

71448-1

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NO. 71448-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JULIANA CRATSENBERG,

Appellant.

RECEIVED
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King County Superior Court
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court inaccurately instructed appellant's jury on the applicable law.

2. Defense counsel was ineffective for failing to request necessary instructions.

3. Defense counsel was ineffective for failing to move for a mistrial after jurors mistakenly learned another court had determined that appellant exploited her husband financially and abused him physically.

Issues Pertaining to Assignments of Error

1. The verdict in appellant's case turned on whether jurors found she had authority to spend from three financial accounts she shared with her husband. This turned, in large part, on whether the funds available from these accounts were separate or community property. Over a defense objection, the trial court used an instruction pertaining to ownership of funds in joint accounts that is inadequate and misleading when applied to married couples and their potential community interests. Was this error?

2. Additional instructions concerning community property would have rectified the court's erroneous use of the instruction regarding ownership of joint accounts. Was defense counsel

ineffective for failing to offer these necessary instructions?

3. During the testimony of a prosecution witness, jurors mistakenly heard evidence, previously excluded by the trial court, indicating that another court had already found that appellant exploited her husband financially and abused him physically. Did defense counsel's failure to move for a mistrial deny appellant her right to effective representation and a fair trial?

4. To the extent defense counsel contributed to the disclosures made by this witness, was this also ineffective?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Juliana Cratsenberg with one count of Theft in the First Degree, alleging that she stole more than \$5,000.00 from her husband, Andrew Cratsenberg, Sr., between September 10, 2009 and October 27, 2010. CP 290. The charge included an aggravating circumstance: that Mrs. Cratsenberg¹ knew or should have known her husband was

¹ Because many of the trial witnesses share the same last name, this brief uses titles or first names to distinguish among them.

particularly vulnerable or incapable of resistance. CP 290.

The Honorable Theresa B. Doyle presided at trial. A jury found Mrs. Cratsenberg guilty (and the aggravating circumstance established), Judge Doyle imposed an exceptional 11-month sentence converted to home detention, and Mrs. Cratsenberg timely filed her Notice of Appeal. CP 260-261, 285, 295.

Recognizing that Mrs. Cratsenberg's case presented important legal issues, Judge Doyle stayed her sentence pending appeal. 23RP² 27-29.

² This brief refers to the verbatim report of proceedings as follows: 1RP – 7/11/13; 2RP – 11/4/13 (erroneously labeled 11/4/12); 3RP – 11/5/13; 4RP – 11/6/13; 5RP – 11/7/13; 6RP – 11/12/13; 7RP – 11/13/13; 8RP – 11/14/13; 9RP – 11/14/13 (beginning 9:21 a.m.); 10RP – 11/18/13; 11RP – 11/19/13; 12RP – 11/20/13; 13RP – 11/21/13; 14RP – 12/2/13; 15RP – 12/3/13; 16RP – 12/4/13; 17RP – 12/5/13 (beginning 9:11 a.m.); 18RP – 12/5/13; 19RP – 12/9/13; 20RP – 12/10/13; 21RP – 12/11/13; 22RP – 12/13/13; 23RP – 1/17/14.

2. Substantive Facts

Andrew Cratsenberg, Sr., who died on June 12, 2013, was a proud man who did not like to be told what to do and enjoyed flaunting his significant financial success. 9RP 27; 10RP 49-51.

Mr. Cratsenberg and his late former wife, Luetta, built and operated Cratsenberg Companies, including its subsidiary – Cratsenberg Properties – which owns and manages commercial real estate in Federal Way. 9RP 30-31. The centerpiece of the business is Center Plaza, a shopping center in downtown Federal Way valued at approximately \$11 million and including such tenants as Red Lobster, Starbucks, and Subway. 9RP 38; 10RP 30. Both of the Cratsenbergs' sons, Andrew Jr. (aka "Butch") and Larry, also worked for the family business over the years. 9RP 30-32; 11RP 116-120.

Mr. Cratsenberg grew up very poor and, as the business achieved great financial success, he wanted everyone to know it. 9RP 38-39. He sometimes bragged about his wealth. 15RP 157. He bought Luetta expensive jewelry and mink coats; he bought his and her matching Rolls Royce automobiles; and, on their sixteenth birthdays, Butch and Larry each received a brand new car. 9RP 38-39.

Mr. Cratsenberg was a skillful developer, but he was never good at managing day-to-day business operations. 11RP 121. Those tasks fell to Luetta, formerly a banker, who handled all of the accounting and other financial paperwork for Cratsenberg Properties, including writing and depositing checks. 9RP 30-31; 11RP 121.

Luetta was diagnosed with cancer in 2003. She did well despite the disease until 2007. By September of that year, she had stopped working at Cratsenberg properties and was placed in a nursing facility, although she continued to handle both the business's and the family's financial affairs from that location. 9RP 51-52, 54-56. Luetta died January 22, 2008. 9RP 27, 56. Consistent with his personality and means, Mr. Cratsenberg paid \$100,000.00 to obtain burial plots and build a Cratsenberg mausoleum in a prominent spot, visible to anyone that enters the cemetery. 9RP 56-57.

Mr. Cratsenberg was lost without his wife. 9RP 57-58. Dr. Brian McDonald, Mr. Cratsenberg's primary care physician, examined Mr. Cratsenberg on March 24, 2008, concluded he was depressed, and encouraged him to get out and socialize. 12RP 5-6, 9-10.

During Luetta's illness and after her death, Mr. Cratsenberg showed signs of cognitive decline, including some memory loss.³ 9RP 52-54, 57-67; 11RP 121-122; 16RP 8. In late March 2008, Butch and Larry expressed concern to Dr. McDonald that their father was often confused and sometimes delusional. 9RP 61-63; 12RP 5-6, 9. On April 4, 2008, Dr. McDonald administered a Mini Mental Status Exam. 12RP 11-13. Mr. Cratsenberg scored 21 out of 30 points. 12RP 13. Anything below 24 suggests dementia, and Dr. McDonald concluded that Mr. Cratsenberg had "mild dementia," but was still functional with a bit of assistance.⁴ 12RP 18-20. Dr. McDonald suggested that Mr. Cratsenberg consider not living alone. 12RP 21.

Within a month, Mr. Cratsenberg first mentioned to his sons that he was "seeing someone" and wanted to bring her by the office to meet them. 9RP 68; 10RP 83; 11RP 125. That person was

³ Several friends and business associates also noticed Mr. Cratsenberg's diminished cognitive skills. See 13RP 61-65; 15RP 142; 16RP 7-8, 28.

⁴ Later exams in July 2009, September 2009, and November 2010 resulted in scores of 20 (mild), 18 (mild), and 13 (moderate), respectively. 12RP 32-36; 16RP 163; 17RP 51-54. Experts do not consider the Mini Mental Status Exam a sensitive tool for measuring dementia. However, it is easy to use and can provide a rough estimate. 12RP 141.

Juliana,⁵ whom Mr. Cratsenberg had met ten years earlier when she worked at Nordstrom. 9RP 70-71. The introduction did not go well. Butch and Larry felt it was too soon for their father to see someone. 9RP 72; 11RP 125. Juliana was quiet and obviously nervous. She awkwardly told Butch and Larry she was not after their father's money and that they could check her out. 11RP 126-127, 152. Mr. Cratsenberg told his sons that Juliana was moving in with him. 11RP 126.

Larry did not like that his father was dating a younger woman (his father was over 80 and Juliana was in her mid-50s). 11RP 153; exhibit 42. Larry particularly resented that his father permitted Juliana to drive a car that had belonged to his mother and allowed her to wear his mother's clothing. 11RP 128, 153. In the fall of 2008, Larry could not keep quiet when he saw Juliana wearing one of his mother's rings. 11RP 127-128, 154-155. He asked Juliana, "Is that my mom's diamond ring you are wearing?" 11RP 129, 153-154. When she did not answer, Larry repeated the question, which Juliana still did not answer. 11RP 129, 153. Mr. Cratsenberg was very angry over the incident and terminated Larry from the family business. 11RP 129, 154.

⁵ Juliana's given name is Young Min Song. 9RP 68.

By fall of 2008, things had become chaotic at Cratsenberg Properties. 9RP 75. Larry had been fired and Butch had left to take a job in Tacoma. 9RP 76-77; 10RP 86-88. By November 2008, it was just Mr. Cratsenberg and Juliana running Cratsenberg Properties. 9RP 77. Center Plaza was not being properly serviced. Lights were not being replaced; graffiti was not being removed; landscaping was not being maintained; rental checks, keys, and other items were being lost. 9RP 65-66, 77-78; 11RP 132-133.

By December 2008, Juliana let it be known that she and Mr. Cratsenberg were considering marriage. 9RP 90. Mr. Cratsenberg had already made Juliana an authorized user on his personal checking account – KeyBank checking account ending in 6659 – and attempted to put her on the business accounts, an attempt that was apparently thwarted when Larry, still an authorized signor on the accounts, told the bank not to permit it. 9RP 77; 11RP 130-131; 17RP 81-84, 90-91.

In January 2009, Mr. Cratsenberg cashed out three certificates of deposit. The CDs had not yet matured, but even with penalties and lost interest, their combined value exceeded \$3 million.⁶ 17RP 85-86. Mr. Cratsenberg's personal banker was convinced that Mr. Cratsenberg understood what he was doing at the time. 17RP 91, 93-94. This same month, Juliana also spent more than \$23,000.00 on a Lexus automobile. 19RP 28-29.

Larry approached Butch with the idea of imposing a guardianship on their father, thereby terminating his legal right to make decisions for himself or on behalf of the business. 10RP 131; 11RP 132; 14RP 20. The two hired an attorney to make it happen and did not tell their father about their plan. 9RP 81-82. The Petition for Guardianship was filed and served on Mr. Cratsenberg on January 27, 2009. 9RP 84.

Mr. Cratsenberg was not the sort of person one challenged, and maintaining control over his affairs was important to him. 16RP 8, 16, 67. He was livid that his sons would do this, believed it to be another in a series of attempts to steal his money, and made it clear

⁶ More than half – \$1,687,240.92 – was used to pay off a line of credit to Cratsenberg Properties. 17RP 86.

he would fight a guardianship.⁷ 9RP 84-85; 10RP 146, 159; 11RP 137; 12RP 116, 121-122; 16RP 52, 56.

Attorney Julie Schisel was appointed as Mr. Cratsenberg's Guardian Ad Litem. 16RP 39. The GAL's role in these actions is to represent the best interests of the alleged incapacitated person. 16RP 39. In addition to her own inquiries and observations, Schisel asked a clinical psychologist, Dr. Renee Eisenhauer, to evaluate Mr. Cratsenberg's mental abilities. 12RP 94, 112; 16RP 46-59.

Dr. Eisenhauer administered a battery of tests. 12RP 123-145. On the rating scale for dementia, Mr. Cratsenberg was still considered "intact." 12RP 132. He was well dressed, neatly groomed, respectful, socially appropriate, communicated spontaneously and fluently, and displayed his sense of humor. 13RP 109-111. But he did suffer from some degree of dementia

⁷ This was hardly the first time Mr. Cratsenberg's relationship with his sons was strained. Among other disputes, he and Larry had a falling out in 2006, resulting in an absence of contact between the two for the next year and a half to two years. 11RP 119-121. Mr. Cratsenberg had fired both of his sons from the family business several times over the years. 11RP 123-124. Butch's ongoing struggles with drug addiction, during which he required financial support, and the criminal charges he faced during this period also led to tension. 9RP 32-36; 10RP 69-77, 120-121; 12RP 121; 16RP 97-98. Moreover, Mr. Cratsenberg would later accuse Larry of making unauthorized withdrawals from a business account. 17RP 94-97.

NOS, and Dr. Eisenhower concluded he was “cognitively compromised,” at risk to make impulsive decisions, and vulnerable to exploitation. 12RP 146, 149-150. She felt that Mr. Cratsenberg could still live independently with some support, but he should not drive, and he needed assistance with his financial affairs. 12RP 146-149.

In March 2009, Mr. Cratsenberg purchased for \$240,000.00 a relatively modest home in Tacoma for Juliana’s two children. 13RP 4-13, 21; 15RP 108-110 exhibits 33-34, 72. Title to the home was placed in an LLC, of which Juliana was a managing member. 13RP 13-14; exhibit 37. The listing agent recalled that Mr. Cratsenberg negotiated the price and seemed to know real estate. The agent had no concerns about his competence to enter into a contract. 13RP 22-23. Around this same time, Mr. Cratsenberg also withdrew hundreds of thousands of dollars in cash for the purchase of a home in Korea.⁸ 15RP 111-115.

On March 30, 2009, GAL Schisel recommended exploration of a less restrictive alternative to guardianship: (1) creation of a

⁸ Mr. Cratsenberg mentioned to a friend the idea of hiding assets in Korea as a means of maintaining control over his finances. 16RP 8-9, 22.

revocable living trust, in which Mr. Cratsenberg's business and personal assets could be placed, and appointment of a professional trustee; and (2) transfer of control over business operations to Butch and Larry. 16RP 62-63, 100-101.

Meanwhile, on March 26, 2009, Mr. Cratsenberg and Juliana married. 9RP 93. Their priest observed that each cared deeply for the other and that they had a genuine and respectful relationship both before and after the marriage. 20RP 99.

Neither Butch nor Larry was told about the marriage. 9RP 94. Upon learning of the event about a week later, Butch and Larry's legal counsel immediately filed a petition under RCW chapter 74.34, the Vulnerable Adult Protection Act, alleging financial exploitation, and, on April 3, 2009, obtained a temporary order freezing all of Mr. Cratsenberg's personal and business accounts and assets. 9RP 94-96; 10RP 138-139, 146-156; 11RP 137; exhibit 12. Mr. Cratsenberg was ordered to vacate his office at Center Plaza, and Butch and Larry were given control of the company, which they never relinquished thereafter. 9RP 95-96; 10RP 60; 11RP 77, 134; exhibit 12.

Schisel still hoped to find a less restrictive alternative to guardianship. 16RP 64, 101, 107. The parties began negotiating a resolution and agreed to several extensions of the temporary restraining order while doing so. 10RP 159-161; exhibits 14-16.

In August 2009, Butch's lawyer deposed Mr. Cratsenberg. That deposition confirmed that Mr. Cratsenberg had memory deficits. It also confirmed his lingering anger with both of his sons. 10RP 166-166; 11RP 4-7; exhibit 78. Later that month, an agreement was reached on a less restrictive alternative in the form of a CR 2A agreement, named after the civil rule.⁹ 11RP 7-9; exhibit 2. In light of this agreement, both the guardianship and vulnerable adult actions were dismissed. 11RP 32-34, 82; exhibit 11.

As part of the CR 2A agreement, Mr. Cratsenberg agreed to execute a number of documents, including a Revocable Trust – into which his personal and real property would be placed – and a

⁹ At trial, the court admitted the deposition of Mr. Cratsenberg, not only to demonstrate his mental capacity around the time of the CR 2A agreement, but also to demonstrate his extreme anger toward his two sons and outrage over their instigation of guardianship proceedings. As the court recognized, this emotional reaction to his sons' efforts was "highly relevant" to whether he had any intention of following the CR 2A agreement and whether he subsequently intended to give money to his wife and consented to her spending. 4RP 3-6.

Postnuptial Agreement establishing that everything Mr. Cratsenberg owned was to be considered his separate property. Exhibit 2, at 3-4.

Regarding the Postnuptial Agreement, the CR 2A indicates:

Juliana Cratsenberg agrees to execute the postnuptial agreement attached as exhibit 5(e). Juliana Cratsenberg agrees not to seek any other disbursements from Andrew Cratsenberg or his estate under any circumstances or challenge this Agreement or any of the transactions contemplated under this Agreement. Juliana Cratsenberg also agrees not to challenge the Post Nuptial Agreement and agrees that the execution of the Post Nuptial Agreement is part of the consideration of this CR2A agreement. In the event that Juliana Cratsenberg challenges any document contemplated under this Settlement Agreement, she will not be entitled to any distribution from Andrew C. Cratsenberg, and Trust executed by him, or his estate.

Exhibit 2, at 4-5. The CR 2A continues:

Juliana Cratsenberg acknowledges and agrees that all the property being transferred pursuant to this Agreement is Andrew C. Cratsenberg, Sr.'s separate property and agrees to execute any and all documents to transfer such property as set forth in this Agreement. She acknowledges that she is being required to execute these documents to make it clear that she has no community property interest in any of the transferred assets and not because she has any interest in these assets. Juliana Cratsenberg certifies under the penalty of perjury under the laws of the State of Washington that she has not received any property, real or personal, tangible or intangible, from Andrew C. Cratsenberg, Sr. except: a Lexus Automobile, which Juliana agrees to transfer to the Trust.

Exhibit 2, at 5.

Consistent with this language, the Postnuptial Agreement, signed by Mr. and Mrs. Cratsenberg on August 24, 2009, indicates that all property owned by Mr. Cratsenberg at the time of marriage, all increases in value on that property, and all earned income was his separate property and would remain so subject to the few exceptions within the agreement. Exhibit 5, at 1-2. Those exceptions were as follows: if Mr. Cratsenberg predeceased his wife, she was entitled to \$12,500.00 for each month of marriage in which they had lived together (up to a maximum of \$750,000.00) and she would receive ownership of the Tacoma residence. She also could continue to reside at Mr. Cratsenberg's Federal Way residence for up to one year following his death. Exhibit 5, at 2-3.

The revocable Living Trust Agreement was executed in September 2009. Exhibit 6. Mr. Cratsenberg was identified as the Trustor and primary beneficiary of the Trust. Exhibit 6, at 1, 3. He and Commencement Bay Guardian Services were designated Co-Trustees. Exhibit 6, at 1, 7; 14RP 21. Among its purposes, the Trust was intended to meet Mr. Cratsenberg's financial needs:

including disbursements to meet the beneficiary's obligation towards his community obligation for and contributions towards his support and that of his spouse. The Trustee shall construe these purposes liberally and in favor of the beneficiary. The Trustee

may provide such resources and experiences as will contribute to and make the beneficiary's life as pleasant, comfortable and happy as feasible, consistent with the standard of living he enjoyed prior to the establishment of this Trust. Nothing herein shall preclude the Trustee from purchasing those services and items which promote the beneficiary's happiness and welfare, including, but not limited to, vacation and recreation trips away from places of residence, expenses for a traveling companion if requested or necessary, entertainment expenses, and transportation costs.

Exhibit 6, at 3.

The Trust Agreement required the signatures of both Co-Trustees (Mr. Cratsenberg and Commencement Bay) for all actions except those involving financial and bank accounts, which only required the signature of a Commencement Bay representative. Exhibit 6, at 7. Mr. Cratsenberg executed a Durable Power of Attorney designating Commencement Bay his attorney-in-fact to handle matters pertaining to his real property, personal property, and financial accounts. Exhibit 9; 14RP 15-17.

At the time Mr. Cratsenberg entered into the CR 2A agreement, the Superior Court judge handling the matter entered a finding that Mr. Cratsenberg had the capacity to do so. Exhibit 11, at 3 (finding 5).

One of the important distinctions between a trust and a

guardianship is that a guardianship strips individuals of their legal rights. In contrast, with trusts, individuals retain their legal rights and some degree of independence with their financial affairs. 10RP 130-131; 14RP 19-20. Mr. Cratsenberg maintained all of his civil rights, including his right to contract. 15RP 44-45, 72-74, 87.

Just how much independence Mr. Cratsenberg retained would become a source of dispute. Robin Balsam, Director of Commencement Bay, served as Co-Trustee in the matter. 14RP 8, 14-15. Although the Trust Agreement, and the financial power of attorney, provided her with ultimate control over Trust assets, she did not recall ever making this clear to Mr. Cratsenberg. 14RP 15-17, 22-23.

Balsam found Mr. and Mrs. Cratsenberg uncooperative concerning their financial affairs. For example, despite Balsam's requests, the Cratsenbergs would not provide her with bank records, access to their accounts, or explanations of their spending, repeatedly telling her this information was none of her business.¹⁰ 14RP 30-32; 15RP 88, 98. Nor would they permit an inventory of the Federal Way home they shared or the family jewelry. 14RP 33-35.

¹⁰ According to one family friend, Mr. Cratsenberg "wasn't going to tell you anything he didn't want you to know[.]" 16RP 31.

There also was sharp disagreement regarding an acceptable budget for Mr. and Mrs. Cratsenberg. The Cratsenbergs requested approximately \$17,000.00 per month. Exhibit 44; 14RP 50. This included monthly payments of \$4,170.00 for a \$50,000.00 wedding band they wished to purchase. Balsam felt this was exorbitant, would not approve this request, and many others, and informed them she was only "willing to entertain the purchase of a reasonably priced wedding band." Exhibits 44-45; 14RP 49. She also refused to allow them to purchase a new car until they first sold one of the cars they had. 15RP 63-64.

The Cratsenbergs reduced their monthly request to approximately \$13,000.00 per month. Exhibit 44; 14RP 52. Ultimately, Balsam decided to pay many of the Cratsenbergs' bills directly and approved a monthly budget of only \$4,592.00. 14RP 58-61. Mr. Cratsenberg never agreed to this amount and never accepted limitations on access to his own money. 15RP 48.

Mr. and Mrs. Cratsenberg were very upset by Balsam's restrictive budget. Mr. Cratsenberg accused Balsam of treating his money as if it were her own. He did not feel as though he was being treated like the very wealthy multimillionaire that he was. 14RP 83-86; 15RP 48-49. The Cratsenbergs complained they were not

receiving enough money to cover their monthly expenses. 14RP 87.

When serving as trustee, Balsam usually closes out existing bank accounts and moves the funds to a trust account. She did not do this in Mr. Cratsenberg's case, however. 14RP 74. Nor had she demanded that Mr. Cratsenberg turn over his monthly Social Security checks to her for inclusion in the trust. 15RP 60. Nor had she placed a limit on the Cratsenbergs' credit card spending and, over time, they increasingly used a credit card account to supplement their monthly budget. 14RP 93-94. Mr. Cratsenberg was the account holder and he had given Mrs. Cratsenberg a card on the account. 14RP 95. She was authorized to use the card for purchases and cash withdrawals. 15RP 53. Balsam had no control over the account and challenged the couples' spending. Eventually, she stopped paying the monthly balance on the account until the credit limit had been reached and the cards could no longer be used. 14RP 89-98; exhibit 49.

In August 2010, Balsam filed a petition in Superior Court seeking, among other things, guidance regarding the Cratsenbergs' credit card spending and an accounting for the Cratsenbergs' KeyBank account. 14RP 89-91, 101; 15RP 10-11. Although Balsam held a power of attorney for Mr. Cratsenberg, KeyBank would not

provide her information about the account because Mrs. Cratsenberg also was named on the account. 15RP 39.

In September 2010, the court ordered Mrs. Cratsenberg to provide Balsam with an accounting for the KeyBank account from September 2009 forward. 14RP 31, 101-102. In response, Balsam was provided an unsigned, incomplete list of expenses. 14RP 102-103; 19RP 51-60; exhibit 50. Bank records were obtained with subpoenas, and those records showed the Cratsenbergs also had been using an undisclosed account at Heritage Bank. 14RP 32-33.

Based on these records, on November 16, 2010, Butch and Larry's counsel filed a new Petition for Guardianship and another Petition for a Vulnerable Adult Protection Order. 11RP 112-113; 16RP 110. Shortly thereafter, around Thanksgiving, Mr. Cratsenberg suffered a serious and debilitating stroke. 9RP 105. He was left paralyzed on the left side of his body, making it impossible to walk. 10RP 9-10; 12RP 71.

According to his physician, Dr. McDonald, Mr. Cratsenberg went from a fairly mild display of dementia symptoms to fairly severe following this stroke. 12RP 72. Dr. Eisenhauer made similar observations on December 9, 2010, when she visited Mr. Cratsenberg at a nursing home dementia unit. 12RP 150-151. He

made bizarre statements and claims (for example, he accused Eisenhower of “peeing in the car” and believed he was running a mile a day for exercise despite his paralysis), had no understanding of why Dr. Eisenhower was there, and could not complete tests she attempted to administer. 12RP 151-155.

Butch and Larry examined the financial records Balsam had obtained regarding their father's various financial accounts. 9RP 107. Based on what they saw, they visited their father at the nursing home dementia unit and asked him about the spending. 9RP 113-118; 10RP 10. According to Butch and Larry, when shown the financial records, their father – in a timely moment of lucidity – expressed surprise and said, “I didn't know she was taking this money.” 9RP 117; 11RP 141.

As part of their renewed efforts against Mrs. Cratsenberg, Butch and Larry sought a restraining order preventing her from having any further contact with their father. 10RP 15, 45-46. In response, Mr. Cratsenberg's attorney, Karen Thompson, submitted a declaration – based on her conversations with Mr. Cratsenberg concerning his sons' efforts – expressing Mr. Cratsenberg's position regarding the allegations of theft:

Mr. Cratsenberg Sr. loves his wife very much, wants to live with her and does not want a divorce. Mr. Cratsenberg is very aware that his sons want him to divorce his wife. He does not want to do that and has stated repeatedly that he believes they are motivated by greed. He has inquired whether the Court can force him to divorce her. He will also state that his wife has not "stolen" money from him, that he is aware of the allegations that Juliana has taken approximately \$220,000, that he and she have discussed her expenditures, that he is a wealthy man worth millions of dollars, and absolutely does not want her punished in any way. . . .

Exhibit 148, at 2; 20RP 46.

Despite Thompson's efforts, a permanent restraining order preventing Mrs. Cratsenberg from contacting her husband was granted on January 21, 2011. 11RP 35. According to Butch, his father was much happier thereafter. 10RP 15-16. Mr. and Mrs. Cratsenberg subsequently divorced, and Mr. Cratsenberg's mental and physical health continued to decline until his death on June 12, 2013. 9RP 27; 10RP 17, 19-21.

The State's theft charge against Mrs. Cratsenberg involved an allegation that she stole more than \$5,000.00 from her husband between September 10, 2009 (the approximate date of the Living Trust Agreement) and October 27, 2010. CP 290; exhibit 6.

Specifically, the charge involved Mrs. Cratsenberg's use of ATM withdrawals, checks, purchases, and cash advances involving

the Cratsenbergs' joint KeyBank checking account (ending in 6659), their joint Heritage Bank checking account (ending in 8238), and the KeyBank MasterCard account (ending in 3503).¹¹ Supp. CP ____ (sub no. 62, State's Response To Defendant's Motion For A Bill of Particulars, at 22 and exhibits B & C); 9RP 5-6.

The State theorized that, in light of the CR 2A agreement, which put Mrs. Cratsenberg "on notice of what's hers to use and not hers and how she can use those funds," she did not have legal use of these accounts and the funds held in them. 1RP 16-17, 25-26; 2RP 60-61. Moreover, according to the State, the Social Security checks should have been property of the trust, and Mrs. Cratsenberg was not spending the approximately \$5,000.00 monthly allowance for proper purposes, which the prosecutor defined as "incidental expenditures of the marital community." 1RP 18-20, 25; 2RP 60.

The State asserted that, although Mrs. Cratsenberg could legally access everything she spent, she was not authorized to spend the funds for her own gain. 1RP 26. Key to the State's theory was RCW 30.22.090, which provides that, generally, ownership of

¹¹ The State also identified one transaction with a KeyBank MasterCard ending in 2073. This is the same MasterCard account later associated with the card ending in 3503. 19RP 12.

funds in a joint account is in proportion to ownership of deposits. According to the State, 100% of the funds used belonged to Mr. Cratsenberg. 1RP 24; 20RP 3-4; Supp. CP ____ (sub no. 121, State's Trial Brief, at 44-46 and exhibit I); Supp. CP ____ (sub no. 86, State's Response To Defense Motion to Dismiss, at 7-10). The State also asserted that, given his mental impairments, Mr. Cratsenberg was incapable of consenting to use of these accounts and funds after entry of the CR 2A agreement. 1RP 16-17, 23; 2RP 61-62.

The defense contended that, just as Mr. Cratsenberg had the legal capacity to enter into the CR 2A agreement, as sole beneficiary of the resulting trust, he also retained the legal capacity to gift and share his money with his wife. She could legally access funds from their joint accounts and then use them for whatever purposes she or Mr. Cratsenberg pleased. 1RP 4-16, 28-34; 2RP 62-65.

Rebecca Tyrrell, financial analyst and investigator for the King County Prosecutor's Office, obtained, analyzed, and summarized financial information for the Cratsenbergs' bank accounts and credit cards. 19RP 5-8. Tyrrell created spreadsheets detailing transactions in financial accounts owned in whole, or in part, by Mr. Cratsenberg from 2007 to 2011. 19RP 9-16; exhibits 54-61.

Tyrell's analysis of the three accounts allegedly involved in Mrs. Cratsenberg's criminal conduct revealed the following.

KeyBank joint checking account 6659 was the Cratsenbergs' most active account, used for household expenses and some investing. 19RP 18; exhibit 54. Mr. Cratsenberg added Mrs. Cratsenberg as a signor on the account on November 7, 2008. 19RP 29. The last check Mr. Cratsenberg signed on this account was on December 9, 2009. Thereafter, all checks were written, and all counter withdrawals made, by Mrs. Cratsenberg. The number of ATM cash withdrawals also increased after this date. 19RP 33-34; 20RP 27.

Mr. and Mrs. Cratsenberg opened Heritage Bank joint checking account 8238 on July 14, 2009, and both were authorized signors. 19RP 35. Deposits to the account came from Mr. Cratsenberg's Social Security checks,¹² cash, and – on a couple of occasions – checks from Commencement Bay. 19RP 35; exhibit 60. Prior to September 2009, the Social Security checks were directly deposited into the couples' KeyBank account. From September 2009 on, they were deposited into the Heritage account. 19RP 36-

¹² Mr. Cratsenberg signed all of his Social Security checks. There was no allegation of forgery. 19RP 71.

39. From February to September 2010, the Cratsenbergs' had a pattern of depositing the monthly \$4,592.00 check from Commencement Bay into the KeyBank account 6659, withdrawing a large percentage of this amount in cash, and then depositing most of that cash in their Heritage account. 19RP 39-42. Most cash withdrawals from this account were done at ATM machines and always with Mrs. Cratsenberg's debit card. 19RP 42-43.

The KeyBank MasterCard account was opened in the names of Mr. Cratsenberg and his previous wife, Luetta Cratsenberg. By January 2010, however, it was solely in Mr. Cratsenberg's name. 19RP 12. Spending with the card increased significantly beginning in January 2010. 19RP 44-45; exhibits 58, 64.

Tyrell broke down the transaction data in various ways. For example, she listed every transaction from each of these three accounts involving some form of cash withdrawal from September 10, 2009 through January 21, 2011 (beyond the period charged) and provided supporting documentation. 19RP 46-49; exhibit 144. Tyrell then created a subset of this data, showing all transactions involving some form of cash withdrawal from September 10, 2009 through October 27, 2010 (the period charged). Total cash withdrawn from these accounts during this period was \$59,739.95. 19RP 49-50;

exhibit 145. Of this total, \$25,304.75 had been withdrawn at a casino, \$19,888.75 had been withdrawn as cash advances on a credit card, and the balance involved ATM withdrawals unconnected to a casino.¹³ 20RP 35.

Tyrrell concluded that spending increased on all three accounts after Commencement Bay took over Mr. Cratsenberg's finances. 20RP 27, 31. Tyrrell conceded she had no idea whether Mr. Cratsenberg was present when cash was withdrawn from the three accounts, whether it was done at his direction, or how it was spent. 20RP 31-32. Nonetheless, the State alleged that Mrs. Cratsenberg stole \$59,739.95 from these three accounts between September 10, 2009 and October 27, 2010 in the form of cash withdrawals and advances. 21RP 31; exhibit 145.

¹³ The State's theft allegation was based, in part, on how and where Mrs. Cratsenberg withdrew and spent cash. According to Butch, when his father was still married to his mother, his father did not go to local casinos to gamble. 9RP 40. Butch had never seen his father use an ATM machine. 9RP 109; 10RP 58-59. And his father historically had not run a balance on his credit card exceeding \$2,000.00. 9RP 107.

In line with its theory of criminal liability, in closing argument the State asserted that Mrs. Cratsenberg was guilty of theft because: (1) under the CR 2A agreement, all property was Mr. Cratsenberg's separate property, (2) although Mrs. Cratsenberg had access to her husband's money thereafter, she was not authorized under the CR 2A agreement to spend it, and (3) her husband did not have the mental capacity to consent to her spending. The State focused on cash withdrawn and credit used beyond the monthly budget and, in particular, on funds spent at the casinos, arguing none of this was authorized by the CR 2A agreement or Mr. Cratsenberg. 21RP 9-41.

The defense argued that the State had failed to prove Mr. Cratsenberg did not know and approve of his wife's spending. 21RP 42-43. Therefore, the State was reduced to alleging that he was incapable of approval. 21RP 46-47. Because there was never a guardianship imposed, Mr. Cratsenberg retained all of his legal rights, including consent to spending and gifts. 21RP 48-49, 55, 81-82. Mr. Cratsenberg was strong willed, extremely wealthy, enjoyed providing his wife with the finer things in life, and would not be told what to do with his own money. Thus, the State could not prove he did not consent to his wife's withdrawals and spending. 21RP 79-80, 84-86. Moreover, the defense contended all spending was done

openly and under a good faith claim of title. 21RP 49-50, 61, 87-89.

C. ARGUMENT

1. THE TRIAL COURT INACCURATELY INSTRUCTED THE JURY ON THE APPLICABLE LAW.

Jury instructions are sufficient only if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform jurors of the applicable law. They are reviewed de novo as a question of law. State v. Clausing, 147 Wn.2d 620, 626-627, 56 P.3d 550 (2002). Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. Id. at 628 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Mrs. Cratsenberg's jury was instructed that, to convict her of Theft in the First Degree, it had to find the following elements proved beyond a reasonable doubt:

- (1) That during a period of time between September 10, 2009, and October 27, 2010, the defendant did exert unauthorized control over property of another;
- (2) That the property exceeded \$5,000.00 in value;
- (3) That the defendant intended to deprive the person of the property;
- (4) That the defendant's acts were part of a common scheme or plan, a continuing criminal impulse, or a continuing course of criminal conduct; and

(5) That the above acts occurred in the State of Washington.

CP 250. Jurors also were instructed on the State's burden to prove, beyond a reasonable doubt, that Mrs. Cratsenberg "did not appropriate the property openly and avowedly under a good faith claim of title." CP 249.

As previously discussed, critical to the State's theory of criminal liability was its belief that, under RCW 30.22.090 and the CR 2A agreement, all of the funds in the three accounts at issue belonged exclusively to Mr. Cratsenberg. 1RP 24; 20RP 3-4; Supp. CP ____ (sub no. 121, State's Trial Brief, at 44-46 and exhibit I); Supp. CP ____ (sub no. 86, State's Response To Defense Motion to Dismiss, at 7-10). RCW 30.22.090 provides, in part:

Funds on deposit in a joint account without right of survivorship and in a joint account with right of survivorship belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account was created.

RCW 30.22.090(2).

Consistent with this language and the decision in State v. Mora, 110 Wn. App. 850, 43 P.3d 38, review denied, 147 Wn.2d 1021, 60 P.3d 92 (2002), the State requested and received

instruction 14, which provides:

Funds on deposit in a joint bank account belong to each depositor in proportion to their ownership of the funds, unless the contract for deposit provides otherwise or there is evidence of a contrary intent at the time the account was created. A joint bank account holder may have the right to withdraw funds, but this does not mean that the joint bank account holder owns the funds.

CP 248; 20RP 3-4, 87-88; Supp. CP ____ (sub no. 135, State's Instructions).

Defense counsel objected to this instruction on several grounds, including arguments that it did not apply to spouses and improperly established, as a matter of law, that none of the funds in the joint accounts belonged to Mrs. Cratsenberg even though funds were commingled. 20RP 88-94. The objections were overruled based on Judge Doyle's belief the instruction left intact defense counsel's ability to argue joint ownership of funds and good faith claim of title. 20RP 94-95. This was error.

The decision in Mora establishes that instruction 14 correctly states the law in cases, like Mora, where the joint account holders are not married. See Mora, 110 Wn. App. at 852-853 (son and daughter-in-law added to mother's account). But RCW 30.33.090 itself makes clear that the general rule regarding ownership in

proportion to deposits is subject to additional rules for spouses. The first line of the statute provides, "Subject to community property rights" RCW 30.22.090. Thus, RCW 30.22.090(2) is subject to this caveat and an instruction based on the statute cannot be given in a case involving a married couple without additional instructions on community property principles.

RCW 26.16.030 defines community property and addresses its management and control. Property attained after marriage is generally considered community property and, subject to certain exceptions, "Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property" RCW 26.16.030; see also RCW 26.16.010 (defining separate property as property acquired before marriage or thereafter by gift, bequest, devise, descent, or inheritance).

Several community property principles potentially apply in this case. First, regardless of its initial status as separate or community property, one spouse may gift his or her interest to the other. Dean v. Lehman, 143 Wn.2d 12, 22, 18P.3d 523 (2001); In re Shea's Estate, 60 Wn.2d 810, 816, 376 P.2d 147 (1963).

Second, the commingling of separate and community funds can convert separate property into community property. Mumm v. Mumm, 63 Wn.2d 349, 352, 387 P.2d 547 (1964). This includes commingling of funds in bank accounts. Doyle v. Langdon, 80 Wash. 175, 180, 141 P. 352 (1914).

Third, even where there is a written agreement to keep all spousal assets separate property, it is not binding where “the separate property agreement was not mutually observed by the parties[.]” Mumm, 63 Wn.2d at 352 (citing Kolmorgan v. Schaller, 51 Wn.2d 94, 98, 316 P.2d 111, 316 P.2d 111 (1957)); see also DewBerry v. George, 115 Wn. App. 351, 359, 62 P.3d 525 (oral separate property agreements also require mutual observance for validity), review denied, 150 Wn.2d 1006, 77 P.3d 651 (2003).

Unfortunately for Mrs. Cratsenberg, her jurors heard nothing about these principles. Instead, under instruction 14, they were simply told that, while Mrs. Cratsenberg could lawfully withdraw funds from the joint accounts, she had no ownership interest in those funds and could not use them unless set forth in a contract for deposit or there was evidence of a contrary intent at the time the accounts were created. CP 248. There were no other exceptions provided. And because there was no such evidence, this instruction

permitted the State to argue that all assets in the accounts belonged exclusively to Mr. Cratsenberg as his separate property under the CR 2A agreement. 21RP 33, 39.

Jurors were never instructed that Mrs. Cratsenberg could still be considered an owner of the funds available in these accounts if Mr. Cratsenberg gifted money to her, if their funds had been commingled, and/or because neither Mr. nor Mrs. Cratsenberg was observing the separate property agreement.

It is important to remember that Mr. Cratsenberg retained all of his legal rights under creation of the trust as a less restrictive alternative to guardianship. 10RP 130-131; 14RP 19-20; 15RP 44-45, 72-74, 87. Although converting separate property into community property by gifting, or intentionally commingling, or refusing to abide by the post-nuptial agreement might have constituted a breach of the civil CR 2A settlement, he and his wife retained the legal authority to do so. And if they did so, this insulated Mrs. Cratsenberg from any criminal liability for theft. See State v. Coria, 146 Wn.2d 631, 48 P.3d 980 (2002) (accepting legal principle that one spouse cannot be convicted of theft of community property).

In summary, while instruction 14 provides an accurate and complete statement of the law in most cases, it does not for cases involving the alleged theft of joint account funds by one spouse from the other during marriage. If elements of civil law are going to be used in criminal cases, courts must ensure that *all* relevant civil principles are included for the jury's consideration. That did not happen here.

The erroneous use of instruction 14, presumed prejudicial, cannot be deemed harmless. Defense counsel attempted to argue that Mrs. Cratsenberg could lawfully access and lawfully spend money from the three accounts at issue. 21RP 47-49, 89-90. But these arguments were unlikely to succeed assuming jurors followed the incomplete law of the case under instruction 14.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST NECESSARY JURY INSTRUCTIONS.

While defense counsel properly objected to instruction 14, whether that instruction was given or not, counsel *also* should have requested instructions discussing the community property principles addressed above. Without these principles, jurors simply assumed (as the State argued) that the CR 2A agreement and instruction 14 conclusively established that Mr. Cratsenberg owned all of the funds

at issue. In fact, however, the question of ownership was more complex, and defense counsel was ineffective for failing to request appropriate instructions.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations"). The failure to bring relevant authority to the trial court's attention is deficient performance. State v. McKinnon, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001). So is the failure to offer an instruction that would have aided the defense. See State

v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where intent a critical trial issue).

Defense counsel understood that instruction 14 was misleading in this case and even recognized that the commingling of funds was relevant to the issue of ownership. See 20RP 92. Despite this, counsel never offered instructions discussing the several community property principles relevant to the issue of Mrs. Cratsenberg's criminal liability. There can be no legitimate tactic behind this failure, which falls below a minimum objective standard of reasonable attorney conduct.

Moreover, Mrs. Cratsenberg suffered prejudice. With proper instructions, jurors could have reasonably found that she had an ownership interest in, and lawful use of, the funds spent from the three accounts because these funds had been converted to community property under the principles already discussed.

In response, the State may seek to rely on evidence of Mr. Cratsenberg's statement to his sons – after his stroke, while in the dementia unit, after he had deteriorated significantly – that he did not know Mrs. Cratsenberg had been spending the money she is accused of stealing. 9RP 117; 11RP 141. Given his demented state

at the time, this is a fragile foundation for harmless error. In any event, even assuming Mr. Cratsenberg still had moments of clarity at that time, he subsequently made it clear to his attorney that his wife had not stolen money from him and he did not want her prosecuted. 20RP 46. There is a reasonable probability a properly instructed jury would have acquitted Mrs. Cratsenberg of theft.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

The State moved to preclude evidence that, in April 2011, Judge Jay White presided at a bench trial and found Mrs. Cratsenberg civilly liable for violating the CR 2A agreement and the terms of the Vulnerable Adult Protection Order entered after the period charged in this case. 2RP 17-18, 61; Supp. CP ____ (sub no. 121, State's Trial Brief, at 17-18). The defense joined in this request, and the motion was granted. 2RP 59, 68; 3RP 4-5. Judge Doyle also excluded use of the label "vulnerable adult" when referring to Mr. Cratsenberg. 3RP 79.

Defense counsel had been particularly concerned about jurors hearing about the 2011 trial result because Mrs. Cratsenberg was without legal counsel at the time. According to defense counsel, this potentially undermined the result of that proceeding.

CP 119-120, 126-127; 3RP 5-6. Because the court excluded all evidence of the 2011 trial, it also excluded her pro se status. 6RP 15-21.

A defense motion to preclude any evidence that Mrs. Cratsenberg rendered deficient health care for her husband also was granted. 3RP 28-32. Moreover, although there was an allegation in the 2011 proceedings that Mrs. Cratsenberg “was abusing her husband,” because evidence of the 2011 trial was excluded, the prosecution indicated it would not present evidence of this allegation, either. 6RP 19.

Unfortunately, during defense counsel’s cross-examination of Butch Cratsenberg, Butch testified in a manner that undermined these pretrial rulings:

Counsel: When does Juliana get the money that was promised to her in this postnup?

Butch: She doesn’t get the money, as a result of a civil court decision. She was –

Counsel: The civil court decision that happened as a result of the lawsuits that you filed against your father and then against her as well?

Butch: No. That was a civil lawsuit that was filed by the Commencement Bay Guardianship Services. Juliana, in exchange –

Counsel: Wait a minute. Answer the question. What

lawsuit was filed by Commencement Bay Guardianship Services?

Butch: They filed a VAPO action, a Vulnerable Adult Petition, against Juliana, alleging that she financially exploited my dad and she physically abused him. They were successful.

10RP 105-106 (emphasis added).

Defense counsel was confused by the answer and attempting to clarify when the prosecutor objected and asked to address the court. 10RP 106. Outside the jury's presence, the prosecutor argued that defense counsel had opened the door to otherwise inadmissible evidence. 10RP 106. Defense counsel responded that he had been trying to focus on actions taken by Commencement Bay and was surprised to hear they had instigated a VAPO action. Defense counsel agreed just to move on. 10RP 107-109.

The following day, however, defense counsel indicated he had confirmed that Commencement Bay had not been a petitioner in a VAPO action and that Butch's answer to his question was "dead wrong." 11RP 38. Counsel's focus, however, was not on the content of Butch's answer. Rather, he sought permission to reveal that Mrs. Cratsenberg had not been represented by counsel during the VAPO proceedings initiated by Butch and Larry in November

2010 and at the trial before Judge White in April of 2011. 11RP 39-48, 93-103.

Ultimately, Judge Doyle permitted counsel to elicit the fact that, on November 16, 2010, Butch and Larry's legal counsel obtained an order preventing any future use of Mr. Cratsenberg's money to pay Mrs. Cratsenberg's legal expenses. 11RP 104-106. Regarding the content of what Butch had said (that a court had found financial exploitation and physical abuse), Judge Doyle noted it was prejudicial to the defense and indicated she would leave it up to defense counsel regarding how to address it. 11RP 104. Both the prosecutor and Judge Doyle suggested the propriety of some type of corrective instruction. 11RP 103-105.

Defense counsel then elicited from Butch's legal counsel the fact that, on November 16, 2010, he had obtained the order preventing Mrs. Cratsenberg's access to funds for legal counsel. He also had counsel confirm that Commencement Bay was never a petitioner in a VAPO or Guardianship action.¹⁴ 11RP 112-113. Defense counsel never, however, took any action regarding Butch's testimony that the allegations Mrs. Cratsenberg financially exploited

¹⁴ He later elicited this same testimony from Robin Balsam. See 15RP 13-14.

her husband and physically abused him had been established in a later judicial proceeding. This was ineffective and violated Mrs. Cratsenberg's Sixth Amendment rights.

No reasonable attorney would have failed to move for a mistrial after Butch's testimony. The primary issue for jurors was whether Mrs. Cratsenberg had permission to use the funds at issue or, as the prosecution contended, use of the funds was the product of exploitation of her husband's condition. Butch's revelation that a court had found exploitation clearly supported the criminal charge. And making matters worse, of course, Butch also indicated the court had found physical abuse of Mr. Cratsenberg by Mrs. Cratsenberg.

In response, the State may point out that it was defense counsel's questions that elicited this inadmissible evidence. Counsel's questions, however, did not require Butch's specific revelations. Judge Doyle found that defense counsel did not open the door to the evidence. 11RP 46, 93-94. But to the extent counsel can be said to be responsible, this also was deficient performance. There was no legitimate tactic in eliciting this information. And, regardless of defense counsel's role, counsel had an obligation to rectify any error by moving for a mistrial and he

failed to do so.

Mrs. Cratsenberg suffered prejudice because, had counsel moved for a mistrial, Judge Doyle would have been obligated to grant the motion. When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, a mistrial was required. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

First, the irregularity was very serious because it injected into the trial additional improper evidence on the major disputed issue of exploitation and added information indicating there had been a judicial finding of physical abuse. This would have affected jurors' abilities to be fair and impartial, making it impossible to decide the theft charge based only on the evidence properly before them.

Second, the evidence was not cumulative of any properly admitted evidence.

Third, there was no request for a curative instruction. But the trial court would have been required to examine whether an instruction *could* cure the prejudice. Escalona, 49 Wn. App. 254-55. In Escalona, this Court noted that “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.’” Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, the evidence of a subsequent judicial finding of financial exploitation and physical abuse was inherently prejudicial.

Because Butch’s improper testimony was a serious irregularity, was not cumulative of any proper evidence, and could not be mitigated with a jury instruction, Judge Doyle would have been required to grant a defense motion for mistrial. Counsel was ineffective for failing to demand one.

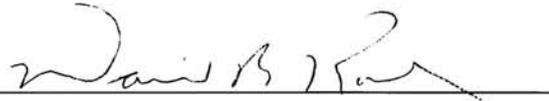
D. CONCLUSION

Use of instruction 14, without additional instructions on community property law, misled jurors, prevented the defense from arguing its theory of the case, and denied Mrs. Cratsenberg a fair trial. Defense counsel was ineffective for failing to request the necessary additional instructions. Counsel also was ineffective for failing to demand a mistrial once Butch revealed a judicial finding that Mrs. Cratsenberg had exploited her husband financially and abused him physically. This Court should reverse and remand.

DATED this 15th day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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