 11RP 1549.

G. John's family members were not aware of G. John's finances after Sophia passed. 9RP 1204. After Pierce was hired, G. John's family noticed an increase in spending for items in the home. 8RP 994; 10RP 1416. Additionally, Pierce's style of dress

---

<sup>3</sup> Funds on deposit in a joint bank account belong to each depositor in proportion to their ownership of the funds. A joint account holder may have the right to withdraw funds, but this does not mean that the joint bank account holder owns the funds. CP 165; RCW 30.22.090(2).

became “more sophisticated” than it had been when she started working for G. John. 8RP 1014.

After Pierce was rehired, Pierce’s adult children moved into G. John’s home in Seattle and stayed in G. John’s home in Rancho Mirage, California. 10RP 1427-28. Pierce explained that her daughter, Katie Pierce, moved in because she was unemployed and had medical problems that prevented her from working. 10RP 1422. Pierce’s son, David Pierce, and his girlfriend moved into the boat house on G. John’s property. 10RP 1419. Pierce said that her son was “working around the property” while he was in between jobs. 10RP 1335.

In 2007, when Alan Willett, G. John’s long-term accountant, discovered that Pierce was an authorized check signer on one of G. John’s accounts, he stopped at G. John’s home to discuss the ramifications with G. John and Pierce. 10RP 1312, 1318, 1326, 1334. Willett informed them that, as a check signer, Pierce had a fiduciary responsibility and recommended that she obtain a fidelity bond to protect herself in case there was ever a discrepancy regarding the account. 10RP 1328-30. Willett also recommended that Pierce accumulate financial records for the joint account and send them to his firm’s office so there would be an independent

record of expenses. 10RP 1327. Pierce was present while Willett made these recommendations and G. John agreed that they should comply with Willett's advice. 10RP 1330. Willett stressed that it was in Pierce's best interest to provide the financial information in case of a later discrepancy. 10RP 1340. During his visit, Willett noticed that G. John had become more disengaged in conversations and that he often deferred to Pierce on financial issues. 10RP 1332-33.

Months later, Willett reminded Pierce that he had not yet received the account documentation that G. John had agreed she would provide. 10RP 1334. During a subsequent visit to G. John's home, Willett told G. John that he still had not received any of the documentation. 10RP 1335. Willett said that he also needed to prepare Pierce's W-2 form for tax purposes and asked Pierce what her compensation was. 10RP 1337. Pierce said that she was not receiving any compensation and was only being reimbursed for her actual expenses and was being provided room and board. 10RP 1337-38. Willett asked G. John how much Pierce was being compensated; G. John responded that he did not know, adding that "I trust her, you'll have to ask her." 10RP 1338-39. Willett told Pierce that she needed to report anything for her benefit on her

W-2 and told her to calculate her expenses so that he could prepare the form for her. 10RP 1338-39. Pierce agreed to do so. 10RP 1339.

In late 2008, Willett still had not received any of the requested information from Pierce. 10RP 1342. G. John again told Willett that Pierce would provide the financial information. 10RP 1343. G. John seemed more disengaged to Willett; at this time, G. John was no longer able to have lengthy conversations. 10RP 1343, 1377.

While Pierce was employed, Dean continued to visit G. John in Rancho Mirage, California. 10RP 1425. While in Rancho Mirage, Dean saw extravagant purchases in the home. 10RP 1427. During one visit, without asking G. John, Pierce removed a credit card from G. John's pocket and used it to change her son's flight arrangements. 10RP 1438-39. Dean had noticed that G. John had difficulty being coherent and that his short-term memory had declined. 10RP 1440-41. G. John repeated conversations, and when Dean had already been staying with G. John for several days, G. John thought he had just arrived. 10RP 1441.

In December of 2008, G. John's grandson, Johnny, was visiting him in Rancho Mirage. 8RP 1043. Johnny noticed that G. John's short-term memory had declined. 8RP 1033. Johnny also observed that G. John, who had typically been able to handle confrontational situations, was no longer able to deal with conflict. 8RP 1036. Around G. John's home, Johnny saw signs of a great deal of holiday spending. 8RP 1043. One day during his visit, Johnny took G. John out to lunch. 8RP 1040. As Johnny was getting G. John ready to leave, Pierce became upset and told Johnny, "You don't have the legal right" to take G. John. 8RP 1041.

Suspicious of Pierce's behavior and excessive spending, G. John and Johnny went to G. John's bank after lunch. 8RP 1043. G. John and Johnny were shown G. John's credit card statements; upon seeing them, G. John "was in shock." 8RP 1045. The statements showed a great deal of spending at places that seemed unusual for G. John, such as Gene Juarez, Urban Anthropologie, and hotel.com. 8RP 1044-45. G. John said, "I can't believe this." 8RP 1045. G. John seemed afraid and asked Johnny, "Who will take care of me?" 8RP 1046.

Johnny did not confront Pierce about the spending, but showed the statements to his father, John. 8RP 1047, 1052-53. After seeing the statements, John and Dean met with G. John's attorney, John T. John.<sup>4</sup> 9RP 1211; 10RP 1452. John T. John assured John and Dean that he would set up a system to monitor spending on G. John's account. 9RP 1211; 10RP 1452. Months later, John and Dean learned that John T. John had not yet put the system in place to monitor Pierce's spending. 9RP 1211. Eventually, John T. John received one of G. John's bank statements from Pierce. 16RP 2161-62. Pierce provided John T. John with only one record: a monthly statement from the joint checking account. 16RP 2161-62; Ex. 36. Pierce made handwritten notes explaining the purposes of some of the expenses; many of the explanations were incorrect. Exs. 36, 122, 124. For example, Pierce listed "Polyclinic Medical" next to checks that had been written to Seattle Suntan and her son, respectively. 16RP 2161-67; Exs. 36, 122, 124. Pierce did not provide John T. John with any records for spending on the credit card. 16RP 2161-62.

---

<sup>4</sup> John T. John is referred to by his full name to avoid confusion.

In May of 2009, G. John called his son and said, "John, my tummy hurts. There is something wrong with my tummy." 9RP 1212. Unbeknownst to G. John's family, at the time of the phone call G. John had been hospitalized for six days due to a major infection. 9RP 1215. Although John is a cardiologist and typically consulted G. John concerning his medical care, Pierce had not contacted him. 9RP 1212-13. Pierce had also not contacted Dean, who had medical power of attorney for G. John, to let him know that his father had been hospitalized. 10RP 1454.

When contacted by family members, G. John's treating physician said that G. John's condition was so dire that if he did not improve, the doctor was planning to contact family the following day to have them fly down because the infection could be fatal to G. John. 9RP 1215-16. G. John's health improved, although he remained hospitalized for 15 days. 9RP 1216. When G. John's condition stabilized, family members arranged for G. John to be flown back to Seattle accompanied by a medical professional. 9RP 1216.

Around this time, and by coincidence, Helene attended a conference in Yakima about elder abuse and financial exploitation. 7RP 948. The conference was an "eye-opener," and a section

dealing with financial exploitation by caregivers described situations that were reminiscent of her father's experience with Pierce.<sup>5</sup>

7RP 948. After the conference, Helene contacted police. 7RP 949.

On June 11, 2009, after meeting with Helene and Dean, Seattle Police Detective Elizabeth Litalien went to G. John's home in Seattle to speak with him. 6RP 735, 737, 740. Upon being shown his credit card statements by Detective Litalien, G. John said, "My God, I would never have authorized these charges, I did not know." 19RP 2715; Ex. 174. G. John told Detective Litalien that Pierce had his credit card but was supposed to use it for "whatever we need, including groceries." 19RP 2716; Ex. 174. G. John was not aware of the various expenses on his account from clothing and shoe stores. 19RP 2716-17; Ex. 174. G. John explained that Pierce looked at the bills every month, but he did not; "I've asked her to give me the statements, but she hasn't." 19RP 2716-17; Ex. 174.

As Detective Litalien was leaving, Pierce said she did not understand why she was "being picked on." 6RP 758. Pierce

---

<sup>5</sup> In her testimony, Seattle Police Detective Elizabeth Litalien described financial abuse of vulnerable adults. 6RP 725. Victims of financial abuse are typically isolated from their friends and family and are happy with the care or companionship of the person who is exploiting them. 6RP 725. Victims typically have limited mental or physical abilities and are dependent on others to meet their daily needs. 6RP 725.

started crying and, when asked about the terms of her compensation, said “[G. John] pays for what I need and there is no contract.” 6RP 758-79. Pierce said that she needs very little. 6RP 759. When asked about her excessive spending, Pierce said, “He buys me whatever I want[,]” and that every month she reviewed credit card statements with G. John and his attorney, John T. John, who approved the statements and the purchases. 6RP 759.

Later that day, Pierce was arrested and served with a Vulnerable Adult Protection Order. 11RP 1570. When Pierce was booked into jail, she had four of G. John’s checkbooks in her purse, including checkbooks for three accounts that Pierce was not authorized to have access to. 6RP 776. Pierce had business cards listing her as G. John’s executive assistant and Certified Nursing Assistant (CNA). 6RP 769. Pierce has never been licensed as a CNA under her name or any of her prior aliases. 11RP 1531-33.

Pierce called G. John and told him that she had been released from jail. 9RP 1220. John recognized Pierce’s voice and told her not to contact G. John again due to the protective order. 9RP 1220.

At G. John's home, Helene found six or seven boxes of G. John's financial records in Pierce's basement living area. 7RP 958. Before Pierce's employment, G. John's financial documents had always been kept in an office located on the main level of his home. 10RP 1391. Due to G. John's limited mobility, he was only able to access the main level and the upper level through the use of an elevator that connected the two levels. 10RP 1391-92. The elevator did not have access to the basement level where Pierce lived. 10RP 1391-92. Although there had not been a lock on the door between the main level and the basement level where housekeepers stayed, after Pierce moved in, she had a lock placed on the door. 10RP 1418.

While working for G. John, Pierce maintained invoices and billing statements for third parties that provided services to G. John and his home. 7RP 959, 972. Although Pierce kept thorough records, there were no invoices or receipts for services provided to G. John and his home by Katie Pierce, David Pierce, or David Pierce's girlfriend. 7RP 972.

Rebecca Tyrell testified at trial; she is a financial analyst and investigator employed by the Economic Crimes Unit of the King

County Prosecutor's Office.<sup>6</sup> 12RP 1614. Tyrell examined approximately 3,000 pages of records and documents associated with this case. 12RP 1625. Tyrell analyzed discretionary spending on G. John's accounts from 2004 to June 11, 2009 and divided the spending into three time periods. 12RP 1637-38.

The first period spanned from 2004 until the date when Pierce was hired by G. John on June 25, 2005. 12RP 1639-41. During this period, G. John and Sophia's average monthly spending was \$1,790. 12RP 1639-41. The second period spanned from the date of Pierce's hiring to the date that the joint bank account was opened: June 25, 2005 to September 27, 2009. 12RP 1640-42. Average monthly spending during this period was \$4,390. 12RP 1640-42. The third period corresponded with the charging period and spanned from the date the joint account was opened until the date Pierce was removed. 12RP 1640-42. Average monthly spending during this time period was \$12,230. 12RP 1640-42.

During the third period, a total of \$290,000 was transferred from G. John's other accounts into the joint account in sixty separate transfers. 12RP 1651, 1662. Of the total, \$245,000 was

---

<sup>6</sup> While testifying, Tyrell referred to PowerPoint slides; the slides are contained in Exhibit 108. 12RP 1619.

transferred online. 12RP 1663. G. John does not know how to use a computer. 7RP 900.

While the joint account was open, \$290,000 originated from G. John's accounts; \$293 originated from a personal check made out to Pierce. 12RP 1662. Throughout this time period, there was no indication that Pierce had a bank account of her own. 13RP 1786. She had a single credit card issued in her own name; it had a credit limit of \$300. 13RP 1786.

The appearance of the names on checks for the joint account changed during the third period. 12RP 1652-53. At first, G. John's name was above and in a larger font size than Pierce's name, which was located below. 12RP 1652-53. By the end of the third period, the checks had Pierce's name in a larger font size located above G. John's name, which was in a smaller font size below. 12RP 1652-53. After Pierce was arrested, check order forms for the joint account were located in her possessions among G. John's financial records. 6RP 788.

In April of 2009, the address for G. John's credit card statement was changed from G. John's home addresses in Seattle and Rancho Mirage to separate Post Office boxes in each city. 12RP 1671. Upon being arrested, Pierce had online change of

address forms from the United States Post Office addressed to her personal email address among her possessions. 6RP 789.

During her testimony, Tyrell described the organization for Exhibit 93, the three binders containing the charged transactions. 12RP 1678-79. Tyrell demonstrated how jurors could find specific charged transactions in the binders. 12RP 1678-79, 1687. The charged transactions included transactions for tens of thousands of dollars of women's shoes and clothing that were in roughly the same size. 12RP 1694; Ex. 93, binders 1, 2. The charged transactions also included checks written to Katie Pierce, David Pierce, and David Pierce's girlfriend. 12RP 1728-30; Ex. 93, binder 3. The total amount written to Pierce's children and David Pierce's girlfriend was \$134,064. 12RP 1728-30; Ex. 93, binder 3. No invoices for work performed by David Pierce, Katie Pierce, or David Pierce's girlfriend were ever located; the checks written to them were in rounded numbers, rather than amounts to the cent like the invoices for services provided by others. 12RP 1721.

When G. John was hospitalized with an infection, from May 21 to June 11, 2009, there was over \$30,818 in discretionary spending from the joint account. 12RP 1731. This spending

included online purchases from Old Navy, Urban Anthropologie, and Nordstrom Direct. 12RP 1733.

Pierce testified at trial. 18RP 2413. Pierce claimed that in lieu of a salary, G. John had promised her that he would take care of her for the rest of her life so that after he passed away she would never have to work again. 18RP 2495-97. Pierce claimed, "It was a long-term type of retirement." 18RP 2495-97. Pierce said that she reviewed every purchase that she made with G. John before she made it, whether it was personal or for the household. 18RP 2514-16. Pierce also claimed that when statements arrived in the mail, she showed all of them to G. John and they reviewed them together. 18RP 2514-16.

**C. ARGUMENT**

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING SUMMARIES OF BANK RECORDS.

Pierce argues that the trial court erred in admitting bank record summaries of G. John's finances, claiming that the records were overwhelming, cumulative, and likely to confuse and mislead the jury. Pierce's argument is misplaced. The court found the bank records relevant: 1) as res gestae to provide context for the

charged transactions; 2) to show Pierce's opportunity, intent, and scheme to gain control of G. John's finances; and 3) to rebut Pierce's claim of consent. Due to the voluminous nature of the bank records, the summaries assisted the jurors in understanding the evidence and saved time; the court found that there was no danger of unfairly prejudicing Pierce through the use of the summaries. The trial court properly exercised its discretion in admitting the evidence.

a. Relevant Facts.

Pierce was charged with theft in the first degree based on 273 transactions totaling over \$167,000 that occurred from September 25, 2007 to June 11, 2009 while Pierce had access to G. John's funds through the joint account. CP 23-24. The 273 transactions consisted of spending that benefited Pierce and her friends and family; they included purchases of women's shoes and clothing, checks written to Pierce's adult children, and thousands of dollars spent while G. John was hospitalized. Ex. 93.

As a defense to theft, Pierce claimed that G. John consented to all of the charged transactions. 18RP 2514-16. Along with evidence of the charged transactions, the State offered summaries

of G. John's bank and credit card records from 2004 to 2009 that were separated into three periods. 12RP 1637-42; Exs. 93, 94.

After hearing argument from the parties, reviewing legal authorities, and reviewing the summaries of bank records, the court ruled that the summaries were admissible for multiple purposes. 4RP 498-509; 5RP 543-48. Specifically, the court found that summaries related to the first period did not implicate ER 404(b) because they did not involve any acts by Pierce. 5RP 545. However, the court found the evidence relevant to show the marked difference in spending to counter Pierce's claim of consent. 5RP 545. The court ruled that summaries for the second period were relevant to show that Pierce gained knowledge and oversight of G. John's various accounts and learned the necessity of establishing a different account that she would have greater access to. 5RP 546-47. The court found that summaries of spending for the third period were relevant to show that average monthly spending had substantially increased, and to show Pierce's opportunity to commit the crime through her access to financial resources as well as her intent and scheme to do so. 5RP 546-47.

In response to Pierce's argument against admission that the summaries would not assist the jury in understanding the context of the crime, the court noted:

If I were to adopt your reasoning and exclude all the transactions except for those 27[3], would not that be giving evidence to the jury in a vacuum, that they wouldn't know what other types of things would occur?

5RP 553, 555-56.

Pierce's counsel then objected under ER 403 that the evidence's relevance was outweighed by prejudice because the use of bank summaries would be cumulative and confusing to the jury. 5RP 556-57. In finding that the relevance of the evidence outweighed any potential prejudice, the court stated:

I think the issue seems to come under the balancing of probative evidence versus what is unfair prejudice. As I understand counsel's argument, there is not necessarily an argument that the comparison of total spending or reference to these individual transactions is unfair prejudice, it's the publishing of the transactions in their entirety to the jury that counsel is concerned about with regard to how the jury may view those transactions.

I don't see a significant difference between testimony coming in through the witness and documents coming in to support that testimony.

...  
Unfair prejudice is prejudice that outweighs any of the probative value of the evidence. And I just

don't see the danger that outweighs the probative value.

...

There are numerous transactions that occurred here. To expect the jury to remember every transaction that is testified from the stand, I think is unreasonable.

The transactions we have already determined, are relevant. The transactions that we already determined are transactions that the jury should hear. To expect the jury to remember every transaction when we are talking about 5000 different transactions, is simply unreasonable. And to assume that a juror doesn't have the ability to view the evidence and consider it in the same light as when they hear the evidence, doesn't rise to unfair prejudice.

...

The jury is entitled to hear the evidence. Whether they hear it on the stand or see it before their eyes, doesn't constitute unfair prejudice.

5RP 559-61.

The court invited Pierce's counsel to propose a limiting instruction for the evidence. 5RP 559. The trial court gave jurors the following limiting instruction:

The State charges allege only those transactions that are included in State's Exhibit #93.

Other transaction evidence, not included in State's Exhibit #93, has been admitted in this case for the limited purpose of considering the defendant's opportunity, intent, and plan. You may not consider it for any other purpose.

This evidence consists of other transactions that are not part of the State's charges, and are not included in State's [E]xhibit #93. Any discussion of this evidence during your deliberations must be consistent with this limitation.

CP 156. The summaries were presented in the form of Exhibit 94 during the testimony of financial analyst Tyrell. 12RP 1624-27.

b. The Trial Court Did Not Abuse Its Discretion By Admitting Summaries Of Bank Records.

Evidence Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Exclusion of evidence under ER 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994). Under ER 403, there is a presumption favoring the admissibility of evidence. Id. at 225. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional

circumstance of a manifest abuse of discretion. State v. Gatalski, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985).

In determining prejudice under ER 403, the linchpin word is “unfair.” State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Evidence may be unfairly prejudicial if it “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action.” Carson, 123 Wn.2d at 223. The likelihood of unfair prejudice substantially outweighing the probative force of evidence is “quite slim” where the evidence is undeniably probative of a central issue in the case. Id. at 224. ER 403 does not provide a basis for objecting simply because the evidence is “too good” or “too powerful.” State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990).

Here, sound reasons supported the trial court’s decision to admit the bank record summaries. The records were highly probative of issues central to the case. The summaries provided context for the charged transactions and showed Pierce’s opportunity, intent, and scheme to gain control of G. John’s finances. 5RP 543. Notably, the summaries showed a dramatic increase in spending during the third time period, when Pierce had

control of G. John's finances. 5RP 544-47. The summaries had even greater probative value due to Pierce's claim that G. John had consented to the charged transactions. 18RP 2514-16.

The court did not abuse its discretion in ruling that the danger of any possible prejudice to Pierce through the admission of the summaries was low. Summaries of bank records like those admitted in Exhibit 94 are not the type of evidence that is likely to "trigger a mainspring of human action" by appealing to the jury's sympathies, arousing a sense of horror, or provoking an instinct to punish. Moreover, the court noted that much of the information contained in the summary was from a time period before Pierce's employment and, thus, the spending for that period was not done by Pierce. 5RP 544-45.

Pierce claims that admission of the summaries was unduly prejudicial because the summaries were overwhelming, cumulative, and likely to confuse and mislead jurors. To the contrary, the court found that admission of the bank summaries would aid the jurors in understanding the evidence. 5RP 559-61. As the court noted, without the summaries, the jurors would need to keep track of every transaction discussed on the stand. 5RP 560. The summaries allowed the jurors to see overarching patterns in spending during

the three time periods in an efficient manner while still allowing Pierce an opportunity to probe how the summaries were compiled and to challenge the information on cross examination. Additionally, Pierce never claimed that the summaries were in any manner inaccurate.

Given the voluminous nature of the bank records, which were estimated at over 5000 records, some cumulative testimony may have been helpful to the jury to understand the evidence. 3RP 394; see Christensen v. Munsen, 123 Wn.2d 234, 867 P.2d 626 (1994) (finding no abuse of discretion in allowing cumulative testimony where the trial court may have deemed some cumulative testimony helpful to the jury's understanding of the issues). As the court noted, even with the summaries, the information would be voluminous for a jury. 3RP 394.

Any potential prejudice was cured by the limiting instruction. Pierce was given an opportunity to draft a limiting instruction, and the court instructed jurors that they were to consider the evidence of non-charged transactions only for a limited purpose. CP 156.

The trial court properly found that the evidence encompassed by the summaries was highly probative and that any

potential for prejudice was minimal. The trial court did not abuse its discretion in admitting the summaries.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEPOSITION OF G. JOHN DOCES.

Pierce argues that G. John lacked personal knowledge to testify, and thus the court erred in admitting G. John's deposition. This argument should be rejected. The court did not abuse its discretion in finding that G. John had personal knowledge of events where G. John "clearly" recalled several events but indicated he was unable to remember others. Moreover, G. John's testimony and the testimony of others supported the court's finding that G. John had personal knowledge of the events in question.

a. Relevant Facts.

At the time of trial, G. John was 96 years old. 7RP 895. After he had testified during a pretrial hearing, the court found that G. John was not competent to testify at trial. 2RP 207. In October of 2011, two years before trial, the parties had taken a videotaped preservation deposition of G. John. Ex. 109. Pierce and her counsel were present for the deposition, and G. John was cross

examined by Pierce's counsel for approximately half of the deposition. Ex. 109 at 1, 28. At trial, Pierce objected to the admission of the entire deposition on the basis that G. John was not competent at the time of the deposition and that he lacked personal knowledge of the events that he testified to in the deposition. 4RP 472.

After reviewing the videotape and transcript of the deposition, the court found that G. John was competent at the time of the deposition and that he had personal knowledge of the events. 2RP 208; 4RP 469, 472. The court found that it "was certainly clear" that G. John was "much more lucid" in the deposition than he was during pretrial testimony. 4RP 467-68. The court noted that although G. John had some inconsistencies with his recollection in the deposition, it was "clear that Mr. Doces has a recollection." 4RP 469. The court observed that G. John did not recall many of the transactions on his bank account and that G. John indicated that he had "never gone there to see, buy, or exchange anything." 4RP 468. The court highlighted that in the deposition, G. John could identify Pierce, knew that she worked for him, and indicated that her duties included taking care of him,

transporting him to doctors, assisting with his medications, and preparing his meals. 4RP 467-68.

b. The Court Did Not Err In Admitting G. John's Deposition Where There Was Sufficient Evidence Of Personal Knowledge.

In relevant part, ER 602 states:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

ER 602 requires that a witness who testifies to a fact that can be perceived by the senses must have actually observed the fact. 5D Tegland, Wash. Prac., Handbook on Wash. Evid., § 602.1 (2013-14 ed.). Stated negatively, the rule bars testimony that is based only on the report of others. Id. See State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1976) (court properly prohibited the owner of a burglarized tavern, who was not present at the time of the burglary, to identify the defendant as the burglar); Yurkovich v. Rose, 68 Wn. App. 643, 847 P.2d 925 (1993) (witness was prohibited from testifying about the details of a meeting that the witness had not attended).

To lay a foundation for admission, ER 602 requires only that evidence “sufficient to support a finding” of personal knowledge be introduced. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Thus, testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge. Id. at 611-12. In determining admissibility, the role of the trial judge is limited to determining whether, under the circumstances presented, reasonable persons could differ as to whether the witness had an opportunity to observe the events in question. 5D Teglund, § 602.3. If reasonable minds could differ, the testimony should be admitted. Id. The trial court’s admission of evidence is reviewed for an abuse of discretion. State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

ER 602 does not limit evidence simply because a witness cannot remember certain details. See Henderson v. Tyrell, 80 Wn. App. 592, 910 P.2d 522 (1996). In Henderson, a witness’ testimony was properly admitted where the witness had personal knowledge of the events testified to although the witness could not remember some details and, thus, would not swear to them. Id. at

614-17. The Court of Appeals found that when the witness expressed that he was unsure about various details, the uncertainty was “the kind of statement we might expect from a truthful witness who wants to be careful to tell the whole truth and nothing but the truth.” Id. at 617.

Here, sufficient evidence supported the trial court’s finding that G. John had personal knowledge of his deposition testimony. G. John’s own testimony demonstrated that he was present for the events that he testified about and that his answers were the result of his first-hand impressions. G. John testified about his personal history and family history. Ex. 109 at 5-8. Importantly, G. John was able to identify Pierce and describe work that she did as part of his employment. Ex. 109 at 9, 12-13. Moreover, it was undisputed that G. John was present for the events that he testified to, such as the hiring of Pierce. 7RP 918; 10RP 1396. The court, thus, properly found that G. John’s testimony during the deposition was the product of his first-hand knowledge of events he was present for.

The court noted that G. John's testimony showed that he had a lack of memory of some events; however, the court did not find that G. John's inability to recall was a proper basis for exclusion. See Delaware v. Fensterer, 474 U.S. 15, 22, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (finding that a witness' inability to recall did not deny a defendant his right to confrontation because "there is no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion").

Pierce's argument, that G. John's answers showed that he lacked personal knowledge, is incorrect. In many instances, G. John's response that he did not know or could not recall likely reflected the memory loss that family members had been observing for several years. 8RP 1033; 10RP 1440-41. However, the inability to recall events does not automatically mean that testimony is based only on the report of others and not on personal knowledge, as suggested by Pierce. See Henderson, 80 Wn. App. 592. Rather, G. John's admissions that he could not remember demonstrated his desire to provide only truthful answers.

In other instances, G. John's lack of memory was due to the fact that he was not aware of various acts done by Pierce. For example, G. John was asked several questions about the charged transactions. Ex. 109 at 17-20. G. John was asked if he knew that \$17,600 from the joint account was spent on clothing at Eddie Bauer. Ex. 109 at 18. G. John responded that he did not know. Ex. 109 at 18. G. John was asked if somebody asked to use a computer to buy clothes for him at Nordstrom. Ex. 109 at 18. G. John said, "I don't remember doing that." Ex. 109 at 18. When asked if he remembered going shopping at The Gap, G. John responded, "No. I don't think I've ever gone there." Ex. 109 at 20. In these instances, the absence of G. John's personal knowledge about these transactions was itself probative evidence, where Pierce claimed that G. John was aware of all of the charged transactions and had authorized them.

Because there was sufficient evidence to support a finding that G. John had personal knowledge of the substance of his testimony, the trial court did not abuse its discretion by admitting G. John's deposition. This Court should reject Pierce's argument to the contrary.

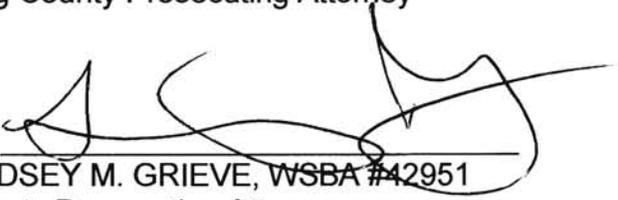
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Pierce's conviction for theft in the first degree.

DATED this 30 day of January, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
LINDSEY M. GRIEVE, WSBA #42951  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. SAMANTHA PIERCE, Cause No. 69952-1 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 30 day of January, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name  
Done in Seattle, Washington