

No. 39925-3-II  
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**LISA KNUTZ**

Appellant.

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STATE OF WASHINGTON  
BY \_\_\_\_\_

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Appeal from the Superior Court of Washington for Lewis County

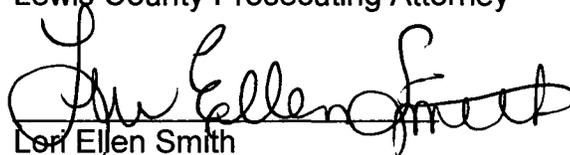
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**RESPONSE BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. THE JURY INSTRUCTIONS CORRECTLY STATED  
THE LAW OF THE CRIME OF THEFT IN THE FIRST DEGREE  
BY COLOR OR AID OF DECEPTION.....1**

**B. A UNANIMITY INSTRUCTION WAS NOT  
REQUIRED IN THIS CASE BECAUSE KNUTZ'S ACTS  
CONSTITUTED A "CONTINUING COURSE OF CONDUCT".....9**

**C. THE 60-MONTH EXCEPTIONAL SENTENCE IS  
NOT CLEARLY EXCESSIVE.....14**

CONCLUSION.....17

## TABLE OF AUTHORITIES

### **Cases**

|   |            |
|---|------------|
| <u>State v. Alexander</u> , 125 Wn.2d 717, 888 P.2d 1169 (1995).....  | 14         |
| <u>State v. Atterton</u> , 81 Wash.App. 470, 915 P.2d 535 (1996).....   | 11         |
| <u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289 (1993).....  | 1          |
| <u>State v. Bobenhouse</u> , 166 Wn.2d 881, 14 P.3d 907 (2009) .....  | 9          |
| <u>State v. Bobenhouse</u> , 166 Wn.2d 881, 214 P.3d 907 (2009).....  | 9          |
| <u>State v. Branch</u> , 129 Wash.2d 635, 919 P.2d 1228 (1996).....   | 15         |
| <u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995).....  | 2          |
| <u>State v. Campbell</u> , 69 Wn.App. 302, 848 P.2d 1292, <i>rev'd on other grounds</i> , 125 Wn.2d 797, 888 P.2d 1185 (1995) ..... | 12, 13, 14 |
| <u>State v. Casey</u> , 81 Wn.App. 524, 915 P.2d 587 (1996) .....   | 3, 4, 5    |
| <u>State v. Crane</u> , 116 Wash.2d 315, 804 P.2d 10 (1991) .....   | 9, 10      |
| <u>State v. Creekmore</u> , 55 Wash.App. 852, 783 P.2d 1068 (1989).....   | 15         |
| <u>State v. Dingman</u> 149 Wash.App. 648, 202 P.3d 388(2009) .....   | 13, 14     |
| <u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953) .....  | 2          |
| <u>State v. Eppens</u> , 30 Wash.App. 119, 633 P.2d 92 (1981) .....   | 11         |
| <u>State v. Fiallo-Lopez</u> , 78 Wash.App. 717, 899 P.2d 1294 (1995).....  | 10         |
| <u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....   | 2          |
| <u>State v. Garman</u> 100 Wash.App. 307, 984 P.2d 453 (1999).....  | 11, 13     |
| <u>State v. George</u> 161 Wash.2d 203, 164 P.3d 506, 510 (,2007).....  | 6          |
| <u>State v. Gooden</u> , 51 Wn.App. 615, 754 P.2d 1000 (1988) .....   | 10         |
| <u>State v. Halsey</u> , 140 Wash.App. 313, 165 P.3d 409 (2007); .....  | 14         |

|   |         |
|---|---------|
| <u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....  | 10, 12  |
| <u>State v. Kitchen</u> , 110 Wash.2d 403, 756 P.2d 105 (1988).....                                     | 9       |
| <u>State v. Kolesnik</u> , 146 Wash.App. 790, 192 P.3d 937 (2008).....                                  | 15      |
| <u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004) .....   | 2       |
| <u>State v. Love</u> , 80 Wash.App. 357, 908 P.2d 395 (1996).....                                       | 12      |
| <u>State v. Marko</u> , 107 Wash.App. 215, 27 P.3d 228 (2001). .....                                    | 10      |
| <u>State v. Mills</u> , 116 Wn.App. 106, 64 P.3d 1253, <i>rev. granted</i> , 75 P.3d 969<br>(2003)..... | 3       |
| <u>State v. Ose</u> , 156 Wash.2d 140, 124 P.3d 635 (2005).....   | 6       |
| <u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....                                       | 9       |
| <u>State v. Reid</u> , 74 Wash.App. 281, 872 P.2d 1135 (1994).....                                      | 11      |
| <u>State v. Ritchie</u> , 126 Wash.2d 388, 894 P.2d 1308 (1995).....                                    | 15      |
| <u>State v. Sao</u> ___ Wn.App. ____, 230 P.3d 277(May 11, 2010).....                                   | 15      |
| <u>State v. Vining</u> , 2 Wash.App. 802, 472 P.2d 564 (1970).....                                      | 11      |
| <u>State v. Willis</u> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....                                       | 1       |
| <u>State v. Zorich</u> , 72 Wn.2d 31,431 P.2d 584 (1967).....   | 3, 4    |
| <b>Statutes</b>   |         |
| RCW 9A.56.010(17)(c) .....  | 11      |
| RCW 9A.56.010(4).....   | 2, 4, 7 |
| RCW 9A.56.020(1)(b); 030(a)(a).....   | 2       |
| RCW 9A.56.030.....  | 16      |
| 11A <i>Washington Pattern Jury Instructions-Criminal</i> , 79.03 at 112 (2d. ed.<br>1994).....          | 3       |

## STATEMENT OF THE CASE

Except as otherwise noted and cited below, Appellant's statement of the case is adequate for the purpose of responding to this appeal.

## ARGUMENT

### **A. THE JURY INSTRUCTIONS CORRECTLY STATED ALL OF THE NECESSARY ELEMENTS OF THEFT IN THE FIRST DEGREE BY COLOR OR AID OF DECEPTION.**

On appeal, Knutz argues that the trial court's instructions relieved the State of its burden to prove the essential elements of theft by color or aid of deception, claiming that the jury was not instructed that the State had to prove "reliance." Brief of Appellant 9,10. This argument is without merit, as discussed below.

Alleged errors of law in jury instructions are reviewed *de novo*. State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005). Jury instructions are proper when they permit the parties to argue their theory of the case, do not mislead the jury, and correctly inform the jury of the applicable law. Id. Jury instructions are reviewed "in the context of the instructions as a whole." State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). Challenges to a jury instruction asserting that it "relieved the State of its burden of proof . . . may be raised for the first time on appeal." State v. Brett, 126 Wn.2d 136,

171, 892 P.2d 29 (1995). In general, all of the elements of the crime must appear in the to-convict instruction. State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). "Elements of the crime" is defined as "[t]he constituent parts of a crime-usu[ally] consisting of the actus reus, mens rea, and causation-that the prosecution must prove to sustain a conviction." State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). However, "as a general legal principle all the pertinent law need not be incorporated in one instruction." State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

To convict Knutz of theft in the first degree by deception, the jury had to be satisfied beyond a reasonable doubt that Knutz (1)obtained unauthorized control over property exceeding \$1,500, (2)by color or aid of deception, (3) with intent to deprive the victim of the property. RCW 9A.56.020(1)(b); .030(a)(a). "By color or aid of deception" means that the deception operated to bring about the obtaining of the property or services. RCW 9A.56.010(4). "[I]t is not necessary that deception be the sole means of obtaining the property or services." RCW 9A.56.010(4).

To show that a defendant obtained the property through the use of deception, the State must also prove that the victim of the theft acted in reliance on the alleged deception. State v. Casey, 81

Wn.App. 524, 529, 915 P.2d 587 (1996). "*Reliance is established where the deception in some measure operated as inducement.*" Id. State v. Zorich, 72 Wn.2d 31,34,431 P.2d 584 (1967)(emphasis added)).

Knutz claims on appeal that the trial court erred because the "to convict" instruction did not instruct the jury on the State's burden to prove reliance . This argument is not persuasive, because the "to convict" instruction reflects the statutory definition of theft in the first degree "by color or aid of deception" and thus contains all of the elements for theft by deception, as set out in the statute. RCW 9A.56.020(1)(b); Instruction 4 Supp. CP. Furthermore, Instruction No. 6, contains the definition of "by color or aid of deception." Supp. CP. Instruction 6 states, "[b]y color or aid of deception means that the deception operated to bring about the obtaining of the property. . . . It is not necessary that deception be the sole means of obtaining the property . . ." Supp. CP (Instruction 6). This instruction is from WPIC 79.03, 11A *Washington Pattern Jury Instructions-Criminal*, 79.03 at 112 (2d. ed. 1994). Although WPICs are not binding on the court, they are persuasive authority. State v. Mills, 116 Wn.App. 106, 116 n.24, 64 P.3d 1253, *rev. granted*, 75 P.3d 969 (2003). Moreover, Instruction No. 6 is identical to the

statutory definition of "by color or aid of deception" in RCW 9A.56.010(4). These instructions correctly informed the jury of the law.

The instructions in this case told the jury that the State had to prove beyond a reasonable doubt that Knutz obtained the property "by color or aid of deception"-- which meant that the State had to prove that Knutz's deception "operated to bring about the obtaining of the property." Instruction 6, Supp CP. In other words, by proving Knutz committed theft by "color or aid of deception," the State necessarily also proved that the deception brought about the obtaining of the property. *That is what "reliance" means--* reliance is *established* where the deception "in some measure operated as inducement." Casey, 81 Wn.App. at 529. "It is not required that the deception be the sole means of inducing the victim to part with his property." Zorich, 72 Wn.2d at 34. Not to mention the fact that had Mr. Von Gruenigen not "relied upon and believed" at least some of Knutz's false claims, he would not have parted with the money in the first place (and we wouldn't be here). RP 89 ("if I hadn't believed her I would have asked for documentation on every item or at least many items); RP 101, 102 (victim gave Knutz \$3,400 but Knutz said she had been on a bus and "fainted" and the

money was stolen, so the victim gave Knutz another \$3,400); RP 103 (Knutz told the victim that Knutz's "Aunt Brenda" had left \$4,400 that the victim had given her in her purse on a car seat overnight, and the next day it was gone, and after Knutz told the victim that "Aunt Brenda" had already mortgaged her house, the victim gave Knutz another check for \$4,400); RP 107-109; ; (Knutz told the victim she found a "lump" in her vagina when inserting a tampon and that the doctor said it was cancer and that Knutz needed \$13,700 for medical bills because the surgeon wanted money "up front"); RP 116 (victim said after giving Knutz thousands of dollars, he realized he could not afford to keep doing this, but if he stopped, Knutz "would go to prison and all that money . . . would have been down the sewer and . . . that's why [he] continued on."); RP 120 (Knutz would call the victim at 2:00 a.m. and she had been in jail and if she didn't come up with a certain amount of money, she would have to go back to jail--so the victim gave her more money.)

The point is, the evidence overwhelmingly showed that Knutz lied to the victim about why she needed money, and that the victim believed her, because he gave her the money (see previous cites to the record). In other words, Knutz's "deception operated as inducement" for the victim to give Knutz the money. Casey, supra.

And, the jury instructions correctly told the jury that the State had to prove that the victim "relied upon" Knutz's lies because the instructions defined "by color or aid of deception"--the definition of which leads us to the meaning of "reliance." Casey, 81 Wn.App. at 52( "reliance is established where the deception in some measure operated as inducement."); Supp. CP (Instruction 4; Instruction 6). Although the instructions did not use the actual word "reliance" or "relied," these express words do not appear in the statute. Given the fact that Casey (the "reliance" case) was decided in 1996, one would assume that the Legislature would have expressly added the word "reliance" to the statutory elements, had Casey required it. It has not done so. "We presume the legislature is aware of judicial interpretation of statutes." State v. George 161 Wash.2d 203, 211, 164 P.3d 506, 510 (,2007), citing State v. Ose, 156 Wash.2d 140, 148, 124 P.3d 635 (2005). Nor do the pattern jury instructions use the words "relied" or "rely, and surely the drafters of the pattern instructions are very well aware of the case law that impacts pattern instructions.

Yet Knutz is apparently arguing that an instruction should have been given that expressly said, "the State must also prove that Mr. Von Gruenigen believed and relied upon Ms. Knutz's

deceptions." Brief of Appellant 10. But none of the cases Knutz relies upon stand for the proposition that the jury must be instructed using those express words. What the cases say is that the State must prove reliance. As explained above, the State did so--and the jury instructions told the jury so. Supp. CP (Instructions 4 and 6). RCW 9A.56.010(4); WPIC 79.03. Knutz's argument on these issues is not persuasive and is not supported by the law as Knutz apparently interprets it. The jury instructions were correct, and this Court should so find.

On the other hand, if this Court is persuaded by Knutz's argument that the jury instructions were flawed, this Court should nonetheless find any error was harmless beyond a reasonable doubt. This is because any way you look at it, the evidence overwhelmingly shows that Knutz repeatedly deceived this trusting and compassionate elderly victim with her obviously-bogus-sob-stories, for the sole purpose of bilking him out of thousands and thousands of dollars. RP 181 (Knutz herself estimating the victim gave her "over \$120,000."); RP 188(detective estimates the amount to be over \$300,000); RP 194, 195(Knutz admitting to a detective that she lied to the victim to get money).

Knutz met the victim when the victim lived in a retirement community. RP 76. A friend of Knutz's had apparently suggested that the victim might be able to help Knutz financially. RP 76. At first, Knutz asked for relatively small amounts of money--and the victim kept track of everything he gave Knutz. RP 81,82,83-85. Knutz--who was apparently only a renter--also told the victim she needed \$1,000 (or \$2,500?) because she had to get the septic tank pumped where she lived. RP 85, 93. Knutz further told the victim she had two "welfare penalties"--one for \$1,800 and another for \$4,300. RP 94. In fact, the victim gave Knutz over \$14,000 for her "welfare fines." RP 94. Knutz almost always asked for cash--so that the victim could not write the check directly to whatever entity Knutz said she owed. RP 100.

And then there were Knutz's bizarre stories about fainting on the bus and the money the victim gave her was stolen, so the victim replaced the money for a total of \$6,800. RP 101, 102. And the "Aunt Bessie" story, where good old "Aunt Bessie" somehow left the money that the victim gave to Knutz on the seat of her car and it was stolen--so the victim replaced that money (\$4,400 x 2). RP 102,103. And so on. RP 104,105, 106, 107, 108, 109,111,113,114, 115. Later, when speaking with a detective,

Knutz said that some of the money went to her father (\$40,000) and some to her boyfriend (\$50,000)--or, depending on which of Kurtz's stories anyone wants to believe--for \$347,000 worth of methamphetamine, because her dad was a meth addict. RP 190, 191. In view of the overwhelming evidence presented in this case, if this Court finds the jury instructions were incorrect--any error should be harmless, and Knutz's conviction should be affirmed.

**B. A UNANIMITY INSTRUCTION WAS NOT REQUIRED IN THIS CASE BECAUSE KNUTZ'S ACTS CONSTITUTED A "CONTINUING COURSE OF CONDUCT."**

Knutz also claims that it was error to fail to give the jury a "unanimity" instruction. This argument is also without merit.

If the State presents evidence of multiple acts that could form the basis of one charged count, the State must tell the jury which act to rely on or the court must instruct the jury to agree on a specific act. State v. Crane, 116 Wash.2d 315, 325, 804 P.2d 10 (1991) (citing State v. Kitchen, 110 Wash.2d 403, 409, 756 P.2d 105 (1988)). This instruction is known as the "unanimity", or "Petrich" instruction. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *citing* State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). However, the Petrich unanimity rule does not apply in cases involving a continuing course of criminal conduct.

Crane, 116 Wash.2d at 330; State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). When the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, it supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wash.App. 717, 724, 899 P.2d 1294 (1995). In these cases, the jury must only be unanimous that the conduct occurred. Crane, 116 Wash.2d at 330. The defendant's actions must be evaluated in a commonsense manner to determine if it forms one continuing offense. State v. Marko, 107 Wash.App. 215, 220, 27 P.3d 228 (2001).

Thus, a unanimity instruction is not required when a number of distinct acts constitute a single crime. State v. Gooden, 51 Wn.App. 615, 754 P.2d 1000 (1988). Put differently, a continuing course of conduct may also form the basis of a single charge, and in that situation, neither a unanimity instruction nor an election by the State is required because jury unanimity is assured when the jury unanimously agrees that the acts constitute a continuing course of conduct. Crane, 116 Wn.2d at 326. Similarly, when the crime at issue involves multiple instances of theft, the State is

allowed to pursue an "aggregation theory." One Court explained this theory as follows:

Aggregation of individual transactions to meet the threshold for a particular degree of theft is allowed by common law and by statute.

The common law allows aggregation of a series of thefts, so long as the thefts are from the same owner and the same place and result from a single criminal impulse pursuant to a general larcenous scheme. The common law also allows aggregation of thefts from the same victim over a period of time or from several victims at the same time and place, if the takings are part of a common scheme or plan. . . .

State v. Garman 100 Wash.App. 307, 314-315, 984 P.2d

453 (1999), citing State v. Atterton, 81 Wash.App. 470, 472, 915

P.2d 535 (1996) (citations omitted); *see also* RCW

9A.56.010(17)(c). Under the law of aggregation, the question of

whether successive takings are the result of a single, continuing

criminal impulse or intent executed as part of a general larcenous

scheme or plan is a factual question for the jury. State v. Reid, 74

Wash.App. 281, 290-91, 872 P.2d 1135 (1994); State v. Eppens,

30 Wash.App. 119, 125, 633 P.2d 92 (1981); State v. Vining, 2

Wash.App. 802, 808-09, 472 P.2d 564 (1970).

Because Knutz's repeated thefts formed a "continuing course of conduct," and because the State is allowed to aggregate all of her instances of theft over time from the same victim, no

unanimity instruction was required in this case. State v. Campbell, 69 Wn.App. 302, 848 P.2d 1292, *rev'd on other grounds*, 125 Wn.2d 797, 888 P.2d 1185 (1995); Garman, supra (and cases cited therein).

In Campbell, the State charged the defendant with welfare fraud. On appeal, the defendant argued that “the evidence showed 21 separate instances of conduct which could have formed the basis for separate counts.” Campbell, 69 Wash.App. at 311, 848 P.2d 1292. The defendant asked for a new trial under Petrich. Campbell, 69 Wash.App. at 311. The Campbell court rejected the defendant's argument, stating that “the welfare fraud statute contemplates a continuing course of conduct in furtherance of the single goal of obtaining public assistance to which one is not entitled.” 69 Wash.App. at 312, 848 P.2d 1292. It concluded that “[t]he evidence showed that [the defendant] engaged in a sophisticated and broad scheme involving numerous acts but in furtherance of a single goal.” Campbell, 69 Wash.App. at 312.; see Handran, 113 Wash.2d at 17-18 (concluding that separate acts of assault were part of a continuing course of conduct); State v. Love, 80 Wash.App. 357, 360-63, 908 P.2d 395 (1996) (finding that defendant's two instances of drug possession were part of an

ongoing course of trafficking conduct); State v. Dingman 149 Wash.App. 648, 665, 202 P.3d 388(2009)(language of contracts showed that defendant's many acts and promises were done in furtherance of a single goal of depriving homeowners of the maximum possible amount of funds while fulfilling a minimum number of contractual promises--no unanimity instruction required).

All of the previously-set-out case law applies here, and no unanimity instruction was required. The evidence shows that over several years, Knutz committed a single, "continuing course of conduct," in "furtherance of the single goal" of bilking a single victim, Mr. Vongruenigen, out of over \$300,000, based upon Knutz's mostly-false, sympathy-inducing sob stories. RP 72-73, 172,173; RP 179, 180, 184, 185, 187,188, 194.; Supp. CP(Instruction 8). Accordingly, no unanimity instruction was required in this case. Garman, supra; Campbell, supra.

In addition, Knutz's attempt to discredit Division One's opinion in Garman is not well-reasoned. Brief of Appellant 17. Conversley, Garman itself is well-reasoned. In Garman, as here, there were multiple instances of theft from the same victim, and the thefts were part of a "continuing course of conduct" and the jury was instructed on the theories of aggregation and continuing

course of conduct or criminal impulse. Garman at 317; Supp. CP.(Instructions 4,6,8). Knutz claims that Garman is off-base because "the exception for a 'continuing course of conduct' applies only where the conduct can rationally be viewed as a single act, rather than multiple acts." Brief of Appellant 18. In the first place, Knutz's conduct in this case most assuredly can "rationally be viewed as a single act" with a single goal against a single victim--as previously explained. Under these facts, the State is neither required to set out fifty separate charges for theft (redundant and ridiculous), nor is a unanimity instruction required in such circumstances. Campbell, supra.; Garman, supra.; Dingman, supra. Knutz's conviction should be affirmed.

**C. THE 60-MONTH EXCEPTIONAL SENTENCE IS NOT CLEARLY EXCESSIVE.**

Finally, Knutz claims that the 60-month exceptional sentence was "clearly excessive." There is no merit to this claim.

In determining whether an exceptional sentence is clearly excessive, an appellate court considers "whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts." State v. Halsey, 140 Wash.App. 313, 324, 165 P.3d 409 (2007); State v. Alexander, 125 Wn.2d 717, 722, 888 P.2d 1169 (1995).“ Put differently, the “clearly excessive” prong of

appellate review under the sentencing reform act gives courts *near plenary discretion* to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence.’ “ *Id.* at 325 (emphasis added)(quoting State v. Creekmore, 55 Wash.App. 852, 864, 783 P.2d 1068 (1989)).

RCW 9.94A.585(4) also provides:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Id.; State v. Kolesnik, 146 Wash.App. 790, 802-03, 192 P.3d 937 (2008) (citations omitted). A sentence is "clearly excessive" if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken. State v. Sao \_\_\_\_ Wn.App. \_\_\_\_, 230 P.3d 277, 283 (May 11, 2010), citing State v. Branch, 129 Wash.2d 635, 649-650, 919 P.2d 1228 (1996).

However, as the Supreme Court stated in State v. Ritchie, a trial court is under no obligation to “articulate reasons for the length of an exceptional sentence.” State v. Ritchie, 126 Wash.2d 388, 392-393, 894 P.2d 1308 (1995)(emphasis added). Notably, “[w]hen a sentencing court does not base its sentence on improper reasons,

[the reviewing Court] will find a sentence excessive only if its length, in light of the record, 'shocks the conscience.' " Kolesnik, 146 Wash.App. at 805, 192 P.3d 937(emphasis added) (internal quotation marks omitted) (quoting Ritchie, 126 Wash.2d at 396).

In the present case, the length of the exceptional sentence imposed certainly does not "shock the conscience," and should be affirmed.<sup>1</sup> Here, the trial court imposed a 60-month exceptional sentence. CP 16-27. The statutory maximum sentence for theft in the first degree--a class B felony--is ten years. RCW 9A.56.030. Although Knutz's standard sentencing range was only 2-6 months, the egregious nature of Knutz's conduct in this case markedly distinguishes this case from the "usual" theft in the first degree case. Over several years, Ms. Knutz repeatedly swindled money from the elderly, vulnerable, kind Mr. Vongruenigen, by concocting deceitful, sympathy-inducing stories designed to induce Mr. Vongruenigen to give her large sums of money. In the end, Knutz fleeced over \$300,000 from Mr. Vongruenigen. Indeed, if anything "shocks the conscience" in this case--it is Knutz's conduct--not the length of her sentence. This was not your ordinary theft

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<sup>1</sup> Knutz does not challenge the basis for the exceptional sentence, only the length of the sentence (the aggravating factors were submitted to the jury in this case). Brief of Appellant 18

case, and it deserved more than an "ordinary" sentence. Given Knutz's unconscionable conduct, and the aggravating factors found by the jury, the trial court surely could have imposed a sentence even longer than 60 months. Accordingly, Knutz's sentence was not clearly excessive, and this Court should affirm.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Knutz's conviction and sentence in all respects.

RESPECTFULLY SUBMITTED this 4th day of June, 2010.

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

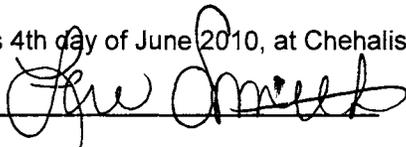
by:   
LORI SMITH, WSBA 27961

Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Backlund & Mistry, 203 East 4th Ave., Olympia, WA 98501

Dated this 4th day of June 2010, at Chehalis, Washington.

  
\_\_\_\_\_

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