

NO. 38646-1

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KIMBERLY ANN PHILLIPS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable James R. Orlando

No. 07-1-05353-2

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**BRIEF OF RESPONDENT**

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DIVISION II  
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show prejudicial error regarding the trial court's pretrial ruling that her prior convictions were admissible under ER 404(b) where the convictions were never admitted at trial?
2. Should this court decline to consider defendant's assertion that the trial court's erred ruling that her prior convictions would be admissible when defendant did not preserve the issue by testifying?
3. Did the trial court properly exercise its discretion in determining a witness's competency where the witness could understand the nature of the oath and could relate facts of the case?
4. Has defendant failed to show that the trial court abused its discretion when it admitted a non-inflammatory photograph of a non-testifying victim?
5. Did the trial court properly decline defendant's proposed jury instructions where they did not relate to the facts of the case and would have confused the jury?
6. Did the State present sufficient evidence for a reasonable fact finder to conclude that three of the victims were particularly vulnerable?

7. Is defendant's exceptional sentence proper where her sole contention on appeal is that the jury had insufficient facts with which to find the aggravating factor of particular vulnerability?
8. Did the State present sufficient evidence for a reasonable fact finder to conclude that defendant committed the crime of theft in the first degree as charged in Counts V and VII?
9. Has defendant failed to show there was any error in her trial, much less such an accumulation of prejudicial error that she is entitled to relief under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

On October 17, 2007, the State charged Kimberly Ann Phillips, hereinafter "defendant," with eight counts of theft in the first degree. CP 1-5. The eight counts arose from incidents involving five elderly victims. CP 1-5, 6-9. In addition to the criminal charges, the State alleged that each of the victims was particularly vulnerable, and for Counts II and III, that defendant abused her position of trust. CP 1-5.

Prior to trial, defendant twice moved for the appointment of an expert to evaluate the competency of three of the State's witnesses. RP

(05/07/08)<sup>1</sup> 3, RP (07/18/08) 1. Defendant was concerned that three of the victims, Robert Hokenson, Joy Ostrander, and Audrey Seitz, would be found not competent because “[a]ll of these victims have various degrees of dementia, memory loss.” RP (05/07/08) 4.

The State objected to the appointment of an expert, but agreed that a competency hearing by the court would be appropriate. RP (05/07/08) 10-13, RP (07/18/08) 8-11. The court denied defendant’s motion as the expert’s evaluation was not necessary for the court’s determination of competency. RP (05/07/08) 15, RP 13-14.

On August 28, 2008, the court held pretrial motions. RP 12. The State sought a pretrial ruling as to the admissibility of defendant’s prior convictions for forgery (1987), second degree theft (1988), and forgery (1989) under ER 404(b). The court was concerned that convictions would be used as propensity evidence. RP 14. The court ultimately ruled that the prior convictions were admissible only in rebuttal. CP 106-107; RP 61; Appendix A.

After a CrR 3.5 hearing, the court ruled that defendant’s statements to Detective Nolta were admissible as voluntary statements. RP 108-09.

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<sup>1</sup> As the pretrial matters were heard in different courtrooms, the verbatim reports of proceedings for those hearings were not consecutively numbered. Therefore the State has cited to each of these hearings as RP, followed by the date of the hearing, then the page number. Once the matter was before the Honorable James Orlando, the transcripts are numbered consecutively. The State cites to those transcripts as RP, followed by the page number.

The court issued written findings of fact and conclusions of law to support his ruling. CP 147-149.

On October 15, 2008, the parties held competency hearings for Joy Ostrander and Robert Hokenson. RP 116, 143. After hearing from Mr. Hokenson, defendant did not contest that he was competent. RP 163. The court reserved ruling on the issue of Mr. Ostrander's competency pending a second hearing, to be held just prior to him testifying. RP 164.

Jury trial commenced October 21, 2008. RP 179. During trial, defendant objected to the State's introduction of a photograph of Ms. Seitz. RP 326; *see* Exhibit 35. Defendant argued that the photograph was irrelevant and its admission would garner undue sympathy for the victim. RP 326. The court ruled that the photograph was admissible. RP 326-27.

Prior to his testimony, the court ruled that Mr. Ostrander was competent to testify and that his memory issues were a matter of credibility for the jury to determine. RP 475.

On October 29th, defendant rested without testifying or presenting any witnesses. RP 804. The court declined to give two of defendant's proposed instructions as they would be confusing to the jury and unnecessary under the facts presented in the case. RP 820-21.

On October 30, 2008, the case went to the jury. RP 875. Later that afternoon, the jury found defendant guilty as charged. CP 261, 263, 265, 267, 269, 271, 273, 275; RP 879-84. The jury also returned special verdicts for each count finding that defendant knew or should have known

that the victims were particularly vulnerable or incapable of resistance. CP 262, 264, 266, 268, 270, 272, 274, 276. In the counts relating to Ms. Seitz, the jury additionally found that defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. CP 264, 266.

On December 5, 2008, the court sentenced defendant to an exceptional sentence of 344 months. CP 284-297. The length of the sentence was based on the court's imposing 43 months, the high end of the standard range on each count, then running all eight counts consecutive to each other. CP 284-297. In imposing the exceptional sentence, the court stated, "If there's a case that screams out for an exceptional sentence based on the aggravating factors of extreme vulnerability and position of caretaker, . . . it's this case." RP 903.

Defendant filed this timely appeal. CP 300.

## 2. Facts

### a. Marie Adams

In 2007, Marie Adams placed an advertisement for a caretaker. RP 195. Ms. Adams was 84 years old, confined to a wheelchair, required supplemental oxygen, and had congestive heart failure. RP 191, 193.

On March 30, 2007, defendant responded to the ad and Ms. Adams hired her. RP 194-95. At the end of the interview, defendant told Ms. Adams that she had a check for \$67,000.00 waiting for her, but escrow

would not release it until defendant had paid for storage fees. RP 197-99. Defendant asked Ms. Adams to lend her \$2,000.00 for the storage fees. RP 199. Ms. Adams refused. RP 199.

Ms. Adams continued to refuse to loan defendant money until defendant offered to repay her an additional \$2,000.00 for the loan. RP 200. Ms. Adams agreed, but only on the condition that she could verify the \$67,000.00 check in escrow. RP 201.

Defendant and Ms. Adams left the house with defendant driving Ms. Adams' car.<sup>2</sup> RP 201. During the trip, defendant stopped the car, made a phone call, and told Ms. Adams that she now needed \$5,000.00 in order to receive her check. RP 201. Ms. Adams told defendant that she would not loan her \$5,000.00 and asked defendant to take her home. RP 201. Instead, defendant drove Ms. Adams to Ms. Adams' bank. RP 202.

While at the bank, Ms. Adams withdrew \$5,000.00 in cash, but she again refused to give the money to defendant the money until she verified defendant's story with the escrow company. RP 203.

After leaving the bank, defendant drove them to an office building in Fife. RP 204. The parking lot was nearly deserted. RP 205. Defendant got out of the car and went into the building. RP 204. When she returned, she told Ms. Adams that she could not go to the escrow

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<sup>2</sup> While Ms. Adams could not drive, she owned a vehicle equipped with a rear-mounted rack for her wheelchair. RP 194.

office, because the elevators were not accessible by wheelchair. RP 204. Defendant said she would take the money in and get Ms. Adams a receipt. RP 204.

Ms. Adams suggested that the escrow employee come down to the lobby to verify defendant's check. RP 207. After disappearing into the building, defendant returned and told her the escrow employee refused to come down. RP 207. Ms. Adams yet again requested to be taken home. RP 207.

Ms. Adams asked defendant several times to take her home, but defendant refused. RP 205-09. Defendant would leave the car to enter the building and then come back and attempt to convince Ms. Adams to give her money. RP 205-09. Defendant argued with Ms. Adams for five hours in an effort to convince her to give her money. RP 207.

Finally, defendant told Ms. Adams, "I have had enough of you all day." RP 209. Defendant said, "I have had enough of this arguing. Now the end is coming. And now - - it's now or never. Give me the money." RP 209. Defendant reached into her own handbag and Ms. Adams was afraid for her life. RP 209. Defendant then reached for Ms. Adams' purse. RP 209. The two women briefly struggled before defendant was able to remove the cash from Ms. Adams' purse. RP 209. Defendant went back into the building and returned, saying, "Escrow will be in touch." RP 209. Defendant did not have any receipts or other documentation. RP 209.

Then defendant agreed to take Ms. Adams home. RP 211. On the way back, Ms. Adams told defendant that she “did the wrong thing.” RP 211. Defendant said she would take Ms. Adams to the bank and pay her back before taking her home, but defendant returned Ms. Adams to her home without making any stops. RP 211-12.

Ms. Adams reported the incident to the Pierce County Sheriff’s Department. RP 228, 280.

b. Audrey Seitz

In June, 2007, Leann Larson placed an advertisement seeking a caretaker for her aunt, Audrey Seitz<sup>3</sup>. RP 331, 345. Ms. Seitz was 79 years old and was diagnosed with dementia and Alzheimer’s disease. RP 331-32. Because of the dementia, Ms. Seitz had severe memory loss and could not retain any memory of events that had happened to her within the five years prior to trial. RP 335. She required a full-time caretaker. RP 333, 336.

Defendant, calling herself “Kim Trilman,” responded to the ad. RP 346, 351. Ms. Larson eventually hired defendant along with a second caregiver. RP 346. Defendant was scheduled to start work July 1, 2007. RP 348. Before she started work, defendant asked Ms. Larson for an advance in order to pay for car repairs, but Ms. Larson refused. RP 349.

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<sup>3</sup> Ms. Seitz passed away prior to defendant’s sentencing. RP 903.

Defendant was scheduled to stay with Ms. Seitz over the July 4th holiday weekend. RP 355. When Ms. Larson returned from a short vacation on July 5th, she called defendant to check on Ms. Seitz. RP 355. The other caretaker answered the phone. RP 355. The other caretaker told Ms. Larson that defendant had called for her to cover, because defendant had a family emergency. RP 355.

Ms. Larson called defendant to find out what was happening. RP 363. Defendant was irate and said her daughter was in the intensive care unit and she would call Ms. Larson back. RP 362.

Later that day, Ms. Larsen attempted to withdraw cash for Ms. Seitz. RP 356. The cash machine would not let her make a withdrawal. RP 356.

The following day, Ms. Larson went to the bank and was told that the bank had flagged Ms. Seitz's checking account because a large amount of money was taken from her account over the holiday weekend. RP 356. A check had been cashed at Money Tree<sup>4</sup> on July 4th, in the amount of \$4,783.20. RP 358. Ms. Larson noticed that the check was preprinted with an old address and that, except for the signature, the handwriting was not Ms. Seitz's. RP 358-59. There were also two cash withdrawals, one for \$2,500.00 and one for \$500.00. RP 361. Again, the signature on the

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<sup>4</sup> Money Tree is a payday loan and check cashing facility. RP 436.

withdrawal slips belonged to Ms. Seitz, the rest of the handwriting did not. RP 361.

As defendant had been with Ms. Seitz on the date the money was taken, Ms. Larson again called defendant. RP 362. There was no answer and Ms. Larson never heard from defendant again. RP 362-64.

Ms. Larson reported the incident to the Puyallup Police Department. RP 362, 415.

Jessica Trainor was working at the Money Tree on 38th Street in Tacoma, Washington, as a teller on July 4, 2007. RP 436-38, 444. She saw two women enter the store, one was younger and one was older. RP 444. The older woman was Ms. Seitz. RP 440, 446. The younger woman filled out a customer form on behalf of Ms. Seitz that indicated that her name was Lisa Coleman and that Ms. Seitz was her aunt. RP 449. Ms. Seitz expressed some hesitation about cashing a check, but the younger woman told Ms. Trainor that it was okay to cash it. RP 445-46. The younger woman told Ms. Trainor how much to write the check for and Ms. Seitz signed it. RP 447. The younger woman told Ms. Seitz, "Remember? You said you were going to loan me this amount." RP 447. Ms. Seitz said, "I don't even remember," and kept asking to be taken home. RP 447, 449. Eventually, Ms. Seitz started to panic and the two left the store without cashing the check. RP 445. They returned a short time later and Ms. Seitz told Ms. Trainor to cash the check. RP 447-48.

Despite Ms. Trainor's discomfort with the situation, her manager directed her to cash the check. RP 448, 458.

c. Joy Ostrander

In August, 2007, Joy Ostrander called his girlfriend, Anne Lizotte, and said something bad had just happened to him. RP 495, 505. Mr. Ostrander was 92 years old, had arthritis, a heart condition, cancer, and had been recently diagnosed with Alzheimer's disease. RP 490, 524. Mr. Ostrander's condition has deteriorated since August, 2007. RP 524.

When Ms. Lizotte arrived at his house, she found Mr. Ostrander confused, disoriented, and upset. RP 506. Mr. Ostrander told her that, "the woman had driven him around," but he did not know the woman's name. RP 506. He told Ms. Lizotte that he had been to the bank with the woman, where she was given "a bunch of money." RP 506.

While Ms. Lizotte was with Mr. Ostrander, the phone rang. RP 509. Ms. Lizotte answered and a woman whose voice she did not recognize asked for Mr. Ostrander. RP 509. When she asked who was calling, the woman hung up. RP 509. Ms. Lizotte called Karen Anderson, Mr. Ostrander's daughter. RP 508.

Ms. Anderson has been handling Mr. Ostrander's finances for ten years. RP 519. This includes counting the cash Mr. Ostrander keeps in the house. RP 521. Mr. Ostrander would keep \$2,000.00 to \$4,000.00 in

cash along with important business papers hidden in a case in his basement. RP 520-21.

Ms. Anderson went to Mr. Ostrander's house, where he showed her the case. RP 527. The case was sitting open on a chair in front of the basement closet. RP 527. Ms. Anderson could tell that the case had been rifled through, as the papers were scattered and there was only \$300.00 in cash. RP 527-28. Ms. Anderson hesitated to call the police, as Mr. Ostrander had hidden his money elsewhere before. RP 528, 532.

Mr. Ostrander testified that he hid money in different places in his house. RP 482. He said a woman came to his house, looked around inside, and would take whatever she wanted from his house. RP 482. Mr. Ostrander also said that this woman would sometimes bring her children. RP 482. The woman would talk to him while her children had the run of the house. RP 482.

Mr. Ostrander's neighbor, Bonnie Faulkner, remembered seeing a strange woman going to Mr. Ostrander's house several times in August, 2007. RP 552. She observed a woman who would change into hospital-type scrubs in the street before approaching Mr. Ostrander's front door. RP 552-55. Ms. Faulkner thought that Mr. Ostrander's family had hired a caretaker.<sup>5</sup> RP 554. Ms. Faulkner's mother saw the strange woman take

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<sup>5</sup> Neither Ms. Anderson nor Mr. Ostrander had hired a caretaker. RP 530.

Mr. Ostrander from his house on one occasion and arrive with two children on another. RP 607, 615.

Approximately two weeks later, on August 24th, Ms. Anderson discovered \$5,500.00 was missing from Mr. Ostrander's checking account. RP 525, 528-29. She reported the incident to the Tacoma Police Department. RP 525, 538. Police acquired bank surveillance photographs of Mr. Ostrander's transaction and ultimately identified defendant as the person with him. RP 765-66.

d. Robert Hokenson

On September 10, 2007, Robert Hokenson was in his garden when a woman approached him. RP 679. Mr. Hokenson was 85 years old, wore hearing aids, was almost blind in one eye, and walked with a cane. RP 679, 706, 709, 715, 738. In addition, Mr. Hokenson had a stroke four years prior and he had been forgetful ever since. RP 712.

When the woman approached him, she asked Mr. Hokenson if he remembered her. RP 679. When he said he did not, she told him that she was looking for a place to live in his neighborhood. RP 679. She told Mr. Hokenson that her name was "Teresa" and that she was a wonderful person. RP 679. She told him several times that she was not there to rob him, as she was not that kind of person. RP 679.

Then she told him that she needed \$400.00 to get her purse out of her car after it had been towed to the Tacoma Mall. RP 680. Mr.

Hokenson went into his house to get money for her, and she followed him inside. RP 689. She even followed him into his bedroom, where he kept several envelopes with cash in his sock drawer. RP 689. One envelope contained \$1,200.00 and there were five or six others containing between \$300.00 and \$400.00 in each. RP 697.

Teresa suggested they take Mr. Hokenson's truck to go to her credit union. RP 683, 709. Initially, Mr. Hokenson drove, but Teresa soon convinced him to let her drive. RP 684. Teresa then drove Mr. Hokenson to his credit union. RP 685-86.

At the credit union, Mr. Hokenson withdrew money for Teresa. RP 686. As the teller was counting, Teresa insisted on more money. RP 687. When Teresa was finally satisfied with the amount, she took the cash and the receipt. RP 689. Mr. Hokenson did not know how much money was withdrawn from his account. RP 689.

Teresa allowed Mr. Hokenson to drive on the way home. RP 691. A few blocks from Mr. Hokenson's house, Teresa told him to drop her off at her grandmother's house and that she and her husband would follow him home to pay him back. RP 691-92.

Mr. Hokenson drove home and sat in his yard for approximately an hour waiting for Teresa. RP 692, 710. When Teresa did not arrive, Mr. Hokenson went back inside and told Mrs. Hokenson about the entire incident. RP 711.

That evening, Teresa called the house and Mrs. Hokenson answered the phone. RP 716. Teresa told her, "Don't bother to call the police because my husband's already called the police and there is no proof." RP 716-17. A short time later, Teresa called again. RP 717. During the second conversation, Mrs. Hokenson asked Teresa for her last name. RP 717. Teresa said her name was "Terry Wilson." RP 717. She also told Mrs. Hokenson, "Honey, don't worry about your money. You will get it by Friday or maybe Thursday or maybe half of it." RP 718. Mrs. Hokenson hung up on Teresa and called her son-in-law. RP 718, 736.

Mrs. Hokenson found that all the cash from Mr. Hokenson's sock drawer was missing, as well as \$700.00 that they kept in their desk drawer for household expenses. RP 719.

The following day, the Hokenson's next door neighbor came to their house and asked, "Why was Kimberly in your yard yesterday?" RP 721-22. Mrs. Hokenson believed that "Teresa" was the girlfriend of a young man who lived at the neighbor's house twenty years ago. RP 722.

Michael Winger, the Hokenson's son-in-law, went to the credit union and discovered that \$3,780.00 had been withdrawn from the Hokenson's account on September 10th. RP 738. He reported the incident to the Tacoma Police Department. RP 736.

Police acquired bank surveillance photographs of Mr. Hokenson's transaction and ultimately identified "Theresa" as defendant. RP 765-66.

e. Corrine Gunderson

On September 17, 2007, 88 year old Corrine Gunderson was walking home from the grocery store when a woman drove up and offered her a ride home. RP 569, 578. When Ms. Gunderson declined, the woman insisted until Ms. Gunderson agreed and got into her car. RP 578.

The woman told Ms. Gunderson that she worked at Ms. Gunderson's bank and that other employees were stealing money. RP 576. The woman told her that she wanted to catch the employees, but would need \$7,500.00 from Ms. Gunderson. RP 576. As Ms. Gunderson had recently read an article in the paper about fraudulent bank tellers, she believed the woman's story and agreed to help. RP 576.

Defendant drove Ms. Gunderson from her home in Auburn to a Bank of America in Fife. RP 570, 576, 580. Once there, Ms. Gunderson withdrew \$7,500.00. RP 576. The woman put the cash in her own purse and immediately drove Ms. Gunderson home. RP 576. The woman did not speak to Ms. Gunderson all the way back to Auburn. RP 576.

Once they arrived at Ms. Gunderson's house, the woman said she was going straight to the Auburn bank and that she would return Ms. Gunderson's money shortly. RP 576.

At 5:00 p.m., Ms. Gunderson received a phone call from the woman who said that her daughter had soccer practice and she would go to the bank the next morning. RP 577. Ms. Gunderson never saw or heard from the woman again. RP 577. The woman had never given Ms.

Gunderson her name. RP 579. Ms. Gunderson was so embarrassed by the situation that she did not immediately report it to anyone. RP 581-82.

Ms. Gunderson's son, Arthur Gunderson, visits her almost every day. RP 585-88. While Ms. Gunderson handles her own finances, Mr. Gunderson is listed on her bank account. RP 589. On September 22nd, Mr. Gunderson was visiting Ms. Gunderson and he reviewed her bank statement. RP 593. He was surprised to see a \$7,500.00 withdrawal from the Fife branch of the bank. RP 593. Ms. Gunderson told him about the incident. RP 595. Mr. Gunderson reported the incident to the Fife Police Department. RP 596.

Police acquired bank surveillance photographs of Ms. Gunderson's transaction and ultimately identified the woman with Ms. Gunderson as defendant. RP 644.

f. Police Investigation

Tacoma Police Detective Lucky was assigned to Mr. Hokenson's case. RP 760. As he read through the report, he realized that the facts were similar to an earlier unsolved case, that of Mr. Ostrander. RP 760-61. Detective Lucky had acquired surveillance photos of both bank transactions and realized that the woman photographed with both men was the same person. RP 765.

Detective Lucky had no leads on the identity of the woman in the photos, so he discussed both cases with other detectives during a unit

meeting. RP 766. Another detective recognized the woman as the sister of an old school friend and identified her as defendant. RP 766, 803. Detective Lucky then acquired a Department of Licensing photograph of defendant, which he presented to witnesses as part of a “photo lineup.” RP 768-70. The teller at the credit union picked defendant’s picture as the woman who had been with Mr. Hokenson on September 10th. RP 770.

Detective Lucky conducted an extensive search for defendant, but was unable to locate her. RP 772-73. Eventually, defendant found out through family members that Detective Lucky was looking for her and she contacted him by phone. RP 774-76. Defendant claimed she had done nothing wrong and that she had nothing to hide. RP 776. She admitted she had taken a person named “Joe” to the bank, but that she had not stolen from him. RP 777. Defendant stated that Joe’s family wanted to get her into trouble. RP 777. Defendant agreed to come in for an interview, which was set for September 26th. RP 777-78.

Two days before the interview, defendant cancelled, as she thought an interview was not in her best interest. RP 779. Detective Lucky never heard from defendant again. RP 779.

As he was unable to find a valid address or phone number for defendant, Detective Lucky contacted the Tacoma News Tribune to have an article run in the paper. RP 780. The article ran on October 1st. RP 781.

Fife Police Detective Jeff Nolta read the article in the Tacoma News Tribune. RP 644, 781. He had previously been assigned to Ms. Gunderson's case, but had been unable to acquire any leads as to the suspect. RP 643. As the facts Detective Lucky's cases sounded similar to the facts in his own, he contacted the Tacoma detective and they compared bank surveillance photographs of the incidents. RP 644. Defendant was the woman photographed with Ms. Gunderson at the bank. RP 644.

On October 3rd, Detective Nolta attended a regional fraud investigators meeting. RP 645. He presented his and Detective Lucky's cases at the meeting. RP 647. Two other detectives approached and indicated they had unsolved cases with similar fact patterns. RP 647. Detective Purvis with the Pierce County Sheriff's Department was working on Ms. Adams' case and Detective Visnaw with the Puyallup Police Department was working on Ms. Seitz's. RP 280, 423-25. They shared surveillance photographs and discovered that defendant was the person photographed at the banks with Ms. Adams and Ms. Seitz. RP 648. Ms. Larson also picked defendant's photograph out of the "photo lineup" and identified her as the person she hired as Ms. Seitz's caretaker. RP 369.

Defendant turned herself in to the Pierce County Jail on November 26, 2007. RP 784. Detective Nolta went to the jail to interview her. RP 650. Defendant informed him that she was innocent and insisted that she

had done nothing wrong. RP 650. Defendant told Detective Nolta that she had “only tried to help those people.” RP 651.

C. ARGUMENT.

1. DEFENDANT IS UNABLE TO SHOW PREJUDICIAL ERROR FOR THE COURT’S RULING THAT HER PRIOR CRIMINAL CONVICTIONS WERE ADMISSIBLE UNDER 404(b), WHERE THE CONVICTIONS WERE NEVER ADMITTED AT TRIAL.

A trial court’s decision to admit evidence is reviewed for abuse of discretion. *State v. Sexsmith*, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). Evidence of prior bad acts is generally inadmissible to prove the character of a person and his propensity in conformity therewith; but such evidence may be admissible for other purposes. ER 404(b).

Evidentiary errors under ER 404 are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). An error of non-constitutional magnitude is harmless if, within reasonable probabilities, the outcome of the trial would have been different if the error had not occurred. *Jackson*, 102 Wn.2d at 695.

Defendant contends that the trial court committed error by ruling that her prior convictions were admissible. *See* Appellant’s Brief at 38. Yet evidence defendant’s prior convictions were never admitted at trial. Any error in the court’s ruling was harmless as it had no effect on the outcome of defendant’s trial.

2. DEFENDANT FAILED TO PRESERVE ANY CLAIM THAT THE TRIAL COURT ERRED IN RULING HER PRIOR CONVICTIONS WERE ADMISSIBLE WHEN DEFENDANT DID NOT TESTIFY AND THE PRIOR CONVICTIONS WERE NEVER ADMITTED AT TRIAL.

Evidence of prior bad acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). Such evidence may also be admissible under ER 404(b) as evidence of a common scheme or plan. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Evidence of a prior conviction under ER 404(b) is substantive, and can be elicited in the State's case-in-chief. See *State v. Brown*, 113 Wn.2d 520, 529-30, 782 P.2d 1013 (1989).

To be admissible under the common scheme or plan exception to ER 404(b), the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *DeVincentis*, 150 Wn.2d at 17 (citing *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

Under ER 609(a):

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by

death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

The admission of a conviction more than ten years old unless the court determines, in the interest of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. ER 609(b).

Crimes of theft and forgery, per se, involve dishonesty. See *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991); see also *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003).

In order to preserve an alleged error in a ruling admitting prior conviction evidence for impeachment purposes, a defendant must take the stand and testify. *Brown*, 113 Wn.2d at 540 (Review sought on ruling based on ER 609(a)). In *Brown*, the court held that a ruling admitting prior convictions under ER 609(a) is not reviewable for a number of reasons. *Id.* at 538. First, a criminal defendant could “plant” error as a ground for appellate review as any action that kept the defendant from testifying could never be harmless. *Id.* at 536. Second, that requiring the defendant to testify in order to preserve the error provides a meaningful record for the appellate court to review. *Id.* at 538. And third, that any assessment of the impact of an erroneous ruling admitting prior conviction evidence is necessarily speculative where the defendant does not testify and the evidence is not introduced by the State. *Id.* at 538.

Here the court determined that defendant's prior convictions were admissible under 404(b), but ruled that the convictions could only be admitted if defendant testified. RP 660. The court determined that the State could not use the evidence of prior convictions unless the defendant took the stand and testified that the money she took from the victims were loans or gifts. RP 660. While the court was hesitant to label this ruling "impeachment," the court's ruling effectively limited the admissions of prior convictions to impeachment only. *See* RP 660.

Defendant argues that if the trial court had not erroneously ruled that her prior convictions were admissible, she would have testified. *See* Appellant's brief at 43. Yet defendant was informed on the record that she was required to testify in order to preserve this issue for appeal. RP 655-56. As defendant did not testify, this issue is not properly before this court.

3. THE TRIAL COURT PROPERLY EXERCISED  
ITS DISCRETION IN FINDING MR.  
OSTRANDER COMPETENT TO TESTIFY  
WHERE MR. OSTRANDER WAS ABLE TO  
UNDERSTAND THE NATURE OF THE OATH  
AND COULD RELATE SOME FACTS AS TO  
WHAT HE SAW.

In Washington, adult witnesses are presumed competent to testify. *State v. Smith*, 97 Wn.2d 801, 802-03, 650 P.2d 201 (1982); RCW 5.60.020; CrR 6.12. An adult witness is incompetent to testify if he or she is of "unsound mind," and appears incapable of receiving and relating

accurate impressions of the facts about which they are examined. RCW 5.60.050. The term “unsound mind,” in this context, means the “total lack of comprehension or the inability to distinguish between right and wrong.” *Smith*, 97 Wn.2d at 803. Unsound mind refers to people with “no comprehension at all,” not merely those who have a history of mental disorders or with limited cognitive abilities. *State v. Watkins*, 71 Wn. App. 164, 171, 857 P.2d 300 (1993).

The determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence. *State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2003). The trial judge’s discretion will not be disturbed on appeal in the absence of manifest abuse. *Smith*, 97 Wn.2d at 803. The general test of competency for those alleged to be of unsound mind is whether the witness understands the nature of the oath and is capable of giving a correct account of what he or she has seen and heard. *Watkins*, 71 Wn. App. at 169. The burden is on the party opposing the witness to show incompetence. *Smith*, 97 Wn.2d at 803.

In *Smith*, the victim had an I.Q. of 23. 97 Wn.2d at 802. The victim had been previously adjudicated as mentally deficient, meaning she was incapable of self-direction, self-support, and social participation. *Id.* at 803. The court held that, because the victim understood the obligation to tell the truth and was capable of recalling and recounting the criminal event, she was competent to testify at trial. *Id.*

In *State v. Johnston*, 143 Wn. App. 1, 14, 177 P.3d 1127 (2007), the court held that evidence of mere treatment for mental disorders was insufficient in and of itself to demonstrate that a witness is of unsound mind. The court determined that the fact that a witness was a patient at a mental hospital did not impose a duty on the court to sua sponte inquire as to the witness's competency. *Id.* at 15.

In the present case, the court held a competency hearing for Mr. Ostrander. RP 115-35. According to Mr. Ostrander's daughter, Karen Anderson, Mr. Ostrander has arthritis, a heart condition, and cancer. RP 524. Mr. Ostrander was also diagnosed with Alzheimer's disease prior to August, 2007. RP 524.

During the competency hearing, Ms. Ostrander could not remember his date of birth, the name of the street he lived on, or what color his house was. RP 115-18. Mr. Ostrander did know, however, that he was present to testify about someone who "swapped everything" he had. RP 124. Mr. Ostrander related that a woman came to his house and would sit and talk to him while her children would go through his house and take what they wanted. RP 126. He remembered that he kept cash in the house and that the woman saw where he kept it. RP 128-29. The court held that Mr. Ostrander was able to express sufficient recall of some of the events. RP 163. However, the court required a second hearing just prior to Mr. Ostrander's testimony. RP 164.

During the second competency hearing, Mr. Ostrander still could not remember where he lived or how old he was. RP 464. He did know that he was present to testify “about the thieving.” RP 469. He testified that a woman came to his house and would take money. RP 471. He also testified that defendant brought a girl with her who would go through his house while the woman was talking to him.<sup>6</sup> RP 472.

The court held that Mr. Ostrander was able to take the oath to tell the truth, and that he still had a “basic grasp of the facts that, as I understand, existed and I think he’s indicated the ability to recite them.” The court held that Mr. Ostrander was competent, and that his credibility was for the jury to decide. RP 475.

Given that Mr. Ostrander was able to take an oath to tell the truth and was able to recite what he saw and heard, the court did not abuse its discretion in finding Mr. Ostrander competent to testify. The court properly determined that any confusion in his testimony went to the weight of his testimony, and not to whether or not he was competent.

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<sup>6</sup> Mr. Ostrander’s trial testimony was consistent with the accounts he gave at both competency hearings. RP 482-84.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED A PHOTOGRAPH OF A NON-TESTIFYING VICTIM.

All relevant evidence is admissible. ER 402. Evidence is relevant if it has any tendency to make the existence of a material fact more or less likely. ER 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

The decision of a trial court to admit photographs is reviewed for abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983).

A trial court has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996).

A defendant's not guilty plea puts in issue every element of the crime charged, and the State is entitled to use photographic evidence probative of those elements. *State v. Gentry*, 125 Wn.2d 570, 609, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995). Inflammatory or repetitive photographs are disfavored. *State v. Ray*, 126 Wn.2d 136, 160, 892 P.2d 29 (1995). A trial court's erroneous admission of evidence is harmless unless, within reasonable probabilities, the outcome of the trial was materially affected by the error. *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).

Here, the State introduced a single photograph taken of Ms. Seitz on October 19, 2008. Exhibit 35; RP 368. Ms. Seitz was unable to testify

at trial, as she had no memory of the incident. RP 364. Defendant objected, characterizing the photograph as the State's intent of "parading" Ms. Seitz around the courtroom. RP 326. The State argued that the photograph was necessary to prove the aggravating factor of particular vulnerability and that it would assist the jury in identifying Ms. Seitz in the bank surveillance photographs. RP 326-27. The court reviewed the photograph, and deemed that, since it is proper for the State to enter "in-life" photographs of murder victims, it was proper for the State to be able to give "a face to the name," in this case. RP 327. The court ruled that the photograph was relevant for identification purposes, as it would help the jury identify Ms. Seitz in a surveillance photo with defendant. RP 327. The court also noted that the photograph was not unduly prejudicial as there was nothing about the photograph likely to trigger a sympathetic reaction. RP 327.

The photograph was relevant to help the jury identify Ms. Seitz in photographs taken by surveillance cameras while she was with defendant. *See* Exhibits 4, 35, 37. The trial court did not abuse its discretion when it admitted the photograph for this purpose.

5. THE TRIAL COURT PROPERLY DENIED  
DEFENDANT'S PROPOSED JURY  
INSTRUCTIONS WHERE THE INSTRUCTIONS  
WERE NOT RELEVANT TO THE CASE AND  
WOULD HAVE CAUSED CONFUSION FOR  
THE JURY.

Jury instructions must accurately state the law and be supported by the evidence. *State v. Berube*, 150 Wn.2d 498, 510-11, 79 P.3d 1144 (2003) (citing *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993)). When taken as a whole, jury instructions must properly inform the jury of the applicable law, may not be misleading, and must permit each party to argue its theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A defendant is entitled to an instruction on his theory of the case if sufficient evidence supports it. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

The validity of jury instructions is reviewed under a de novo standard. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Shumaker*, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007).

Particular vulnerability relates to whether a person is incapable of resistance and whether a defendant knowingly takes advantage of that incapability. *See* RCW 9.94A.535(3)(b); *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

Here, the jury was asked to consider whether the victims were particularly vulnerable or incapable of resistance to the crime of theft in

the first degree. CP 262, 264, 266, 268, 270, 272, 274, 276. All of the testimony at trial indicated that defendant either physically took money from the victims without their permission or deceived them into giving her money. All of the victims were elderly, relied to varying extents on caretakers, and had some mental or physical infirmities. That several of the witnesses required the assistance of family members when they reported the incident to police suggests they were particularly vulnerable and defendant's own actions of targeting elderly people suggested that she counted on their particular vulnerability to facilitate her crimes.

Defendant did not testify at trial, but she wanted to argue during closing that age alone does not render a victim particularly vulnerable. *See* Appellant's Opening Brief at 52; RP 819. In order to advance this theory, she presented two proposed jury instructions to the court. The instructions read:

A person is incompetent if he or she cannot understand the nature and consequences of their interaction with others.

and;

Advancing age does not bestow upon an elderly person's family members some type of natural guardianship, as neither age nor eccentricity alone is not enough to find incapacity.

CP 202-220 (both *citing State v. Simms*, 95 Wn. App. 910, 977 P.2d 647 (1999)).

As noted above, the determination of competency is within the sound discretion of the trial court. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). Defendant offers no authority, nor does she provide any argument that the jury is ever responsible for making a determination as to a witness's competency. As such, any instruction on the standard of incompetency would be irrelevant. Nor does defendant articulate any law or argument as to how competency relates to the issue of particular vulnerability. While an incompetent person may be particularly vulnerable, there is no authority that holds that incompetency is a "prerequisite" in finding particular vulnerability. In short, defendant provides this court a bare assertion that an elderly person can only be particularly vulnerable if they have also been found incompetent. This argument fails as there is no requirement that an elderly victim be mentally incompetent to support a finding of particular vulnerability.

Defendant's reliance on *Simms* is inappropriate. In *Simms*, the defendant was hired as a caretaker for a 93 year-old man, Cook. 95 Wn. App. at 911. After Simms was hired, Cook removed his daughter's name from his bank accounts and, for the first time, accused her of stealing from him. *Id.* at 911-12. Cook's daughter believed that Simms was exerting undue influence on Cook and fired her. *Id.* at 912. Simms refused to leave. *Id.* When Simms attempted to leave the area with Cook, Cook's daughter called the police and Simms was later charged with kidnapping. *Id.* at 912. The State did not allege that Cook was particularly vulnerable.

The State's theory of the case was that Cook was incompetent and therefore could not legally consent to leave with Simms. *Id.* at 913. The court held that the State failed to present any evidence that Cook was incompetent, including Cook's testimony at trial that he could not remember the date, the name of the President, or the defendant. *Id.* at 914. The court also held that Cook's daughter could not grant or deny consent on behalf of Cook because she was not his guardian merely by virtue of her capacity as trustee of his living trust. *Id.* at 916. The court in *Simms* did not address the propriety of jury instructions on the issue of competency or address whether the jury was the appropriate fact finder on the issue of competency.

As *Simms* did not hold that a jury must be instructed as to the definition of competency or that only an incompetent person is "particularly vulnerable," this case does not prove defendant with the necessary legal support for the giving of her proposed instructions.

Also, neither of the instructions were supported by the evidence. The evidence presented in this case indicated that 1) the victims could consent to give defendant money, 2) they either did not consent or they were deceived into consent, and 3) the victims contacted their families for help. There was no evidence presented that suggested that the victims' families were substituting their own judgment over that of the victims.

The trial court properly declined to give defendant's proposed instructions they were 1) irrelevant, 2) inaccurate statements of the law, and 3) unsupported by the evidence presented at trial.

6. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF THE CRIMES.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Similarly, a jury’s finding regarding the presence of an aggravating factor is a factual determination which will be upheld unless clearly erroneous. *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008).

- a. The State presented sufficient evidence for a reasonable fact finder to determine that Ms. Adams, Ms. Gunderson, and Mr. Hokenson were particularly vulnerable victims.

To find the aggravating factor of particular vulnerability, the State was required to prove that “defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.” CP 226-260 (Jury instruction 26). A person is particularly vulnerable if 1) the victim is more vulnerable to the commission of the crime than the typical victim and 2) the victim’s vulnerability was a substantial factor in the commission of the crime. CP 226-260 (Jury instruction 28). As noted above, particular vulnerability relates to whether a person is incapable of resistance and whether a defendant knowingly takes advantage of that incapability. *See* RCW 9.94A.535(3)(b); ***State v. Suleiman***, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

Advanced age may render an individual particularly vulnerable to crime. *See, e.g., State v. Jones*, 130 Wn.2d 302, 312, 922 P.2d 806 (1996) (77-year-old woman); ***State v. Butler***, 75 Wn. App. 47, 53, 876 P.2d 481 (1994) (89-year-old woman); ***State v. Clinton***, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (67-year-old woman). In ***State v. Sims***, 67 Wn. App. 50, 834 P.2d 78 (1992), a ‘feisty’ woman of ‘advanced age’ fought off an attacker, and the court affirmed an exceptional sentence based upon particular vulnerability due to advanced age.

Here, Ms. Adams, Ms. Gunderson, and Mr. Hokenson were all in their mid to late 80's. Not only were these victims of advanced age, but each had additional indications that they were particularly vulnerable or incapable of resisting than the average victim of theft in the first degree.

Ms. Adams was 84 years old, confined to a wheelchair, required supplemental oxygen, and had congestive heart failure. RP 191-95. While she did not appear to have any memory issues, physically she was dependent on a caretaker to handle routine chores and to get her from place to place. *See* RP 195. Ms. Adams' age combined with her physical limitations rendered her more vulnerable to theft than the typical victim when defendant took her money by force.

Ms. Gunderson was 88 years old, lived alone, and did not often travel more than one half mile away from her house because she could not drive. RP 569. Her son performed limited caretaking duties as he visited her daily to check on her, performed routine chores around her house, and monitored her finances. RP 585-89. Her son's caretaking was what allowed Ms. Gunderson to continue to live independently. RP 585-88. Ms. Gunderson's age combined with her inability to live without a caretaker indicates she was more vulnerable to theft than the typical victim who does not require a person to monitor her finances.

Mr. Hokenson was 85 years old and had been "forgetful" ever since he had a stroke, four years prior to the incident. RP 712. He lived with his wife, but his son-in-law handled his finances. RP 725-26. Mr.

Hokenson's family would call daily and visit weekly to ensure his well-being. RP 724-25. Mr. Hokenson's age combined with his memory loss suggests he was more vulnerable to theft than the typical victim who does not require a third party to handle their financial transactions.

In addition to each of these victims' ages, mental, or physical infirmities, each victim was isolated by defendant before she stole their money. Isolation may also render a victim incapable of resistance. Each victim in this case described how defendant isolated them by taking them from their homes and families. Defendant drove Ms. Adams to a building far from her house. She could not call for help as the empty parking lot was devoid of people, and she could not walk or drive. RP 210-11. With Ms. Gunderson, defendant took her from her home in Auburn to a bank in Fife. Ms. Gunderson does not drive, and was entirely dependent on defendant to return her to her home. RP 572. Defendant convinced Mr. Hokenson to leave his house, where his wife was present, before defendant conned him into giving her money. Defendant's actions of isolating each of these elderly victims could reasonably have rendered them incapable of resistance.

Finally, the State provided sufficient evidence to prove that defendant knew the victims were particularly vulnerable and that it was a substantial factor in the commission of the crime. Every victim defendant chose was elderly, had some mental or physical infirmity, and was living independently. Twice she answered advertisements for caretakers. In

each case, defendant created a situation where the victims were entirely reliant upon her when she was driving them to different locations. The record is clear that defendant knew of the victims' particular vulnerability and that she targeted them specifically because vulnerabilities were advantageous to her scheme.

The State presented sufficient evidence to convince a reasonable fact finder that Ms. Adams, Ms. Gunderson, and Mr. Hokenson were all particularly vulnerable victims based on their age, reliance on caretakers, and mental or physical infirmities. The State also presented sufficient evidence for a reasonable fact finder to infer that defendant knew of the victims' particular vulnerability and that it was a substantial factor in the commission of the crimes. The jury's findings of particular vulnerability were not clearly erroneous.

- b. As there were sufficient facts adduced at trial to support the jury's finding of aggravating factors, it was not improper for the court to impose an exceptional sentence based on the jury's finding.

Sentences imposed outside of the standard range must be based on information that is admitted, acknowledged, or proved at trial or at the time of sentencing. RCW 9.94A.530(2). RCW 9.94A.535 states that, "facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW

9.94A.537.” “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt.” RCW 9.94A.537(2).

Here, the court imposed an exceptional sentence based on the jury’s finding of particular vulnerability of each of defendant’s five victims. Defendant was sentenced to a maximum standard range sentence of 43 months on each of her eight counts of first degree theft. CP 287-297. By running each count consecutive to the others, the court imposed an exceptional sentence, based on the jury’s finding of particular vulnerability of each of defendant’s five victims. CP 284-297; RP 903.

Defendant asserts that, because there was insufficient evidence to support the jury’s findings of an aggravating factor for Counts I, IV, VII, and VIII, her exceptional sentence on those counts is improper. *See* Appellant’s brief at 66. As argued above, the State presented sufficient evidence for a reasonable fact finder to conclude that the victims’ advanced age made them particularly vulnerable to defendant’s theft by deception, and that their advanced age was a substantial factor in the commission of the crime. As the jury found the aggravating factor for each count beyond a reasonable doubt, the court had a substantial and compelling reason to impose the exceptional sentence.

- c. The State presented sufficient evidence for a reasonable fact finder to find defendant guilty of theft in the first degree as charged in Counts V and VII.

To convict defendant of the crime of theft in the first degree, the State was required to prove each of the following elements beyond a reasonable doubt:

- (1) That on or about [date], the defendant by color or aid of deception, obtained control over property of another [victim];
- (2) That the property was not a firearm and exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the state of Washington.

CP 226-260 (Jury Instruction 12, 14); RCW 9A.56.030(1)(a). Count V related to the cash taken from Mr. Ostrander's home and Count VII was to the value of cash taken from Mr. Hokenson's. CP 1-5.

Defendant claims there was insufficient evidence presented at trial to support the element of value for both counts. *See* Appellant's brief at 60, 62. Yet the jury heard testimony from Mr. Ostrander's daughter, Karen Anderson, that her father invariably kept between \$2,000.00 and \$4,000.00 in cash in a case in his basement. RP 520-21. Ms. Anderson would count the cash for Mr. Ostrander at least every other month and it never held less than \$2,000.00. RP 521. After defendant and her children were at his house, Mr. Ostrander's case was out of its hiding place, it was left open, the papers had been rifled through, and only \$300.00 in cash

remained. RP 527. Drawing all reasonable inferences on behalf of the State and deferring to the trier of fact on the issues of witness credibility and persuasiveness of the evidence, there was sufficient evidence for the jury to find that defendant had stolen a minimum of \$1,700.00 from the case in Mr. Ostrander's basement.

Mr. Hokenson testified that he kept five or six envelopes, each with \$300.00 to \$400.00, in the top drawer of his dresser. RP 697. Both Mr. and Mrs. Hokenson testified that there was an additional envelope with \$1,200.00 in cash in the drawer. RP 697, 718. Mrs. Hokenson also testified that they regularly kept \$700.00 in a desk drawer for household expenses. RP 719. After defendant had been in Mr. Hokenson's house, all of the cash was missing. RP 719. Five envelopes with \$300.00 in each is \$1,500.00, in addition to the envelope containing \$1,200.00. Drawing all reasonable inferences on behalf of the State and deferring to the trier of fact on the issues of witness credibility and persuasiveness of the evidence, the State presented sufficient evidence to convince a reasonable fact finder that defendant stole more than \$1,500.00 from Mr. Hokenson's home.

The State presented sufficient evidence to support defendant's convictions of first degree theft for Counts V and VII.

7. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”).

Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”)

Cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather,

reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to

cumulative error—the errors must be prejudicial errors. See *Stevens*, 58 Wn. App. at 498.

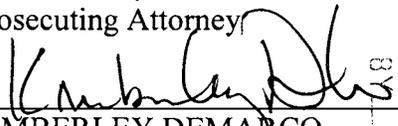
In the instant case, for the reasons set forth above, defendant has failed to establish that her trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. She has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and sentence.

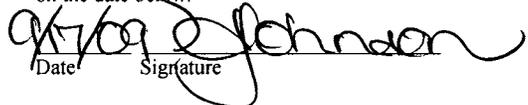
DATED: SEPTEMBER 17, 2009.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

SEP 17 2009 11:05 AM  
COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/17/09   
Date Signature

# **APPENDIX “A”**

*Letter to Department No. 1*

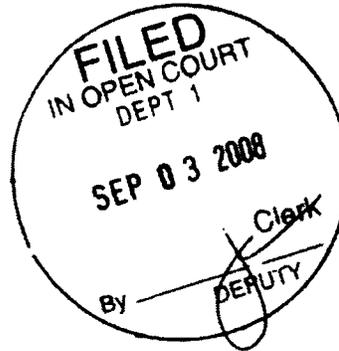


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**SUPERIOR COURT  
OF THE  
STATE OF WASHINGTON  
FOR PIERCE COUNTY**

**JAMES R. ORLANDO, JUDGE**  
L. Janet Costanti, *Judicial Assistant*  
DEPARTMENT 1  
(253)798-7578

334 COUNTY-CITY BUILDING  
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September 2, 2008

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Re: State v. Kimberly Phillips  
Pierce County case 07-1-05353-2

Dear Counsel:

Thank you for giving me the opportunity to review the briefing in more detail. "Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crimes. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the various acts are naturally to be explained as caused by a general plan." Lough, 125 Wn.2d at 860.

Here, the State has agreed to use only the acts that resulted in prior convictions. I find those prior acts where convictions followed to have been proven by a preponderance of the evidence. They are offered to prove a common scheme or plan, specifically a plan by Ms. Phillips to prey upon elderly victims, gain access in to their residence by some trick or design, and either steal directly from them or engage them in transactions where money is removed from their bank accounts. In at least one prior case (Bernard Thomas) Ms. Phillips claimed the money was a loan from the victim, which is also claimed in some of the current cases.

The prior convictions would appear to be relevant to prove an element of the crime charged or to rebut a defense, as the State has the burden of establishing that the defendant intended to deprive the victims of their property, or that she obtained property without the victim's permission with the color or aid of deception. In at least one of the current cases, alleged victim Adams, the defendant is claimed to have removed money directly from the victim's purse, then refused to return it. In another, Ostrander, the defendant is alleged to have entered the residence and removed cash from a box in a closet in the basement. These two new crimes are more similar to the cases from 1988.

The key issue in this case is whether the evidence is more probative than prejudicial. If the defendant testifies at trial and claims a general denial, or that the transactions were intended to be loans or gifts, then the evidence of the prior bad acts would appear to be highly probative. Here, many of the current victims are allegedly suffering from dementia or other ailments and they may not be able to recall the acts alleged to have been committed by the defendant. It may be impossible for the state to prove the color or deception with victims who may not be able to recall facts, dates or transactions involving Ms. Phillips.

It would defy common sense to allow Ms. Phillips to testify the money was lent to her by the victims, without the jury hearing that she had claimed a similar defense in prior matters involving elderly victims yet was convicted of theft or forgery involving them. Here, it would appear that the probative value of the evidence outweighs the prejudice to the defendant. The defense may also request or propose a limiting instruction to cure potential prejudice.

Sincerely,

A handwritten signature in black ink, appearing to read 'James R. Orlando', written in a cursive style.

James R. Orlando