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September 21, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72067-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

IVAN LJUNGHAMMAR,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence of each of the elements of first degree theft.

2. The State violated the appellant's constitutional right to silence by commenting on his exercise of the right.

3. The trial court erred in failing to grant a mistrial following the prosecutor's arguments urging the jury to find the appellant guilty based on the exercise of his right to silence.

4. The exceptional sentence is not authorized by statute.

5. The restitution order is not authorized by statute.

Issues Pertaining to Assignments of Error

1. To prove first degree theft, the State was required to prove the appellant exerted unauthorized control over the property of another, the appellant's mother. Where the mother granted the appellant her power of attorney, the appellant performed work for the mother, and the mother had a habit of loaning and providing gifts to her children, did the State present insufficient evidence that the transfers of property to the appellant were unauthorized?

2. The State violates the right of an accused to silence when, in a criminal proceeding, the State comments on the exercise of right,

particularly where the State utilizes the exercise of the right to argue the accused is guilty as charged.

Did the State violate the appellant's right to silence where the appellant had a right to silence, the appellant exercised that right, and the State commented on his exercise of that right in arguing he was guilty of the charged crime?

3. Did the trial court erred in failing to grant a motion for a mistrial following the prosecutor's arguments urging the jury to find guilt based on the exercise of the constitutional right to silence?

4. The State's theory at trial was that each co-defendant acted as the other's accomplice. Did the court therefore err in imposing an exceptional sentence where the jury was not instructed, and did not find, that each co-defendant knew the crime was a major economic offense?

5. Did the court err in imposing "joint and several" restitution that failed to reflect the culpability of each individual defendant?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charges, verdicts, and sentence

The State charged Ivan Ljunghammar and his wife Deborah with first degree theft<sup>2</sup> based on a theory the couple made unauthorized use of Ivan's elderly mother's money during the period from 2007 to 2010, while Ivan was acting as his mother's attorney-in-fact under a power of attorney document. CP 1-6. The State alleged the acts constituting the theft were part of a continuing course of conduct, a continuing criminal impulse, and a common scheme or plan. CP 1. The State also alleged two aggravating factors, that the mother, Shelarose Ljunghammar, was particularly vulnerable, and that the crime constituted a major economic offense. CP 1-2; RCW 9.94A.535(2)(b), (d) (aggravating factors).

Ivan and Deborah were tried together, and the jury convicted each as charged. CP 22-23; 7RP 137-41. The court sentenced each to an

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 1/30 & 2/4/14; 2RP – 2/10 & 2/11/14; 3RP – 2/12/14; 4RP – 2/13/14; 5RP – 2/18/14; 6RP – 2/19/14; 7RP – 2/20 & 2/21/14; 8RP – 5/23/14; and 9RP – 6/16/14.

<sup>2</sup> A person is guilty of first degree theft if he or she exerts unauthorized control over the property or services of another exceeding \$5,000 in value, with intent to deprive that person of the property or services. RCW 9A.56.030(1)(a); RCW 9A.56.020(1)(a); see also CP 40 (to-convict instruction).

exceptional sentence of nine months and permitted the sentences to be served in work release. CP 52-59.

Ivan timely appeals. CP 78.

2. Pretrial motion regarding right to silence

Before trial, Ivan and Deborah moved to exclude their pre-arrest silence, i.e., failure to respond to requests by Shelarose's court-appointed guardian to provide an accounting for certain transactions made while the power of attorney document was in effect. Ivan and Deborah argued that the court-appointed guardian for Shelarose was a State actor, police were heavily involved in the initial investigation that precipitated guardianship, and that their Fifth Amendment right to silence had therefore attached. CP 14-21; 1RP 95-99; 2RP 21-30. The State argued the appointed guardian would simply testify that Ivan and Deborah were asked for "an accounting" related to certain transactions. When they did not respond, however, the guardian sought records from other sources. 2RP 25, 27.

The court denied the motion. 2RP 31. The court ruled that the guardian was not a state actor, the guardianship proceedings were civil, and that therefore no Fifth Amendment right attached. 2RP 32. The court observed, however, that the prosecutor had not stated he wished to make any argument "squarely commenting" on the defendants' silence. 2RP 33. The court thereby suggested it might have found such argument improper.

3. Trial testimony

Ivan's mother Shelarose was born in 1928.<sup>3</sup> 3RP 4. Ralph Ljunghammar, Shelarose's oldest son, testified at the trial about the general composition of the family. 2RP 49. Ivan was two years younger, son Keith was three years younger, and son Daryl was 14 years younger than Ralph 2RP 49. Shelarose's husband died in 1998. 2RP 46.

Shelarose owned various rental properties she had obtained through purchase or inheritance. 2RP 51-52. Shelarose and her late husband had also formed a partnership with son Daryl in the early 1990s, and they collaborated on construction of a nine-unit apartment building in north Seattle. 2RP 51; 3RP 5, 72-73.

In addition to rental income from her various properties, Shelarose received Social Security as well as income from a trust formed after her husband died. 2RP 53; 3RP 74. Shelarose was both beneficiary and administrator of the trust. 2RP 53. A family member indicated that at one point, Shelarose's assets were worth \$3.5 million. 6RP 97.

Son Ralph testified that around 2005, he noticed Shelarose was having trouble handling the bookkeeping and other necessary tasks related to her rental properties. 2RP 55. Ivan and Deborah, who lived near

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<sup>3</sup> By agreement of the parties, the court informed jurors that Shelarose was "unavailable" to either party. 5RP 10; 6RP 109.

Shelarose's Haller Lake home,<sup>4</sup> started helping her with the bookkeeping. 2RP 57. On one occasion, Deborah and Shelarose were sitting together at the table at Shelarose's house working on something. Ralph and brother Daryl saw Deborah use a piece of paper to cover what they were working on. 3RP 4, 79. Shelarose announced that they were "doing checks," 3RP 4, or, "[w]e're doing our book work." 4RP 24.

In 2007, Shelarose and her sons met with Shelarose's attorney, Charles Mullavey, to discuss Shelarose's estate planning. 2RP 60-62; 3RP 89-90. Ralph and Daryl believed Shelarose was unable to make decisions with respect to the issues discussed at the meeting. 2RP 61; 3RP 91.

Attorney Mullavey testified at trial. In contrast with the brothers' testimony, he believed Shelarose understood the purpose of the meeting but wanted more time to consider her options. 3RP 109. Shortly thereafter, Mullavey prepared a power of attorney document authorizing Ivan, the attorney-in-fact, to handle financial and medical decisions for Shelarose, the principal. 3RP 111, 120-21; Ex. 1. Deborah was named as the alternate attorney-in-fact, to come into her powers if Ivan become unable or unwilling to perform his duties under the document. Ex. 1 at 1.

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<sup>4</sup> Ivan and Deborah rented a home owned by Ralph that was located near Shelarose's residence. 2RP 56, 58-59; 3RP 22.

The document authorized the attorney-in-fact to make gifts of Shelarose's assets in her "accustomed manner of giving." Ex. 1 at 3 (paragraph "(k)"); 3RP 116, 130-31. According to Mullavey, that could include gifts to the attorney-in-fact, provided it was the principal's custom to make such gifts. 3RP 117. Mullavey believed Shelarose had the mental capacity to sign the power of attorney document. 3RP 120-21.

Ralph and Daryl first learned about the power of attorney in 2008, when Shelarose was hospitalized. 2RP 72; 3RP 98. Ralph was shocked because he had believed Shelarose wanted all the sons to share such responsibility. 2RP 72.

Around that time, Ralph began having difficulty contacting his mother by telephone. He believed Ivan or Deborah screened calls. 2RP 72-73. In addition, Ivan and Deborah had the locks at Shelarose's home changed. 2RP 73. Later, after discovering Shelarose was no longer living at that residence, Ralph contacted Adult Protective Services. 2RP 75.

Daryl testified Ivan began helping Shelarose maintain her rental properties in 1996, around the time Daryl's role diminished. 3RP 77. In 2002 or 2003, Daryl began to notice his mother was not consistently collecting rent from tenants. In addition, she had failed to prepare taxes related to the trust for a number of years. 3RP 78-79. This was

concerning to Daryl because Shelarose's trust was a part-owner of the apartments he co-owned. 3RP 138.

According to Daryl, Deborah began to help Shelarose with her bookkeeping, while Ivan continued to work to maintain Shelarose's properties. 3RP 79-81; 4RP 29-30 (testimony of Daryl's wife). Daryl, however, banned Ivan from working on the nine-unit apartments after a disagreement about a painting project. 3RP 81-82. Daryl also noticed that Shelarose's other rental properties were not being rented out timely. 3RP 142.

Like Ralph, Daryl began to have trouble contacting Shelarose, and he became concerned. 3RP 101-02; see also 4RP 27 (testimony of Daryl's wife regarding difficulty contacting Shelarose). Like Ralph, Daryl noticed Shelarose's house was becoming increasingly cluttered, but Ivan said he would address the issue. 4RP 14-15. Daryl ultimately called the city to complain about junk cars and construction material left around his mother's yard. 4RP 16.

Ralph testified Shelarose was a very modest in her gifts to children and grandchildren. 2PR 79-80. But Daryl acknowledged Shelarose had a history of gift-giving and loaning money. For example, Shelarose had loaned him \$25,000 for the down payment on his first home. 3RP 147. He believed his 30 percent share of the nine-unit apartments was

commensurate with his contribution to the project. 4RP 6-10. However, he later acknowledged that he had underestimated the property's value. 6RP 156-58. Shelarose also paid for Daryl and his children to go on mission trips abroad. 3RP 146.

Son Keith also testified at trial. He had lived with Shelarose rent-free most of his adult life. 3RP 41-42, 58. Shelarose continued to do Keith's laundry and make him dinner even though Keith was in his 50s. 3RP 63-64. Keith acknowledged Shelarose lent him \$10,000 in 2005, but he was never able to pay her back. 3RP 43. While Keith was living with Shelarose, Ivan and Deborah would visit Shelarose for two or three hours at a time; they would eat meals with Shelarose and Deborah would assist Shelarose with her bookkeeping. 3RP 44-45.

As of 2008, Ivan and Deborah asked Keith to start paying rent or leave Shelarose's house. 3RP 51-52. Keith left, leaving an extraordinarily messy room. 3RP 52, 58; 6RP 127.

APS investigator Heidi Wilson met Shelarose in September of 2009. Shelarose was in good physical health but seemed confused about Wilson's role. 4RP 42, 45. Wilson met a woman named Karen Lura at Shelarose's house the day of her visit. Lura said she was Shelarose's caregiver 30 to 40 hours a week. 4RP 43.

After speaking with Daryl in September of 2009, Seattle police detective Pamela St. John went to Shelarose's home to do a welfare check. 6RP 45. While poking around the property, she met Deborah and Ivan, who had arrived in a car. 6RP 48, 105. At first, Deborah and Ivan told St. John that Shelarose was on vacation. But they later said she was with Lura and provided the address for a welfare check.<sup>5</sup> 6RP 51.

St. John set up an interview with Shelarose a few days later, which Wilson also attended. 6RP 68, 70. Ivan showed St. John around the Haller Lake house and later provided St. John a stack of Shelarose's financial documents. The documents were, however, out of date. 6RP 73.

APS petitioned the court asking that Shelarose be subject to a guardianship. 4RP 107. A private non-profit agency, Puget Guardian Service (PGS), was appointed guardian of Shelarose's "person and estate." 2RP 76; 4RP 103.

According to PGS director Karen Newland, one goal of a guardianship proceeding is to "marshal" the ward's assets. 4RP 107. In particular, Ivan and Deborah were asked to provide an "accounting" from the time Ivan served as his mother's power of attorney. 4RP 110; 5RP 103. The guardianship court eventually ordered Ivan and Deborah to

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<sup>5</sup> Detective St. John acknowledged patrol officers later performed a welfare check, which revealed Shelarose was in good health. 6RP 102.

prove an accounting, issuing a “citation.” 4RP 111-13. They never did so. 4RP 125-26.

PGS obtained bank records for Shelarose’s various accounts. 4RP 114. Newland identified transactions over \$100<sup>6</sup> that did not appear to benefit Shelarose. She also identified transactions for which she desired additional information. 4RP 116-17. For example, although some of the checks indicated “work” and listed a rental property address in the memo field, Newland wanted documentation of the work performed. 4RP 125. In addition, many checks were labeled “loan” in the memo field. 5RP 111. Newland deemed all such transactions “questionable” and compiled them on a series of spreadsheets. Ex. 5; 4RP 121-31. Any transactions Newland initially deemed “questionable” retained that status unless additional information was provided by Ivan and Deborah. 5RP 89.

Ivan ultimately signed a “confession of judgment” in the guardianship proceeding agreeing to pay PGS \$160,000. The amount included approximately \$26,000 in attorney and guardian fees. 4RP 131-32; Ex. 6.<sup>7</sup>

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<sup>6</sup> Newland testified that the \$100 cutoff was standard practice in her field. 4RP 146-47.

<sup>7</sup> According to Newland, as part of the settlement, Ivan agreed that he would not inherit from his mother’s estate. 4RP 140. The document itself, however, does not explicitly refer to any inheritance. Ex. 6.

Rebecca Tyrell, a prosecutor's office employee, also examined Shelarose's financial records and produced various spreadsheets eventually admitted at trial. 5RP 134-35; 6RP 23. The State introduced through Tyrell a spreadsheet listing all payments from Shelarose's accounts to Deborah and Ivan's accounts, and vice-versa, reflecting a net transfer of \$133,811.26 to Deborah and Ivan. 5RP 150-52; Ex. 9. The State also introduced a spreadsheet of Shelarose's payments to caregiver Karen Lura over a seven-month period, totaling \$32,370.30. 5RP 155; Ex. 11. Tyrell pointed out that during the same period, additional checks were written to Ivan and Deborah for "mom's care" or similar purpose. 5RP 156.

Tyrell presented a spreadsheet listing charges to Shelarose's credit card over a single year while the power of attorney was in place, including significant finance charges. Ex. 7; 5RP 135-41. Tyrell tracked a substantial "certificate of deposit" owned by Shelarose that was ultimately transferred to Deborah and Ivan's bank account. Ex. 13, 14; 6RP 5-12. Tyrell also prepared documents highlighting withdrawals from Shelarose's accounts and comparing the withdrawal dates to the dates Deborah and Ivan paid their mortgage. Ex. 10; 6RP 13-17.

Neither Ivan nor Deborah testified, but Deborah presented three witnesses. A longtime tenant of one of Shelarose's rental properties

testified that Ivan and Shelarose were frequent visitors to the property and that Ivan had performed various projects to maintain the property. 6RP 118-19. Shelley Robb, a nail salon owner, testified that both Deborah and Shelarose were clients. 6RP 122-23. Deborah and Ivan paid Robb and her husband, who also testified, to clean and organize Shelarose's home and yard. 6RP 124-25, 128, 130, 148.

4. Closing arguments and resulting motion for mistrial

In closing, the State argued that Ivan and Deborah had not provided an accounting when asked. In addition, while not dispositive, the confession of judgment signed by Ivan was evidence supporting the charge. 7RP 54-56.<sup>8</sup> Regarding accomplice liability, the State argued that each defendant acted as the other's accomplice. 7RP 59. The State also argued that the spending from Shelarose's accounts was inconsistent with her customary practices and was, rather, for Ivan and Deborah's benefit. 7RP 60-62. In addition, Shelarose's diminishing cognitive abilities made her vulnerable to the theft. 7RP 62-64. The State argued that even though Deborah was not the named power of attorney, the major economic offense aggravator applied to both defendants. 7RP 65.

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<sup>8</sup> The prosecutor also stated in his opening remarks that "despite repeated requests [the co-defendants] failed to produce records." 2RP 42. The court denied the parties' motions for a mistrial, but it suggested that the State would violate the court's pretrial ruling if it argued the jury should infer guilt from the failure to respond. 2RP 42-43.

Ivan's counsel argued in closing that although the brothers were upset that Shelarose chose Ivan for the power of attorney, the document was drawn up by a lawyer with experience working with Shelarose who had no concerns regarding her competency. 7RP 68-70. Ivan characterized Daryl's concerns as hypocritical and the product of greed rather than concern for his mother's well-being. 7RP 73-75.

Ivan also argued that he was overwhelmed by the task of serving as his mother's attorney-in-fact. But the work he performed on her properties nonetheless merited substantial compensation. 7RP 90. While he had failed at the task in many ways, he had been attempting to maintain and manage Shelarose's rental properties while maintaining his own full-time employment. 7RP 77. On the other hand, PGS had multiple trained employees assigned to the estate. 7RP 77. Moreover, post-power of attorney, PGS provided substantial compensation to the other brothers for performing tasks similar to those he and Deborah had undertaken. For example, Daryl had been paid substantial sums to care for Shelarose and to clean out her Haller Lake house for its eventual sale. 7RP 77.

In addition, the gifts and loans made to Ivan and Deborah did not reflect their intent to deprive Shelarose of her property. 7RP 78. Shelarose was very wealthy. 7RP 77-78, 89. Although the other brothers downplayed her generosity and highlighted her frugality, Shelarose was,

in fact, very generous with her children. 7RP 67-68. For example, she had lent Keith \$10,000 and Daryl \$25,000. 7RP 70, 89.

PGS had also determined that substantial gifts to the brothers were an appropriate use of Shelarose's property. 7RP 77-78. Ivan and Deborah had, moreover, made good faith attempts to repay Shelarose for loans. 7RP 89; Ex. 9 (listing payments from Ivan and Deborah's bank accounts to Shelarose).

Regarding the confession of judgment, Ivan argued it reflected his acknowledgment that he had failed to keep his mother's finances in order and provide an accounting. But such a breach did not necessarily reflect an admission to theft. 7RP 81. Consistent with jury instruction 12,<sup>9</sup> Ivan's counsel reminded jurors the confession did not satisfy the proof beyond a reasonable doubt threshold of criminal proceedings. 7RP 80. Ivan had no duty to provide information in a criminal proceeding. Under the law, the State, not Ivan, must be penalized for any gaps in the evidence. 7RP 80; see also 7RP 87 (arguing State failed to prove credit card charges were not for Shelarose's benefit). To the extent that transactions were deemed "questionable," it was the State's sole

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<sup>9</sup> CP 38 (instructing jurors a guardianship is a civil proceeding and the standard of proof is a preponderance, *i.e.*, a proposition need only need proven to be more probably true than not.).

responsibility to demonstrate the transactions were the result of intent to deprive rather than poor recordkeeping. 7RP 89-90.

Deborah's attorney made similar arguments but also pointed out she was not the named power of attorney. 7RP 91-111.

On rebuttal, developing a theme, the State argued that although Newland was not the State's "star witness," she had "a lot to add" including the defendants' refusals to give an accounting. 7RP 116. A defense objection was overruled. 7RP 116. The State then argued that, while other witnesses offered relevant information, Shelarose's bank records were the real "star witness." 7RP 116-17. The State also argued the confession of judgment, while not dispositive, was evidence Ivan had committed theft. 7RP 119.

The prosecutor also argued Ivan never responded to the guardian or guardianship court despite multiple requests and orders to do so. And even though Ivan had argued at trial that some of the transfers of money represented gifts or loans, his repeated failure to offer that explanation to the guardian indicated his claims were false. The court repeatedly overruled defense objections that such comments were a comment on

Ivan's right to silence and/or improperly shifted the burden. 7RP 121-22.<sup>10</sup>

After the jury was excused, Ivan and Deborah moved jointly for a mistrial, arguing in part that, in rebuttal, the State improperly commented on the right to silence. 7RP 124-30. The court denied the motion, stating that the prosecutor had referenced "what had occurred, not what did not occur" and that, in any event, the jury instructions made it clear the Ivan and Deborah had no duty to produce evidence. 7RP 131-32.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF EACH OF THE ELEMENTS OF FIRST DEGREE THEFT.

Pursuant to RAP 10.1(g)(2), the appellant adopts assignment of error 1, related issue 1, and, in particular, the argument set forth at pages 11-12 of the co-appellant's opening brief.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

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<sup>10</sup> For the convenience of this Court, a portion of the State's rebuttal, 7RP 116-22, is attached as an Appendix.

Based on the facts set forth above, and for the reasons stated in the co-appellant's brief, the State presented insufficient evidence of first degree theft because it failed to prove the transfers of money from Shelarose to Ivan and Deborah were unauthorized. This Court should reverse Ivan's theft conviction.

2. THE STATE VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHT TO SILENCE BY URGING THE JURY TO FIND HIM GUILTY BASED ON HIS EXERCISE OF THE RIGHT.

Pursuant to RAP 10.1(g)(2), the appellant adopts assignment of error 2, related issue 2, and the argument set forth at pages 12-24 of the co-appellant's opening brief.

The State and federal constitutions protect the right of an accused to remain silent. Griffin v. California, 380 U.S. 609, 614-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965);<sup>11</sup> State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).<sup>12</sup> When an accused takes the stand, his pre-arrest silence may be used to impeach his testimony, but his silence can never be

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<sup>11</sup> The Fifth Amendment states, in part, no person "shall . . . be compelled in any criminal case to be a witness against himself." This provision applies to states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

<sup>12</sup> Article I, section 9 states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself."

used as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008)

The co-appellant's arguments regarding the right to silence apply with equal force to Ivan's case. Commenting on the silence of an accused is impermissible where, as here, the comment is "used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing Tortolito v. State, 901 P.2d 387, 391 (Wyo.1995)).

The use of pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment and is not merely an evidentiary issue. Easter, 130 Wn.2d at 235. Constitutional error may be deemed harmless only if this Court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Burke, 163 Wn.2d at 222 (citing Easter, 130 Wn.2d at 235).

The State cannot meet its burden. Although Ivan signed a confession of judgment, he made a strong case that the "confession" related to mismanagement and poor recordkeeping rather than any intent to deprive his mother of property. 7RP 81. Simply put, the power of attorney put Ivan in over his head, granting him powers he did not have

the time or training to properly exercise. The confession of judgment reflected no more than this and, as a matter of law, was not proof of guilt beyond a reasonable doubt. 7RP 81-82.

In many ways, moreover, the financial records were far from being the State's "star witness." They were, rather, ambiguous. For example, list of charges on the credit card summary prepared by the prosecutor's office did not specify who had benefitted from the expenditures. Ex. 7. A number of checks indicated they represented compensation for "work." Exs. 5, 9. The guardian testified she deemed any such transactions over \$100 "questionable" simply because she wanted more documentation. 4RP 124.

But in a prosecution for theft, one in which the alleged victim explicitly authorizes the accused to make expenditures on her behalf, ambiguity is not sufficient: It is the State's responsibility to demonstrate beyond a reasonable doubt that the expenditures were not for her benefit. See State v. Traweck, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986) (defense has no burden to present any evidence). Considering that criminal proceedings were looming at the time of the guardianship, the State's comments urging jurors to infer guilt from Ivan's silence, as well as from his failure to assert the arguments ultimately asserted in his

criminal trial, violated his constitutional right to silence. 7RP 116-22. A new trial is therefore required. Burke, 163 Wn.2d at 206, 223.

3. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL FOLLOWING THE STATE'S IMPROPER ARGUMENTS IN REBUTTAL.

For similar reasons, the court erred in denying Ivan and Deborah's motion for a mistrial following the prosecutor's extensive comments on the exercise of their right to silence.

A prosecutor is a quasi-judicial officer who has a duty to ensure an accused is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id.; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

Where counsel timely objects or timely moves for a mistrial based on prosecutorial misconduct, the issue is preserved for appellate review. State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014). This Court's prosecutorial misconduct inquiry therefore consists of two prongs: (1) whether the prosecutor's comments were improper; and (2) if so, whether the improper comments caused prejudice. Id. at 431.

This Court reviews a trial court's denial of a motion for mistrial for abuse of discretion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514

(1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Corona, 164 Wn. App. 76, 78-79, 261 P.3d 680 (2011) (citing State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006)). In considering whether a trial court applied an incorrect legal standard, this Court reviews de novo the choice of law and its application to the facts in the case. Corona, 164 Wn. App. at 79.

The trial court abused its discretion for two reasons. First, the Court observed, incorrectly, that the prosecutor was simply arguing that Ivan's acts—rather than his silence—indicated guilt. 7RP 132. This is a manifestly unreasonable interpretation of the State's argument. The State clearly argued, for example, that Ivan's failure to explain himself during the earlier guardianship proceeding indicated he was guilty in the criminal proceeding. E.g. 7RP 120 (if Shelarose in fact wished to loan Ivan money, "why didn't [Ivan and Deborah] just say so?"); 7RP 121 ("When the guardian was showing him these checks, . . . why not at that point say, yeah, that's a loan. . . .[w]ell, that's a gift."); 7RP 121 ("[T]here were repeated requests for bank records, which the never provided, for an accounting, for explanations of what these amounts were. Not one."). The

prosecutor's argument invited the jury to infer guilt based on Ivan's exercise of a constitutionally protected right, rather than simply from his actions. Burke, 163 Wn.2d at 223.

Second, as argued by the co-appellant and as adopted by Ivan in section 2 above, the trial court erred in finding no right to silence attached during the guardianship proceedings, even though it was clear there was a strong possibility of impending criminal liability. Thus, the court's ruling was grounded on an erroneous view of the law. "[T]he inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is natural and irresistible." Griffin, 380 U.S. at 614. But "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." Id.

The court abused its discretion in denying the appellants' motion for a mistrial. A new trial is therefore required. See Burke, 163 Wn.2d at 209-10, 223 (holding trial court abused its discretion in denying motion for a new trial based on State's comments on accused person's right to silence).

4. THE EXCEPTIONAL SENTENCE IS NOT AUTHORIZED BY STATUTE.

Pursuant to RAP 10.1(g)(2), the appellant adopts the co-appellant's assignment of error 3, related issue 3, and the argument set forth at pages 24-30 of the co-appellant's opening brief.

As the State argued, each co-defendant acted as the other's accomplice. 7RP 59. Indeed, although the power of attorney document named Ivan as the attorney in fact, the evidence showed Deborah was more involved with the bookkeeping and check-writing than Ivan, who was more involved with maintenance of the rental properties. E.g., 3RP 79-81. Moreover, the jury was not required to find Ivan's individual conduct formed the major economic offense aggravator. Brief of Co-Appellant at 26-27. As such, the aggravator must be vacated and the case remanded for resentencing. Id. at 27-30.

5. THE RESTITUTION ORDER IS NOT AUTHORIZED BY STATUTE.

Pursuant to RAP 10.1(g)(2), the appellant adopts the co-appellant's assignment of error 4, related issue 4, and the argument set forth at pages 30-36 of the co-appellant's opening brief. As stated above, the State's theory was each co-defendant acted as the other's accomplice. And although the power of attorney document named Ivan as the attorney in fact, the evidence showed Deborah was more involved with the

bookkeeping than Ivan. The co-appellant's arguments apply with equal force to Ivan's case.

D. CONCLUSION

The trial court erred in finding that no right to silence attached during the guardianship despite the strong possibility of impending criminal proceedings. The State was then permitted to make a number of unconstitutional comments on the exercise of the appellant's right to silence, denying the appellant a fair trial. The State cannot show the resulting constitutional error was harmless beyond a reasonable doubt. For similar reasons, the court erred in denying the appellant's motion for a mistrial. In any event, the case should be remanded for resentencing and for a new hearing on restitution.

DATED this 21<sup>ST</sup> day of September, 2015.

Respectfully submitted,

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\_\_\_\_\_  
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Attorneys for Appellant

# APPENDIX

1 can get yours. They can say I represent --

2 MS. WIGGS-MARTIN: Object to that, your Honor.

3 THE COURT: Overruled.

4 MR. PETERSON: They can get Shelarose's records  
5 because they are representing her, but that's all they  
6 could get. So they are kind of not the star witness in  
7 the case, even though they have a lot to add, including  
8 all of the refusals by the defendants to provide any  
9 records or to give an accounting and confession of  
10 judgment and all of that.

11 MS. WIGGS-MARTIN: I would object to the  
12 characterization, your Honor.

13 THE COURT: Overruled.

14 MR. PETERSON: But they don't have the big  
15 picture, either. If they say, well, we got the records.  
16 Actually, they were obtained by subpoena, not by  
17 Ms. Tyrell. She received them from me. So we were able  
18 to subpoena the bank records, the defendants'. So  
19 Ms. Tyrell sorted through those great piles of records to  
20 come up with summaries of information that we thought  
21 would be helpful for you to decide the case, a way to look  
22 at it, at one or two pages instead of 2,200 pages. And  
23 all of those records were provided to everybody. The  
24 defense had them. Everybody has access to them.

25 MS. WIGGS-MARTIN: I'm going to object to this as

1 burden shifting, your Honor.

2 MR. PETERSON: I'm not saying they have to prove  
3 anything, I am saying they have the records.

4 MS. WIGGS-MARTIN: Burden shifting I maintain the  
5 objection.

6 THE COURT: The jurors are reminded yet again  
7 that the lawyers' remarks are not evidence. The ultimate  
8 deciders of evidence would be the jury.

9 Please continue.

10 MR. PETERSON: So is it Ms. Tyrell. , she was my  
11 star witness. Well, she's pretty good. She saw a lot in  
12 those records. She found all kinds of things, including  
13 the CD. She figured out where that \$13,500 cashier's check  
14 went from, it was a CD. She found that out by looking at  
15 the bank statements and saw that. And that was where that  
16 money came from, the records. But she's not really -- all  
17 she can do is show you what she saw.

18 The real star witness in this case is the bank  
19 records. They basically say -- they aren't inheriting any  
20 money, they don't have a dog in this fight. They are just  
21 records created in part by the defendants, showing what  
22 happened to Shelarose Ljunghammar's money. That is my  
23 best witness.

24 Deborah, of course, she doesn't have power of  
25 attorney and I hope I didn't say she did. She is the

1 alternate, but that doesn't mean she's not also a person  
2 authorized by agreement to have access to Shelarose's  
3 money. So circumstances will show you that she was able  
4 to help her with her finances. She was able to do like  
5 those transfers from bank statements and some of the  
6 checks and other things that you saw that--

7 MR. NEWCOMB: Your Honor, I object to that.  
8 That's not in evidence. That's not what the evidence --  
9 that is not arguing from the evidence.

10 THE COURT: The objection is overruled.

11 MR. PETERSON: The 13,500 dollars, those kinds of  
12 things. She was not -- she had absolutely no authority to  
13 take any of Shelarose's money and spend it on anything.  
14 Absolutely, Ivan, who has power of attorney, expended for  
15 Shelarose. He's the guy to pay some of her money to get  
16 the things that benefit her. Deborah had no authority to  
17 make any transactions with Shelarose's money.

18 I'm probably about done. Oh, the defense  
19 arguments sort of shift between these were gifts and these  
20 were loans. I don't think there's been any evidence that  
21 any of the money that Ivan received is a gift. Yet none  
22 of the checks say Christmas or happy birthday, or a gift  
23 to Ivan or anything else. They say nothing. Some of them  
24 say loan. That could be that they are loans. Also  
25 possible that to write loans on the check somehow

1 justifies them taking the money. One of the checks I  
2 pointed out to you during my opening remarks said balance  
3 due (inaudible) effort to conceal the nature of it. Of  
4 course, they would were due no money from Shelarose at  
5 that point. They had already clearly taken thousands of  
6 dollars out of her account in supposed loan. So when they  
7 talk about a pattern of gifting, it's interesting that if  
8 she had some pattern of gifting to her sons, why didn't we  
9 find any checks to any of the other sons during this time  
10 period? There are a couple to Ralph , small amounts. So  
11 how can that be a pattern of gifting? Unless Shelarose's  
12 pattern of gifting was just give great sums of money to  
13 the one son who just happens to have power of attorney, it  
14 does not prove she had a pattern of gifting or that they  
15 of any right to take that money.

16 Let's see. Guardianships were totally advised.  
17 I don't recall the guardian saying that they were  
18 interested in prosecuting anybody. They were trying to  
19 marshal assets, Shelarose's assets. To suggest that they  
20 were biased or they were not a not for profit, it's  
21 ridiculous. There's no evidence to that.

22 Now, under the confession of judgment, I might  
23 have said this, again, and I apologize, but I want to make  
24 this very clear. It doesn't prove the crime. It's  
25 evidence of the crime. It's like any confession. If you

1 have somebody who has confessed to a murder, you don't  
2 have a body, you don't have a crime. You actually

3 MS. WIGGS-MARTIN: Object to that.

4 THE COURT: Overruled.

5 MR. PETERSON: The confession and the crime. We  
6 have mean tea of evidence of the crime. And we also have  
7 the confession. It kind of boils down to this. So the  
8 defense is, when all the rest of the smoke and dust  
9 clears, Shelarose is very generous woman, she wanted to  
10 give Ivan a loan, she wanted to loan it to him or gift it  
11 to him or something. So if that's true, why didn't they  
12 just say so? Why didn't he say so?

13 MS. WIGGS-MARTIN: I'm sorry. I am going to  
14 object to this kind of argument your Honor. This is very  
15 objectionable.

16 THE COURT: The objection is overruled.

17 The jurors are reminded given the context of  
18 closing argument.

19 MS. WIGGS-MARTIN: Your Honor, I'm going to object  
20 on the basis of burden shifting.

21 THE COURT: Understood.

22 MR. PETERSON: The evidence was that --

23 MS. WIGGS-MARTIN: And a comment on my client's  
24 right to remain silent and not testify, which is in the  
25 your jury instructions. He has no duty.

1 THE COURT: Again, the jurors have the jury  
2 instructions and are the ultimate determiners of that.

3 MR. PETERSON: When the guardian was showing him  
4 these checks, (inaudible) that why not at that point say,  
5 yeah, that's a loan. She loaned me that money.

6 MS. WIGGS-MARTIN: Objection. Objection based on  
7 motions in limine.

8 THE COURT: Objection is overruled.

9 MR. PETERSON: Well, that's a gift. Why not say  
10 that? There wasn't just once, there were repeated  
11 requests for the bank records, which they never provided,  
12 for an accounting, for explanations of what these amounts  
13 were. Not one.

14 MR. NEWCOMB: Your Honor I absolutely would object  
15 to this. This is burden shifting at this point. The  
16 prosecutor is talking about things that she could be  
17 providing.

18 THE COURT: Thank you. The objection is  
19 overruled.

20 MR. PETERSON: (inaudible) And then after not  
21 providing any records, after not offering any explanation,  
22 after not providing an accounting, despite being ordered  
23 to do so by the court, after --

24 MS. WIGGS-MARTIN: Objection to not providing any  
25 explanation, your Honor.

1 THE COURT: The objection is overruled.

2 MR. PETERSON: On the eve of the trial, signs a  
3 confession of judgment. That's why that's evidence -- the  
4 reason that you have this is that it's evidence. If what  
5 they are arguing to you is then we'd know it by now.

6 MS. WIGGS-MARTIN: Object to that kind of  
7 argument, your Honor. Burden shifting.

8 THE COURT: The objection is overruled.

9 MR. PETERSON: Okay. I think I've said my piece,  
10 probably more than once. So just checking my notes here  
11 see if I thought of anything, but I think that is all I  
12 have. Thank you very much.

13 THE COURT: Ladies and gentlemen, I have a couple  
14 instructions for you now that apply to the entire panel.  
15 One particular is -- this instruction will apply to jurors  
16 13 and 14.

17 So member of the jury, Ms. Weisor will be  
18 providing you with the official copy of the court's  
19 instructions on the law, your individual note pads, as  
20 well as the verdict forms to be used in this case. You  
21 will then subsequently be provided with all exhibits that  
22 I have admitted into evidence without limitation. Now, do  
23 not begin your deliberations until you have chosen a  
24 presiding juror and all of you are present. You should  
25 deliberate only when all of you are present. This means,

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

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STATE OF WASHINGTON )

Respondent, )

v. )

IVAN LJUNGHAMMAR, )

Appellant. )

COA NO. 72067-8-I

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IVAN LJUNGHAMMAR  
P.O. BOX 23632  
HIGHWAY 99, SUITE F-119  
EDMONDS, WA 98026

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2015.

X *Patrick Mayovsky*