

COURT OF APPEALS
DIVISION I
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NO. 71448-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JULIANA CRATSENBERG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. ARGUMENT	15
1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND DEFENSE COUNSEL DID NOT FAIL TO PROVIDE EFFECTIVE ASSISTANCE BY DECLINING TO REQUEST IRRELEVANT INSTRUCTIONS	15
2. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST A MISTRIAL	24
D. CONCLUSION	29

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 22, 27

Washington State:

Dean v. Lehman, 143 Wn.2d 12, 18 P.3d 523 (2001) 21

In re Estate of Tosh, 83 Wn. App. 158, 920 P.2d 1230 (1996)..... 19

State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002) 17

State v. Fleming, 155 Wn. App. 489, 228 P.3d 804, 811 (2010) ... 17

State v. Lopez, 107 Wn. App. 270, 27 P.3d 237 (2001) 27

State v. Mark, 94 Wn.2d 520, 618 P.2d 73 (1980) 17

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002) 27

State v. Mora, 110 Wn. App. 850, 43 P.3d 38 (2002)..... 18, 19

State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002)..... 18

Statutes

Washington State:

RCW 30.22.090 18, 19

RCW 30.22.120 19

Rules and Regulations

Washington State:

CR 2A 8, 20, 25

A. ISSUES PRESENTED

1. A trial court's instructions to the jury are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. Here, the trial court instructed the jury, in language directly tracking the relevant statute, that ownership of the funds in a joint bank account is directly proportional to the ownership of the funds prior to their deposit into the account. The court's instruction did not discuss community property law. The evidence in this case showed that the defendant and the victim had no community property, and that all deposits in their joint bank account were the separate property of the victim. Given the absence of evidence of community property, did the trial court properly instruct the jury on the ownership of funds in a joint bank account?
2. To prevail on a claim of ineffective assistance, a defendant must affirmatively demonstrate that his counsel's performance was deficient and that there is a reasonable possibility that this deficiency altered the outcome of the proceedings. Failure to satisfy either prong defeats a claim.

Here, the defendant contends that her attorney provided deficient performance because he failed to request a jury instruction concerning the relationship of community property law to ownership of a joint bank account. The defendant also contends that her attorney was incompetent because he failed to seek a mistrial after eliciting an answer from a witness on a subject that defense counsel previously agreed should be excluded as irrelevant evidence. Given that any request for an instruction regarding community property would have been denied due to a complete lack of evidence supporting its inclusion, and given that defense counsel openly acknowledged that he decided, as a tactical and strategic decision, to elicit testimony on the subject that the witness addressed, has the defendant failed to demonstrate that her attorney was ineffective?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant was charged by amended information with one count of first-degree theft for exerting unauthorized control, between September 10, 2009, and October 27, 2010, over U.S. currency that was the property of Andrew C. Cratsenberg, Sr. CP

290. The appellant was further accused of knowingly committing this theft against a particularly vulnerable victim. CP 290.

By jury verdict rendered on December 13, 2013, the appellant was found guilty as charged. CP 261.

2. SUBSTANTIVE FACTS

On April 4, 2008, Andrew Cratsenberg, Sr., (hereinafter referred to as Andrew) visited his doctor, Brian McDonald, for treatment of possible pneumonia. 12RP 11, 16.¹ Andrew, who was nearly 82 years old, had been a patient of McDonald's for many years. 9RP 44; 12RP 6. In the course of the April 4 visit, McDonald noticed that Andrew's cognitive functioning seemed to be impaired. 12RP 11. Andrew seemed more confused than he had in the past, and McDonald suspected advancing dementia. 12RP 12-13. McDonald conducted a series of standardized mental acuity tests on Andrew; on such tests, a score of 24 or above out of 30 possible points is considered normal. 12RP 18. Andrew was scored at 21, which indicated dementia. 12RP 18. McDonald prescribed medication meant to decelerate the progress of the

¹ The verbatim report of proceedings consists of 23 volumes, referred to in this brief as follows: 1RP (7/11/2013); 2RP (11/4/2013); 3RP (11/5/2013); 4RP (11/6/2013); 5RP (11/7/2013); 6RP (11/12/2013); 7RP (11/13/2013); 8RP (11/14/2013); 9RP (11/14/2013); 10RP (11/18/2013); 11RP (11/19/2013); 12RP (11/20/2013); 13RP (11/21/2013); 14RP (12/2/2013); 15RP (12/3/2013); 16RP (12/4/2013); 17RP (12/5/2013); 18RP (12/5/2013); 19RP (12/9/2013); 20RP (12/10/2013); 21RP (12/11/2013); 22RP (12/13/2013); and 23RP (1/17/2014).

dementia, and suggested to Andrew that he take care and avoid living alone. 12RP 20-21.

McDonald's concern about Andrew's living arrangements was well-advised, because Andrew's wife of many years, Luetta, had passed away in January 2008. 9RP 56. With Luetta's help, Andrew had, during the course of their marriage, developed a prosperous commercial and residential real estate empire that he operated as a family business. 9RP 38. At various times, Andrew's sons, Larry and Andrew "Butch" Cratsenberg, Jr., (hereinafter referred to as Larry and Butch) worked at his father's Federal Way-based company in a variety of tasks. 9RP 31; 11RP 116.

Like Dr. McDonald, Butch recognized that Andrew's cognitive troubles were affecting his ability to function. 9RP 64-65. Andrew was having difficulties operating his business, could not remember people's names, and would disappear for periods of time. 9RP 66-67.

Around the time of Andrew's visit to Dr. McDonald in April 2008, Andrew brought the defendant (hereinafter referred to as Cratsenberg) to the office where he and Butch worked together. 9RP 68. Cratsenberg and Butch exchanged brief introductions, so

Butch was surprised, at their next encounter a couple of days later at the family office, when Cratsenberg walked up to him and said, "I don't want your daddy's money. I have my own money. You can go ahead and check me out." 9RP 69-70. Andrew also introduced Cratsenberg to Larry as his girlfriend. 11RP 125. Cratsenberg was 27 years younger than Andrew. State's Ex. 42.

Cratsenberg began arriving to the office with Andrew and leaving with him with regularity. 9RP 70. In late May or early June 2008, Andrew asked Butch to help Cratsenberg move her belongings from a modest apartment in Fife into Andrew's lavish home in Federal Way. 9RP 71-72. Though Butch and his brother felt it was too soon after their mother's death for Andrew to begin a new relationship, they acquiesced because they did want their father to be lonely. 9RP 72.

Cratsenberg began wearing Luetta's clothes and jewelry and drove Luetta's car. 11RP 127-28. She discouraged Butch from visiting his father at his home, telling him that he was coming over "too often." 9RP 75.

Butch and Larry were growing increasingly concerned that Andrew was failing to manage his real estate holdings properly and were worried about his erratic behavior. 9RP 81. By January

2009, after consulting with family friends and their pastor, Butch and Larry retained an attorney and directed him to file a guardianship action in King County Superior Court. 9RP 81-84.

The superior court appointed Julie Schisel to act as the guardian ad litem (GAL) in the guardianship proceeding in late January 2009. Pursuant to her duties as GAL, Schisel asked psychologist Renee Eisenhauer to conduct a psychological exam of Andrew, the results of which Schisel would report back to the court. 12RP 98-99.

Eisenhauer performed her evaluation of Andrew on March 13-14, 2009. 12RP 112. After concluding her two-day exam, Eisenhauer found that Andrew suffered significant cognitive impairment due to dementia. 12RP 146-49. Andrew's deteriorating memory, incapability of solving simple problems, and lack of impulse control, coupled with his inability to recognize his impairment, left him in need of assistance in managing his affairs. 12RP 146. Though she found that Andrew could currently take care of basic daily tasks, his dementia would progressively worsen to the point that he would need help there, as well. 12RP 148.

Despite Andrew's condition and the pending guardianship petition, Cratsenberg applied for a marriage license on March 23,

2009, at 1:50 p.m. 9RP 92-93. On March 26, 2009, at 2:08 p.m., nearly the exact moment at which the mandatory three-day waiting period expired, Cratsenberg and Andrew were married by a retired judge, with none of Andrew's family present. 9RP 93; State's Exs. 42, 43.

Butch learned of his father's marriage a few days later, and immediately moved for a restraining order. 9RP 94. At the first hearing on Butch's motion, the court issued an order prohibiting Cratsenberg from accessing Andrew's bank accounts and from spending his money. 9RP 95-96. Immediately after the hearing, Butch and his brother took a copy of the restraining order to Andrew's personal banker at Key Bank. 9RP 96-97. As the brothers were departing the bank branch, they noticed Cratsenberg walking in. 9RP 97. When she saw Butch, Cratsenberg turned around and quickly left. 9RP 97.

In the course of preparing for a potential trial on the guardianship petition, Mark Vohr, the attorney retained by Butch and Larry, conducted a deposition of Andrew, on August 11, 2009. The deposition was videotaped, and portions of it were played for the jury. 13RP 133; 14RP 5. During the deposition, Andrew was unable to recollect his date of birth, birthplace, or social security

number. 11RP 6. He could not describe his financial affairs, and seemed to display deficits in short- and long-term memory. 11RP 6.

Shortly after Andrew's concerning deposition, and in order to resolve the protective order and guardianship matters, the parties executed, pursuant to CR 2A, an agreement to enter into a less-restrictive alternative to full guardianship (which typically entails the complete surrender of the incapacitated person's civil rights). 10RP 159. The agreement, admitted into evidence as State's Ex. 2, involved distribution of ownership of Andrew's business, the creation of a living trust into which Andrew's assets would be placed and thereafter administered by a professional trustee, and a post-nuptial agreement signed by Cratsenberg and Andrew. 11RP 4; State's Exs. 2, 5, 6.

In the post-nuptial agreement, Cratsenberg formally renounced any ownership interest in Andrew's property, including his cash, real estate, and personal property. State's Ex. 6. Per the terms of the agreement, the property that each spouse brought into the marriage was to remain that spouse's separate property, in which the other spouse would hold no interest as owner. State's Ex. 6. The agreement included a list of all property that

Cratsenberg had at the time of the marriage; it was limited to clothing valued at \$2,500.00 and household goods and furnishings worth a collective \$6,500.00. State's Ex. 6. The agreement was dated August 24, 2009. State's Ex. 6.

On September 11, 2009, Andrew signed a living trust agreement whereby all of his property was transferred into a trust to be administered by Commencement Bay Guardianship Services (CBGS) for his benefit. State's Ex. 6. The trust agreement provided that its purpose was to provide for Andrew's care, support, and maintenance, as well as recreation and spending money. State's Ex. 6, at 3. The trust also allowed for disbursements to meet Andrew's spousal obligation toward Cratsenberg. State's Ex. 6, at 3.

Robin Balsam, operator of CBGS and a licensed attorney, explained to the jury that she agreed to serve as the trustee of Andrew's living trust, and was given by him a durable financial power of attorney in order to handle all of his financial affairs, consistent with the trust agreement. 14RP 16-18. After the trust agreement was finalized, Balsam met with Andrew and Cratsenberg in order to establish a monthly budget that would be consistent with the lifestyle they had maintained up to that point.

14RP 26-27. Balsam asked the couple to provide her with copies of bank statements and check registers, as well as their estimate of how much they spent on groceries, gasoline, and other routine items. 14RP 27.

Cratsenberg and Andrew failed to provide these items despite repeated requests. 14RP 30. Finally, Cratsenberg presented a budget request for over \$17,000 per month, in November 2009. 14RP 50. She provided no documentation in support of this request and included requests for cash for items outside the limits of categories authorized by the trust agreement, including \$50,000 for a wedding ring for herself. 14RP 48-49, 52. Balsam was very concerned that such a budget would drain the liquid assets in the trust far too quickly, to Andrew's detriment. 14RP 74-76.

After contentious discussion, Balsam agreed to provide a monthly cash allowance to Andrew of \$4,592.00. 14RP 78-79, 83-84. Balsam would also directly pay for Andrew a number of his monthly expenses, including his legal fees, insurance and taxes, and educational costs for his grandchildren. 14RP 79-80. Andrew was also authorized to use a credit card from Key Bank to pay for

medical bills and other items, which the trust would pay off each month. 14RP 80.

Subsequently, Balsam began to notice very large charges being made on the Key Bank credit card, much of it for cash advances and some to pay for basic household expenses that the monthly allowance was meant to cover. 14RP 89-91. Balsam sent letters to Cratsenberg (who had her own card on Andrew's account) and Andrew, seeking an explanation for the large monthly balances and for copies of receipts. 14RP 93. She received no response, and eventually told them that, as trustee, she was directing them to cease use of the credit card. 14RP 95-96. At a meeting in June 2010, Balsam noticed a significant decline in Andrew's cognitive condition; he seemed especially confused and agitated, and directed her staff to take special care when dealing with him. 14RP 98-99.

Ultimately, when she saw a charge of \$6000 made in October/November 2010 on the credit card account for tuition for Cratsenberg's adult daughter, Balsam sought judicial intervention, because such an expense was in conflict with the stated purpose of the trust. 14RP 90, 98-99. Andrew was present for a November 2010 hearing on Balsam's action, but was unable to respond

coherently when he was questioned. 9RP 106. Pursuant to court order, Balsam was able to obtain records from Key Bank regarding Andrew's checking and credit card accounts. 14RP 101. In her review, Balsam discovered the existence of a heretofore-unknown bank account at Heritage Bank. 14RP 104. She also noticed a large number of withdrawals and cash advances made at an area casino. 14RP 105.

Becki Tyrell, a financial analyst for the King County Prosecutor's Office, testified that she analyzed records associated with accounts held by Andrew at Key Bank and Heritage Bank, among others, as well as Andrew's MasterCard account at Key Bank. 19RP 9-12.

The Heritage Bank account was opened in the names of Cratsenberg and Andrew in mid-July 2009. Tyrell discovered that, soon thereafter, each time CBGS would make a direct deposit of Andrew's \$4,500+ monthly allowance into his Key Bank account (account number ending in 6659), it was immediately withdrawn in full or near-full in cash, and deposited into the Heritage Bank account. Tyrell examined all ATM card withdrawals made from the Heritage Bank during the charging period in this matter, and found that Andrew's card was used only one time; in every other instance,

Cratsenberg used her ATM card. 14RP 42-43. In addition, many cash withdrawals were made in the form of checks cashed at the Muckleshoot casino, and a large number of cash advances were made on the MasterCard account. 19RP 58.

In total, from January 2010 to December 2010 (with very little activity in November and December of that year), a total of \$63,239.93 was charged to Andrew's credit card, along with \$19,888.75 in cash advances. 20RP 35. From September 10, 2009, to October 27, 2010, a total of \$25,304.75 in withdrawals was made from ATMs located in casinos, along with nearly \$14,000 from non-casino ATM machines. 19RP 52-58, 20RP 35.

Andrew suffered a stroke around Thanksgiving 2010. 9RP 105. While Andrew was recuperating at a local rehabilitative clinic, Butch visited him and showed him a number of bank account records, to see if he was aware of all of the spending activity on his accounts. 9RP 114. Cratsenberg was not present. 9RP 114.

Upon seeing records of a large number of significant cash withdrawals close in time to each other, Andrew expressed surprise and told Butch, "I didn't know she was taking this money." 9RP 117.

Butch also explained to the jury that Andrew had never been a gambler and did not patronize casinos. 9RP 40. In addition, Balsam stated that at no point during any of her discussions with Andrew and Cratsenberg about their budget or their spending did Cratsenberg ever mention frequenting casinos. 14RP 105.

Vohr was able to obtain a permanent restraining order against Cratsenberg in January 2011, prohibiting her from having any further contact with Andrew. 11RP 35. Andrew passed away in June 2013. 9RP 27.

Cratsenberg did not testify in her case-in-chief. She presented the testimony of Butch and Larry's estranged half-sister, who testified that she visited Andrew after his stroke, and that he seemed "great," with no sign of diminished capacity whatsoever. 19RP 85-88, 108-09. A priest who conducted mass at services that Andrew and Cratsenberg attended for a few years also testified for Cratsenberg, and stated that the pair seemed to have a "genuine relationship." 20RP 99. He, too, reported that he observed no impairment in Andrew's cognitive functioning. 20RP 104.

Finally, Cratsenberg presented Karen Thompson, Andrew's attorney during the guardianship proceedings. 20RP 40. Thompson declined, on the basis of attorney-client confidentiality,

to discuss any details of her interactions with Andrew. 20RP 42. She only read to the jury a January 2011 declaration that Andrew stated to her, though he was unable to sign it, in which Andrew declared that he loved his wife, was aware of the allegations that she had stolen from him, had discussed her expenditures with her, and did not want her punished. 20RP 47. Thompson refused to describe Andrew's condition at the time he uttered this declaration, or who else may have been with him before he met with her. 20RP 51. Thompson explained that because no court had yet formally determined whether Andrew had capacity, she felt it was her duty, as Andrew's attorney, to express his views without questioning his cognitive condition herself. 20RP 49-50.²

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND DEFENSE COUNSEL DID NOT FAIL TO PROVIDE EFFECTIVE ASSISTANCE BY DECLINING TO REQUEST IRRELEVANT INSTRUCTIONS

Cratsenberg contends that the trial court erred by providing the jury, at the State's request, with Closing Instruction No. 14:

² Suzanne Winingar, a registered nurse, assessed Andrew after his stroke, at the request of Robin Balsam. 16RP 119-20. She found that he was unable to speak coherently and seemed to have little grasp of reality. 16RP 168-70. He also suffered a psychotic episode while hospitalized, requiring tranquilization. 17RP 23.

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. The State sought the inclusion of this instruction because its case-in-chief was premised on Cratsenberg's misuse of a particular bank account on which both Andrew and Cratsenberg were signatories, along with a credit card on which both were authorized signers. Cratsenberg objected on several grounds, including a claim that the case law on which the State relied was inapposite when the joint account holders were married and thereby subject to community property laws. 20RP 89. The trial court overruled Cratsenberg's objections in their entirety, holding that the State's proposed instruction did nothing more than provide guidance to the jury on a potentially confusing subject, i.e., whether a person becomes a full owner of all funds on deposit in a joint bank account as soon as a co-signer adds money into it. 20RP 93.

Cratsenberg asks this Court to revisit the trial court's ruling and conclude that Instruction No. 14 was inadequate because it failed to address the role of community property principles in the

context of a joint bank account. Her claim should be rejected.

Under the circumstances of this case, the question of community property in regard to this account was a non-issue, and inclusion of that subject in Instruction No. 14 would have only confused the jury. Moreover, Instruction No. 14 in no way limited Cratsenberg in her defense or closing argument.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. State v. Fleming, 155 Wn. App. 489, 503-04, 228 P.3d 804, 811 (2010). A proper jury instruction “states the law, is not misleading, and permits counsel to argue his theory of the case.” State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

Cratsenberg contends that Instruction No. 14, as provided to the jury, was erroneous as a matter of law, and thus subject to *de novo* review by this Court. Brief of Appellant, at 29, citing State v. Clausing, 147 Wn.2d 620, 626-67, 56 P.3d 550 (2002). However, as discussed in detail, *infra*, the trial court’s decision was due to the absence of any evidence that would have necessitated consideration of community property laws. In other words, this was an issue of fact, not law, and the trial court’s determination is

reviewed only for abuse of discretion. See State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

In support of its request for Instruction No. 14, the State cited to State v. Mora, 110 Wn. App. 850, 43 P.3d 38 (2002), a case in which an adult son and his wife were convicted of stealing money from a bank account opened by the son's mother, to which the mother had added the defendants as authorized signatories. On appeal, the defendants asserted that, by virtue of being signers on the victim's bank account, they became owners of the funds on deposit, and thus could not be deemed to have taken or exerted unauthorized control over "the property of another" when they looted the account. Mora, 110 Wn. App. at 856. Division Three rejected the defendants' claim, noting that under the relevant banking laws, the funds "in a joint account belong to each depositor in proportion to their ownership of the funds." Id. (citing to RCW 30.22.090(2)). The Mora court further recognized that a joint tenant may have the right to withdraw funds from a joint account, but this does not mean that he or she owns the funds within the account in their entirety, regardless of whether they deposited them or not; it means only that the bank is not liable for disbursement of funds to account signatories regardless of the actual ownership of the

money. Id., citing to In re Estate of Tosh, 83 Wn. App. 158, 166, 920 P.2d 1230 (1996), and RCW 30.22.120.

Cratsenberg maintains, as he argued to the trial court, that Mora is inapposite because RCW 30.22.090, setting forth the rules of ownership of funds within a joint account, expressly provides that those rules are “subject to community property rights.” Brief of Appellant, at 32. She is correct regarding the language of this statute, but wrongly asserts that this language is material in the framework of her case.

It was undisputed at trial that before she engaged in the unauthorized use of Andrew’s funds, Cratsenberg affirmatively and expressly acknowledged that Andrew’s money was his separate property and not that of their marital community. As indicated on the post-nuptial agreement that Cratsenberg signed on August 24, 2009, “[a]ll property owned by Husband and Wife at the time of their marriage, or as beneficiary of any trust, and all earnings, rent and accumulations related thereto, shall be and remain the separate property of each....” State’s Ex. 5. Cratsenberg identified her separate property as non-monetary items such as clothing and furnishings that were collectively worth \$9,100.00. State’s Ex. 5.

She did not include any bank accounts or cash as her own property. State's Ex. 5.

In contrast, Andrew listed, in the post-nuptial agreement, several bank accounts (including the Key Bank account ending in 6659) containing millions of dollars in cash, along with other real and personal property, as property of his that would remain separate. State's Ex. 5. Andrew's assets were contemporaneously transferred into a living trust that was expressly created for his benefit as trustor-beneficiary. State's Ex. 6.

The post-nuptial agreement and the living trust were created as part of the CR 2A agreement that resolved Andrew's guardianship petition. The CR 2A agreement, also signed by Cratsenberg, included her acknowledgement that all of the property being transferred into the living trust was Andrew's separate property and that she "has no community property interest in any of the transferred assets." State's Ex. 2 (p. 5 of 7).

The validity and legal effect of the documents in which Cratsenberg voluntarily relinquished any community property interest in Andrew's assets were unquestioned at trial. Nevertheless, Cratsenberg mistakenly contends that community property issues were at play here. Brief of Appellant, at 32-33.

While it is true, as Cratsenberg notes,³ that one spouse may make a gift of his interest in community property to his spouse, thereby making it her separate property, here, by express agreement, there was no community property to begin with. Similarly, insofar as there was no community property whatsoever, there was no evidence presented to the jury of any commingling of community and separate property. Finally, Cratsenberg provided no basis on which the jury could have concluded that Andrew affirmatively decided to join her in disregarding their written agreements to keep their property separate. Indeed, by virtue of independently depositing his assets into his living trust to be administered by an unrelated trustee, Andrew no longer maintained the authority to bestow ownership of his money on others.

Accordingly, there was no reasonable basis upon which the trial court would have felt a need to instruct the jury on the intricacies of community property law. Although Cratsenberg and Andrew were married, the property that each spouse brought into the marriage at its start and acquired throughout its course was, by specific agreement, that spouse's separate property.

³ Brief of Appellant, at 32, citing Dean v. Lehman, 143 Wn.2d 12, 18 P.3d 523 (2001).

Moreover, Cratsenberg was in no way prevented by the absence of language regarding community property law within Closing Instruction No. 14 from arguing that Andrew consented to the manner in which she exercised the limited control she had over his money by virtue of being a co-signer on his checking and credit card accounts, or that she had a good-faith, albeit mistaken, belief in her right to do so. The trial court did not abuse its discretion.

For the same reasons, Cratsenberg's claim that her trial attorney provided deficient assistance for failing to propose an instruction that included language regarding community property law also fails. To establish that trial counsel provided constitutionally ineffective assistance, a defendant must show that her attorney's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances, and that there is a reasonable probability that, but for the attorney's incompetence, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); see also Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Reversal of the outcome of a trial court proceeding is required only where the defendant

demonstrates *both* deficient performance and resulting prejudice.

Strickland, 466 U.S. at 687.

Cratsenberg's claim of ineffective assistance is suspect.

She recognizes that her trial attorney specifically sought to prevent the court from instructing the jury on the nature of ownership in a joint bank account because he wanted to argue that his client maintained a community property interest in her husband's money. Although he was unsuccessful in convincing the trial court of the merits of his position, it cannot be said that Cratsenberg's lawyer failed to raise this issue in a meaningful way. To suggest that he provided constitutionally incompetent performance because he did not accompany his objection with a proposed instruction memorializing his position is problematic, and Cratsenberg provides no authority for this questionable proposition.

Moreover, just as there was no basis, for the reasons described supra, for the trial court to sustain Cratsenberg's objection to Instruction No. 14, she cannot demonstrate that the trial court would have elected to instruct the jury on community property laws vis-à-vis joint bank accounts had it been asked to by her lawyer, and that such an instruction would have likely resulted in an acquittal. Because she neither demonstrates deficient

performance nor resulting prejudice, Cratsenberg's claim of ineffective assistance should, like her challenge to Instruction No. 14, be rejected.

**2. DEFENSE COUNSEL DID NOT PROVIDE
INEFFECTIVE ASSISTANCE BY FAILING TO
REQUEST A MISTRIAL**

Cratsenberg presents a second claim of ineffective assistance in her appeal. She contends that her trial attorney deprived her of her constitutional right to competent counsel when he failed to move for mistrial after Butch, when asked during cross-examination if he knew why Cratsenberg was not going to receive the payout following Andrew's death that was provided in her post-nuptial agreement, answered that it was because of the resolution against her in a vulnerable adult protection order case. Brief of Appellant, at 39-40.

Pre-trial, the State moved for exclusion of any testimony regarding the outcome of this vulnerable adult matter on the ground of relevance. CP 380-81. The State initially believed that this was an agreed motion, but defense counsel withdrew its agreement and asked the trial court to reserve ruling. 2RP 17-18. He later joined in the State's motion, and it was granted. 2RP 68.

During his cross-examination of Butch, defense counsel turned to the subject of the CR 2A agreement, and asked Butch if he knew when Cratsenberg would receive the money she was to be provided per the agreement following Andrew's death:

Q: When does Juliana get the money that was promised to her in the post-nup?

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

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

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

Q: Wait a minute. Answer the question. What lawsuit was filed by Commencement Bay Guardianship Services?

A: 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.

Q: The Vulnerable Adult action is the same type of suit that you had filed on April 3rd when you found out that they were getting married, right?

A: Gosh, I don't know if it is the same type of suit. Again, it's called a "VAPO," Vulnerable Adult Protection Act [sic].

Q: And there was a trial?

10RP 105-06. At this point, the State objected and noted that defense counsel was violating the order *in limine* prohibiting the parties from going into detail about this civil proceeding. 10RP 106-07. The State suggested that defense counsel wanted to raise the question of whether his client had been represented during that proceeding, although that fact, too, had been ruled off-limits before the start of trial. 10RP 107-08.

Defense counsel responded that he sought to develop this line of inquiry in order to explore “potential for bias issues there and what happened” to the money that had been allocated to Cratsenberg in the post-nuptial agreement. 10RP 108. When the trial court expressed its concern that this subject matter was “mostly...not favorable to your side,” defense counsel replied, “I think it cuts both ways. If the nature of the proceedings were known, it might not hurt as much,” before he agreed to abide by the pretrial ruling. 10RP 109.

Cratsenberg now asserts that his attorney was obligated to seek a mistrial following Butch’s statement that the vulnerable adult proceeding based on allegations of exploitation and abuse was successful. His claim is without merit. Great judicial deference is accorded to counsel’s performance, and the analysis begins with a

strong presumption that counsel was effective. Strickland, 466 U.S. at 689-90; McFarland, 127 Wn.2d at 335. To overcome this presumption, a defendant must establish that his attorney's conduct fell below an objective standard of reasonableness under prevailing professional norms, when evaluated against the entire record of the case. State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001). The presumption of competence of counsel requires the defendant to show the absence of any valid tactical or strategic reason for the challenged action in order to sustain the defendant's burden. State v. McNeal, 145 Wn.2d 352, 362-63, 37 P.3d 280 (2002).

It is abundantly clear from the record, and particularly as evidenced in his closing remarks to the jury, that defense counsel's strategy was to show that Andrew's sons sought to seize their father's riches because they were tired of waiting for his death. He argued that they, in cahoots with a "guardianship industry" motivated by its desire for profits to pursue legal claims of exploitation, incompetence, and abuse, however unfounded, used their father's relationship with Cratsenberg as their means of entry into a court system predisposed to find incompetence where none existed. 21RP 42-46.

Regardless of the lack of success he ultimately found in attacking the civil guardianship and protection order legal system and the professionals involved in it, one cannot entirely fault defense counsel for his choice of strategy, given the nature of the State's case and its reliance on Cratsenberg's responses to civil efforts to protect Andrew. Cratsenberg needed to show that the civil legal system was not to be trusted as a finder of truth and was easily misused. As such, and as defense counsel readily admitted, he made a tactical decision to open the process to the jury's inspection, even knowing that it could cut "both ways."⁴ His questioning of Butch may not have produced the ultimate outcome that he desired, but defense counsel's elicitation of the facts of one of the civil cases was a legitimate strategic decision, and cannot fairly be deemed to be deficient performance. Had he even considered seeking a mistrial under these circumstances, his motion would have been denied.

⁴ In view of the entirety of the line of questioning that led to Butch's disclosure, and especially considering defense counsel's acknowledgement that he sought to elicit previously-proscribed testimony about the civil protection order case, the trial court's conclusion that defense counsel did not seek the specific answer that Butch provided is open to doubt. 11RP 104. Regardless, it is in no way binding on this court given that the trial court was not asked to rule on a motion for mistrial.

In addition, Butch's disclosure was limited to one remark during a five-week trial involving the testimony of many witnesses and the presentation of hundreds, if not thousands, of pages of documentary exhibits. The State made no effort to exploit Butch's statement; indeed, it was the State that continually sought to restrict discussion of the civil proceedings that tracked alongside Cratsenberg's marriage to Andrew. No further reference to this civil matter touched on the nature of its allegations or the ultimate outcome; the only testimony regarding it was sought by Cratsenberg's counsel, and concerned the fact that she was not provided with an attorney, again supporting his strategy that the civil legal process should be viewed by the jury with skepticism. 11RP 112-13. Under the circumstances, Cratsenberg cannot show that her attorney's failure to seek a mistrial caused her such prejudice that retrial is warranted.

D. CONCLUSION

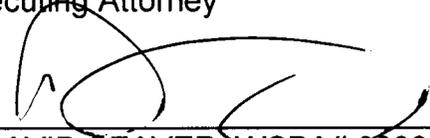
The trial court properly instructed the jury regarding joint ownership of bank accounts, and the defendant received the effective assistance of counsel. The State respectfully asks this Court to affirm the defendant's conviction.

DATED this 20th day of February, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



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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 David Koch, 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. JULIANA CRATSENBERG, Cause No. 71448-1 -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 20 day of February, 2015



Name
Done in Seattle, Washington