SUPREME COURT NO. 100302-1

NO. 80848-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HELGA KAHR,

Petitioner.

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

The Honorable Kristen Richardson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Helga Kahr, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Kahr, no. 80848-6-I, entered on August 16, 2021. Reconsideration was denied on September 15, 2021. Copies of the opinion and order denying reconsideration are attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Due process guarantees all accused persons the right to present evidence in their defense. Kahr's defense to the charge of theft was that, as guardian, she used funds from her ward's estate to invest in her home with the understanding that he would profit when the home was later sold or when he moved out. To demonstrate her intent to invest, Kahr sought to present evidence that she repaid the all the invested funds to the ward's estate shortly after he moved out. Was she denied her right to present her defense when the court excluded this evidence?

C. STATEMENT OF THE CASE

1. **Kahr became Barrett's guardian and gave him a home when his family was unable to do so.**

After many years of association, Helga Kahr and Jeffrey Barrett were akin to family. RP 1285. In October 1995, Barrett had suffered a traumatic brain injury in a collision with a drunk driver. RP 973-75. In 1996, Kahr became his attorney, and has been involved with his life ever since. RP 1276-77; CP 126. When no other attorney would take on Barrett's case, Kahr successfully challenged the existing law and ultimately forced the tavern that overserved the drunk driver to pay nearly a million dollars. RP 982, 984, 1280-82, 1587; Barrett v. Lucky Inc., 152 Wn.2d 259 96 P.3d 386 (2004). Kahr spent 10 years litigating Barrett's case and ensuring that he received compensation. RP 1278, 1283. She also represented Barrett when he and his wife divorced shortly after the accident. RP 1283.

Barrett's brain injury left him unable to manage his own affairs. RP 974-75. His brother John Barrett was appointed guardian in 1997. RP 947, 1277. That year, John Barrett

successfully moved to have the guardianship files sealed from public view, available only to the guardian, the standby guardian, and attorneys for the ward and guardians except by court order. RP 398-403. Also in 1997, Barrett was adjudicated incompetent to testify by deposition. CP 34. The ruling resulted after a psychological assessment showed permanent and extreme deficits in Barrett's ability to recall or relate information and a tendency to confabulate, i.e. to make up stories and believe them to be true. CP 40, 51, 81-83.

In 2014, John Barrett became unable to continue as guardian. RP 952. When no other family member stepped up, Kahr agreed to take on the duties of caring for Barrett and managing his affairs. RP 993-94. Kahr was appointed guardian in October 2014. RP 1292; Ex. 1. At the time, Barrett lived with his mother. RP 1294-95. However, the family quickly realized that situation was untenable. RP 991-92. Barrett's father had recently passed away, and his mother's health was deteriorating. RP 991-92.

Barrett loathed the idea of assisted living and longed to be a homeowner again. RP 1063-64. Knowing that Seattle area property could be both a good investment and a way to provide him with a place to live that would be his own, John Barrett and Kahr had both explored options to combine investment and housing for Barrett. RP 962-63, 1069. In 2015, Kahr obtained a court order from the guardianship court unblocking the estate funds and authorizing her to invest in real estate without prior court authorization. RP 1295; Ex. 1 (tabs 14, 15). This was necessary because Seattle area homes were being sold extremely quickly. RP 1298. The time necessary to obtain prior court approval before making an offer would likely lead to the home being sold to someone else in the interim. RP 1298-99. Under the order, Kahr was required to file a quarterly accounting report for any quarter in which more than 10 percent of the estate's assets were invested. RP 1300.

On January 6, 2016, Barrett's mother was suddenly moved into assisted living, about six months earlier than anticipated. RP 1303. His father's death made his mother's infirmities more evident than they had previously been. RP 992. The family explored the possibility of Barrett simply buying his mother's home. RP 990. Unfortunately, under the homeowner's agreement in the retirement community, he could neither buy the home nor continue to live there without his mother. RP 990.

With no family member able to provide a place for Barrett to live, Kahr again stepped into the breach. RP 998-99. She and John Barrett discussed the possibilities with Barrett: assisted living, a hotel, or, Barrett could stay with Kahr while they worked something out. RP 1305. That was the option Barrett preferred. RP 1305. On January 6, 2016, he moved into Kahr's Seattle home. RP 1305-06.

2. Kahr invested some of Barrett's estate in her Seattle home in order to benefit them both.

Meanwhile, Kahr was becoming overwhelmed with her own life. She had taken on several significant cases from a

retiring attorney friend. RP 1325. Her own mother, who lived in Oregon, was in poor health, and her brother could no longer care for her due to his own illness. RP 1325. During a period of health problems when she was unable to work, Kahr fell behind on her mortgage payments from 2009 to 2012. RP 1346. Several attempts to renegotiate had failed. Finally, she planned to sue the lender to prevent the foreclosure trustee sale, which was scheduled for September 9, 2016. RP 1324-25. In January 2016, her long-time assistant left, and Kahr was without an assistant for several months. RP 1352.

In August 2016, she decided to invest some of Barrett's estate in her own home, providing a profitable short-term investment for him while protecting the home where they both lived. RP 1329, 1350. To make him feel included and keep him informed, she wrote an agreement, which she reviewed with him. RP 1330-32; Exs. 15, 16. He testified he signed after his brother read it and told him it was a good deal. RP 744-46. Under the agreement, Barrett would receive a 40 percent interest in Kahr's

home in exchange for investment in the amount of the remaining balance on her mortgage. RP 1329; Ex. 16. The principal and profit was to be paid to Barrett when the house was sold or when he decided to move elsewhere. Ex. 16. The arrangement seemed to be a win-win. RP 1350.

She phoned her lender, learned the pay-off amount, and transferred that amount, approximately $280,000, from the guardianship estate on September 3, 2016. RP 827-29, 866-69. On September 7, she learned of additional fees and transferred another $2,002. RP 866-69. The funds were earmarked in the bank statements for Barrett's guardianship accounts as a real estate investment. RP 866-67, 1337; Ex. 28.

In February 2018, 14 days after Barrett moved out of Kahr's home, the entire amount was repaid to Barrett's estate. CP 16; RP 881. A few months later, Kahr paid Barrett an additional $29,740 in profit on the investment. RP 1390-92, 1491; Ex. 47.

3. Overwhelmed, Kahr got behind on paperwork, which led to an investigation.

In August 2017, Thomas Deacon, a volunteer with the Snohomish County guardianship monitoring program, noticed Kahr had not filed the annual accounting for 2016. RP 308, 313-15. Upon being contacted in August 2017, Kahr filed the accounting, which she admitted was late, having been due by court order in May. RP 331-32, 1432-33. In that accounting, she noted an expenditure of $282,673.90 for an interest in what she described as a real estate investment trust. RP 332; Ex. 1 (tab 22). When asked for documentation, Kahr responded that she believed it had already been filed with the court, but if it had not, she would see that it was filed. RP 337-38. In her testimony she explained that she answered Deacon's email from Oregon without access to her files. RP 1361. Kahr informed Deacon she would be available after September 12, 2017, to meet and discuss the 2016 accounting. RP 1364, 1369.

Deacon could find no documentation of a real estate investment trust. RP 338. At trial, Kahr explained she had begun drawing up documents to officially transfer a 40 percent interest in her home but had become concerned about unanticipated tax consequences to Barrett. RP 1335-36. Then, in February 2017, her computer broke down and the partially completed trust documents were lost. RP 1335-36.

Unsatisfied with Kahr's responses, Deacon moved for appointment of a guardian ad litem. RP 339. Paul Gill was appointed on September 6, 2017. RP 394. Kahr objected to Gill's appointment because it would be costly to Barrett's estate. RP 480. The court declined to discharge Gill and ordered Kahr to turn over documents and information. RP 489.

Kahr retained her own attorney, Sarah Atwood. RP 1202. Unfortunately, Atwood became seriously ill just as she began to work on Kahr's case. RP 1202. She was unable, for several weeks, to meaningfully respond to Gill's requests for information or documents. RP 1202-05. On December 1, 2017, Atwood gave

notice that Kahr would be resigning as Barrett's guardian effective December 31, 2017. RP 1206. She explained that all records would be turned over to the new guardian. RP 1206.

On December 28, 2017, Gill filed a motion to compel production of the guardianship records. RP 509. Atwood told Gill he could review them at her office. RP 509-10. He rebuffed this offer, stating he needed to have copies of the records. RP 509-10. On January 18, 2018, Atwood had six boxes of records delivered to Gill's office. RP 512. She testified she included, but did not highlight, the letters explaining the agreement to give Barrett a 40 percent interest in the house. RP 1209, 1214, 1232, 1249. Gill acknowledged Kahr may have believed she was authorized to invest Barrett's funds in her house. RP 555.

Without reviewing the records, Gill turned them over to Denise Meador, whose company, Private Client Fiduciary, was appointed Barrett's new guardian on January 19, 2018. RP 512-13. Meador admitted it took her six weeks to thoroughly review the files. RP 920. Nevertheless, she filed a police report on

January 30, 2018, a mere 11 days after receiving them. RP 920. Meador claimed the agreement letters were not included in the records. RP 880. She claimed not to have seen the letters until they were attached to a declaration Atwood filed in May 2018. RP 881. (However, Kahr's new assistant testified she had seen the agreement letters earlier, no later than February or March 2018. RP 1173.) Meador testified the agreement described in the letters likely benefitted Barrett, rather than Kahr, due to appreciation in the real estate market. RP 916-17.

4. When Barrett moved out, Kahr repaid the entire amount, but evidence of repayment was excluded.

On February 8, 2018, 14 days after Barrett moved out of Kahr's home, the entire amount of the two transfers was repaid to his estate, as contemplated in the agreement letters. CP 16; Exs. 15, 16. Four months later, Kahr was charged with one count of first-degree theft based on the first wire transfer of $280,000 and one count of second-degree theft based on the second wire transfer of $2,002. CP 1-2.

The relevance of repayment to the charged offenses was heavily litigated. Kahr argued the fact of repayment was evidence the transfers were authorized as a real estate investment. RP 27-28, 30, 82-84. She argued the repayment was evidence of her intent for Barrett to benefit. RP 82-84. The court excluded evidence of repayment, however, on the grounds that several cases have held repayment to be not relevant to an embezzlement charge. RP 88. Despite excluding evidence of repayment, the court allowed Kahr to present evidence that she later made another payment to the Barrett estate of $29,740 profit on the house investment. RP 90; Ex. 47.

Three times during the trial, Kahr argued repayment evidence had also become admissible under the open door doctrine because the topic had been broached by other testimony, making repayment even more relevant. First, early in the trial, Paul Gill mentioned money being returned to the guardianship account. RP 524. The Court deemed this testimony too insignificant to open the door to evidence of repayment. RP 524,

574-75. Later, Meador testified she was investigating funds that were "missing" from Barrett's accounts. RP 853. Kahr argued she needed to rebut this false impression with evidence that the funds had been repaid. RP 855-57. The court rejected this argument. RP 858. On cross-examination, Meador clarified she meant was that there was no documentation regarding how the funds had been spent or that Barrett had benefitted, not that the funds were missing. RP 923-24. Finally, Atwood mentioned return of the funds in response to a question from the prosecutor about what she thought was relevant. RP 1241. The court again declined to find the door had been opened to evidence of repayment. RP 1252-60. Robert Barrett also testified funds were missing from the guardianship accounts. RP 654-55.

Atwood testified there had never been any allegation that funds were actually missing. RP 1234. She went on to mention mentioned a court document, which prompted an objection from the prosecutor. RP 1234. After a sidebar, the court sustained the objection and ordered that Atwood's answer be stricken. RP

1234-35. The summary of the sidebar makes clear that the court's intent was to strike only the mention of a court document, not Atwood's original answer "never" when asked if there was any allegation of missing funds. RP 1261. But this distinction was not explained to the jury. In closing, Kahr argued there was never any money missing from Barrett's estate, and Barrett earned a profit of $29,740 on the investment in Kahr's home over a period of only 18 months. RP 1632.

Kahr was convicted of one count of first-degree theft and one count of second-degree theft. CP 164, 168; RP 81, 88. The court imposed an exceptional sentence based on the findings that she abused a position of trust, that Barrett was a particularly vulnerable victim, and that the offense was a major economic offense. CP 273-79.

On appeal, Kahr argued the court violated her constitutional right to present a defense by excluding evidence of repayment. The Court of Appeals rejected Kahr's arguments,

affirmed her conviction, and denied her motion to reconsider. Kahr now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THE COURT ERRED IN EXCLUDING EVIDENCE OF REPAYMENT BECAUSE IT WAS RELEVANT TO CORROBORATE KAHR'S EXPLANATION OF HER CONDUCT.

This Court should grant review under RAP 13.4(b)(3) because the court erred in excluding evidence of repayment and violated Kahr's constitutional right to present a defense. Kahr's defense was that she intended only to invest Barrett's money in a way that would benefit them both. The fact of repayment is relevant to prove that intent. The agreement expressed the intent to repay the investment "at the time the house is sold . . . or in the event that you should want to move or live elsewhere." Ex. 16. Repayment occurred 14 days after Barrett moved out of Kahr's home, as per the agreement. Ex. 16; RP 881. Additionally, the prosecution opened the door to this evidence by repeatedly eliciting testimony that the transferred funds were "missing."

Kahr was entitled to present evidence rebutting this false impression. The violation of Kahr's constitutional right to present evidence in her defense requires reversal of her convictions.

The constitution guarantees to all those accused of a criminal offense the right to fully and meaningfully defend against the prosecution's allegations at trial. U.S. Const. amend. VI, XIV; Const. art. 1, sec. 21; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Appellate courts engage in de novo review of a claimed violation of this constitutional right. State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019); State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The right to present a defense includes the right to present evidence relevant to the defense theory of the case. Jones, 168 Wn.2d at 720. When the evidence is even minimally relevant, the jury must be allowed to hear it unless it is "so prejudicial as to

disrupt the fairness of the fact-finding process at trial." Id.; State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Evidence is relevant when it has any tendency to make any fact at issue more or less likely. ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. Kappelman v. Lutz, 167 Wn.2d 1, 9, 217 P.3d 286 (2009) (citing State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006)). "'All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant.'" State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting _). The trial court's ruling on relevance is reviewed for abuse of discretion. State v. Clark, 187 Wn.2d 641, 648, 389 P.3d 462 (2017).

"The discretion conferred upon the trial judge is not arbitrary" and "is to be used with great caution to avoid prejudicing defendants." State v. Lough, 70 Wn. App. 302, 313, 853 P.2d 920 (1993). Reversal is required when the trial court's decision is manifestly unreasonable, is based on untenable

grounds, or is grounded in a misapprehension of the applicable law. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). Moreover, the trial judge's interpretation of the applicable law is reviewed de novo. Id.

Here, the judge determined, based on State v. Ager, 128 Wn.2d 85, 94, 904 P.2d 715 (1995), and several other cases, that repayment is categorically irrelevant to the elements of theft. RP 88. This categorical and far-reaching principle is incorrect as a matter of law because relevance cannot be determined in a vacuum.

The question of relevance in an individual case "is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388, 128 S. Ct. 1140, 1147, 170 L. Ed. 2d 1 (2008); State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726, 729 (1987). Relevance depends on the specific facts and defense theory of the case; it is not generalizable to every case involving a given offense. See id.

This general principle, that relevance hinges on specific facts, is illustrated by Ager, and the other cases cited by the state at trial, and the Court of Appeals decision. Evidence of repayment is relevant in some theft cases but not others depending on the facts and the defense theory of the case. The facts and defense theory in this case are significantly different from the cases rejecting the relevance of repayment.

The critical point in the cited cases was that, even if the defendant's explanation of his or her conduct was believed, that action was not authorized or was not of a type that contemplated repayment. See Ager, 181 Wn.2d at 89; State v. Grimes, 111 Wn. App. 544, 555, 46 P.3d 801 (2002); State v. Komok, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989); State v. Moreau, 35 Wn. App. 688, 669 P.2d 483 (1983). Because the action the defendant claimed was not authorized, or did not involve repayment, that repayment was not relevant. See id. In short, evidence of repayment was not relevant because, even if believed, the

defendant's explanation was not a defense. See id. That scenario does not apply in Kahr's case.

For example, the defense theory in Ager was that the money taken by the officers of the company was authorized as "advances." 181 Wn.2d at 89. The defendants agreed they were not entitled to take loans. Id. Repayment was, therefore, irrelevant because an advance is not a transaction that involves repayment. In short, repayment could not help establish Ager's theory of the case.

The defense claim that the money was an "advance" differentiates this case from Ager. Kahr's defense, by contrast, was that the funds were an investment. RP 1329, 1350. An investment, unlike an advance, is a transaction that contemplates return of the funds, usually with profit. See, e.g., Christgard, Inc. v. Christensen, 29 Wn. App. 18, 21-22, 627 P.2d 136 (1981). Therefore, in contrast to Ager, repayment was relevant to establish the defense theory in this case.

The other cases in this line are distinguishable because the defendant's explanation of his or her conduct was admittedly unauthorized and could not, even if established, be a defense to the theft charge. In State v. Moreau, 35 Wn. App. 688, 691, 669 P.2d 483 (1983), the defendant argued the money she took was a loan. However, she admitted she was not expressly authorized to make loans. Id. at 690–91. Therefore, evidence of repayment or intent to repay a loan was irrelevant because her theory was not a defense. Id. at 692. Similarly, in Grimes the accused sought to present evidence of promissory notes he claimed were used to repay loans; however, he admitted the loans were unauthorized. Grimes, 111 Wn. App. at 555. Komok is a shoplifting case; no one argued the shoplifting was authorized. 113 Wn.2d at 813.

By contrast, Kahr's explanation, if believed, is a defense. The court order expressly authorized her to invest in real estate. Ex. 1 (tabs 14, 15). Kahr's claim of intent to invest differentiates this case from the Ager and Grimes line of cases. None of the defendants in those cases claimed to have engaged in an action

that was authorized and which contemplated repayment. Komok, 113 Wn.2d at 813; Grimes, 111 Wn. App. at 555; Ager, 181 Wn.2d at 89; Moreau, 35 Wn. App. at 669.

The Court of Appeals erred when it concluded there was no way Kahr could have demonstrated her actions were a legitimate investment. Slip op. at 12. Appellate courts are not fact-finders. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Whether Kahr intended to invest or to deprive is a factual determination and a jury question. If the jury found her conduct to be an authorized investment (rather than an exertion of unauthorized control), it would find her not guilty.

Whether the evidence was sufficient to support such a determination is irrelevant. The jury was forced to make its factual determination without the benefit of evidence that is of undisputed relevance. The exclusion violated Kahr's constitutional right to present a defense.

"We do not question the principle that a criminal defendant has the constitutional right to present evidence in his or her own defense, and relevant observation testimony tending to rebut any element of the State's case, including mens rea, is generally admissible." Clark, 187 Wn.2d at 653. Here, Kahr was denied the chance to present relevant evidence that would have given concrete detail to her intent to invest. Without that evidence, the jury was left with only confusing evidence that no funds were missing and that she paid Barrett a much smaller amount as profit.

Denial of the right to present a defense is presumptively prejudicial and requires reversal unless the court concludes that, even without the error, any rational jury would have found guilt beyond a reasonable doubt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998) (citing Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). The government cannot rebut the presumption of prejudice here because, with direct

evidence of repayment, the jury would likely have concluded Kahr intended to create a mutually beneficial investment.

Kahr was entitled to fully present her defense, that she intended to invest Barrett's money for a time with appropriate profit. Evidence that Barrett, in fact, received his initial investment in addition to a sizeable return was directly relevant to this defense. Forcing Kahr to rely on vague and ambiguous testimony rather than objective direct corroboration violated her right to present that defense. This Court should grant review of this constitutional issue under RAP 13.4(b)(3) and reverse.

E. CONCLUSION

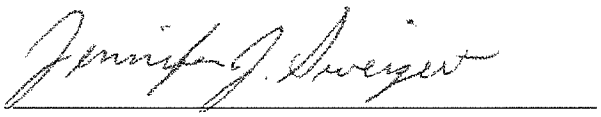
For the foregoing reasons, Kahr respectfully requests this Court grant review and reverse.

DATED this 15th day of October, 2021.

I certify that this document was prepared using word processing software and contains 4124 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

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Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HELGA KAHR, Appellant.	)	No. 80848-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Helga Kahr moved to reconsider the court's opinion filed on August 16, 2021. The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

FILED
8/16/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HELGA KAHR, Appellant.	)	No. 80848-6-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Helga Kahr was convicted of one count of theft in the first degree and one count of theft in the second degree for using funds of her ward, Jeffrey Barrett, to satisfy her home mortgage. Kahr appeals and argues: (1) that there was insufficient evidence to prove her guilt, (2) that the trial court erred in excluding evidence of her repayment of the Barrett's funds, and (3) that the trial court erred in allowing Barrett to testify despite a prior finding of incompetency. We disagree on all grounds and affirm.

FACTS

On October 11, 1995, a drunk driver crossed the center line of the road and hit Barrett head on. Barrett suffered a traumatic brain injury and spent several months in a coma prior to moving into a rehabilitation facility. After regaining consciousness, Barrett had to re-learn how to speak, walk, and use the bathroom. He was also unable to

recognize his wife and children. Barrett eventually moved in with his parents where he became under their care.

On April 22, 1997, the Snohomish County Superior Court appointed Barrett's oldest brother, John Jr.[1] Barrett, as limited guardian of person and estate. John Jr. hired Kahr to represent Barrett in his marriage dissolution and in a civil suit to recover damages for his injuries. After lengthy litigation, including a successful appeal to the Washington Supreme Court, Kahr recovered a nearly one million dollar settlement against the bar that overserved the driver that struck Barrett. See Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004). Due to Barrett's disability, the family hoped to keep his living expenses low so that he could sustain himself off of the settlement for as long as possible before relying on public assistance.

In 2014, due to increased work responsibilities, John Jr. became unable to continue being Barrett's guardian. As a result, John Jr. asked Kahr if she would assume his role of guardianship, to which she agreed. The Snohomish County Superior Court appointed Kahr as Barrett's guardian in October 2014. At the time of Kahr's appointment, Barrett continued to live with his mother; his father had passed away earlier that year.

Unbeknownst to Barrett and his family, Kahr was having financial troubles. Between 2009 and 2012, Kahr had only made one mortgage payment on her Seattle home. Kahr hired an attorney to mediate foreclosure on her home and secure a loan modification. Still, Kahr could not afford payments.

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[1] We refer to Jeffery Barrett's brother by his first name for clarity purposes and intend no disrespect in doing so.

In 2015, Barrett had $657,451.89 between two bank accounts. Both accounts were blocked and required court authorization for Kahr to spend more than $3,000. Citing the cumbersome nature of dealing with the blocked accounts, the "pathetic" interest earned on the accounts, and the inconvenience of traveling to Snohomish County to request spending permission, Kahr moved to unblock Barrett's funds. In her motion, Kahr stated that she had been "consulting with financial planners and investment advisors and [believed Barrett] would be best served by diversifying his assets into liquid savings and other investment vehicles, e.g., a stock index fund, mutual fund, bonds, etc." The court unblocked Barrett's funds for investment, requiring that, in addition to Kahr's annual financial reporting requirements, she file a quarterly financial update during any period "in which more than 10% of the guardianship assets have been allocated to a specific investment."

In January 2016, Barrett's mother's health worsened. The family moved her into an assisted living facility. On January 6, 2016, after exploring alternatives, Barrett moved into the basement of Kahr's home. Beginning in May 2016, Kahr failed to file the required period status reports for Barrett's guardianship.

During this time, Kahr remained unable to pay her mortgage, receiving pre-foreclosure notices from the company managing her loan, Select Portfolio Servicing, Inc. (SPS). SPS scheduled a foreclosure auction date for September 9, 2016. On August 31, 2016, Kahr requested a payoff quote and money-wiring information from SPS. On September 7, 2016, Kahr promised SPS she would pay her loan in full by the following day.

On September 3, 2016, Kahr authorized a wire transfer of $280,673.50 from Barrett's account to SPS. On September 7, 2016, Kahr transferred $2,002.40 for additional fees. These transfers satisfied the entirety of Kahr's mortgage and SPS cancelled the foreclosure auction the day before it was scheduled. Kahr did not inform the court or any of Barrett's family members of the wire transfers.

In August 2017, the court assigned Tom Deacon, a volunteer with Snohomish County's Guardianship Monitoring Program, to follow up on Kahr's report delinquency from the prior year. On August 17, 2017, Kahr filed the reports in response to Deacon's request. Of the 24-page submission, a single line reported a $282,673.90 expenditure labeled "Interest in Real Estate Investment Trust" (REIT). In response to a question on the report "have you (the Guardian) used the incapacitated person's property, had financial dealings with the ward or obtained any benefit from the ward during the period covered by this report?" Kahr answered: "Yes, while living in and occupying the ground floor of [Kahr]'s house, [Barrett] paid rent of $412.50, an amount less than half the market value of the space."

After attempted phone calls, Deacon e-mailed Kahr asking if she had provided any documentation to the court related to the "withdraw of significant funds" from Barrett's accounts. Kahr responded:

> Some of [Barrett]'s cash assets have been invested in a Seattle-based real estate investment trust to allow the guardianship estate to benefit from the appreciating Norwest real estate market without having the responsibility of property maintenance. That investment has been doing well. I do not have the entire file in front of me at the moment, some of it is with the accountant for review. The information on the REIT should be of record in the court file; if for some reason it has not made it to the court file, I will see that it gets filed.

Deacon could not locate any documentation regarding the REIT.

Deacon escalated the use of Barrett's funds to a program manager and requested that the court appoint a guardian ad litem (GAL) to further investigate the guardianship. Kahr objected, asserting that appointing a GAL would be costly to Barrett's estate. The court nonetheless appointed Paul Gill as the GAL to investigate.

Gill requested that Kahr provide REIT documentation, to which she responded that she was caring for an ill relative in Oregon, but that she would respond by September 14, 2016. The deadline passed and Gill moved that the court authorize further investigation into Barrett's guardianship.

On November 1, 2017, Kahr filed a response to Gill's motion, asking that the court deny his request for investigation. Kahr explained that Barrett did not want an investigation and that, due to much effort on her part, Barrett still had resources and independence. In her answer, Kahr did not mention the funds that she wired to satisfy her mortgage.

The court granted Gill's motion, after which Gill wrote to Kahr requesting copies of Barrett's bank records and "full particulars with respect to the 'Interest in Real Estate Investment Trust.'" Shortly thereafter, Kahr retained attorney Sarah Atwood. Atwood informed Gill that she and Kahr were not willing to speak to him. On December 1, 2017, Atwood notified Gill that Kahr would be resigning as Barrett's guardian effective December 31, 2017. As a result, the court ordered Kahr to provide Gill with Barrett's guardianship records by December 31, 2017; Kahr provided the records two weeks late.

On January 19, 2018, the court appointed professional fiduciary Denise Meador as Barrett's new guardian. After reviewing Barrett's bank account records, Meador discovered the wire transfers to SPS. Meador contacted SPS, by which she learned

that Kahr used the transfers to pay her mortgage debt. Meador examined Kahr's property records and found no indication that Barrett, a trust, or anyone other than Kahr had an interest in the property. In February 2018, Meador referred the matter to the Seattle Police Department.

On February 8, 2018, after obtaining a $250,000 home equity line of credit, Kahr repaid the funds into Barrett's account, along with the corresponding appreciation amount.

On May 7, 2018, Atwood sent Meador two letters related to the "Palatine Real Estate Investment Trust."[2] The letters were dated August 14 and 17, 2016, and addressed from Kahr to Barrett. The letters describe a real estate investment involving Barrett, Kahr, and Kahr's house, acknowledging potential conflicts of interest. Barrett would pay $283,000 in exchange for a 40 percent interest in Kahr's home, benefitting from the "very hot" Seattle real estate market. In return, he would not have to pay rent and Kahr would pay homeowners insurance to safeguard the investment. The letters further represented that Kahr would establish a REIT, subsequently transferring Barrett's portion of the property to him. Barrett's name was located on a signature line in the letters.

On June 11, 2018, the State charged Kahr with one count of theft in the first degree for the $280,671.50 transfer and one count of theft in the second degree for the $2,002.40 transfer.

In June of 2019, three months before trial, Kahr sent a check to Barrett's guardianship for $29,740. She claimed this check was a return on his investment.

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[2] Kahr's house is located on Palatine Avenue in Seattle.

At trial, Kahr testified that the money wired from Barrett's accounts was a legitimate real estate investment. Although Kahr acknowledged Barrett's cognitive limitations, she stated that she read him the agreement letters over several days, resulting in an understanding and desire to invest in Kahr's home.

The jury convicted Kahr as charged. The court imposed an exceptional sentence based on the jury's findings that Kahr abused a position of trust, that Barrett was a particularly vulnerable victim, and that the count for theft in the first degree was a major economic offense.

Kahr appeals.

ANALYSIS

A. Insufficient Evidence

Kahr argues that there was insufficient evidence to prove theft. We disagree.

The State is required to prove every element of a crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). We review the sufficiency of the evidence de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). For a sufficiency of the evidence challenge, a reviewing court "must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Townsend, 147 Wn.2d at 666. This court's review of sufficiency of the evidence is highly deferential to the fact finder's decision. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). We "must also defer to the fact finder on the issue of witness credibility." State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Witherspoon, 180 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The elements of first and second degree theft are identical but for the value of the property.[3] RCW 9A.56.030; RCW 9A.56.040. As charged here, "theft" means "to wrongfully obtain or exert unauthorized control[4] over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a).

A statutory defense to theft is that "the property . . . was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a). A "good faith claim of title" negates the mens rea of intent because it suggests that the defendant honestly believed she owned the property. State v. Ager, 128 Wn.2d 85, 92, 904 P.2d 715 (1995). Once a defendant produces a factual basis to show good faith, it becomes a question of fact for the jury. State v. Mora, 110 Wn. App. 850, 855, 43 P.3d 38 (2002).

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[3] An individual commits theft in the first degree when the property taken exceeds $5,000, and theft in the second degree when the property taken exceeds $750 but does not exceed $5,000. RCW 9A.56.030(1)(a); RCW 9A.56.040(1)(a).

[4] "Wrongfully obtains" or "exerts unauthorized control" means:
(a) To take the property or services of another;
(b) 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.
RCW 9A.56.010(23)(a), (b).

To support her insufficient evidence argument, Kahr asserts that the investment of Barrett's funds in real estate was not theft because it was authorized by a court order, that the evidence demonstrates that her intent was to invest Barrett's funds to benefit them both (and not to deprive him of said funds), and that the prosecution failed to disprove the defense of a good faith claim of title. Despite Kahr's assertions, there is sufficient evidence to support the jury's findings.

First, although a court order authorized Kahr to make investments on Barrett's behalf, there is sufficient evidence to support the jury's rejection of Kahr using the funds for a legitimate investment. Rather, the jury found that Kahr criminally deprived Barrett of his property. Prior to using Barrett's funds, Kahr did not get her house appraised for fair market value, nor did she investigate potential consequences for Barrett's taxes or government benefits. Kahr also never established the trust that she claimed was part of the investment. There is no evidence on record that Kahr spoke to anyone about placing Barrett's funds into her home; she simply did it. And moreover, despite characterizing the transfer of Barrett's funds as an investment in her home, Kahr never conveyed a property interest to Barrett.

Kahr used Barrett's money in secret. She did not file the quarterly report required for using more than 10 percent of Barrett's funds until prompted by Deacon. Kahr falsely responded to Deacon's inquiries, omitting her use of Barrett's funds to pay off her home, and insisting that there was documentation regarding an REIT on file. Kahr refused to respond to GAL Gill's request, and openly opposed his investigations. In investigation responses, Kahr was silent regarding the use of Barrett's funds to

satisfy her mortgage. Meador was the first to discover this use of funds, and not until after she gained access to Barrett's accounts.

The letters explaining the REIT are also suspect. Kahr did not produce the letters until after police began investigating criminal charges. Kahr did not fulfill promises in the letters such as establishing a trust, recording Barrett's interest in her property, covering rent, or providing homeowners insurance. Viewing these facts in a light most favorable to the State, there is sufficient evidence to support the jury's finding that Kahr did not use Barrett's funds as an investment.

Finally, there is sufficient evidence to support the jury's finding that Kahr did not act in good faith when transferring Barrett's funds. Due to Barrett's brain injury, he was cognitively incapable of managing his finances. Following Barrett's father's passing, his mother's advancing Alzheimer's disease, and his brother John Jr.'s increasing work obligations, few people could provide oversight to Barrett's finances. Kahr further discouraged Barrett's family from being involved in his affairs. These factors combined provided Kahr the opportunity to use Barrett's funds unchecked. Viewing these facts in the light most favorable to the State, there is sufficient evidence to support the jury's finding that Kahr did not act in good faith.

B. Exclusion of Evidence

Kahr argues that by excluding evidence of her repayment of Barrett's funds, the court deprived her of her constitutional right to present a defense.[5] Kahr additionally argues that, during trial, the State "opened the door" to this evidence. We disagree.

[5] At oral argument, the State asserted that Kahr raised this issue for the first time on appeal. While appellate courts normally decline to review issues raised for the first time on appeal, RAP 2.5(a) grants them the discretion to accept review of claimed errors not appealed as a matter of right. State v.

1. Initial Exclusion of Evidence

Appellate review of a trial court's exclusion of evidence involves two steps. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). First, we examine whether the trial court abused its discretion when excluding the evidence. We review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court." Clark, 187 Wn.2d at 648. Second, when relevant defense evidence was excluded, we "determine as a matter of law whether the exclusion violated the constitutional right to present a defense." Clark, 187 Wn.2d at 648-49.

Whether evidence is relevant is subject to the discretion of the trial court. State v. Rice, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). "The trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact." Rice, 48 Wn. App. at 1. This court will only reverse a trial court's decision on the relevance and prejudicial effect of the evidence upon a manifest abuse of discretion. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Rice, 48 Wn. App. at 11.

During motions in limine, Kahr asserted that the trial court should admit evidence that she repaid Barrett's funds, as it would be relevant to determine a good faith claim of title and disprove requisite criminal intent. Kahr further requested that the $29,740 check be admitted because it was a return on Barrett's investment. After review, the court excluded evidence of repayment as irrelevant, ruling that theft does not require the

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Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). We exercise this discretion to address Kahr's exclusion of evidence argument.

intent to permanently deprive the victim of their funds. The court did, however, allow evidence of the check as a potential return on Barrett's investment.

The trial court did not abuse its discretion in excluding the evidence of repayment. In excluding this evidence, the trial court cited State v. Grimes, 111 Wn. App. 544, 556, 46 P.3d 801 (2002), and its lineage of cases[6] for the proposition that because the crime of embezzlement[7] is committed at the time of conversion, the intent to permanently deprive is not an element.[8] Like Grimes, Kahr's crime was committed at the time of conversion. Thus, "evidence of repayment or intent of repayment is irrelevant." 111 Wn. App. at 556.

Kahr distinguishes these cases, noting that in each the individuals who used funds inappropriately were unauthorized to do so. Here, even were we to believe Kahr's transfer of Barrett's funds was authorized, there is no evidence of the transfer of property in consideration of those funds. Thus, Kahr's use of Barrett's funds to satisfy her mortgage absent any property conveyance is just as invalid as the use of funds in cases relied upon by the trial court. The trial court's reliance on the application of Washington precedent did not rise to an abuse of discretion.

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[6] The trial court also made reference to State v. Dorman, 30 Wn. App. 351, 633 P.2d 1340 (1981), and State v. Larson, 123 Wash. 21, 211 P. 885 (1923).

[7] Embezzlement is a statutory crime included within Washington's general theft statute. Ch. 9A.56 RCW; State v. Ager, 128 Wn.2d 85, 91, 904 P.2d 715 (1995). "[Embezzlement] differs from the historically common law crime of theft, which requires a trespass in the taking, in that embezzlement occurs where property that is lawfully in the taker's possession is fraudulently or unlawfully appropriated by the taker." Ager, 128 Wn.2d at 91.

[8] Grimes (an escrow officer), was charged with embezzling funds from his clients who authorized him to make real estate transactions on their behalves. Grimes, 111 Wn. App. at 548. Grimes attempted to offer promissory notes as evidence that he repaid the victims, which the trial court excluded. Grimes, 111 Wn. App. at 548. The appellate court affirmed the exclusion, holding that because the crime of embezzlement is committed at the time of conversion, the intent to permanently deprive is not an element. Grimes, 111 Wn. App. at 556.

Even were we to determine that the trial court abused its discretion in excluding evidence of Kahr's repayment, the exclusion did not violate Kahr's constitutional right to present a defense. First, at no point did the State argue that Kahr did not repay Barrett's funds. Second, the trial court permitted Kahr to introduce evidence of profit, thus implying an investment. Finally, in both Kahr's personal testimony and closing argument, she asserted that the transfer of Barrett's funds was authorized, done in good faith, and used for the purposes of investment. Kahr was not denied her right to present a defense.

2. "Open Door" Doctrine

Kahr next argues that the evidence of repayment should have been admitted under the "open door" doctrine. As recently described in State v. Rushworth, 12 Wn. App. 2d 466, 473, 458 P.3d 1192 (2020):

> Put simply, the open door doctrine is a theory of expanded relevance. It permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion. The open door doctrine recognizes that a party can waive protection from a forbidden topic by broaching the subject. Should this happen, the opposing party is entitled to respond. As explained in Gefeller, "when a party opens up a subject of inquiry on direct or cross-examination, [the party] contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced."

Rushworth, 12 Wn. App. 2d at 473 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Whether a party has waived protection from a forbidden topic and opened the door to the admission of otherwise inadmissible evidence is within the sound discretion of the trial court. State v. Wafford, 199 Wn. App. 32, 34, 397 P.3d 926 (2017). A

passing reference to a prohibited topic does not open the door. State v. Avendano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995).

During trial, Kahr argued three times that the State had "opened the door" to evidence of repayment. During Gill's testimony, after being given an exhibit of faxes to refresh his memory, he commented regarding Kahr's "payoff" of funds. In rejecting Kahr's argument that the State "opened the door," the court noted that it was a close call, "but the fact that it flew right by me and I'm sure it flew by the jury as well—I can't say that of course—but tends to make me think that it's not something that needs to be rebutted or explained because it was so minimal."

The second time Kahr argued that the State "opened the door," the State asked Meador why she needed to assess Barrett's assets after becoming his guardian. Meador testified that she was "concerned about the funds that were missing that couldn't be resolved prior to the guardianship." In rejecting Kahr's argument that the State "opened the door," the court noted that Meador's testimony opened the door to "the fact that the money went to mortgage," not repayment.

The final time Kahr argued that the State opened the door, Atwood was commenting on the transactions that comprised the REIT investment. When the State asked her to elaborate on the transactions, Atwood included "the checks and bank statements for return of funds" in her response. When the State attempted to cut Atwood off and ask what the single most important document for the REIT was, she replied "the wire transfers and the return of the funds." After a sidebar, the court sustained the State's objection and asked the jury to disregard the answer. In rejecting Kahr's argument that the State "opened the door," the court stated that Atwood violated

motions in limine twice, and her knowledge as a lawyer in doing so bordered on bad faith; Atwood's attempts to undercut the court's rulings did not open the door.

Here, the trial court did not abuse its discretion in concluding that the State did not "open the door" to the evidence of repayment. The testimonies of Gill, Meador, and Atwood were vague and subtle. The court appropriately determined that they did not open the door to Kahr's repayment.

C. Competency

Kahr argues that the trial court erred in ruling that Barrett was competent to testify. We disagree.

All adult witnesses are presumed competent to testify. State v. Johnston, 143 Wn. App. 1, 13, 177 P.3d 1127 (2007). A witness, however, is not competent to testify if he or she is of "unsound mind" or appears incapable of receiving facts or relating them truthfully. RCW 5.60.020; CrR 6.12. A person is of "unsound mind" if he or she displays a "total lack of comprehension or the inability to distinguish from right or wrong." State v. Smith, 97 Wn.2d 801, 803, 650 P.2d 201 (1982). A person is not of "unsound mind" because of mere cognitive limitations. Johnston, 143 Wn. App. at 14.

"We afford significant deference to the trial judge's competency determination, and we may disturb such a ruling only upon finding a manifest abuse of discretion." State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011). An appellate court gives the trial judge great deference because the judge "sees the witness, notices his manner, and considers his capacity and intelligence." State v. Cross, 156 Wn. App. 568, 579, 234 P.3d 288 (2010).

Both parties moved in pretrial for the court to determine whether Barrett was competent to testify. To make this determination, the court reviewed video recordings and an interview conducted by investigators regarding Kahr's alleged theft. The court also reviewed a 1997 order that found Barrett "not competent for purposes of deposition" in Barrett's marriage dissolution proceeding, evaluations and opinions of Dr. Monte Scott, and a 2018 occupational assessment of Barrett.

To support her assertion that Barrett was not competent to testify,[9] Kahr cites State v. Smith, 97 Wn.2d 801, 650 P.2d 201 (1982) and State v. Moorison, 43 Wn.2d 23, 259 P.2d 1105 (1953), for the premise that, because Barrett was found incompetent in 1997, the burden shifted to the State to prove present-day competency. After reviewing the documents and videos provided, the trial court found Barrett competent. In doing so, the court stated that the prior findings were made after Barrett's injury and long before Kahr's trial. The court also distinguished Smith and Moorison, because both cases involved shifting the burden of proof following a finding of insanity rather than incompetence.

On appeal, Kahr asserts that the trial court applied the wrong standard when it distinguished the Smith and Moorison opinions based on insanity. Kahr is incorrect. Both Smith[10] and Moorison, explicitly deal with witnesses deemed insane. Thus, Kahr bears the burden of demonstrating that Barrett is incompetent, a burden that she did not meet. Johnston, 143 Wn. App. at 14.

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[9] Oddly enough, Kahr asserts that Barrett was not competent enough to testify, yet relies on the presumption of his competency to validate the letters that outline the agreement to purchase an ownership interest in Kahr's house.

[10] Smith further clarifies that a witness who is "mentally deficient" (there, a person with an intelligence quotient of 23), is not the same as someone declared insane. 97 Wn.2d at 803.

Affirmed.

Mann, C.J.

WE CONCUR:

Brennan, J.

Chun, J.

NIELSEN KOCH P.L.L.C.

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