

64409-2

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NO. 64409-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TYRONE DASH

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY,
THE HONORABLE MICHAEL J. FOX

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

Frances Taylor was a financially independent woman with a net worth of \$1.4 million dollars when she met the defendant in late 1999-early 2000 and he began his involvement in her finances. Five years later, when he was removed from Taylor's financial affairs on March 29, 2005, she was penniless, with no assets, credit card debt of over \$40,000, and facing foreclosure and eviction from her home in ten days.

The defendant Tyrone Dash was convicted of Theft in the First Degree for his role in Frances Taylor's reversal of fortune.

On appeal Dash asserts five issues, each of which he argues mandate reversal. Because of the complexity of these issues, the State's response to each issue summarized in detail in the next section.

II ISSUES

The issues raised by Dash and the State's response in this brief are summarized below in the order most significant to the State's interest in this case. The issues are:

- The challenged instructions (which will be referred to as the "fiduciary" instructions);
- The Confrontation Clause issue;
- The Good Faith Claim of Title Defense;
- The Aggravating Factor Special Verdicts; and
- Jurisdiction/Statute of Limitations

A. The Fiduciary Instructions

The defendant challenges instructions 19-24 because they “equat[e] theft with breaching a fiduciary’s responsibility” Appellant’s Opening Brief at 43. The appellant misapprehends and misstates the relationship between the challenged instructions and the “to convict” instruction setting out the elements of theft. Neither the instructions on their face, nor the Judge’s discussion of the instructions, or the Prosecutor’s use of the instructions in closing, support the defense interpretation. Rather the challenged instructions define and explain terms used in the elements (to convict) instruction.

The use of civil concepts, and the law developed in civil cases, to define and explain the elements of crimes in criminal cases is well established. The elements of theft, in particular, the concept of “exertion of unauthorized control” as defined in RCW 9.56.010(19)(b), and the specialized legal relationships contained in that definition (such as “bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian”) require additional explanation to make those concepts understandable to a jury.

The defense has not challenged the legal accuracy of the challenged instructions, only their application in criminal cases.

The challenged instructions meet the standard for evaluating the sufficiency of jury instructions. They are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 56 P.3d 550 (2002), citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999).

Even if the instructions were erroneous, the error was harmless. The instructions do not apply to the alternative means of wrongfully obtain or theft by deception. There was substantial evidence as to both these alternatives. (Theft by exertion of unauthorized control to which the instructions apply is not an independent alternative means of committing theft. It is one of two alternative ways of proving theft by taking (the other being wrongfully obtain). *State v. Linehan*, 147 Wn.2d 638, 645, 56 P.3d 542 (2002)

B. Confrontation Clause

Dash contends the Confrontation Clause was violated by the admission of a video tape of Frances Taylor and the testimony of Adult Protective Services worker Cathy Baker.

The Confrontation Clause does not apply to out-of-court statements offered for a purpose other than the truth of the matters asserted

in the statement. *Crawford v. Washington*, 541 U.S. 36, 59, n.9, 124 S.Ct. 1354 (2004).

Neither the Frances Taylor videotape nor APS worker Cathy Baker's testimony were offered for the truth of the matters asserted.

The defense below failed to object to or otherwise identify individual sections of the Taylor videotape for redaction despite Judge Fox's request for such objections, thus waiving his claim of error on appeal. In addition, the defense below solicited other arguable hearsay testimony from witness Baker on cross examination, beyond the questions asked by the State on direct. Furthermore the defense below emphasized Baker's testimony by offering her written report containing the statements Dash now objects to on appeal, thus inviting error.

C. Good Faith Claim of Title

Dash contends that the prosecutor engaged in misconduct by misrepresenting the nature of the good faith claim of title defense.

The defendant waived any claimed error by failing to object to or request a curative instruction for the claimed misrepresentation at the time it was made or anytime thereafter.

The defendant invited error by proposing the instruction without requesting any additional instructions making clear what the instruction meant beyond the plain meaning.

Any error with regard to the concept of a claim of title was harmless because the defendant's claim was not made in good faith and was not open and avowed as required by the defense. It was also harmless because even if the defense includes a claim of entitlement as Dash contends, Dash was not entitled to the specific funds he took. Furthermore any error was harmless because the defense does not apply to theft by deception, an alternative means of theft with which Dash was charged.

D. Aggravating Factor Special Verdicts

The jury was instructed that they had to be unanimous to find the absence of the two aggravating factors. Since the verdict, our Supreme Court has held such an instruction to be an incorrect statement of the law in *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). The State concedes error. Such error was, however, harmless.

Bashaw implies that a harmless error analysis be done in the case of such errors.

For both the "vulnerable adult" and the "major economic offense" special verdicts, the verdict would have been the same had the jury been

properly instructed. There was no dispute that the victim was elderly. The overwhelming evidence was that the defendant suffered from dementia in March 2005 and had had such dementia for most if not all of the charged crime period. The overwhelming evidence was that the victim's dementia meant that she was unable to understand complex matters like those involved in this case, and was vulnerable to being unduly influenced. Equally overwhelming was the evidence that any normal person who was around Taylor on a regular basis, like Dash was, would know something was wrong and she couldn't meaningfully participate in or understand complex financial or legal transactions.

As far as the major economic offense, the defendant denied any crime. By finding Dash guilty the jury necessarily rejected his denial. While takings in the very earliest part of the five+ year crime period (when the church was overseeing Taylor's finances and Dash was billing by specific invoice and being paid by check) were possible to distinguish from the remainder of the takings, there was little to distinguish the later takings from each other, i.e., if Dash's defense was rejected for one taking it was essentially rejected for all. By returning a verdict of guilty to the underlying theft the jury was already making the findings that support one or more of the alternative means of proving a major economic offense.

In addition it took the jury less than 3 hours to reach the general verdict of guilty plus decide the special verdict questions in the affirmative. This is evidence of the overwhelming nature of the State's case and the absence of any time needed by the jury to persuade recalcitrant jurors to join the three verdicts.

E. Jurisdiction/Statute of Limitations

Dash contends that because the jury was not instructed to find a criminal act occurred within the statute of limitations the court lacked jurisdiction. Dash does not deny that the state proved a criminal act within the statute, merely that the jury was not instructed as to the need for this finding.

Case law suggests that jurisdictional issues need not go to the jury for fact finding unless jurisdiction is contested. The defendant must point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat jurisdiction. The defendant did not contest jurisdiction or point to such evidence.

Unlike the jury instructions in *State v. Mermis*, 105 Wn.App.738, 20 P.3d 1044 (2001) cited by Dash, this jury was required to find Dash's acts, committed between certain dates, were part of a continuing criminal course of conduct and a continuing criminal impulse. The time period included time within the statute of limitations.

Any error in failing to instruct the jury on this issue was harmless. Dash acknowledged taking Taylor's funds within the statute of limitations.

By his own words Dash admitted to taking cash from Taylor without her knowledge or permission, to pay himself back money he was owed. Case law is clear that the good faith claim of title is not applicable to attempts to collect a debt. *State v. Self*, 42 Wn.App. at 657-58. In short Dash admitted to acts of theft within the statute of limitations. The absence of an instruction telling the jury they must find what the defendant admitted is harmless error.

III STATEMENT OF THE CASE

As indicated by the above summary of the State's argument on the issues in the case, a harmless error argument is asserted in all of them. Proper evaluation of a claim of harmless error based on the presence of sufficient untainted evidence requires a thorough understanding of the evidence presented. Thus the below factual statement is more detailed than typical.

A. Introduction

Between 1999 and 2005 Frances Taylor went from being a financially independent and secure 88 year-old to a dependent and destitute 94 year-old facing eviction from her own home through foreclosure.

In 1999 Frances Taylor had a net worth of approximately \$1.4 million including free and clear ownership of two apartment buildings and her residence. She also had significant other assets including an investment account, a cash value life insurance policy and a valuable postal history collection. In 2005 she was virtually penniless with more than \$40,000 in credit card debt and no assets other than her residence, encumbered with a \$324,000 mortgage, many months behind on her mortgage payments, facing foreclosure and eviction in ten days. 9/23/09RP 54; 9/29/09RP 104-05. By 2005 her sole income was her \$720 monthly social security check. 9/23/09RP 121, 9/28/09RP 170.

There were several factors that led to this reversal of fortune. Her apartment buildings were in need of significant, costly repairs and starting in 1999 she engaged in an ill-fated and ultimately cost-ineffective remodeling project. 9/23/09RP 63-66. Her ability to cope with these repairs and other aspects of daily living was increasingly compromised by the onset of dementia. See Section III.F. (Dementia) below. But the most important cause of the change in Taylor' circumstances was the entrance into her life in late 1999/early 2000 of the defendant, Tyrone Dash. 9/28/09RP 200; 9/23/009RP 51-52.

Starting with helping Taylor manage the dispersal of an apartment repair loan, Dash's role gradually evolved into providing her with advice and assistance with the running of her apartments, and eventually into being involved in all aspects of Taylor's business and personal affairs. 9/29/09RP 50-52. From narrow, itemized and billed services totaling \$34,000 in the first year, Dash's use of Taylor's assets increased to over \$100,000 in 2001 and over \$200,000 in both 2002 and 2003, before dropping back down to a little over \$60,000 in 2004 and a mere \$2,325.81 in Jan-Mar 2005 when Taylor had no assets and her only income was her \$720 monthly social security check. 9/23/09RP 121, 9/28/09RP 170, calculations derived from Ex. 5,7,8,10 From direct checks to the Defendant, signed by Taylor in 2000, Ex. 5, the Defendant's method of obtaining funds evolved into use of her ATM cards and cash advances under her credit cards to obtain more than \$200,000 in cash between 2000 and 2005, EX. 7, 10, and the use of Frances Taylor's funds to pay for charges on those same credit cards totaling more than \$225,000, EX. 8. The defendant also received direct payments from the victim of nearly \$225,000 during the same time period. Ex.5. All told the Defendant obtained the benefit of more than \$650,000 of Frances Taylor's money between 2000 and 2005. CP 266.

To create the cash needed to fund these takings, the Defendant engineered the sale or mortgage of every asset Taylor owned including the two apartment buildings, 9/23/09RP 55-56, her personal residence, *id.*, her investment accounts, 9/28/09RP 149, the cash value life insurance policy, *id.*, and the postal history collection, *see id.* at 150-51. A significant portion of the money Taylor received from the mortgage or sale of her assets went to Dash or for his benefit. 9/23/09RP 69-77.

While all this was going on Taylor had experienced significant mental decline such that by March 2005 a CT scan showed brain abnormalities consistent with a diagnosis of dementia that had developed over many years. 9/28/09RP 64-66.

B. Time Line

To help the reader follow this complex set of events, a timeline is provided below. Citation to the record is made in the detailed statement of facts following the timeline.

TIMELINE	
Year	Event
Jan 2000	Dash Initial Involvement
May 2000	\$150,000 mortgage through Bank of America on Taylor's personal residence
Jul 2000	\$300,000 Frontier Bank Construction Loan
Jan 2001	\$170,000 Frontier Bank Construction Loan

Mar 2001	Church Removed from Control over Taylor' Assets
Jul 2001	Last of Taylor' Salomon Smith Barney Investment Account Exhausted
Nov 2001	Cash Value of Taylor' Jackson Nat'l Life Insurance Policy Spent
Jan 2002	Dash Obtains Power of Attorney for Taylor
Mar 2002	323 Bellevue E. Apartment Sold for \$500,000
Jun 2002	\$217,500 World Savings Bank Loan on Personal Residence (refinance of Bank of America mortgage)
Mar 2003	\$200,000 loan on 310 Bellevue E. Apartment
Jul 2003	\$297,500 Ameriquest Loan on Personal Residence (refinance of World Savings Bank mortgage)
Oct 2003	310 Bellevue E. Apartment Sold for \$800,000
Apr 2004	\$324,000 Ameriquest Loan on Personal Residence (refinance of earlier Ameriquest mortgage)
Mar 2005	Forgrave takes over

C. Frances Taylor Background

Frances Taylor was born on May 27 1911, in Victor Montana. She went to nursing school in Spokane around 1932. In Spokane she met and married Sterling Taylor in 1936. They moved to Seattle in 1940. Taylor worked as a social services nurse. Sterling worked in public relations and advertising and started investing in real estate. He purchased one apartment building and had another built. Sterling died in 1972.

9/23/09RP 79-81.

Frances Taylor lived frugally, typically spending about \$15,000 a year for all expenses (including gifts of about \$6,000 per year to her church) from 1986 to 2000. 9/23/09RP 62. Her income was her social

security benefits and rental income from the apartments. 9/23/09RP 120-21.

Tyrone Dash was involved in Taylor's life from January, 2000 to March 29, 2005. 9/23/009RP 47-48, 51-52.

After Robert Forgrave removed Dash from Taylor's life in 2005 (see below), Forgrave took control of her finances and well being. He got a power of attorney and ultimately became Taylor's guardian. He hired a bankruptcy attorney to start bankruptcy proceedings to stave off the foreclosure she faced. Forgrave was ultimately able to negotiate a settlement with the company holding her mortgage such that Taylor got half of the sale price of her home. Through Forgrave's actions Taylor was able to stay in her home until May of 2007, when she went into an adult family home, paid for by the proceeds of the settlement. She stayed in the adult family home until her death. 9/23/09RP 67-70.

Frances Taylor died on February 12, 2009. 9/23/09RP 71.

D. Forgrave Involvement

Robert Forgrave had known Taylor since 1984. 9/23/09RP 35-39.

During the relevant time (2000-2005) Forgrave heard Dash was working with Taylor. He wasn't worried about this. He had heard that Dash was helping her with her apartments. He knew she needed help and

Dash apparently had a business background. He believed she already had a separate financial adviser managing her investments and now she had someone to help her with her apartments. 9/23/09RP 76-77.

Forgrave and his wife had Taylor to their house on March 27, 2005 to celebrate her 94th birthday. He noticed something unusual. She didn't know if her apartment buildings had been sold. She couldn't answer questions about her mortgage and other financial affairs, saying, "I'll have to ask Tyrone." 9/23/09RP 39-40.

Forgrave and his wife investigated and learned that Taylor's home was in foreclosure and she was facing eviction in ten days. 9/23/09RP 39-40. When told about this over the next two days (March 28 and 29, 2005), Taylor seemed flustered, didn't seem to understand 9/23/09RP 43-44. Forgrave went through her papers in her house. Her house was in disarray. There were stacks of things all over the kitchen, in the sink, in the dining room. In the living room everything was stacks except for a narrow winding path that went to the chair where she sat and watched television. 9/23/09RP 45-46.

Forgrave found evidence of eight different financial accounts and at least three mortgages. Forgrave showed Taylor the accounts and mortgage documents. When she saw Tyrone Dash's name on the

accounts, “[S]he just said ‘Oh dear, oh dear,’ and her shoulders slumped and she said, ‘I’ve never felt old until now.’” 9/23/09RP 45-46. Every time Forgrave talked to her after March 29, it was like she was hearing it for the first time. 9/23/09RP 50.

E. Videotape

On May 16, 2005, Forgrave took Taylor to a meeting with Detective Caryn¹ Lee and Senior DPA Ivan Orton at the Seattle Police Department. The purpose of the meeting was for Lee and Orton to determine her level of mental capacity. A video was made of that meeting. 9/23/09RP 49-50.

F. Dementia

Robert Forgrave. According to Forgrave, even in her older years Taylor had been phenomenally healthy, rollerblading and parasailing into her 70s. Her personal hygiene was very good. Mentally she was very sharp. She was in top-top shape physically and mentally. 9/23/09RP 71.

From Forgrave’s observation (he saw her about three times a year between 2000-2005, 9/24/09RP 37-38), Taylor started to decline in 2001. Whereas before then she had always been a snappy dresser, between 2001

¹ The Report of Proceedings throughout misspells Det. Lee’s first name as “Karyn” rather than the correct “Caryn”.

and 2003 she began wearing sweat pants and her clothes had an odor.

9/23/09RP 72.

She experienced physical decline consistent with her age, but she also developed incontinence. She also began to experience a decline in her mental abilities. In her 80s she was always in the middle of conversations in social settings but by 2001 these conversations had become too much for her 9/23/09RP 72-73. In retrospect he traced when he first noted a decline to November, 1999, when she got pneumonia. She didn't appear capable of understanding or handling some issues related to her Medicaid insurance. 9/23/09RP 75-6.

Cathy Baker. Baker was employed by Adult Protective Services (APS) during 2000 as a social worker. Baker investigated referrals received by APS about possible abuse of a vulnerable adult. Her tasks were to determine if the alleged victim was a vulnerable adult (meaning unable to handle their affairs and needs) and if the report of alleged abuse was credible. 9/24/09RP 96-100.

In August, 2000, Baker was assigned to investigate a referral complaining about financial abuse of Taylor by her contractor, Abel Cordova. 9/24/09RP 104.

Baker talked to Taylor. She said Taylor was oriented but was vague in regard to her finances and had some memory deficits. 9/24/09RP 108. Baker talked to a number of other people involved with Taylor and concluded that although she felt that Taylor could be a vulnerable adult, she was unable to determine whether she was being exploited at the time. Her concern about Taylor's possible future exploitation were relieved when she learned that the church (the Western Washington Corporation of Seventh Day Adventists) was going to be taking over her affairs and apartments and would be overseeing the repair work being done on the apartments. 9/24/09RP 118-120.

Myrtle Mitchell. Mitchell was a registered nurse who had been trained to assess the elderly for social and mental health problems. She cared for elderly adults with dementia. 9/24/09RP 132-33.

Mitchell had known Taylor from 1982 on, through their church. Taylor and Mitchell were choir partners and served on church committees together. They also socialized together on many occasions.9/24/09RP 133-35.

Mitchell began to have concerns about Taylor in 2001 and by 2002 Mitchell was very aware of Taylor's physical and cognition decline. 9/24/09RP 156. By early 2002 Taylor seemed quite confused. Taylor also

developed an obvious incontinence problem. These problems were very apparent by 2002. 9/24/09RP 136-37.

In 2003 Mitchell visited Taylor at her home at the urging of church members. By this time Taylor had become very private and was not letting visitors into her home. In an earlier visit in 2002, Mitchell found Taylor's house cluttered, littered and unclean, filled with empty cartons and junk with just a little pathway through the house. (In an even earlier visit in the 90s, Mitchell had found the house neat and clean.) During subsequent visits in 2003 and 2004 the condition of the interior of the house was worse – more chaotic, larger accumulations. The sink was stained; there was garbage on the floor. 9/24/09RP 138-39.

During visits in 2002 Taylor was a little confused. She didn't talk much and when she did it was about earlier times with her husband. The urine smell in the house was evident. 9/24/09RP 140. In 2003 she couldn't remember the name of her doctor. She didn't appear to have an understanding of her financial affairs. 9/24/09RP 141.

Prior to 2002 Taylor had been very outgoing and very independent. In 2002 Mitchell noticed a marked difference. She was not gregarious. She was quiet. 9/24/09RP 142.

She would show up on the wrong day for choir practice.

9/24/09RP 158. By 2004 she had to be escorted to the choir loft or she would get lost. 9/24/09RP 159.

Mitchell expressed her concerns about Taylor to Dash in 2003 or 2004. He said he didn't think anything was wrong with her. 9/24/09RP 143.

Mitchell said in her work with the elderly they ranged from those perfectly in touch, good cognition, to those who were very confused, unable to care for themselves, serious declining memory. She put Taylor in that lower end of the gamut by 2003. 9/24/09RP 144-45, 156.

Joseph Puckett. In 2000 Puckett was an attorney specializing in landlord-tenant issues. In the summer of that year Dash brought Taylor to him to discuss some landlord-tenant issues. 9/24/09RP 166-68.

During this meeting Puckett became concerned about Taylor's competency. She didn't seem to understand a power of attorney she had granted to her church – she seemed to think it was something to do with a will, something that would go into effect after her death, when in reality it appeared to grant the church full authority over her property at that time. Sometimes Taylor would answer questions on her own but quite often she would look to Dash for directions or for confirmation of her answer.

Because of his concern about her competency Puckett urged Taylor to see an elder care attorney. 9/24/09RP 168-70.

Lucille Bertholf. Bertholf had been a registered nurse for 32 years. She had known Taylor since 1999. They sat next to each other in choir at their church. 9/28/09RP 8-9. When they first met in 1999 Taylor was bright, capable of organizing her music and keeping up with the fast moving church service. 9/28/09RP 10. But starting in 2001-02 there was a gradual decrease in her ability to organize her music. She started to develop a strong urine odor. 9/28/09RP 11.

Bertholf accompanied Mitchell on one of her visits to Taylor's house. She described the condition of the house the same way Mitchell did - sinks were full of sacks, counters covered with sacks and different food items – it didn't seem possible to cook meals or prepare food. 9/28/09RP 14.

One day in choir in 2003 or 2004 Taylor told Berthold, about Dash, "I'm not in love with him. I love him." 9/28/09RP 14-15.

Barbara Ristagno. Ristagno was a tenant of Taylor's from 1990 to 2000. 9/28/09RP 22-23. She described the strong social relationship Taylor had with many of her tenants, noting that the tenants seemed to be main social companions outside of church. 9/28/09RP 25-26.

Donald Kellogg. Kellogg was a trust officer for the Western Washington Corporation of Seventh Day Adventists. His duties included talking with people about estate planning, and managed the finances for some of those unable to manage on their own. 9/28/09RP 37-38. When he first met Taylor in 1997 she seemed happy with the existing arrangement with the Corporation. Kellogg described her as a “pretty sharp old gal.” 9/28/09RP 41.

Early in their relationship Kellogg could visit Taylor pretty much any time he wanted. 9/28/09RP 42. After Dash became involved, however, she wanted Kellogg to make an appointment before coming over. 9/28/09RP 45.

When Kellogg met Dash, Kellogg got the impression that Dash was in the business of managing finances for people. *Id.*

In the fall of 2000 Kellogg requested information from Dash about Taylor’s financial situation. Dash responded with detailed information about her apartments. During his testimony Dash acknowledged that the information he provided Kellogg did not include money that was going to Dash’s fees. 9/28/09RP 47-48, 9/29/09RP 84.

Kellogg described an incident in 2000 or early 2001 when Taylor visited his office. It was obvious she was incontinent. 9/28/09RP 50.

Because of concerns the Corporation had about Taylor, they offered to buy one of the apartments. They would pay off all loans on both apartments, give her \$100,000 plus a life income of \$4,000 or more. 9/28/09RP 50-52.

Simona Vuletic. Dr. Vuletic is a researcher in the University of Washington Department of Endocrinology and Nutrition. She has worked on research involving Alzheimer's and related dementias for the last nine years. She is a medical doctor by training. 9/28/09RP 55-56.

Dr. Vuletic stated that early stage dementia can be hard to recognize but people around the impacted person start to notice things. As dementia develops, judgment is impacted; there is a lack of insight. Dementia progresses from mild to moderate to severe – a person with severe dementia can't recognize familiar faces. They don't understand that the person in front them is their son or daughter. 9/28/09RP 56-58

Dr. Vuletic described how strokes can cause dementia. 9/28/09RP 59.

She explained the concept of executive functioning – the set of complex functions that require reasoning, thinking, judgment, insight, ability to form and understand emotional relationships. She further explained how dementia is very detrimental to executive functioning. It is

one of the first things that start to go. Dementia also impacts a person's vulnerability to be influenced by others. The person can't understand whether someone is benevolent or malevolent. They also often forget things that are relevant to judging what is happening. 9/28/09RP 60-62.

Dr. Vuletic met Taylor in their church in 1999. She had personal experiences with Taylor that raised concerns about her memory and other mental defects. One was her incontinence. It was not the incontinence per se but rather Taylor's inability to recognize the problem that concerned Dr. Vuletic. She also had called an ambulance on two occasions because Taylor lost consciousness. 9/28/09RP 62-63.

Dr. Vuletic reviewed a CT scan of Taylor done in March 2005. She saw brain abnormalities consistent with small strokes. Chambers of Taylor's brain reflected a loss of brain tissue. This kind of loss is long term, it can't happen overnight, absent a traumatic event. It takes years to develop. Taylor's CT was consistent with a diagnosis of dementia that had lasted for a long time before March 2005. 9/28/09RP 64-65, 72.

She stated that the likelihood that Taylor didn't have dementia in 2005 was practically nonexistent, 9/28/09RP 71, and this dementia had been going on for ten years before 2005. 9/28/09RP 73

Having dementia means a person can't comprehend complex things – they're simply unable to the necessary reasoning. 9/28/09RP 79-80. Even with only mild dementia, in dealing with complex tasks like understanding financial transactions, mortgages, etc., the person can't understand cause and effect, relationship between actions and consequences. 9/28/09RP 108. In Dr. Vuletic's opinion Taylor no longer had mild dementia by 2000-2001. 9/28/09RP 83.

According to Dr. Vuletic, by 2000 any normal person around Taylor on a regular basis would know something was wrong. 9/28/09RP 89-90. Any person who had dealings with her for anything that required comprehension and judgment would realize that she's unable to make a good judgment. 9/28/09RP 93. It would be absolutely impossible for any person around her on a daily basis, making complex business and financial transactions, legal transactions, to be unaware of her impediment. 9/28/09RP 110-11.

G. Dash's Testimony

During his testimony Dash stated that his first involvement in assisting Taylor was in late 1999. 9/28/09RP 200. Prior to working with Taylor, Dash assisted Angel Cordova (the contractor doing the repair/remodel of her apartments) in preparing invoices to Taylor for the work being done. 9/28/09RP 126-27. Dash showed Cordova how to

calculate what he was owed. 9/28/09RP 49-50. When he started working for Taylor, Dash told her that Cordova was overcharging her. 9/28/09RP 131.

Starting with helping Taylor manage the dispersal of an apartment repair loan, Dash's role gradually evolved into providing her with advice and assistance with the running of her apartments, and eventually into being involved in all aspects of Taylor's business and personal affairs. 9/29/09RP 50-52. He was seeing her every day by the end of 2000, 9/28/009RP 148, and by 2001 was spending at least 40 hours a week at her apartment (sic). 9/28/009RP 155.

During the first nine months of 2000 Dash billed Taylor for his work with specific invoices detailing the hours worked, his hourly fee (\$65), and the work done. Taylor paid him by check. 9/28/09RP 197-201, Ex. 5. Dash said he believed he continued to submit invoices to Taylor into 2001. 9/28/09RP 201. Forgrave testified there were no other invoices found in Taylor's house besides the ones identified by Dash for 2000. 9/29/09RP 101.

Dash stated that initially Taylor paid him in cash, although she also may have paid him by allowing him to use her credit cards. 9/28/009RP

144. Dash said that by mid-2001 Taylor was paying him by cash, checks, use of her credit cards, and gifts. 9/28/009RP 155.

Dash said that by November 1999, they began drawing on Taylor's investment accounts to pay for the repairs to her apartments, to pay him for his services and to pay her ongoing expenses. 9/28/009RP 149.

Dash said that Taylor would sign checks and then he filled in the amount. 9/28/009RP 161.

Dash acknowledged that he had calculated Taylor's net worth in April 2001 at \$1.7 million and that, by his calculation, it was \$200,000 in March 2005. He said that her money went to retire debt and loans. 9/29/09RP 12, 15.

Dash acknowledged he used Taylor's ATM to withdraw cash, claiming he used the cash to pay for gas, ongoing expenses, and his personal items. He didn't know of any particular reason explaining why he made multiple ATM withdrawals in one day. 9/28/009RP 157-160.

He claimed he used her credit cards to buy groceries for her. 9/28/009RP 159. He claimed a "large amount" of the credit card charges were for Taylor's benefit. He did acknowledge some were for his benefit. 9/28/009RP 183-86. He said that Taylor gave him gifts by giving him a credit card and telling him to "go ahead and use it." 9/28/009RP 161. He

acknowledged that he used her credit cards to pay for travel for himself and his family. He thought there had been three trips but acknowledged 24 different charges on her credit cards as being for trips for himself and his family. 9/28/009RP 182, 9/29/009RP 23-37. He said that he and Taylor went to lunch 2-3 times a week and she paid the majority of the time. 9/28/09RP 157. He also said that every time a loan was made to Taylor, she would pay his account up to date and give him \$4-5,000 in addition. 9/28/09RP 155. He said that “I got paid when she got paid . . . if there was no money I suffered and my family suffered.” 9/28/09RP 181.

Dash acknowledged that he never prepared an accounting showing where Taylor’s money went. He said he kept track of this on a spreadsheet but then agreed this was only for the invoiced charges in 2000, and he didn’t really keep track of what he was owed, which items of compensation he received, whether in ATM withdrawals, cash advances on credit cards or credit card charges, were salary and which were gifts. 9/29/009RP 15-17.

Dash didn’t recall any income he had after 2001 other than what he received from Taylor and agreed that the income and gifts he received from Taylor were “a pretty sizeable portion” of his income from 2000-2005. 9/29/009RP 20-22.

Dash acknowledged that he liked to gamble and had taken cash advances on Taylor's credit cards in order to gamble. 9/29/009RP 37-39. He also acknowledged traveling to Las Vegas on Taylor's credit card, 9/29/009RP 23-27, and making six ATM withdrawals in one day in Las Vegas which caused Taylor's account to be overdrawn incurring overdraft charges. He agreed that these withdrawals essentially were spending Taylor's social security deposit. 9/29/009RP 43-46.

Dash said that as far as competence was concerned, Taylor appeared to be functioning okay as late as January-March of 2005 but that she went down hill after her accident on March 12, 2005. (Taylor had been involved in an automobile accident on that date. 9/24/09RP 59.) Dash said that he didn't take any pay, gifts or cash withdrawals after March 12, 2005. 9/29/09RP 53-54. When shown bank records he acknowledged that he had made a cash withdrawal of \$141.50 on March 25, 2005 and had made six ATM withdrawals on March 28 totaling a little over \$400 and another withdrawal on March 29, 2005. 9/29/09RP 54. He said the withdrawals were to reimburse himself for expenses he had fronted from his VA disability compensation. He said "[A]fter Mr. Forgrave came in, I took my money back out." He said he didn't know if Taylor was aware of advances he'd made on her behalf and he didn't know if she agreed to the withdrawals he'd made. 9/29/09RP 55-56.

H. Details of Taylor Finances

According to Forgrave, between 1986 and 2000 Taylor lived frugally, typically spending about \$15,000 a year for all expenses (including gifts of about \$6,000 per year to her church) from 1986 to 2000. 9/23/09RP 62. Her income was her social security benefits and rental income from the apartments. 9/23/09RP 120-21. Forgrave said that as recently as 2001 her attorney stated she lived on about \$1,200-\$1,500 per month. 9/24/09RP 61-62.

Before 2000 Taylor had two bank accounts and one credit card. By March 2005 she had at least 12 active bank accounts and at least six credit cards. 9/23/09RP 94-5.

Taylor kept a detailed expense ledger from the mid 1950s to 1996, tracking things to the penny. Forgrave found no comparable ledgers in her house covering the years 2000-2005. He described it as very atypical of her not to have a record keeping system. 9/23/09RP 96-99.

Forgrave said Taylor had only a few financial transactions a month before 2000. There were daily transactions after then until 2005. Her total annual expenditures before 2000 ran about \$20-30,000 a year. From 2000 to 2005 they averaged \$30-40,000 per month. 9/23/09 100-101.

Forgrave described the financial activity in 2000-2005 as atypical, noting many, many checks to numerous contractors and many to a specific individual, Tyrone Dash. The checks were extraordinary in number and size. He said it was not easy to determine how her money was spent between 2000 and 2005 because of the large number of accounts and the cross deposits and withdrawals between these accounts. 9/23/05 94-5. Not counting these cross deposits and withdrawals there was more than \$2 million in transactions in her bank accounts between 2000 and 2005. 9/23/09RP 120.

More than \$225,000 in checks was written to Dash or for his benefit in this time. 9/23/09RP 100-101. Ex. 5.

Also atypical was the large number of ATM withdrawals after 2000, the first on March 21, 2001 and the last on March 29, 2005, when Dash was removed. Forgrave identified approximately 900 ATM withdrawals in that time, totaling almost \$100,000. Ex. 7. Forgrave never knew Taylor to use an ATM card. 9/23/09RP 105-06, 109, Ex. 7. Taylor rarely had more than \$20 cash on her prior to 2000. 9/23/09RP 107.

Forgrave also described as atypical of Taylor before 2000 the nearly 3,000 credit card charges to Taylor's credit card made between 2000 and 2005. These totaled approximately \$390,000, including

balances unpaid as of March 2005. 9/23/09RP 109-110, ex. 8. These charges included cash advances on the credit cards, totaling over \$105,000. 9/23/09RP 114-15, ex. 10. The total cash withdrawn from Taylor's accounts via ATM and credit card cash advances between 2000 and 2005 was over \$200,000 – about \$40,000 a year. Forgrave never knew Taylor to use more than \$100 cash at most a month before 2000. 9/23/09RP 115-16.

Forgrave identified a calendar showing all ATM cash withdrawals and cash advances against credit cards by day between January 2000 and March 2005. This calendar showed frequent instances where there were multiple ATM withdrawals or cash advances on the same day. 9/23/09RP 116-17, ex. 11, 17.

In addition to detailing the withdrawals and credit card charges on Taylor's accounts, Forgrave described the loans taken out in her name and the disposition of her assets. Taylor start taking on major debt in 2000, including a mortgage on her house and multiple constructions loans. 9/23/98RP 59-60. She obtained a mortgage on her house in May 2000 for \$150,000. That amount was refinanced in June 2002 via a loan from World Savings for \$217,500. Another refinance was done in July 2003 through Ameriquest, and yet another in April 2004. By then the mortgage

was up to \$324,000. 9/23/09 55-56. Each loan paid off the previous mortgage and extracted extra cash. 9/23/09 124-25.

Forgrave identified the use of the various loan proceeds and assets sales. In addition to paying off construction loans or prior mortgages, the proceeds were used as follows:

\$139,000	directly to Dash
\$66,000	withdrawn by ATM withdrawals
\$217,000	to pay credit card debt.

9/24/09RP 69-77.

IV ARGUMENT

A. Fiduciary Instructions

1. Summary of Argument

See Section II.A above.

2. The Role of the Challenged Instructions in the Dash Case

a) The Instructions Themselves

As noted earlier, Dash characterizes the challenged instructions as equating theft with a violation of a fiduciary duty. Appellant's Opening Brief at 43. The appellant misapprehends and misstates the relationship between the challenged instructions and the "to convict" instruction setting out the elements of theft. Neither the instructions on their face, nor the Judge's discussion of the instructions, or the Prosecutor's use of the instructions in closing support the defense interpretation. Rather the

challenged instructions define and explain terms used in the elements (to convict) instruction.

There are 9 instructions relevant to this discussion. They are:

- The unchallenged “to-convict” instruction (Instruction 7, CP 233);
- The unchallenged definition of “exert unauthorized control” (Instruction 9a, CP 237);
- The unchallenged definitions of “trust” and “trustee” (Instruction 18, CP 247); and
- The six challenged instructions (Instructions 19-24 CP 248-53).

The unchallenged “to-convict” instruction lays out the elements of first degree theft as follows:

- (1) That during a period of time intervening between January 1, 2000 and March 31, 2005, the defendant:
 - a. wrongfully obtained or exerted unauthorized control over property of another or the value thereof; or
 - b. by color or aid of deception, obtained control over property of another or the value thereof; and
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property;
- (4) That the defendant’s acts were part of a common scheme or plan, a continuing course of criminal conduct, and a continuing criminal impulse; and
- (5) That the acts occurred in the State of Washington.

Instruction 7 (CP 233).

The unchallenged definition of exerts unauthorized control, defines part of 1(a) of this instruction.

To exert unauthorized control means, having any property or services in one's possession, custody, or control, as a attorney, agent, employee, trustee, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

Instruction 9a (CP 237).

The unchallenged definition of a trust and trustee described the limits on the authority of a trustee.

As used in these instructions, the word “trust” means a fiduciary relationship in which one person holds the property of another person, subject to the obligation to keep or use that property for the benefit of the other person. As used in these instructions, the word “trustee” means the individual who holds the trust property for the benefit of the other person.

Instruction 18 (CP 247).²

The challenged instructions (quoted in partial form in Appellant’s Opening Brief at pp. 38-40), performed a similar role to unchallenged instruction 18, CP 247, in defining or explaining concepts in the to-convict instruction.

Instruction 19, CP 248, defines the obligations of a fiduciary (referenced in unchallenged Instruction 18) and the restrictions on a fiduciary’s authority.

² Dash did not/does not challenge this instruction even though the law referenced in the instruction originates in the civil context (Restatement of Trusts, Second, § 2, Bogert, Trusts and Trustees, 2nd Edition § 1).

Instruction 20, CP 249, defines the limits on the power of a person acting under a Power of Attorney (“attorney” being one of the specifically listed capacities in unchallenged instruction 9a).

Instruction 21, CP 250, further defines the role of one acting under a power of attorney.

Instruction 22, CP 251, states further obligations of fiduciaries and those acting under a power of attorney.

Instruction 24, CP 253 defines the limits on the ability of a fiduciary with regard to obtaining gifts (may not use undue influence).

Instruction 23, CP 252, defines how a claim of undue influence should be evaluated.

It is clear that on their face, the challenged instructions do not equate a violation of fiduciary duties with the crime of theft. None of these instructions in any way state or imply that violating the listed obligations or exceeding the listed powers constitutes the crime of theft or in any other way substitute for all the elements listed in the to-convict instruction that the jury needed to find before convicting Dash of theft.

b) Judge Fox’s Explanation of Instructions to Counsel

During the making of exceptions to these instructions the defense attorney objected to Instruction 19, CP 248, stating that he didn’t believe it

was a crime to break a fiduciary relationship (sic). Judge Fox, correctly, responded that the instruction didn't say it was a crime – the instruction defined a term, pointing out that Instruction 19 was not a part of the to-convict instruction. 9/29/09RP 113.

Judge Fox made it clear that under the instructions as given the defense could argue their theory of the case, i.e., that a violation of a fiduciary duty does not constitute a crime. *Id.*

When defense counsel objected to Instructions 20, claiming it looked like it came from probate. Judge Fox correctly noted that the terms “power of attorney” and “attorney in fact” had been used in trial and they were not terms that people were normally familiar with. *See id.* at 116.

It is important to note that in the face of this statement by Judge Fox's, that terms used in trial that jurors were not normally familiar with required definition, the defense claimed the intended definitions were not correct statements of the law, 9/29/09RP 113, 117, but did not offer any alternative definitions to those Judge Fox stated he would give.

In short, the defense attorney made the same argument that is now raised on appeal – that the instructions equate a violation of fiduciary duties as a crime. Judge Fox disagreed with that characterization of the instructions, noting that the challenged instructions were not part of the to-

convict instruction but were, rather, definitions. Judge Fox made it clear that the defense could argue their theory of the case (that a violation of fiduciary duties did not constitute a crime) under the instructions as he proposed to give them. 9/29/09RP 113.

c) Prosecutor's Use of Instructions

If the instructions on their face, and the Judge's explanation of the instructions do not support the interpretation given by Dash, then such an interpretation can only flow from the way the instructions were used in closing by the Prosecutor.

But the Prosecutor's argument does not support the defense interpretation either.

The prosecutor emphasized to the jury in closing that they should pay closest attention to the "to-convict" instruction (together with the "good faith" instruction discussed earlier) 9/29/09RP 122. The prosecutor discussed the elements with the jury in detail. *See id.* at 126-143. The challenged instructions were only discussed by way of explaining the concept of "exerted unauthorized control" found in the to-convict instruction. *See id.* at 136-39.

To understand the role of the challenged instructions it is helpful to state in summary and outline form, the Prosecutor's argument in closing about prongs 1(a) and (b) of the to-convict instruction:

- a) wrongfully obtained or exerted unauthorized control over property of another or the value thereof; or
- b) by color or aid of deception, obtained control over property of another or the value thereof; and

The Prosecutor argued as follows:

- Frances Taylor's incompetence means that any funds taken by Dash during her incompetence were wrongfully obtained as she did not have the capacity to consent. 9/29/09RP 129.
- Even if she was competent, Dash's taking of Taylor's funds constituted an exertion of unauthorized control in his role as her attorney in fact under the power of attorney, as her agent, as her employee, as her trustee or under any agreement he had with her for his use of her money. *See id.* at 136.
- Each of these roles contains limits on Dash's authority as defined by the nature of fiduciary relationships. *See id.* at 138.
- A violation of these fiduciary relationships is an exertion of unauthorized control.
- Even if there was no incompetence or exertion of unauthorized control, Dash's actions constitute a theft by deception. *See id.* at 139-142.
- The jury can convict on any one or more of these alternatives. *See id.* at 142.

The challenged instructions were used by the Prosecutor only under "exerts unauthorized control" alternative definition of wrongfully obtains. At no time did the Prosecutor state or imply that a violation of

any of the obligations or an exceeding of any of the powers stated in the challenged instructions constituted theft.

3. Use of Civil Concepts in Criminal Cases is Well Established

Use of common law, including civil law to define and explain terms in the to-convict instruction is well supported in Washington. Judge Fox explicitly recognized the need to use the common law to explain and define words used in criminal statutes. 9/29/09RP 115. A summary Westlaw search identified at least five areas where civil law concepts are used to define/explain terms in criminal cases.

a) Assault

As demonstrated by the lineage listed below, courts have long applied the common law concepts, specifically including law developed in the civil arena, to charges of criminal assault.

2006 - *State v. Stevens*, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006)

The term assault itself is not statutorily defined so Washington courts apply the common law definition. . . . *Clark v. Baines*, 150 Wn.2d 905, 909 n. 3, 84 P.3d 245 (2004).

2004 - *Clark v. Baines*, 150 Wn.2d 905, 909 n. 3, 84 P.3d 245 (2004)

The term assault is not statutorily defined, so Washington courts apply the common law definition to the crime. *State v. Aumick*, 126 Wn.2d 422, 426 n. 12, 894 P.2d 1325 (1995). . . . (quoting *State v. Walden*, 67 Wn.App. 891, 893-94, 841 P.2d 81 (1992)).

1992 - *State v. Walden*, 67 Wn.App. 891, 893-94, 841 P.2d 81 (1992)

Because the term “assault” itself is undefined in the criminal code, Washington courts apply the common law definition to the crime.

Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 504, 125 P.2d 681 (1942).

Peasley, at the beginning of this chain of legal authority, was a 1942 civil case involving an action for malicious prosecution brought by Peasley against Puget Sound Tug & Barge Co. (“Puget Sound”), the employer of an individual who had sworn a criminal complaint against Peasley for “interfering with, preventing, or obstructing the search for, and the retaking of, branded logs – a gross misdemeanor. Peasley was arrested, held for 24 hours, tried and acquitted. This action resulted.

Although the charge filed related to logs, the Puget Sound employee also complained of an assault by Peasley. The civil court found it necessary to determine if there was probable cause to believe Peasley had committed the crime of assault. As the other courts in this legal chain have done, the *Peasley* court first noted the absence of a definition of assault in the criminal code, concluding that common law must be consulted, and citing *Howell v. Winters*, 58 Wash 436, 437-38, 108 P. 1077 (1910). *Howell* adopted the definition given by the trial judge there below, which itself originated in Cooley, on Torts (3d Ed.) 278.

The definition of words used in criminal cases of assault, thus, had their origin in a treatise on the civil law of torts written in the 1800s.

b) Living with a Prostitute

In *State v. Everett*, 121 Wash. 322, 326, 209 P. 519 (1922) the defendant was convicted of living with and accepting the earnings of a common prostitute. The defendant excepted to instruction 14, defining what would constitute living with a common prostitute. The defendant objected to this instruction, like Dash does with the challenged instructions in the instant case, because it originated in a civil case, *Eddy v. Cunningham*, 60 Wash 544, 125 Pac. 961 (1912). The *Everett* court worded the objection and their resolution as follows:

It is argued that, since this was a civil case, the definition there (in *Eddy*) given of what would constitute living with a common prostitute should not apply in a criminal case. We see no reason why 'living with' should be given a different meaning in a criminal case from what it has been given in a civil case.

Everett at 326.³

c) Proximate Cause

In *State v. David*, 134 Wn.App. 470, 141 P.3d 646 (2006) the defendant was charged with vehicular homicide. RCW 46.661.52(1) made one guilty of vehicular homicide if, *inter alia*, a person died as a proximate result of injury *proximately caused* by the defendant's acts. Proximate causation was not defined in the criminal code.

³ The court went on to note that the instruction was in accord with the holding in a criminal case.

The defendant presented evidence suggesting that the victim, not he, was the proximate cause of the accident. The trial court gave an instruction defining proximate causation based on common law. The defendant, on appeal, claimed that the statute, by failing to define an essential element of the offense (proximate cause) and thus requiring the courts to supply the missing definition, violated the separation of powers doctrine. *David* at 478.

In rejecting this contention the *David* court stated:

It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes.

David at 481.

The *David* court cited specifically to RCW 9A.04.060 ("The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.") in support of its approval of the trial court's definition, noting that prior to the 1975 enactment of this statute

the Supreme Court ruled on the common law meaning of “proximate causation” in the context of the vehicular homicide statute, citing *State v. Jacobson*, 74 Wn.2d 36, 36-8, 442 P.2d 629 (1968). *David* at 481-82.

In *Jacobson*, the Supreme Court had to determine whether the prosecutor’s rebuttal argument concerning the meaning of “proximate cause” was improper. The court had given the following definition of proximate cause in the instructions:

The term “proximate cause” means that cause which, in a direct, unbroken sequence, produces the injury complained of and without which such injury would not have happened.

Jacobson at 37. There were no instructions on concurring or intervening cause.

Jacobson’s counsel argued in closing that the negligence of the victim was an intervening cause. The prosecutor in rebuttal argued that this was a concurring cause. The defendant was convicted but the trial court granted a new trial, finding that the prosecutor had, in effect, told the jury that the instruction defining probable cause did not correctly state the law, and that this conduct was so prejudicial that no instruction to disregard it could have effected a cure.

The prosecutor argued on appeal, *inter alia*, that his argument correctly stated the law. *Id.*

The *Jacobson* court found in favor of the prosecutor on this issue. The court cited four civil cases (*Boyle v. Lewis*, 30 Wn.2d 665, 193 P.2d 332 (1948); *Charlton v. Baker*, 61 Wn.2d 369, 378 P.2d 432 (1963); *Robison v. Simard*, 57 Wn.2d 850, 360 P.2d 153 (1961); *Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County*, 3 Wn.2d 475, 101 P.2d 345 (1940)) in support of its conclusion that the prosecutor's argument did correctly state the law.

The definition of "proximate cause", an essential term in the elements of vehicular homicide, originates in civil law

d) Securities Fraud

Securities fraud cases can be either civil or criminal. In the criminal case of *State v. Philips*, 108 Wn.2d. 627, 630-631, 721 P.2d 24 (1987), the court looked to civil securities fraud cases to determine the meaning of the term "security."

[The definition of "security" in the Washington Securities Act, *RCW 21.20.010* mirrors the definitions of the federal Securities Act of 1933, 15 U.S.C. §§ 77a, 77b et seq. and the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. *Sauve v. K.C., Inc.*, 91 Wn.2d 698, 700, 591 P.2d 1207 (1979). We therefore look to federal law to determine the meaning of the term "security". *McClellan v. Sundholm*, 89 Wn.2d 527, 531, 574 P.2d 371 (1978); see also *RCW 21.20.900* (policy of the Securities Act of Washington is to make uniform the law and to coordinate its interpretation and administration with related federal regulation).

Phillips then looked to civil federal cases (*United Housing Found., Inc. v. Forman*, 421 U.S. 837, 858, 95 S.Ct. 2051, 2063, 44 L.Ed.2d 621 (1975); *S. E. C. v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946); *S. E. C. v. Glenn Turner Enterprises*, 474 F.2d 476, 482 n.7 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 53 (1973)) in determining whether the investment involved was an “investment contract.” *Phillips* at 631-33.

e) Theft

In *State v. Dorman*, 30 Wn.App. 351, 633 P.2d 1340 (1981) the defendant objected to the court instructions defining “trust” and “trustee”. Neither the actual instructions nor the legal source of those instructions is contained in the *Dorman* decision, but it is reasonable to assume those definitions came from civil law as criminal statutes do not contain a definition of either. The thrust of the defense objection was apparently not directed to the legal source of the instructions and the defense did not contend the instructions were incorrect statements of the law. *See id.* at 356-57.

The defense did contend, however, like Dash does here, that the instructions “effectively directed the jury to find the existence of a trust relationship and thus denied him the right to trial by jury.” *Id.* The court disagreed. They noted that the State’s evidence tended to show the

existence of the trust relationship and “[t]he court's instructions merely defined what was meant by the various terms, including ‘trust.’” *Id.*

A similar reliance on civil law in a criminal theft case can be found in *State v. Wallace*, 97 Wn.2d 846, 651 P.2d 201 (1982), where the defendant was convicted of first degree theft (welfare fraud) for failing to report income while receiving welfare benefits, specifically, funds the defendant Mary Wallace received from her estranged husband James Wallace while he was incarcerated. After quoting from the welfare fraud statutes (RCW 74.08.331 and 74.04.005 (11) and (12)) the court stated the issue to be whether the State proved Mary had actual knowledge that the funds sent to her by her husband were “available for her use.” *See id.* at 847-850.

The funds James sent Mary were from his veteran’s education benefits which, the court determined, were his sole and separate property. *Id.* Furthermore, when sending Mary funds, James limited her use of this money to the purchase of tools James intended to use in a furniture business after his release from prison. James formalized this agreement by having his attorney draft a limited power of attorney in Mary’s favor. James’ attorney testified at trial that the purpose of the power of attorney was to limit Mary’s over the money to only those purposes specified by

her husband. *See id.* at 848. The court, thus, had to determine whether this agreement and power of attorney restricted Mary's use of the funds sufficiently that they were not "available for her use." *See id.* at 851.

In concluding that the funds were not available for her use the court said:

Petitioner's authority to deal with the funds was limited to her husband's specific instructions, because a limited power of attorney conveys only the authority expressed therein. *In re Estate of Springer*, 97 Wash. 546, 551, 166 P. 1134 (1917). By the terms of the limited power of attorney, therefore, petitioner was prohibited from using the funds for her own benefit. Any use of the funds in a manner inconsistent with James Wallace's instructions would have constituted a breach of petitioner's fiduciary duty. *Nelson v. Smith*, 140 Wash. 293-294-95, 248 P. 798 (1926). *See also Theis v. DuPont, Glore Forgan, Inc.*, 212 Kan. 301, 306-07, 510 P.2d 1212 (1973).

Id.

In short, in determining the scope of authority Mary had over property she had, subject to a power of attorney, (similar to the definitions of the powers and responsibilities of one acting under a power of attorney provided by Judge Fox in the Dash case in challenged instructions 20-22, CP 249-251) the *Wallace* court referred to and specifically relied on principles established in civil cases.

At least one other criminal case has used four of the instructions challenged in this case. Crowder SuppCP ____ (Sub 87, "Courts

Instructions to the Jury”, CP32-35 in *State v. Crowder*, 103 Wn.App. 20, 11 P.3d 828 (2000).⁴ The instructions were not challenged by Crowder on appeal.

4. The Theft Statute in this Case

The language of the theft statute and statutory criminal definitions in this case call out for guidance from civil cases. Specifically, the definition of “exerts unauthorized control”, found in RCW 9A.56.010(19)(b), reads as follows:

Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

Under this definition, incorporated into WPIC 7902, a jury would have to understand arcane and/or specialized legal terms as bailee, factor, pledgee, servant, agent, trustee, executor, administrator and guardian along with more commonly understood terms like renter, attorney and employee. A jury would not only have to understand such terms, but also share a common and correct understanding of the powers and limitations

⁴ The State has filed a Motion to Permit Designation of Clerk's Papers in *Crowder* and *Mermis* (see n. 15 below),

on such powers each of these capacities bestows upon the holder. A jury would have to have a shared and correct understanding of when an agreement exists and how an agreement is to be interpreted.

By using these terms without definition the legislature intended for courts to use the common law to explain them, including civil common law. *State v. David* at 481, *State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008).

Judge Fox gave a version of RCW 9A.56.010(19)(b) and WPIC 7902, limited to the capacities in which Dash held Taylor's property (i.e., attorney, agent, trustee and by agreement), Instruction 9a, CP 237, and then provided definitions from common law to define these terms, Instructions 19-24, CP 248-253. This was entirely appropriate.

5. Legal Standards for Evaluating Challenges to Instructions

The standard for evaluating Jury Instructions is well established.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999).

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

Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support the theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Hughes*,

106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to give such instructions is prejudicial error. *Id.*

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999).

In his opening brief Dash makes no reference to these standards for challenging instructions. Dash instead bases his claim of error on the Prosecutor's use of the instructions to alter its threshold of proof. Opening Brief of Appellant at 41-45. Where, as here, the Prosecutor did not argue outside the wording or meaning of the instructions, the claim of "misuse of instructions" is initially a challenge to the instructions. Such a challenge should be measured by the standard cited above in *State v. Clausing*.

a) Supported by Substantial Evidence

Dash makes no argument that the challenged instructions were not supported by substantial evidence.

b) Allow the Parties to Argue their Theories of the Case

Dash does claim that the instructions did not allow him to argue his theory of the case. Dash's concept of his theory of the case can be found at Appellant's Opening Brief, p. 42. "Defense counsel tried to make the argument suggested by the court, that the jury should ignore those instructions because the question was whether he had committed theft and not whether he had other duties or obligations."

What defense counsel did, however, went well beyond Judge Fox's suggestion that, under the instructions, the defense could argue their theory of the case, i.e., that a violation of a fiduciary duty does not constitute a crime. 9/29/09RP 113. Defense counsel made that argument but then told the jury they could completely disregard the challenged instructions as irrelevant civil instructions. 9/29/09RP 167-68. Judge Fox never suggested that defense counsel argue that the jury could ignore any of his instructions.

c) When Read as a Whole the Instructions Properly Inform the Jury of the Applicable Law

The essence of Dash's objections to these instructions is not that the instructions kept him from arguing his theory of the case, but rather that the law did not support his theory.

Dash would like to have argued that as Taylor's attorney-in-fact he could change her will or make gifts to himself, but that's simply not the law. RCW 11.94.050.

Dash would like to have argued that a fiduciary need not act in good faith, need not fully disclose all facts, need not use the principal's property solely for the principal's benefit, but that's simply not the law. *Bryant v. Bryant*, 125 Wn.2d 113, 118-19, 882 P.2d 169 (1994), *Crisman v. Crisman*, 85 Wn.App. 15, 22, 931 P.2d 163 (1997) (citing *Moon v.*

Phipps, 67 Wn.2d 948, 956, 411 P.2d 157 (1966)); *In re Estate of Palmer*, 145 Wn.App. 249, 263, 187 P.3d 758 (2008).

Courts do not act in a vacuum, without knowledge of the facts.

City of Seattle v. Platt, 19 Wn.App. 904, 907, 578 P.2d 873 (1978).

Neither can a court, a jury or a defendant act in a vacuum, ignorant of the law, whether criminal or civil, defining the relationships in a case.

6. Comment on the Evidence

Dash argues that the court commented on the evidence by telling the jury of the responsibilities of a fiduciary. He contends that by instructing the jury on these responsibilities the court removed from the jury the factual issue of whether Dash was in fact a fiduciary. This was exacerbated, claims Dash, by the Prosecutor's rebuttal statements telling the jury they must follow all of the court's instructions and they should disregard defense counsel's suggestion to ignore the challenged instructions. Appellant's Opening Brief at 42-45.

a) State's Proposed Instruction Defining "Fiduciary"

Initially it should be noted that the State offered an instruction defining fiduciary. CP 351. The court declined to give the instruction. 9/29/09RP 10-09. While the State does not feel the failure to give this

instruction is reversible error (and thus has not filed a cross appeal), the State does feel giving this instruction would be a better practice.

b) Invited Error

More importantly, although the defense objected to the fiduciary instructions in general, once the court indicated it was going to give those instructions, the defense did not object to the absence of, and failed to offer, the kind of limiting or defining instruction, whose absence they now contend, is error.⁵

Had he taken the position below now argued on appeal (that the instructions removed from the jury the issue of whether Dash was a fiduciary), Judge Fox would have had the opportunity to consider that argument and reverse his decision to not give the State's offered instruction, or any defense offered instruction, defining "fiduciary". The defendant invited any claimed error.

c) Prosecutor's Discussion of Jury Instructions in Rebuttal

The objections in Appellant's Opening Brief to the Prosecutor's rebuttal comments are without merit. The Prosecutor did not state or

⁵ Not only did defense counsel fail to object to the absence or, or offer, an instruction defining a fiduciary, defense counsel actually contradicted the claim made by Dash on appeal. In arguing that he thought Instruction 19, CP 248 made it a crime to violate a fiduciary duty, defense counsel said: "It just become a question of is Mr. Dash a fiduciary . . .", tacitly acknowledging that the instructions did not remove that issue from the jury as appellant counsel now claims on appeal.

imply to the jury that by giving the challenged instructions Judge Fox had already found that Dash was a fiduciary. The Prosecutor did not state or imply, as Dash argues at Appellant's Opening Brief p. 45 that Judge Fox believed Dash had "become an attorney-in-fact". The evidence at trial established that Dash acted under a power of attorney. 9/23/09 60, 9/24/09RP 12-13, Exhibit 22.

Furthermore the Prosecutor's comments that the jury was to use all the instructions was an entirely proper rebuttal to defense counsels erroneous and misleading claim that the jury could simply disregard certain instructions. As the opening instruction states, "It . . . is your duty to accept the law from my instructions. . . . You must apply the law from my instructions. . . . [Y]ou must consider the instructions as a whole." Instruction 1, CP 225.

d) Evidence and Court's Instructions Provided the Jury with Sufficient Basis to Conclude Dash was in a Fiduciary Relationship with Taylor

Finally, the evidence produced at trial coupled with all the court's instructions provided the jury with a sufficient basis to conclude that Dash was a fiduciary. Unchallenged instruction 18, CP 247, defined a trust as "a fiduciary relationship in which one person holds the property of another person, subject to the obligation to keep or use that property for the benefit

of that other person” Instruction 21, CP 250, defined an “attorney-in-fact” as one acting under a power of attorney. Judge Fox made it clear that he felt Instructions 18 and 19, CP 247-48, gave an adequate explanation of what a fiduciary is. 9/29/09RP at 108. He gave defense counsel the opportunity to make any other record he wanted after Judge Fox announced the instructions he intended to give, and defense counsel made no further argument, offered no other instructions, and made no other record. 9/29/09RP 118-19.

This same argument was made by the defense in *Dorman*, 30 Wn.App. 351, 356-57. The defense contended, like Dash does here, that the instruction defining “trust” and “trustee” “effectively directed the jury to find the existence of a trust relationship and thus denied him the right to trial by jury.” *Id.* The court disagreed. They noted that the State’s evidence tended to show the existence of the trust relationship and “[t]he court’s instructions merely defined what was meant by the various terms, including ‘trust.’” *Id.*

This court should reach the same conclusion.

7. Harmless Error

Even if the challenged instructions were erroneous, such error is harmless. Dash was convicted under the alternative means of theft by taking (wrongfully obtain or exert unauthorized control) and theft by

deception. None of the challenged jury instructions relate to either “wrongfully obtaining” or deception.

In *State v. Linehan*, 147 Wn.2d 638, 645, 56 P.3d 542 (2002) the defendant contended he had been convicted of theft under three alternative means – wrongfully obtain, exert unauthorized control and by color and aid of deception, when there was there was no unanimity instruction and there was insufficient evidence of the exert-unauthorized-control alternative.

The court first noted that in alternative means cases, jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to support each of the alternative means charged, citing *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976).

The court then ruled that theft by embezzlement (exert unauthorized control) is not an alternative means of committing theft; rather, embezzlement is but one way of committing theft by taking. 147 Wn.2d at 647-48, 56 P.3d 542. The other way of committing theft by taking is wrongful obtainment. *Linehan*, 147 Wn.2d at 648-49, 56 P.3d 542.

The court next determined that the definition used to define “exert unauthorized control” was erroneous (much like Dash contends the

challenged instructions were invalid additions to the exert unauthorized control definition in the instant case.) The *Linehan* court then had to determine, as will this court if it finds the giving of the challenged instructions to be error, whether such error was harmless. They concluded it was. *See id.* at 654. The court concluded that the instructional error was harmless because there was sufficient evidence that Linehan “took the property or services of another.” Since proof of either wrongfully obtaining or exerting unauthorized control satisfied the alternative of theft by taking (and since there was no challenge to the proof or instructions on wrongfully obtaining) the error in the exert unauthorized control instruction was harmless.

Likewise, Dash has only challenged the instructions supplementing the exert unauthorized control means of committing theft by taking. Dash challenges neither the wrongfully obtains method of committing theft by taking nor the theft by deception alternative and thus the error, if any, in instructions allegedly broadening the scope of exerting unauthorized control is harmless.

8. Conclusion as to Fiduciary Instructions

Neither the instructions on their face, nor the Judge’s discussion of these instructions with counsel, or the State’s use of these instructions support Dash’s characterization of the instructions.

There is a long standing legal history of courts using common law concepts, including those originating in civil law, to define otherwise undefined terms and concepts in criminal cases. The terms used in the definition of “exerts unauthorized control” require such definitions.

The jury instructions taken as a whole were supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law.

Because the challenged instructions only relate to the exertion of unauthorized control prong of the taking alternative, and do not relate either the wrongfully obtain prong of taking or to theft by deception, any error is harmless.

B. Confrontation Clause

Dash contends that two pieces of evidence – a videotape of Frances Taylor, Ex. 24, and the testimony of former APS worker Cathy Baker 9/24/09RP 96, *et seq.*, violated his Sixth Amendment right to confrontation. Each of these pieces of evidence is discussed in turn.

1. Videotape of Frances Taylor Interview

a. Summary of Argument

See section II.B above

b. Factual Background

State's witness Robert Forgrave testified that he brought Frances Taylor to a meeting at the Seattle Police Department on May 16, 2005. The other people present at this meeting besides Forgrave and Taylor were Seattle Police Detective Caryn Lee and King County Senior Deputy Prosecutor Ivan Orton (who is counsel for the State on this appeal). Forgrave stated that the purpose of this meeting was for Det. Lee and DPA Orton to determine Taylor's level of mental capacity and put it on the record. Forgrave said the meeting was videotaped. 9/23/09RP at 49.

Forgrave identified the video and a redacted copy of that video was played for the jury. 9/24/09RP at 16. Transcripts of the unredacted and redacted video can be found at CP 309-29.

The admissibility of this video was addressed in pretrial briefing, State's Trial Brief Corrected at 15-21, SuppCP ____, State's Reply Re: Trial Brief at 6-8, CP 215-17, and at a pretrial hearing. 9/21-22/09RP at 16-25.

In its trial brief the State stated its intent to offer a number of out-of-court statement of Ms. Taylor, including those contained in the videotape. The State contended that most, if not all, of these statements would be offered not for the truth of the matter asserted in the statements but to show the defendant's state of mind and limited mental capacity.

State's Trial Brief Corrected at 21, SuppCP _____, State's Reply Re: Trial Brief at 7, CP 216, and at a pretrial hearing. 9/21-22/09RP at 17.

In his trial memorandum the defendant objected to "any testimony in the present case under ER 802 unless properly admitted under a valid exception." CP 223.

Additional out of court statements of Frances Taylor, which the State intended to offer, were contained in the State's Reply Brief at 8-10, CP 217-219. That reply brief also contained the state's analysis of any *Crawford* argument. The State noted that witness Forgrave would testify that the purpose of the meeting recorded on the videotape was for Det. Lee and the prosecutor to evaluate Ms. Taylor's mental capacity, to determine what she could and could not remember accurately. CP 216. The State contended, in this reply brief:

This interview was not aimed at producing information for a criminal prosecution (other than the informal evaluation of Ms. Taylor's memory.) While some things were accurate, many were inaccurate. There is no testimonial value to any of her statements - they all go to her state of mind.

State's Reply Brief at 7, CP 216.

The State noted that the defense did not point to any specific testimonial aspects of the recording. *Id.*

Judge Fox addressed the admissibility of the video recording the following morning, after receipt of the above pleadings. 9/21-22/09RP 16-26. When Judge Fox asked the prosecutor if he believed the entire videotape was admissible, the DPA responded that he had included the entire interview for the purpose of completeness, to show that things hadn't been taken out of context. The DPA reiterated that he was willing to go through the transcript of the video tape line by line with defense counsel, but he (the DPA) believed the objection was to the entire document. 9/21-22/09RP 18, 20.

Judge Fox then indicated the portions of the video he believed should not be admitted. 9/21-22/09RP 18-20. The State had no objection to those suggested deletions. Judge Fox then asked defense counsel if he wanted to specifically object to particular phrases, in addition to his general objection to the entire video. 9/21-22/09RP 20.

Defense counsel responded by stating his objection to the entire video under *Crawford*. 9/21-22/09RP 20-23.

Judge Fox then denied the defense motion to exclude the entire video, noting that:

[T]his videotaped interview . . . would tend to indicate whether or not she [Frances Taylor] had a compromised mental functioning and whether she was a vulnerable adult. The testimony – the statements by her are not really testimonial in nature. They are

indicative of her compromised memory, her apparent inabilities to understand certain things concerning her finances, and there are no direct factual assertions that are presented in this videotape once we exclude the specific references that I've indicated to Mr. Dash to the effect that he is a deceptive person, that he did this, that or the other.

. . . I took out the statements that were about him and some things – factual assertions about him, and those should all be excluded.

If there's anything else that wasn't included in that, I would take those objections up one-by-one from the defense.

9/21-22/09RP 24-25.

Judge Fox then asked defense counsel if he had any specific statements from the video he wanted excluded. Defense counsel identified one specific statement and the State agreed to delete that statement. 9/21-22/09RP 25-26. Judge Fox asked if defense counsel had any other individual references he wanted deleted. Defense counsel replied, "Not at this point." 9/21-22/09RP 26. Defense counsel did not subsequently identify any other individual references he wanted deleted.

c. Argument

i) The Confrontation Clause does not apply to statements not offered for the truth of the matter asserted.

The *Crawford* Court specifically retained the pre-existing rule of *Tennessee v. Street*,⁶ that "[t]he [Confrontation] Clause ... does not bar the use of testimonial statements for the purposes other than

⁶ *Tennessee*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)

establishing the truth of the matter asserted.”⁷ There is no doubt that Washington decisions following *Crawford* recognize that “[w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no confrontation clause concerns arise.”⁸ [All footnotes in original.]

In re Theders, 130 Wn.App. 422, 433, 123 P.3d 489 (2005).

Crawford itself made it clear that the Confrontation Clause does not apply to non hearsay (statements not offered for the truth of the matter asserted):

The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *See Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).

Crawford, 124 S.Ct. at 1369 n. 9

This statement from *Crawford* has been adopted by Washington courts. *In re Pers. Restraint of Theders*, 130 Wn.App. 422, 432-33, 123 P.3d 489 (2005) (noting that when out-of-court assertions are not introduced to prove the truth of the matter asserted, confrontation clause concerns do not arise); *State v. Mason*, 129 Wn.App. 718, 732, 119 P.3d 906 (2005).

⁷ *Crawford*, 541 U.S. at 59 n. 9, 124 S.Ct. 1354 (citing *Street*, 471 U.S. at 414, 105 S.Ct. 2078).

⁸ *State v. Mason*, 127 Wash.App. 554, 566 n. 26, 110 P.3d 245 (2005); *State v. Moses*, 129 Wash.App. 718, 119 P.3d 906 (2005).

Dash in Appellant's Opening Brief at 24 tacitly agrees with this proposition.⁹

ii) Distinguish non hearsay from exceptions

Because the videotape was offered to show Taylor's state of mind it is important to distinguish state of mind evidence that is not hearsay from state of mind evidence that is hearsay, but admissible under an exception (ER 803(a)(3)). Under *Crawford* the Confrontation Clause is applicable to the latter (exceptions) but not to the former (non hearsay.) *Crawford* 541 U.S. at 59, n. 9 and *State v. Moses*, 129 Wn.App. 718, 724, 119 P.3d 906 (2005) citing *Crawford* at 63.

This distinction has long been recognized. In *Betts v. Betts*, 3 Wn.App. 53, 59, 473 P.2d 403, review denied, 78 Wn.2d 994 (1970) the issue was whether certain out-of-court actions and statements by a child were admissible to show her state of mind.

Professor Meisenholder¹⁰ has made the following pertinent remarks concerning the admissibility of such statements:

Out-of-court statements are often circumstantial evidence of the declarant's state of mind when his state of mind is relevant in a case. Evidence of such statements is not hearsay under the classic

⁹ Dash implies that the introduction of the videotape would not have been error had it been limited to Taylor's answers to innocuous questions such as who is the president and what year it is. Dash argument is not that Judge Fox misperceived the law but that he erred in apply the law to the facts. Such claims are classically viewed under an abuse of discretion standard. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

¹⁰ Robert Meisenholder, Professor of Law, University of Washington.

definition of hearsay. The Washington cases contain many illustrations of this principle.

(Footnotes omitted.) 5 R. Meisenholder, Wash.Prac. s 383 at 387 (1965).

It should be pointed out that there is a distinction between non-hearsay statements which circumstantially indicate a present state of mind *regardless* of their truth, and hearsay statements which indicate a state of mind *because* of their truth. The state of mind must be relevant in either instance. The distinction is based upon the question of whether the statement shows the mental state *regardless* of the truth of the statement. The distinction is usually disregarded in the cases because the statement will usually be admissible either under the exception to the hearsay rule or under the theory that it is not hearsay. 5 R. Meisenholder, *Supra*, ss 383 and 473.

* * *

An obvious example of an out-of-court non-hearsay statement which circumstantially indicates a state of mind regardless of the truth of the statement would be 'I am Napoleon Bonaparte.' This would be relevant in a sanity hearing.

The statements in question in this case are clearly non-hearsay statements which circumstantially indicate a state of mind regardless of their truth. Since they were relevant, they are admissible.

Betts at 60-61.

As we argue below, the statements of Frances Taylor in the videotape are also non-hearsay because they circumstantially indicate a state of mind regardless of their truth.

iii) Taylor Videotape was not offered for truth of matters asserted

Washington courts have long strictly adhered to the definition of hearsay found in ER 801(3): “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The “matter asserted” is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence. *In re Theders*, 130 Wn.App. at 432.

State v. Spencer, 111 Wn.App. 401, 408-09, 45 P.3d 209 (2002)

Judge Fox carefully reviewed the transcript of the challenged video and concluded that other than specific, identified sections which were to be redacted,¹¹ the video only went to Frances Taylor’s mental functioning and contained no direct factual assertions. 9/21-22/09RP 24.

The Taylor videotape did more than demonstrate Taylor’s limited memory and mental capacity in general. It demonstrated the specific disability that Dr. Vuletic described as one of the first things to go in dementia – executive functioning, the ability to understand and participate in complex functions that require reasoning, thinking, judgment, insight, ability to form and understand emotional relationships, the absence of which makes one vulnerable to undue influence.9/28/09RP 60-62.

¹¹ The redactions suggested by Judge Fox and defense counsel were made. Ex 24, CP 309-329. There has been no claim that the video tape shown to the jury contained any of the to-be-redacted material.

The significance of the tape was a combination of Taylor's limited memory, the loss of executive functioning, the closeness in time to the last crime date (less than six weeks) and the obviousness of her incapacity.

Dash contends on appeal that "the importance of Taylor's understanding of events prove [sic] an element of the charged crime", Appellant's Opening Brief at 16, that "Taylor's state of mind was a central factual issue that the State was required to prove", *see id.* at 25, and concludes that "Taylor's videotaped answers were used to prove the elements of the offense". *See id.* at 26.

Obviously the videotape was relevant to the issues before the jury or else it would not be admissible. But the fact that the videotape demonstrated Taylor's incapacity regardless of any factual statements contained in the video doesn't make it inadmissible. It's only inadmissible if the statement is offered for the purpose of proving the truth of any fact asserted, and Taylor's statement was definitely not offered for that purpose.

iv) Alternatives

Dash contends that *Tennessee v. State*, 471 U.S. at 414-15 holds that:

[W]hen testimonial statements directly incriminate the defendant such that there is a substantial risk that the jury will disregard limiting instructions to consider the statement for a narrow nonhearsay purpose, the prosecution must show: (1) it has a genuine need to use the evidence for this nonhearsay purpose, and (2) the statement cannot be redacted or rephrased to eliminate the risk of improper use by the jury.

Appellant's Opening Brief at 23.

The State does not concede that Taylor's video contains statements directly incriminating Dash, or that the jury could not follow the court's instructions. Assuming those are true for sake of argument, State's counsel has read the cited sections of *Tennessee* repeatedly and has been unable to find language in support of the above proposition. While the court did find in the case before them that there was no reasonable alternative to the statement in question, they did not posit the absence of alternative avenues as a prerequisite for admission. And although the *Tennessee* Court stated its disagreement with the lower court as to whether the statement could have been edited to reduce the chance of jury misuse, they did not posit complete redaction as a prerequisite for admission. For example, the Court noted an alternative way the evidence before it could have presented, but stated this "was not the only option constitutionally open. *Tennessee v. State*, 471 U.S. at 414-415.

Even if the unsupported standard offered by Dash applies, however, Taylor's video would still be admissible.

Dash contends that the videotape was unnecessary as the State had other avenues of showing Taylor's declining cognitive ability, citing to the testimony of church members and Forgrave. Appellant's Opening Brief at 23-24. There certainly was other evidence of Taylor's mental decline, but this came from people who saw her sporadically. The most helpful to the fact-finding process evidence was Dr. Vuletic's descriptions of the symptoms of dementia coupled with a relatively lengthy interview with the victim herself. There was no alternative to such testimony, no other way for the jury to measure Taylor's cognitive decline objectively, for themselves.

v) Redactions

Dash also contends, relying on his flawed analysis of *Tennessee* above, that the court did not order all necessary redactions to the videotape over defense objections. Appellant's Opening Brief at 24. The only objection raised by Dash below to specific portions of the videotape (as opposed to their objection to the entire video) was counsel's statement at 9/21-22/09RP 23 stating generally that any reference at all to Mr. Dash should be taken out. Counsel did not identify which portions of the video he wished redacted, despite repeated offers by the State to review the transcript line by line with him, 9/21-22/09RP 18, 20, and opportunities

provided by the court, even after it denied the motion to suppress the entire video, for defense counsel below to raise objections to specific sections of the video. 9/21-22/09RP 25-26. Dash should not be heard on appeal to objection to the court's failure to redact sections that he did not propose below to redact. See discussion of waiver immediately below.

vi) Waiver

The defendant has waived any objection to specific portions of the videotape. The defendant, below, objected to the entirety of the videotape on *Crawford* grounds, 9/21-22/09RP 20-21, but in the face of Judge Fox's denial of his request to suppress the entire videotape the defendant below did not make any objection to specific portions that was denied. Counsel on appeal has not pointed to any ruling of Judge Fox denying a defense request to redact any specific statement in the videotape.

Judge Fox denied Dash's motion to suppress the entire video, 9/21-22/09RP 23, but *sua sponte* identified passages from the original video he felt to be factual assertions about Dash, 9/21-22/09RP 24-25, and the State agreed to redact those passages. *Id.*, CP 309-329. Judge Fox (and the State) invited defense counsel to identify other passages he wanted excluded. Defense counsel identified one specific statement and the State agreed to delete that statement. 9/21-22/09RP 25-26. Judge Fox asked if

defense counsel had any other individual references he wanted deleted.

Defense counsel replied, “Not at this point.” 9/21-22/09RP 26.

Defense counsel did not subsequently identify any other individual references he wanted deleted.

Although our courts allow a defendant to raise issues of “manifest constitutional error” for the first time on appeal, RPA 2.5(a)(3), not all claims of such are entitled to automatic review. *State v. Naillieux*, slip op 11/18/10, citing *State v. Lynn*, 67 Wn.App. 339, 342-46, 835 P.2d 251 (1992).

Whether RAP 2.5(a)(3) should allow a new argument on appeal is determined after a two-part analysis. First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is “manifest,” i.e., whether the error had “practical and identifiable consequences in the trial of the case.”

State v. Kirkpatrick, 160 Wn.2d 873, 879-80, 161 P.3d 990 (2007)

It is arguable whether a determination by a trial judge that a statement contains no direct factual assertions is a constitutional error. There is no assertion that Judge Fox used the wrong legal standard. The defense argues with the result of his application of that law to the facts. An appellate court reviews the trial court's application of the rules to

particular facts for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).¹²

Furthermore, where the State has indicated a willingness to delete contested passages and both the State and the Court has invited defense to identify any additional individual passages to which it objects, failure of the defense to further identify offending passages strongly suggests that the error was both invited and had no “practical and identifiable consequences in the trial of the case.” *Kilpatrick, id.*

viii) Jurors were given appropriate limiting instruction and are presumed to follow instructions.

Jurors were instructed both at the time the video was played, 9/24/09RP 16-17, and when reading instructions before closing, Instruction 6, CP 231, that nothing said in the video should be considered for the truth of the matter asserted. Instruction 6 was proposed by the defense. CP 209. Jurors are presumed to follow instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Dash argues two things about the limiting instruction. First he asserts, in effect, that Taylor’s statement made her a witness against Dash,

¹²*State v. Mason*, 160 Wn.2d 910, 921-23, 162 P.3d 396 (2007) seems, at first glance, to suggest that even the most elementary decisions by a trial court on hearsay claims are subject to *de novo* review. A close examination, however, suggests that is only a trial court’s determination that a matter is not testimonial is entitled to the higher standard.

i.e., her perceptions about Dash, no matter how incapacitated she was, would be used by the jury as statements of fact offered for their truth. Two problems. First, it ignores that the jury was instructed precisely not to do that and they are presumed to follow the instructions. Second, when one watches (or reads) the interview in its entirety her incapacity is completely apparent – an undeniably sociable and friendly woman who has little concept of dates or events and appears to have trouble comprehending and understanding some questions. Any viewer/reader would be skeptical of the truth of any assertions she made even without the limiting instruction.

Next Dash argues that, contrary to the authority cited above, that it is a legal fallacy to expect a jury to follow limiting instructions in some instances, stating that this was recognized in *Street (Tennessee v. Street)*, 471 U.S. 409). But *Street* actually held to the contrary, rejecting the proposition that the jurors did not follow the instructions. *Street* emphasized that “the assumption jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue,” citing e.g., *Frazier v. Cupp*, 394 U.S. 731, 735, 89 S.Ct. 1420, 1422, 22 L.Ed.2d 684 (1969). *Tennessee v. Street*, 471 US at 415 n. 6.

ix) Harmless Error

It is well established that constitutional errors, including violations of a defendant's rights under the Confrontation Clause may be harmless. "The correct inquiry is whether, assuming that the damaging potential of the [testimony] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *The reviewing court must look at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.* (citations omitted, emphasis added.)

State v. Moses, 129 Wash. App. at 732.

The arguable tainted evidence contained in Taylor's video, as identified by Dash in Appellant's Opening Brief at 19-20 is as follows:

- Taylor said she did not authorize Dash to work for her.
- She said she did not participate in and understand the sale of her apartments which Dash had orchestrated.
- She said she just trusted Dash.
- She said Dash was helping her manage her apartments and arranged the apartment sales.
- She was unaware of Dash helping her with her finances and did not direct Dash to write checks for her.
- She said she did not recall signing checks that Dash filled out.
- She said she did not recall receiving investment advice from Dash.
- She said she did not understand that she had a mortgage on her home but thought Dash had something to do with it. CP 310-311
- She said she did not use credit cards or bank machines to withdraw cash.

In evaluating the possible impact of these statements on the jury's decision one must initially remember the context in which these

statements were made. The jury was presented with a videotape of a very charming woman in her mid 90s (see video tape in general, Ex. 24) but it became obvious early in the interview that Frances Taylor large gaps in her memory both as to dates. As argued above, it is difficult to imagine that even without Judge Fox's admonitions and instructions the jury would have given credence to any thing this obviously confused woman said.

Second, many of the statements identified by Dash as being offered for the truth of the matter asserted were repeated by other witnesses (see for example Forgrave's testimony that he had never known Taylor to use an ATM card, 9/23/09RP 105-06), admitted by Dash (see for example Dash's testimony that he helped manage her apartments, 9/29/09RP 50-52) or otherwise not contested.

In other words, even if, in a vacuum, the above statements by Taylor were viewed to be credible assertions of facts, in the context of the other evidence related to these alleged facts, these statements were of no consequence other than for the legitimate purposes identified by the State at trial and as instructed by Judge Fox. The statements do not go to any material act *in dispute*. *State v. Athan*, 160 Wn.2d 354, 386-87, 158 P.3d. 27 (2007)

The analysis of harmless error looks also at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Moses*, 129 Wn.App. at 732.

- There was overwhelming evidence of Taylor's lack of capacity not only in May 2005 when the videotape was made, but much earlier. See generally Section III.F above.
- The extravagant nature of Dash's expenditures was apparent in his testimony (see for example his discussion of a trip to Las Vegas where he used Taylor's ATM card to withdraw funds from her account, spending her social security income and overdrawing the account, (9/29/009RP 23-27, 43-46) and Ex. 8 and 12.
- Dash's testimony revealed many contradictory claims (only made three trips and then acknowledged 24 specific charges relating to travel, 9/28/009RP 182, 9/29/009RP 23-37, claiming cash withdrawals were used for cash when there were hundreds of charges to credit cards at gas stations, 9/28/009RP 157-160, Ex. 8.)
- Dash acknowledged his use of Taylor's money for gambling. 9/29/009RP 37-39.
- Dash acknowledged that he didn't keep accurate records of the money he was owed or of the charges and withdrawals he made. 9/29/009RP 15-17.

These and countless other items of untainted evidence are so overwhelming that they necessarily lead to a finding of guilt.

2. Cathy Baker

a) Summary

Cathy Baker testified to her investigation, as a social worker for Adult Protective Services, of an allegation of suspected abuse of a vulnerable adult (Taylor). The State argues below:

- 1) Her testimony did not contain out of court statements offered for the truth of the matter asserted in those statements;
- 2) Dash's counsel below invited error by offering Baker's entire investigative report as evidence;
- 3) If there was error, it was harmless.

b) Argument

i) Out of court statements were not hearsay

As noted in the immediately preceding section the Confrontation Clause does not apply to non hearsay.

Baker's testimony was offered for the purpose of showing Frances Taylor's mental capacity in 2000 and to explain why APS took no action as a result of this investigation. Any testimony she gave regarding statements of others to her during this investigation was offered for these two purposes, not for the truth of any matter asserted in those out of court statements.

Baker identified her duties as determining if the client was a vulnerable adult and if so, determining whether or not the allegation of abuse was credible. 9/24/09RP 97. To make the determination as to whether the client was a vulnerable adult Baker would interview the client and gather other information. *See id.* at 103. In the vast majority of cases, information gathered from other people had an impact on her determination. *See id.* at 107.

In the case involving Taylor, Baker interviewed Taylor and a number of other people and the information she gathered from them had an impact on her determination.. *Id.*

Dash does not identify any out of court statement given during Baker's testimony that he believes was offered for the truth of the matter asserted.

ii) Dash Invited Error

Dash not only failed to specifically object to Baker's testimony,¹³ he introduced Baker's investigative report in its entirety. 9/24/09RP 123, Ex. 19. He asked numerous questions of Baker about that report that went well beyond anything asked by the State. 9/24/09RP 123-130. By introducing what amounted to essentially a written copy of Baker's testimony, Dash put his own undue emphasis on that testimony and any alleged hearsay statements in that testimony to which he now objects.

Invited error precludes review even when constitutional issues are involved. *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990).

iii) Harmless Error

See the harmless error discussion in section B.1.c.ix above.

¹³ Counsel for respondent has been unable to locate any objections in the record beyond the general objection to hearsay found in his trial brief. That objection is not based on the Confrontation Clause. CP 223.

c) Conclusion as to Confrontation Clause Issues

Neither Taylor's videotape nor Baker's testimony contained hearsay, i.e., statements made for the truth of the matter asserted.

Dash invited error by expanding the scope of the State's questioning of Baker in his cross-examination and in offering Baker's written report.

Because of the overwhelming untainted evidence, and error in the admission of the videotape and Baker's testimony was harmless

C. Good Faith Claim of Title Defense

1. Summary of Argument

See section II.C above.

2. Argument

The defendant claims the prosecutor, in closing argument, misrepresented the essential requirements of Dash's good faith claim of title. This claim fails for four reasons.

a) Waiver

First, the defendant waived this issue for appeal by failing to object or request a curative instruction when the claimed misrepresentation occurred or at anytime thereafter.

The law regarding failure to object to an alleged misrepresentation by the prosecutor is clear:

Generally, a defendant must object to an alleged error at trial when it can be corrected; otherwise, he fails to preserve the error for appeal. *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (citing *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975)), review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008). Thus, where the defendant does not object at trial, he must prove that the prosecutor's comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. *Classen*, 143 Wn.App. at 64, 176 P.3d 582; *State v. Barajas*, 143 Wn.App. 24, 38, 177 P.3d 106 (2007), review denied, 164 Wn.2d 1022, 195 P.3d 957 (2008).

State v. Coleman, 152 Wn.App. 552, 570, 216 P.3d 479 (2009).

Dash's counsel did not object at trial to the prosecutor's comments that he now challenges for the first time on appeal. He does not meet his burden to show that the claimed misstatement of law was so flagrant or ill intentioned that a curative instruction could not have remedied its prejudicial effect. He makes no argument to that effect, and the facts do not support such a finding, *See id.* at 64-65.

b) Invited Error

Second, the defendant proposed the instruction at issue, without any proposed addendum containing the interpretation he now puts forward. CP 208. The prosecutor's argument, cited by defendant, contained the specific wording proposed by the defendant. The prosecutor

referred repeatedly to the words “good faith claim of title”, quoting directly from the defendant’s instruction. 9/29/09RP 124-26, 13-75

Dash does not challenge the good faith claim of title instruction actually given, as such a challenge is precluded by the invited error doctrine. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999), citing *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Rather, Dash contends, the instruction means something other than its plain wording (i.e., he contends that “good faith claim of title” is not in fact limited to claims of title but also includes a “claim of right” and situations where you “feel you are entitled” to the victim’s property. 9/29/09RP 164.) He contends the word “title” is not limited to ownership interests. Appellant’s Opening Brief at 36. His complaint at its core is that the good faith claim of title instruction was not supplemented by an instruction qualifying the plain wording of the instruction. He did not propose such a supplemental instruction. The invited error doctrine also precludes claims based on allegedly “missing” instructions when the “missing” instruction was not proposed by the defendant. *Studd* at 552 (Defendants were not precluded from challenging an instruction they offered when they also unsuccessfully proposed a curative instruction.

Defendants who did not propose such a curative instruction were precluded.)

Furthermore, the invited error doctrine applies even where an alleged error is of constitutional magnitude. *Henderson*, 114 Wn.2d at 871, 792 P.2d 514.¹⁴

c) Harmless Error

Third, if there be error, it was harmless for five reasons.

i) Claim was not in Good Faith

It was harmless because the good faith claim of title defense requires that the claim of title be in good faith and the evidence did not show that Dash's claim was made in good faith. The defense attorney in closing emphasized that Dash was not guilty even if his claim of title "was unreasonable, even if his belief was groundless or baseless." 9/29/09 RP 158. In explaining what "untenable" means the defense attorney almost explicitly equated untenable with absence of good faith. "Baseless, groundless, ridiculous, that's untenable. You can't even support it . . ." *Id.* Similar arguments equating untenable with ridiculous were made by the defense at 9/29/09RP 165.

¹⁴ A narrow exception applies to allow review when a defendant claims that the instructional error was the result of counsel's ineffective assistance, but Dash has not asserted an ineffective assistance of counsel claim in this appeal. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In fact the only reference to “good faith” made by the defense was “If she (Frances Taylor) was completely demented, but Mr. Dash had a good faith claim of title because he was performing services, he is still not guilty of the crime of theft.” 9/29/09RP 166.

But “good faith” does not include baseless, groundless or ridiculous beliefs. Even where courts have accepted a mistake of law or fact as a valid basis for the defense of good faith claim of title in an embezzlement case, a defendant is entitled to an instruction on the defense only where the evidence at trial supports a reasonable inference that the claimed belief was held in good faith. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995), citing *People v. Vineberg*, 125 Cal.App.3d at 137, 177 Cal.Rptr. 819. *Ager* held that there must be “some legal or factual basis” for a claim for it to be in good faith. The totality of the evidence in the instant case showed an absence of good faith. 9/29/09RP 124. There was no evidence of good faith and the defense attorney’s own words seem to concede as much. Even if the prosecutor misstated the claim of title issue, the error was harmless because of the absence of a good faith basis for the claim of title.

ii) Claim was not Open and Avowed

Any error was also harmless because the good faith claim of title defense requires that the claim be open and avowed. The evidence showed to the contrary.

The defense equated open and avowed as being the opposite of “forging somebody’s signature” or “sneaking into a person’s house in the middle of the night”. 9/29/09RP 159. The defense equated open and avowed with getting a power of attorney and reviewing the bank statements with the incompetent victim. *Id.* The defense asserted that because the bank statements were mailed to Ms. Taylor’s house and weren’t hidden in the basement, the taking was open and avowed. 9/29/09RP 161. Because Ms. Taylor signed the checks to Dash (even though she only signed the checks Dash filled out, 9/29/09RP 61), because Dash took her to a lawyer, the defense claimed he was acting open and avowed. 9/29/09RP 162-63.

In contrast the evidence showed the following:

Dash claimed his actions were open and avowed because he disclosed them to Frances Taylor, but Taylor was increasingly unable to understand and evaluate the information even if he did provide it to her. (See Section III. F above). Dash concealed his actions by taking steps to

minimize the involvement of others who could have checked his actions had they known of them. 9/28/09RP 45, 9/24/09RP 138.

In the early period of his involvement in Taylor's finances Dash provided specific itemized invoices showing hours of service and per hour charges. Payments to him were made by check, from the invoices. Dash stated that he believed the practice of submitting invoices continued into 2001 but the last invoice in evidence was dated September 8, 2000. 9/28/09RP 1997-201.

Dash admitted he never prepared an accounting or notes of any kind showing the purpose of the numerous withdrawals from Taylor's accounts. Dash didn't provide Taylor with any written documents showing what she owed him. He didn't keep track of what she owed him, or keep track of which items were compensation for services and which were gifts. He claimed, at one point, to have kept track of what he was owed in the early period of his involvement, on a spreadsheet, but he didn't track on a spreadsheet any of the ATM withdrawals or credit card charges on her accounts. He claimed to have known at the time what each ATM withdrawal was for but admitted that Taylor probably did not know. 9/29/09RP 15-17.

He acknowledged that during the time the Western Washington Corporation of Seventh Day Adventists was the trustee on Taylor's Trust, had power of attorney for her and had approval authority for any loans Taylor obtained, he submitted information to the Corporation for their use in deciding whether she should obtain certain loans. 9/29/09RP 6, 42. He acknowledged that the information he submitted for them to base this decision on failed to include the amount of his fees. 9/29/09RP 84.

The State argued that the fact that a significant portion of the takings was in cash, that Dash kept no record of the amount he took, that he kept no record either contemporaneously or historically showing which takings were gifts and which were for services rendered, demonstrated the lack of openness required by the good faith defense. 9/29/09RP 123-24. Even if the State misrepresented the "claim of title" element of the defense, the fact that the defendant's appropriations were not open and avowed makes this harmless.

iii) No Entitlement

Any alleged error was also was harmless because even if the correct interpretation of the defense allows a claim of entitlement as opposed to title, the facts do not support a claim of entitlement by Dash. Dash kept no accounting or notes of what he was owed or what compensation he had received. 9/29/09RP 15-17. A good faith claim of

title defense applies only to the claim of title in the specific property acquired. *State v. Brown*, 36 Wn.App. 549, 559, 676 P.2d 525 (1984) (citing *State v. Larsen*, 23 Wn.App. 218, 219, 596 P.2d 1089 (1979)). For any particular taking Dash had no idea of whether he was “entitled” to that amount at that time.

iv) Good Faith Claim is inapplicable for the Alternative means of Theft by Deception

Lastly, any alleged error was also harmless because the defendant was convicted under alternate means of theft by deception. The good faith claim of title defense is not a valid defense to a theft by deception. *State v. Casey*, 81 Wn.App. 524, 526-27, 915 P.2d 587 (1996), Any error with regard to this defense did not effect the jury’s ability to convict Dash of Theft by Deception.

d) Prosecutor Did Not Misrepresent the Defense

Finally the claim fails because the prosecutor did not misrepresent the requirements of the defense. The essence of the defendant’s claim is that he believed he had a right to do what he did. But our courts have held that in theft cases, a defendant who is relying on the good faith claim of title defense “must do more than assert a vague right to property.”

A defendant can always claim he thought he had the right to do what he did and a jury can evaluate such a claim in determining whether he acted with the requisite intent. The good faith claim of title defense does not apply to all claims that amount to a claimed lack of intent to deprive, only to a narrow range of such defenses. The prosecutor used the language of the instruction to distinguish when the defense is applicable from when it is not. In doing so he did not misstate the law.

First, case law is clear that the good faith claim of title must be to the specific property appropriated. *Brown*, 36 Wn.App. 559. Dash kept no records of what he was owed or what he had been paid and thus had no claim of title to any particular funds.

Second, Dash's actions could better be described as using self-help to collect a debt. Case law is clear that the good faith claim of title is not applicable to attempts to collect a debt. *State v. Self*, 42 Wn.App. 654, 657-58, 713 P.2d 142 (citing *State v. Brown*, 36 Wn.App. 549, 676, 676 P.2d 525, review denied, 101 Wn.2d 1024 (1984)), review denied, 105 Wn.2d 1017 (1986).

Third, in citing *State v. Mora*, 110 Wn.App. 850, 855 43 P.3d 38 (2002) for the proposition that the good faith claim of title instruction covers claims of entitlement the defense oversteps the holding in *Mora*.

Neither *Mora* nor the case it cited, *State v. Ager*, 128 Wn.2d 85,92, nor the case cited by *Ager*, *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984) use the word “entitled” to mean the claim of entitlement offered in Dash’s defense. The word “entitled” in those three decisions appears to have been used in lieu of the word “title”. There was no indication in any of these cases that the use of the word “entitled” was intended to expand the scope of the defense beyond those claiming title or ownership to the property.

The defense citation to *Mora* at p. 36 of Appellant’s’ Opening Brief is followed by the sentence “Title is not limited to the actual owner of the property. Id.” That latter sentence is not, in fact, supported by *Mora*. In fact, immediately after the statement correctly attributed to *Mora* (“rights of ownership or is entitled to possession”), *Mora* states: On a showing of a good faith belief of *ownership* supported by evidence of legal or factual basis for the belief, the defendant is entitled to a jury instruction on the defense.” *Mora* at 856. (emphasis added) *Mora* uses the words “ownership” and “entitled to possession” without intending any concept beyond ownership or title.

D. Aggravating Factor Special Verdicts

1. Concession of Error

The jury was instructed that they had to be unanimous to find the absence of the two aggravating factors. Since the verdict, our Supreme Court has held such an instruction to be an incorrect statement of the law in *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). The State concedes error. Such error was, however, harmless.

2. Harmless Error

a) Harmless error in *Goldberg* and *Bashaw*

In discussing harmless error in this context it is important to look at *Bashaw* and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), the case cited by *Bashaw*. In *Goldberg* the jury had actually returned a verdict of “no” on the special verdict form (asking whether the State had proved the crime (homicide) was committed because of the victim’s role as a witness). Rather than accept that verdict the judge polled the jurors. One juror indicated they had voted no. (Three actually had.) The judge instructed the jurors to continue deliberations. The next day they returned a unanimous verdict of “yes”.

Bashaw dealt with an evidentiary issue before discussing the special verdict. *Bashaw* was convicted of three counts of delivery of a controlled substance with a sentence enhancement due to the deliveries being within 1,000 feet of a school bus route stop. The distance was

measured by an electronic measuring device with no evidence that the device was properly calibrated. Admission of evidence based on this device was error. This error in admission of evidence was held to be harmless for two of the three counts where the device showed the distance to be 100 and 150 feet, but not harmless where the device showed a measurement of 924 feet between the stop and the delivery.

But when examining this same evidence in the context of the erroneous special verdict instruction, the court engaged in a harmless error analysis and concluded the error was not harmless.

In both cases, on the facts before them, the court could not conclude that the jury verdict would have been the same without the error.

Dash argues that the *Bashaw* court held that this kind of error (unanimity in arriving at special verdict), the error can never be harmless. The court's language suggests a narrower construction is appropriate.

First, the court did not say that instructional errors of this type can never be subject to a harmless error analysis. The *Bashaw* court itself engaged in this analysis.

Second, the language of the court makes it clear the absence of harmless error was specific to the case before it, not to all cases involving similar instructional error.

The result of the flawed deliberative process tells us little about what result *the* jury would have reached had it been given a correct instruction. . . . We cannot say with any confidence what might have occurred had *the* jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. [emphasis added.]

See id. at 147.

"A" and "an" are indefinite articles signaling that the noun modified is indefinite, referring to any member of a group. In contrast "the" is a definite article, signaling that the noun is definite, that it refers to a particular member of a group. Paul Lynch and Allen Brisee, *Using Articles* (Nov. 22, 2010) (accessed December 27, 2010) <<http://owl.english.purdue.edu/owl/resource/540/01/>>. *See also* A.J. Thompson, *A Practical English Grammar*, at 3 (3d ed. 1982).

In short, *Bashaw* held that the instructional error in *that* case was not harmless under the facts in *that* case. By undertaking a harmless error analysis the court tacitly directed that harmless error analysis be undertaken in cases involving similar error.

b) Harmless Error in Dash

In the case before this court the jury returned two special verdicts: vulnerable adult, Special Verdict Form C, CP 258, and major economic offense, Special Verdict Form B, CP 257. The issue is, can this court say

with confidence what the jury verdicts would have been had the jury been properly instructed. *Bashaw* at 148.

i) Vulnerable Adult

This verdict form reads:

Was the victim . . . a person that the defendant knew or should have known was particularly vulnerable or incapable of resistance due to age, disability or ill health, and this particular vulnerability was a factor in the crime

The jury returned a verdict of “Yes”. CP 258.

The four factors contained in this verdict (Did the defendant know, Taylor was particularly vulnerable or incapable of resistance, due to age, disability or ill health, and this vulnerability was a factor in the crime) were proved overwhelmingly during trial. As with the other harmless error analysis arguments in this brief, the court is referred generally to the statement of the case found early in the brief, and more specifically to the following:

- There was no dispute the victim was elderly (89 in 2000, 94 in 2005) 9/23/09RP 79;
- The overwhelming evidence was that the victim suffered from dementia in March 2005 and had had such dementia for most if not all of the charged crime period (see Section III.F above)

- The victim's dementia meant that she was unable to understand complex matters like those involved in this case, 9/28/09RP 79-80, 108, and was vulnerable to being unduly influenced, 9/28/09RP 60-62;
- Any normal person who was around Taylor on a regular basis, like Dash was, would know something was wrong and she couldn't make good judgments, 9/28/09RP 93, 103;

While the court could not say with confidence what the jury would have done in *Bashaw*, this court can make that determination in this case and should conclude, beyond a reasonable doubt and with confidence, that the jury verdict as to Special Verdict C (vulnerable victim) would have been the same absent the error.

ii) Major Economic Offense

The jury was instructed that a major economic offense was identified by consideration of any alternative of:

- Multiple incidents per victim;
- Occurred over a lengthy period of time;
- Defendant used his position of trust, confidence, and fiduciary responsibility to facilitate commission of the crime. Instruction 17, CP 246.

The defendant denied any crime. By finding Dash guilty the jury necessarily rejected his denial. While takings in the very earliest part of

the five+ year crime period (when the church was overseeing Taylor's finances and Dash was billing by specific invoice and being paid by check) were possible to distinguish from the remainder of the takings, there was little to distinguish the later takings from each other, i.e., if Dash's defense was rejected for one taking it was essentially rejected for all. By returning a verdict of guilty to the underlying theft the jury was already making the findings that support one or more of the alternative means of proving a major economic offense. Like with the vulnerable victim special verdict, this court should conclude, beyond a reasonable doubt and with confidence, that the jury verdict as to Special Verdict B (major economic offense) would have been the same absent the error.

c) The Length of Jury Deliberations and absence of Jury Questions

The jury deliberated less than 3 hours to return both the general verdict of guilt and the affirmative findings on the two special verdicts. The actual deliberation time was likely closer to two hours given that the total time included time for the jury to select the foreperson and the time between when they reached their verdict and when it was announced (waiting for all parties to come to court.) SuppCP _____ (Minute Entry, pp. 8-9.) There were no questions asked during deliberations. *Id.*

This court can take cognizance of the speed with which this jury reached the three verdicts in the face of the complex factual and legal issues presented as evidence of the overwhelming nature of the State's case and the absence of any time needed by the jury to persuade recalcitrant jurors to join the three verdicts.

E. Jurisdiction/Statute of Limitations

Dash contends that in a case where a continuing crime is alleged, failure of the jury to find that at least one criminal act occurred within the statute of limitations, i.e., after March 18, 2005, citing *State v. Mermis*, 105 Wn.App.738, 20 P.3d 1044 (2001). Dash does not contend that the State failed to prove a criminal act within this period, merely that the jury did not so find. The State responds as follows:

- A jury finding of jurisdiction is not necessary unless jurisdiction is contested;
- Under the to-convict instruction the jury found that the defendant committed the theft between January 1, 2000 and March 31, 2005, by a series of acts which were part of a continuing course of criminal conduct, and a continuing criminal impulse (a finding not present in *State v. Mermis*, cited by Dash);
- Failure to instruct was harmless where:
 - The evidence of Taylor's incompetence after March 18, 2005 was uncontroverted. Any taking after that time was theft; and
 - By Dash's own admission, the takings made on March 28 and 29, 2005, were unilateral actions on his part to repay himself for money he had fronted

Taylor, repayments done without her knowledge or consent.

1. Jury finding of jurisdiction is not necessary unless jurisdiction is contested

In the context of determining when a factual issue of jurisdiction must be put before a jury (whether the offense occurred on trust land and was thus outside the court's jurisdiction), the court in *State v. L.J.M.* 129 Wn.2d 386, 918 P.2d 898 (1996), stated:

[The State] does not acquire a higher burden of proof [submission of the factual question to the jury] on jurisdiction unless the totality of the evidence before the trial court causes it to reasonably question the State's prima facie showing that jurisdiction exists simply because the site of the alleged crime is within the state of Washington.

See id. at 394. The court said that the amount of evidence that would cause a court to reasonably question whether jurisdiction properly lies in state court was similar to that which a defendant must present when raising an affirmative defense of self-defense. *Id.* The court further said this burden does not require a defendant to persuade the trial court that state jurisdiction is improper, but only that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction.

As stated earlier, the defendant here does not contend that the crime did not occur after March 18, 2005, only that the jury did not so find. There is no dispute that no evidence, argument, or even hint was

presented to the court to the effect that the crime was complete before March 18, 2005. Without such there is no need to present this factual question to the jury. Since Dash's challenge is not to jurisdiction itself but rather the lack of a jury factual finding, there is no error.

2. Under the to-convict instruction the jury found that the defendant committed the theft between January 1, 2000 and March 31, 2005, by a series of acts which were part of a continuing course of criminal conduct, and a continuing criminal impulse (a finding not present in *State v. Mermis*, cited by Dash)

As Dash notes, *Mermis* stated that “Whether a criminal impulse continues into the statute of limitations is a question of fact for the jury.” *Mermis*, 105 Wn.App. at 746. The court concluded that since “[n]either the instructions nor the general verdict form permit us to determine whether the jury convicted Mermis of a crime committed within the available charging period” they must remand. *See id.* at 752.

Unlike the case before this court, the *Mermis* instructions did not require the jury to find the theft occurred during a particular time by a series of acts which were part of a continuing course of criminal conduct, and a continuing criminal impulse. *Mermis* SuppCP ____ (Sub 93, “Court’s Instructions to the Jury”, CP251-266 in 45203-7-I).¹⁵ Absent

¹⁵ The State has filed a Motion to Permit Designation of Clerk’s Papers in *Mermis* and *Crowder* (see n. 4 above).

such a finding the *Mermis* court could not determine whether the jury convicted the defendant of a crime committed within the statute of limitations. In the instant case, by contrast, the jury unanimously found a continuing course of criminal conduct and a continuing criminal impulse “during a period of time intervening between January 1, 2000 and March 31, 2005.” Instruction 7, CP 233.

3. Harmless Error

a) The evidence of Taylor’s incompetence after March 15, 2005 was uncontroverted. Any taking after that time was theft

The State’s alternative theories were based on Taylor’s dementia. As argued in closing, 9/29/09RP 129-30, during a period when Taylor was demented she was not capable of consenting and a taking during that time would be a theft by taking - wrongful obtaining. Because of the nature of their relationship, when Taylor was demented Dash was in a fiduciary relationship with her, a breach of which, together with proof of the other elements of theft would be theft by taking – exertion of unauthorized control. Finally, when Taylor was demented she was not capable of comprehending the truth of any disclosures by Dash justifying any taking and such would be a theft by deception. In short, under the State’s theory of the case, during the period of Dash’s dementia, his takings constituted theft.

The defendant acknowledged obtaining Taylor's money after March 18, 2005. 9/29/09RP 54. There was overwhelming evidence of her dementia at that time (see Section III.F above and Ex. 24). If the jury convicted Dash of anything it would have to include the time when she was most demented, at the end of the charged time. (Dr. Vuletic testified that dementia is a progressive disease, always worse later than it was earlier. 9/28/009RP 90.)

b) By Dash's own admission, the takings made on March 25, 28 and 29, 2005, were unilateral actions on his part to repay himself for money he had fronted Taylor, repayments done without her knowledge or consent

Dash identified takings of cash from Taylor's account via ATM on March 25, 2005 (cash withdrawal of \$141.50), six ATM withdrawals on March 28, 2005 (totaling a little over \$400) and another withdrawal on March 29, 2005. 9/29/09RP 54. He said the withdrawals were to reimburse himself for expenses he had fronted from his VA disability compensation (even though he also said he had no income for 2005, 9/29/009RP 20-22). He said "[A]fter Mr. Forgrave came in, I took my money back out." He said he didn't know if Taylor was aware of advances he'd made on her behalf and he didn't know if she agreed to the withdrawals he'd made. 9/29/09RP 55-56.

By his own words Dash admitted to taking cash from Taylor without her knowledge or permission, to pay himself back money he was owed. Case law is clear that the good faith claim of title is not applicable to attempts to collect a debt. *State v. Self*, 42 Wn.App. at 657-58. In short Dash admitted to acts of theft within the statute of limitations. The absence of an instruction telling the jury they must find what the defendant admitted is harmless error.

V. CONCLUSION

There was no error. If there was error it was harmless. The conviction should be affirmed.

RESPECTFULLY SUBMITTED

DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY

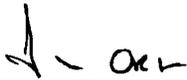
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the *State's Response Brief*, in STATE V. TYRONE DASH, Cause No. 64409-2-1, in the Court of Appeals, Division I, for the State of Washington.

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



IVAN ORTON
Done in Seattle, Washington



Date


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