93187-9

SUPREME COURT NO. 93187-9

NO. 72067-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IVAN LJUNGHAMMAR

Petitioner.

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

The Honorable Timothy Bradshaw, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Ivan Ljunghammar asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Ljunghammar, filed April 25, 2016 ("Opinion" or "Op."), attached as this petition's Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. To prove first degree theft, the State was required to prove the petitioner exerted unauthorized control over the property of another, the petitioner's mother. Where the mother granted the petitioner her power of attorney, the petitioner performed work for her, 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 petitioner were unauthorized?

2. The State violates the right of an accused to silence when, in a criminal proceeding, it comments on the exercise of right, particularly where it utilizes the exercise of the right to argue the accused is guilty. Did the State violate the petitioner's right to silence where he had a right to silence, he exercised that right and was not required to "invoke" it, and the State commented on his exercise in arguing he was guilty?

3. Did the trial court err 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 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?

D. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentence

The State charged Ivan Ljunghammar and his wife Deborah with first degree theft[2] based on a theory the couple made unauthorized use of Ivan's elderly mother's money between 2007 and 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

[1] As below, this petition 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.

[2] 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).

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 exceptional sentence of nine months. CP 52-59.

2. Pretrial motion regarding right to silence

Ivan and Deborah moved to exclude their pre-arrest silence, i.e., failure to respond to requests by Shelarose's court-appointed guardian (as well as later court orders) to provide an accounting for certain transactions made while the power of attorney document was in effect. They 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, 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 did not wish 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.[3] 3RP 4. Ralph Ljunghammar, her oldest son, testified about the 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 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 an 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, the assets were worth $3.5 million. 6RP 97.

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

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

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. In contrast with the brothers' testimony, Mullavey 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. 3RP 111, 120-21; Ex. 1. Deborah was named as the alternate. Ex. 1 at 1. 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. Around that time, Ralph began having difficulty contacting his mother by telephone. He believed Ivan or Deborah screened calls. 2RP 72-73. In addition, they 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.

Son 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 rents. 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. But Daryl also noticed Shelarose's

properties were not rented out timely. 3RP 142. Like Ralph, Daryl began to have trouble contacting Shelarose, and became concerned. 3RP 101-02.

Ralph testified Shelarose was very modest in her gifts-giving. 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. 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. As of 2008, Ivan and Deborah asked Keith to start paying rent or leave Shelarose's house. 3RP 51-52. Keith left. 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,. 6RP 48, 105. At first, Deborah and Ivan told St. John that Shelarose was on vacation. But they later said she was with Lura. 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 her 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 for 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, part of a guardianship proceeding is to "marshal" the ward's assets. 4RP 107. 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 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 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. 5RP 89.

Ivan ultimately signed a "confession of judgment" in the guardianship proceeding agreeing to pay PGS $160,000, including approximately $26,000 in attorney and guardian fees. 4RP 131-32; Ex. 6.

Rebecca Tyrell, a prosecutor's office employee, also examined Shelarose's financial records and produced various spreadsheets 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 a longtime tenant of one of Shelarose's rental properties, who testified that Ivan visited frequently and maintained the property. 6RP 118-19.

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.[4] Regarding accomplice liability, the State argued that each defendant acted as the other's accomplice. 7RP 59. The State also argued 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. 7RP 62-64. The State argued that even though Deborah was

[4] 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.

not the named power of attorney, the major economic offense aggravator applied to both defendants. 7RP 65.

Ivan's counsel argued that although the brothers were upset that Shelarose chose Ivan for the power of attorney, the document was drawn up by a lawyer who knew Shelarose. 7RP 68-70. Ivan characterized Daryl's concerns as hypocritical and the product of greed. 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. On the other hand, PGS had multiple trained employees assigned to the estate. 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 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. 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.

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 admission to theft. 7RP 81. Consistent with jury instruction 12,[5] the confession did not satisfy the "proof beyond a reasonable doubt" threshold for criminal proceedings. 7RP 80. To the extent that transactions were deemed "questionable," it was the State's responsibility to demonstrate the transactions were the result of intent to deprive rather than poor recordkeeping. 7RP 89-90.

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 confession of judgment was additional evidence Ivan had committed theft. 7RP 119.

[5] CP 38 (instructing jurors a guardianship is a civil proceeding and the standard of proof is a preponderance of the evidence.).

The State also argued Ivan never responded to the guardian or guardianship court despite multiple requests and orders. 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.

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". 7RP 131-32.

5. Appeal

On appeal, Ivan made the arguments reflected issue statements above. In an April 25, 2016 unpublished decision, the Court of Appeals rejected each of these arguments. Ivan now asks this Court to accept review and reverse the Court of Appeals.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(4) BECAUSE THE CASE IMPLICATES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST, SUFFICIENCY OF THE EVIDENCE OF THEFT IN THE CONTEXT OF A "POWER OF ATTORNEY."

Pursuant to RAP 1.2 and RAP 10.1(g)(2), Ivan adopts and incorporates by reference Deborah's arguments in favor of review as to this issue.

2. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3) BECAUSE THE CASE IMPLICATES A SIGNIFICANT CONSTUTIONAL QUESTION INVOLVING THE EXERCISE OF THE CONSTITUTIONAL RIGHT TO SILENCE.

Pursuant to RAP 1.2 and RAP 10.1(g)(2), Ivan adopts and incorporates by reference Deborah's arguments in favor of review as to this issue. Ivan also submits the following additional argument:

The State and federal constitutions[6] 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); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). An accused's pre-arrest silence may be used to

[6] 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). Article I, section 9 states in relevant part that "[n]o person shall be compelled in any criminal case to give evidence against himself."

impeach his testimony, but his silence can never be used as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008).

Deborah's arguments regarding the right to silence apply to Ivan's case. Commenting on the silence of an accused is impermissible where 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)). Moreover, contrary to the Court of Appeals' opinion, Ivan was under compulsion from the guardianship court to respond. He was, moreover, entitled to invoke his right to silence by remaining silent in the face of the orders to produce documents. See Salinas v. Texas, ___ U.S. ____, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) ("where assertion of the privilege would itself tend to incriminate, [witnesses may] exercise the privilege through silence") (citing, inter alia, Leary v. United States, 395 U.S. 6, 28-29, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities)).

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 this 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. 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 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 such transactions over $100 were considered "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. Rather, it is the

State's responsibility to demonstrate beyond a reasonable doubt that the expenditures were not for her benefit. See State v. Traweek, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986) (no burden to present any evidence).

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

3. FOR SIMILAR REASONS, THIS COURT SHOULD FIND THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL.

Similarly, 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; 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). An appellate 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). In considering whether a court applied an incorrect legal standard, this Court reviews de novo the choice of law and its application to the facts. Id. 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. Burke, 163 Wn.2d at 223.

Second, the trial court erred in finding no right to silence attached during the guardianship proceedings. 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 petitioners' motion for a mistrial. A new trial is required. Burke, 163 Wn.2d at 209-10, 223.

4. THIS COURT SHOULD GRANT REVIEW BECAUSE THE EXCEPTIONAL SENTENCE IS NOT AUTHORIZED BY STATUTE.

Pursuant to RAP 1.2 and RAP 10.1(g)(2), Ivan adopts and incorporates by reference Deborah's arguments in favor of review as to this issue.

5. THIS COURT SHOULD GRANT REVIEW BECAUSE THE RESTITUTION ORDER IS NOT AUTHORIZED BY STATUTE.

Pursuant to RAP 1.2 and RAP 10.1(g)(2), Ivan adopts and incorporates by reference Deborah's arguments in favor of review as to this issue.

F. CONCLUSION

For the reasons stated, this Court should grant review and reverse the petitioner's conviction.

DATED this 24th day of May, 2016.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. IVAN D. LJUNGHAMMAR, and DEBORAH JEAN LJUNGHAMMAR, and each of them, Appellants.	No. 72067-8-I (Consolidated with No. 72069-4) DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2016

APPELWICK, J. — Ivan and Deborah Ljunghammar were convicted of theft in the first degree for embezzling from Ivan's mother while acting under her power of attorney. The trial court imposed an exceptional sentence for each defendant based on the fact that the crime was a major economic offense and that the victim was particularly vulnerable. Both Ivan and Deborah contend that the State's evidence was insufficient to prove they committed first degree theft, that the State violated their right to silence by emphasizing their failure to provide financial records, and that the trial court erred in imposing exceptional sentences and joint and several restitution. Deborah contends that she was prejudiced by their joint trial. We affirm.

FACTS

Shelarose Ljunghammar was born on October 19, 1928. She was married to Nils Ljunghammar until he passed away in 1998. The couple had four sons: Ralph,[1] Ivan, Keith, and Daryl.

Shelarose owned several rental properties. She handled the bookkeeping for these properties. Shelarose began falling behind in her bookkeeping for the rental properties in the early 2000s. Around 2005, Ivan and his wife, Deborah, started helping Shelarose with her bookkeeping. Ivan also helped Shelarose maintain the rental properties, and he was paid for his work.

In 2007, Shelarose and several of her sons met with Shelarose's attorney to discuss her estate plans. The attorney discussed the possibility of giving someone power of attorney, but Shelarose wanted additional time to consider this possibility. Shortly afterward, on June 13, 2007, Shelarose signed a document giving her son Ivan a general durable power of attorney over her property and finances. The document named Ivan's wife, Deborah, as the alternate in the event that Ivan became unable or unwilling to act. At that time, Ivan and Deborah did not inform Daryl, Ralph, or Keith about the power of attorney.

After Ivan became Shelarose's attorney-in-fact, Ivan and Deborah began limiting Shelarose's interactions with the rest of the family. Shelarose stopped attending family functions. Ralph and Daryl became concerned that Ivan and Deborah were screening their calls to Shelarose—they were unable to reach their

[1] We refer to members of the Ljunghammar family by their first names for clarity. No disrespect is intended.

mother by phone. Ivan and Deborah did not notify the rest of the family when Shelarose was hospitalized. And, Ivan and Deborah changed the locks on Shelarose's home.

In 2009, Ralph and Daryl became concerned that Shelarose was no longer living at her home. Ralph contacted Adult Protective Services (APS). Daryl called the police.

On September 24, 2009, Detective Pamela St. John of the Seattle Police Department went to Shelarose's home to do a welfare check. No one answered when Detective St. John knocked on the door. While Detective St. John was looking around the house, Ivan and Deborah arrived. Detective St. John identified herself and asked where Shelarose was. According to Detective St. John, Ivan and Deborah were confrontational and uncooperative, but they eventually revealed that Shelarose was with her caregiver.

Detective St. John returned to Shelarose's home on September 29, 2009 to interview Shelarose in the company of her attorney. On this occasion, she was accompanied by Heidi Wilson from APS. During that interview, Shelarose appeared confused—she could not answer any of Detective St. John's questions about what day of the week it was, who the president was, or her children. And, she did not appear to understand who Wilson or Detective St. John were.

After an investigation, APS petitioned to appoint a guardian for Shelarose. On January 19, 2010, the court appointed Puget Sound Guardians (PSG) to be Shelarose's guardian. The court order also required Ivan and Deborah to provide

an accounting of Shelarose's finances for the time period that Ivan had power of attorney. Ivan and Deborah did not provide an accounting despite multiple court orders directing them to do so.

PSG conducted an independent investigation of Shelarose's finances by collecting records from the banks with which Shelarose had accounts. Then, they attempted to discern what funds may have been misappropriated when Ivan was attorney-in-fact by identifying questionable transactions.

PSG and Ivan reached a settlement agreement in March 2011. And, Ivan confessed to judgment in the amount of $160,000. Judgment was entered against him in the guardianship proceeding.

On August 22, 2012, Ivan and Deborah were charged with first degree theft. The State presented the testimony of numerous witnesses, including members of the Ljunghammar family and employees of PSG.[2] And, a financial analyst for the King County Prosecuting Attorney's Office testified regarding her analysis of Ivan's and Deborah's financial records. Her summaries regarding the transfers of money from Shelarose's accounts to Ivan and Deborah's accounts, and the correlation between these transfers and Ivan and Deborah's mortgage payments, were admitted as exhibits.

The jury convicted both Ivan and Deborah as charged. And, the jury found by special verdict that the crime was a major economic offense and that Ivan and Deborah either knew or should have known that the victim was particularly

[2] Shelarose was unavailable for either party to call as a witness at trial.

vulnerable. Accordingly, the trial court imposed an exceptional sentence for each defendant. The trial court also ordered Ivan and Deborah to pay restitution in the amount of $160,000, and it made the restitution obligation joint and several. Ivan and Deborah appeal.

DISCUSSION

Ivan and Deborah challenge the sufficiency of the evidence supporting their convictions for first degree theft. They also argue that the State violated their right against self-incrimination by inviting the jury to infer guilt from the fact that they failed to provide an accounting to PSG. Both assert that the trial court erred in imposing their exceptional sentences and joint and several restitution. And, Deborah contends that she was prejudiced by their joint trial.

I. Sufficient Evidence of First Degree Theft

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the elements beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. Id.

Under RCW 9A.56.020(1)(a), theft means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." A person exerts unauthorized control over property by having it in one's "possession, custody or

control" as attorney or other person authorized to hold possession and appropriating that property to one's own use or the use of someone other than the true owner or person entitled to the property. RCW 9A.56.010(22)(b).

Here, Deborah contends that the State did not present evidence to show that Shelarose's property was in Deborah's possession, custody, or control. She argues that she did not sign any of the checks written on Shelarose's accounts, withdraw or transfer money from Shelarose's accounts, or use Shelarose's credit card. And, she points out that the power of attorney document named her as " 'alternate attorney in fact,' " which gave her power of attorney only if Ivan was unable to exercise his authority.

But, numerous witnesses testified that they observed Deborah assisting Shelarose with her bookkeeping. Ralph recalled a time when Deborah and Shelarose were working on the bookkeeping, and Deborah was writing checks for Shelarose. He testified that Deborah appeared to be covering up the checks as she was writing them. Daryl often saw Deborah helping Shelarose write checks, and he also observed Deborah covering up the books on one occasion. Keith noticed Deborah writing Shelarose's checks for her. Daryl's wife, Kerie, also testified that Deborah would often have Shelarose sign checks, but that Ivan never helped with the bookkeeping.

The evidence also showed that Deborah took possession of Shelarose's funds. Checks from Shelarose to Deborah were deposited in Deborah and Ivan's joint account. Several of these checks contributed to the total amount of

questionable transfers that were identified in the confession of judgment as a breach of fiduciary duty. And, a cashier's check in the amount of $13,500 was made out to Deborah alone and deposited in the joint account.

And, multiple witnesses testified that Deborah represented herself as sharing the power of attorney with Ivan. Ralph testified that in early 2008, Deborah told him and Daryl that she and Ivan had power of attorney. Wilson from APS testified that when she went to Shelarose's home with Detective St. John, Deborah showed them the power of attorney she and Ivan had—she carried the document in her purse. From this evidence, a rational trier of fact could conclude that Deborah exerted control over Shelarose's finances.[3]

Deborah and Ivan both assert that even if they exerted control over Shelarose's finances, the State failed to prove that the money transfers were unauthorized. They contend that Shelarose gave Ivan power of attorney because she wanted him to control her finances. And, they argue that Shelarose herself signed many of the checks in question, and it is unclear who performed many of the other transactions. Moreover, they contend that the State did not prove that any transfers to Ivan and Deborah were not merely gifts from Shelarose.

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[3] We also note that the jury received an instruction on accomplice liability. Therefore, the fact that only Ivan had power of attorney is of no consequence. A person may be an accomplice in the commission of a crime by soliciting, commanding, encouraging, or requesting the other person to commit the crime, or by aiding or agreeing the other person in planning or committing the crime, if the person knows that their actions will facilitate the commission of a crime. RCW 9A.08.020(3). Here, even if the jury did not believe that Deborah herself exerted unauthorized control over Shelarose's finances, the State's evidence still showed that Deborah aided Ivan in taking money from Shelarose by holding herself out as having power of attorney along with Ivan and by depositing checks into her and Ivan's joint account.

But, the State admitted into evidence Ivan's signed confession of civil judgment. This confession of judgment acknowledged that Ivan acted as attorney-in-fact for Shelarose and breached the fiduciary duties he owed to her. He admitted that he unjustly benefitted by distributing money from Shelarose's assets to himself, in an amount at least equal to $160,000.[4]

The State also produced evidence of Shelarose's previous manner of gift-giving to her relatives. The power of attorney document gave Ivan the authority to give gifts only in amounts consistent with Shelarose's previous manner of giving. Ralph, Keith, and Daryl testified that Shelarose did give them gifts in the past, but only in small amounts and on special occasions. Yet, Shelarose's and Ivan and Deborah's bank records show "gifts" and "loans" to Ivan and Deborah in amounts much larger than that.[5] Thus, under the power of attorney document, Ivan was not authorized to give these kinds of gifts and loans.

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[4] Ivan, in a statement of additional grounds, contends that the court erred in admitting the confession of judgment against him, because he signed it under duress. Deborah also contends that the trial court erred in admitting this document.

Ivan moved to exclude the confession of civil judgment before trial. But, the trial court denied this motion, because the confession of judgment is relevant to the issues in this case and it is an admission of a party opponent. The court also instructed the jury that the standard of proof in a civil guardianship proceeding is preponderance of the evidence.

The court did not err in admitting this document. Ivan was given the opportunity to discuss the confession of judgment with a lawyer before signing it. Ivan acknowledged this fact in the confession of judgment itself. He was not forced to admit that he breached his fiduciary duty to Shelarose. And, this document was highly relevant in the criminal case against both Ivan and Deborah.

[5] The notes on many of the checks paid to Ivan and Deborah from Shelarose's accounts involve loans or work. Other checks or transfers were not labeled. These money transfers range in amounts, with several loans of $3,000 or $5,000, an unlabeled check of $7,500, and a cashier's check made out to Deborah in the amount of $13,500.

Ivan and Deborah's secretive behavior provided additional evidence that these takings were unauthorized. They failed to keep records of their involvement in Shelarose's finances. Ivan and Deborah took steps to isolate Shelarose from her other sons by keeping her from attending family parties, changing the locks on her home to prevent the other sons from entering, refusing to let Daryl, Ralph, or Kerie talk to Shelarose when they called, and withholding information about her hospital visits. And, Ralph and Daryl witnessed Deborah covering up the checks she was writing for Shelarose.

We hold that there was sufficient evidence to support both Ivan's and Deborah's convictions.

II. Right to Silence

Deborah and Ivan argue that the State violated their constitutional right to silence by urging the jury to find them guilty based on their exercise of this right. They argue that they exercised their right to remain silent by failing to provide an accounting to PSG. And, Ivan contends that the trial court erred in denying his motion for a mistrial on this basis.

Both the United States and the Washington Constitutions protect the criminal defendant's right to be free from self-incrimination, which includes the right to silence. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. We interpret these provisions similarly, and liberally construe the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

At trial, the defendant's right against self-incrimination includes the right not to testify. Id. at 236. And, the State is prohibited from eliciting comments from witnesses or making closing arguments related to a defendant's silence such that would encourage the jury to infer guilt from that silence. Id. Nor may the State use evidence of the defendant's prearrest silence as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 215, 181 P.3d 1 (2008).

Here, Deborah and Ivan moved pretrial to exclude evidence of their failure to provide an accounting. They argued that a guardian is deemed to be an officer of the court, and, therefore, the fifth Amendment did attach in the guardianship proceedings. Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). They assert that responding to the court orders with answers or documents could have incriminated them. Consequently, they argue they were entitled to invoke the Fifth Amendment right to remain silent. Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (the Fifth Amendment applies in any proceeding where the answers could be used against the person in a later criminal prosecution). The State asserted pretrial, and the trial court agreed, that the Fifth Amendment protections did not attach in these proceedings, because the guardian was acting as a private individual, not a state actor. The trial court denied the motion. It ruled that the Fifth Amendment had not attached at the time, because the investigation was conducted in the context of a civil proceeding, and the defendants did not show that the guardian was a state actor.

At trial, the State presented evidence that Ivan and Deborah failed to provide financial documents to PSG, even after multiple court orders. In closing argument, the State emphasized that Ivan and Deborah refused to provide any records or give an accounting. The State further said that Ivan and Deborah were given multiple opportunities to provide an accounting and explain that Shelarose had gifted or loaned them money, yet they did not ever provide an accounting. Both Ivan and Deborah objected to this line of argument as burden-shifting and commenting on their silence, and they moved for a mistrial. The trial court denied their motion.

We need not decide if the Fifth Amendment applies. Assuming it did apply, Ivan and Deborah did not expressly invoke their right to remain silent. Instead, they simply did not respond to the court orders. The State argues that Ivan and Deborah's failure to explicitly invoke the right means that they waived it. In response, Ivan and Deborah contend that they invoked the right by remaining silent.

A person who seeks the protection of the Fifth Amendment right to remain silent must claim it at the time he or she relies on it. Salinas v. Texas, ___ U.S. ___, 133 S. Ct. 2174, 2179, 186 L. Ed. 2d 376 (2013). One does not expressly invoke the Fifth Amendment by standing mute. Id. at 2181. The United States Supreme Court has recognized two limited exceptions: when a defendant decides not to testify at trial, and when governmental coercion makes waiving the right involuntary. Id. at 2179-80. And, where assertion of the right would itself

incriminate the person, silence is sufficient. Id. at 2180. These exceptions all recognize that a witness need not expressly invoke the right "where some form of official compulsion denies him 'a free choice to admit, to deny, or to refuse to answer.' " Id. (internal quotation marks omitted) (quoting Garner v. United States, 424 U.S. 648, 656-57, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976))

Deborah and Ivan argue that responding to the request for an accounting by invoking the Fifth Amendment would have incriminated them. But, only answers that "would furnish a link in the chain of evidence needed to prosecute" the person for a crime are incriminating. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Here, invoking the right to remain silent would not have provided substantive evidence of the crime. Ivan and Deborah were not subject to official compulsion that denied them the free choice to invoke the right to remain silent.

We conclude that Deborah and Ivan failed to invoke their right to remain silent in the guardianship proceedings. Because they did not invoke this right, the trial court did not err in admitting evidence pertaining to Ivan and Deborah's failure to provide an accounting. Nor did the State err in referring to this failure in closing argument. Therefore, the trial court did not err in denying Ivan and Deborah's motion for a mistrial.

III. Exceptional Sentence

Deborah argues that the trial court erroneously imposed an exceptional sentence based on a major economic offense aggravating factor. She asserts this

is so, because she was convicted as an accomplice, but the jury did not find that she knew the offense was a major economic offense. Ivan also argues that the trial court erred in imposing his exceptional sentence based on the major economic offense aggravating factor.

RCW 9.94A.535(3) permits the trial court to impose an exceptional sentence based on aggravating circumstances considered by the jury. One of these aggravating factors is if the current offense was a major economic offense or series of offenses. RCW 9.94A.535(3)(d). A major economic offense is one which involved multiple victims or multiple incidents per victim, attempted or actual monetary loss substantially greater than is typical for the offense, a high degree of sophistication or planning or a lengthy amount of time, or was facilitated by the defendant's position of trust, confidence, or fiduciary responsibility. Id.

Appellants argue that State v. Hayes, 182 Wn.2d 556, 342 P.3d 1144 (2015) requires reversal of their exceptional sentences. In Hayes, the defendant was convicted as an accomplice, and he appealed his exceptional sentence based on the major economic offense aggravating factor. Id. at 562-63. On appeal, the court noted that it looks to whether the defendant's own misconduct satisfies the language of the statute in reviewing a sentence aggravator. Id. at 563. The court held that when the aggravating factor relates to "the current offense" and the defendant is an accomplice, the jury must find that the defendant had knowledge that informs the aggravating factor. Id. at 566. For example, whether the defendant knew that the offense would have multiple victims, involve a high degree

of sophistication, or take place over a long period of time. Id. Because the court could not tell from the jury's special verdict whether it found that Hayes had any knowledge informing the major economic offense factor, it vacated his exceptional sentence and remanded for resentencing. Id. at 566-67.

Here, Deborah's actions showed that the crime was facilitated by her own position of trust, confidence, or fiduciary responsibility. The power of attorney document named her as the alternate attorney-in-fact, and she held herself out as sharing the power of attorney with Ivan.[6] She wrote checks for Shelarose to sign. She received significant amounts of money from Shelarose during the time Ivan was attorney-in-fact. She isolated Shelarose by screening her family members' calls, preventing her from attending family functions, and changing the locks on Shelarose's home. And, she failed to respond to multiple court orders requesting an accounting of Shelarose's funds during this time period. Therefore, the evidence clearly allowed the jury to find that Deborah's own actions satisfied the major economic offense aggravator whether she was a principal or an accomplice.

Moreover, the trial court also imposed Deborah and Ivan's exceptional sentences based on another aggravating factor: that the defendants knew that the victim was particularly vulnerable or incapable of resistance. Neither Deborah nor Ivan argues that the particularly vulnerable victim factor was an invalid basis for an exceptional sentence. And, the court noted in the findings of fact associated with each exceptional sentence, "Each one of these aggravating circumstances is a

[6] Nothing in the record suggests that Deborah actually served as attorney-in-fact under the power of attorney.

substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed." It is appropriate for this court to affirm an exceptional sentence where the trial court expressly states that the same exceptional sentence would be imposed based on any of the aggravating factors standing alone. State v. Weller, 185 Wn. App. 913, 930, 344 P.3d 695, review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015).

But, Deborah asserts that the trial court's statement was a "boilerplate finding" that is insufficient to support the exceptional sentence. We do not agree. This finding was supported by the trial court's comments during the sentencing hearing emphasizing, "[W]hat was proved beyond a reasonable doubt was the taking advantage of an infirm person, who is infirm by their age and their dementia. And why? For money. For greed. That crime is repugnant." Taken together, the trial court's statements and written findings indicate that the same exceptional sentence would be imposed based on either of the aggravating factors.

Thus, these exceptional sentences stand regardless of whether the major economic offense aggravating factor was proper. We affirm both appellants' exceptional sentences.

IV. Joint and Several Restitution

Deborah further argues that the trial court was not authorized to impose joint and several restitution on Deborah and Ivan. Ivan adopts this argument.

This court reviews a trial court's order of restitution for an abuse of discretion. State v. Grantham, 174 Wn. App. 399, 403, 299 P.3d 21 (2013). The

trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Cawyer, 182 Wn. App. 610, 616, 330 P.3d 219 (2014). We review de novo whether the trial court applied the wrong legal standard or based its decision on an erroneous view of the law. Id.

The trial court's authority to impose restitution is derived from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). The governing statute here, RCW 9.94A.753(3), provides, "[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury."

The broad language of the restitution statutes indicates legislative intent to give the courts broad powers of restitution. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). As such, this court does not give restitution statutes an overly technical construction that would permit a defendant to avoid just punishment. Id. at 922.

Restitution may be ordered only for losses incurred as a result of the crimes charged. State v. Raleigh, 50 Wn. App. 248, 252, 748 P.2d 267 (1988). The trial court need find only that a victim's injuries were causally connected to a defendant's crime before ordering a defendant to pay restitution for the resulting expenses. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999).

Both Ivan and Deborah contend that the other is the more culpable party, and therefore joint and several restitution is not commensurate with their individual

conduct. But, the evidence shows that Ivan and Deborah acted together to deprive Shelarose of her property by writing checks on Shelarose's accounts and depositing the money into their joint bank account. Clearly, the victim's injury was causally connected to each of them. The court had authority to impose the full amount of restitution on each of them individually. Because they acted in concert to perpetrate the theft, a joint and several restitution order is appropriate to the husband and wife team. They fail to articulate any way in which this order imposes a burden on them in excess of what the statute allows. RCW 9.94A.753(3) gives trial courts broad powers to impose restitution. Davison, 116 Wn.2d at 920. We do not interpret it as prohibiting joint and several restitution.

We hold that the trial court did not err in imposing joint and several restitution here.

V. Joint Trial

In a statement of additional grounds, Deborah contends that she was prejudiced by the State's decision to try her and Ivan together. CrR 4.3(b) provides that two or more defendants may be joined in the same charging document when each is charged with the same offense or with offenses so closely related that it would be difficult to separate proof of one offense from proof of others.

Deborah appears to raise this issue on the first time on appeal. Accordingly, she must demonstrate that the joint trial was so manifestly prejudicial that it outweighed the concern for judicial economy. State v. Embry, 171 Wn. App. 714, 731, 287 P.3d 648 (2012).

Deborah contends that because she did not have power of attorney for Shelarose, she was prejudiced by being tried with Ivan. But, the State's evidence showed that Deborah assisted Ivan with the theft—her involvement was not limited to depositing funds into their joint accounts. The evidence showed that Deborah and Ivan worked together to deprive Shelarose of her property. Therefore, Deborah has not established the necessary threshold of prejudice.

We affirm.

Cypelwick, J.

WE CONCUR:

Spearman, J.

NIELSEN, BROMAN & KOCH, PLLC

May 24, 2016 - 2:29 PM

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