Supreme Court No. _____
Court of Appeals No. 73954-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONNA GREEN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Donna Green requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Donna Green*, No. 73954-9-I, filed June 19, 2017. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The theft statute specifically provides for the defense of good faith claim of title, and this defense negates the defendant's alleged intent. Despite the plain language of the statute, the trial court found, as a matter of law, that Ms. Green was not entitled to a jury instruction on good faith claim of title. Should this Court accept review in the substantial public interest where the trial court declined to follow the statute and, by doing so, relieved the State of its burden, thereby violating Ms. Green's constitutional right to due process under the Fourteenth Amendment and article I, section 3? RAP 13.4(b)(4).

2. The State was required to prove Ms. Green had the actual knowledge necessary for the commission of the crimes of theft and forgery. While actual knowledge may be proven by circumstantial evidence, this Court recognized in *State v. Allen*[1] that the pattern

[1] 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

instruction for knowledge allows jurors to "understandably misinterpret Washington's culpability statute to allow a finding of 'knowledge'" if the defendant "should have known." Should this Court accept review where the trial court rejected Ms. Green's supplemental knowledge instruction, which provided the jurors with a correct and complete statement of the law, because the ruling conflicts with *Allen* and presents an issue of substantial public interest? RAP 13.4(b)(1), (4).

3. A defendant may be denied her constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. Where the State made a number of improper arguments in its rebuttal that shifted the burden to Ms. Green, mischaracterized its burden, and appealed to the passion and prejudice of the jurors, should this Court accept review? RAP 13.4(b)(4).

4. The Sixth Amendment right to counsel entitles a defendant to conflict-free representation, and a defendant is constructively denied the right to counsel when she is forced to proceed to trial represented by an attorney with whom she has an irreconcilable conflict. Ms. Green asked for the substitution of appointed counsel because her current counsel failed to meet with her over a period of eight months prior to trial despite her repeated requests to do so. Should this Court accept review in the

substantial public interest where Ms. Green's constitutional right to counsel was violated when the court denied her motions? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Donna Mae Green[2] passed away in May of 2012. 2 RP 9.[3] Before she died, she received a monthly benefit of approximately $700 from the Social Security Administration (SSA). 2 RP 10. Her husband's death preceded hers, and she was entitled to this benefit as his surviving spouse. 2 RP 12.

For approximately two years after Donna Mae Green's death, the SSA continued to deposit the monthly benefit into her bank account. 2 RP 10. Scott Henderson, a federal agent with the SSA, admitted this type of error is not uncommon, particularly in cases where the benefit is provided to a surviving spouse rather than the original recipient. 2 RP 11.

When the SSA recognized its error, it contacted Bank of America, where the direct deposits had been made, in an attempt to reclaim the funds. 2 RP 11. However, it learned from the bank that the remaining balance on the account was approximately $2,000. 2 RP 12.

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[2] To avoid confusion, the appellant's mother, Donna Mae Green, will be referred to using her full name or as Ms. Green's mother. All references to "Ms. Green" refer to the appellant.

[3] The verbatim report of proceedings are divided into two unnumbered volumes. Here, volume 1 refers to the volume beginning on July 24, 2014, and volume 2 refers to the volume beginning on June 23, 2015.

Agent Henderson reached out to Donna Mae Green's daughter, also named Donna Green. Ms. Green, the daughter, met with Agent Henderson and explained that she had cared for her mother toward the end of her mother's life and that after her mother's death, she used the funds in her mother's account to pay for her mother's cremation and for her own monthly expenses. 2 RP 26-27. It had not occurred to her she was doing anything wrong because her mother had given her permission to access the account and she assumed the SSA would terminate the benefits at the appropriate time. 2 RP 27, 35.

Ms. Green had obtained the funds in her mother's account by writing checks on the account to herself, and signing her own name, Donna Green. 2 RP 31. When the agent questioned whether Ms. Green had attempted to confuse or mislead the bank by signing the checks "Donna Green," Ms. Green explained that she presented her own debit card with the checks, and had informed the teller the account did not belong to her. 2 RP 37.

The State charged Ms. Green with one count of first degree theft and five counts of forgery. CP 7-8. Prior to trial, Ms. Green repeatedly moved for the substitution of her appointed counsel, explaining that he had not taken the time to meet with her outside of court. 1 RP 5, 10, 15. Each time, the trial court denied her motion. 1 RP 7, 14, 16.

Ms. Green's defense at trial was good faith claim of title. 1 RP 177. In opening statement, defense counsel told the jury that Ms. Green had not tried to hide her actions, and did not believe that she was committing theft. 1 RP 177-78. However, the trial court denied Ms. Green's request for a jury instruction on good faith claim of title. 2 RP 70. It also denied her request for a supplemental instruction explaining that the jury must find Ms. Green had the actual knowledge required to commit the deception and forgery, even if the jury relied upon circumstantial evidence to make this determination. 2 RP 70.

In its closing argument, the State told the jury that the defense was wrong to fault the State for missing evidence, because defense counsel could have elicited this information on cross-examination. 2 RP 134-35. It also suggested that asking the jury to find reasonable doubt in Ms. Green's case was a request for the jurors to "bend over backwards," and that this case was not about Ms. Green, but about holding people accountable more generally. 2 RP 136-37. In each instance, defense counsel objected, but his objections were overruled. 2 RP 134-37.

During deliberations, the jury submitted a question, asking why the case against Ms. Green was criminal, rather than civil. CP 121. Despite these apparent reservations, it returned a guilty verdict on all six counts. CP 132, 138. Ms. Green was sentenced to six months of community

custody, with 100 hours of community restitution, in addition to the monetary restitution to be later ordered by the court. CP 134-35. The Court of Appeals affirmed. App. at 10.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the plain language of the statute specifically allows for a good faith claim of title defense to theft, regardless of how the theft is allegedly committed.

Ms. Green was charged with one count of theft in the first degree and five related counts of forgery. CP 7-8. An individual may commit theft in one of three ways. RCW 9A.56.020(1). Under the statute:

> (1) "Theft" means:
>
> (a) To 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; or
>
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him of her of such property or services.

RCW 9A.56.020.

The statute also specifically provides for a defense to theft. RCW 9A.56.020(2). The legislature directed:

> (2) In any prosecution for theft, it shall be a sufficient defense that:
>
> (a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable[.]

RCW 9A.56.020.

By providing that a defendant cannot be guilty of theft if the defendant takes property from another under the good faith belief that she is entitled to possession of the property, this defense negates the element of intent to steal. *State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). A defendant is entitled to have the jury instructed on good faith claim of title when she presents some evidence of a legal or factual basis for her good faith belief of entitlement to the property at issue. *Ager*, 128 Wn.2d at 96-97.

The trial court agreed Ms. Green presented evidence at trial that she had acted under the belief she was entitled to the money at issue. 2 RP 68. However, it denied Ms. Green's request for a good faith claim of title jury instruction as a matter of law, finding that Ms. Green was not entitled to the instruction because the State was proceeding only under RCW 9A.56.020(1)(b), which required it to prove Ms. Green acted "[b]y color or aid of deception" in order to obtain the money. 2 RP 66.

a. The lower courts improperly relied on this Court's decisions in *State v. Emerson* and *State v. Mercy*, which predated the current theft statute.

In rejecting Ms. Green's request for the jury instruction, the trial court adopted the State's argument, which relied on *State v. Casey*, for the conclusion that a defendant is not entitled to a good faith claim of title instruction where the State alleges theft by deception because in such cases "it is logically impossible to convict without implicitly rejecting any claim of good faith." 81 Wn. App. 524, 527, 915 P.2d 587 (1996).

The Court of Appeals affirmed on these grounds, relying on its prior decisions in *Casey* and *State v. Stanton*, 68 Wn. App. 855, 868, 845 P.2d 1365 (1993), to find the trial court did not err in denying Ms. Green's request for the instruction. App. at 6. However, the court's opinion ignores the history of the statute and this Court's decisions.

The statute defining theft and sufficient defenses to theft, including good faith claim of title, was enacted in 1975.[4] RCW 9A.56.020; Laws of 1975, ch. 260, § 9A.56.020. The analysis in *Casey* and *Stanton* rely on this Court's decisions in *State v. Emerson*, 43 Wn.2d 5, 12, 259 P.2d 406 (1953) and *State v. Mercy*, 55 Wn.2d 530, 533, 348 P.2d 978 (1960), both of which predated the enactment of RCW 9A.56.020.

[4] While the version enacted in 1975 has since been amended, it included the definition of theft under which Ms. Green was prosecuted ("[b]y color or aid of deception") and the good faith claim of title defense at issue here.

In *Emerson* and *Mercy*, this Court relied on the language provided in former RCW 9.54.010, which defined larceny, and former RCW 9.54.120, which provided the good faith claim of title defense. Laws of 1915, ch. 165, § 3; Laws of 1909, ch. 249, § 356. While the language in these statutes was similar to the language in RCW 9A.56.020, the current theft statute is different in that it provides a concise list of the three ways in which theft may be committed, immediately followed by the explicit statement that good faith claim of title is a sufficient defense "[i]n *any* prosecution for theft." RCW 9A.56.020 (emphasis added).

The plain language of the current statute does not allow for the same conclusion reached by this Court in *Emerson* and *Mercy*. Op. Br. at 12. Because "[t]he surest indication of legislative intent is the language enacted by the legislature," this Court is required to give effect to the plain meaning of the text where the statute is plain on its face. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

Here, the language of the statute is plain on its face. It provides three different ways of committing theft, and states that "[i]n *any* prosecution for theft, it *shall* be a sufficient defense that… [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020 (emphasis added). It is well established that the use of the

word "shall" indicates a mandatory obligation. *Blueshield v. State Office of Ins. Com'r*, 131 Wn. App. 639, 650, 128 P.3d 640 (2006). Thus, when this Court carved out an exception for theft committed by deception, it violated the basic principles of statutory construction. *See Ervin*, 169 Wn.2d at 820.

b. The holding in *State v. Casey* cannot be reconciled with this Court's decision in *State v. Ager.*

In addition, the Court of Appeals' efforts to distinguish its holding in *Casey* from this Court's holding in *Ager* was misguided. *Casey*, 81 Wn. App. at 589. In *Ager*, the defendant was charged with embezzlement, proscribed under the first definitional prong of the statute, RCW 9A.56.020(1)(a). *Ager*, 128 Wn.2d at 91. Although the court found the trial court properly denied the good faith claim of title instruction, its decision was based on the fact that there was "*no* evidence" presented at trial from which a jury could infer good faith claim of title by the defendants. *Id*. at 96 (emphasis original). Had such evidence been presented, the defendants would have been entitled to the instruction. *Id*.

In *Casey*, this Court recognized the apparent conflict with *Ager*, and stated:

> Nor is our decision inconsistent with *Ager*, in which the Supreme Court approved an instruction on the good faith claim of title defense in a trial for theft by embezzlement. In the case of a theft by deception, a good faith claim of

> title would negate a specific element of the crime, namely deprivation "[b]y color or aid of deception." In contrast, the good faith claim of title is an affirmative defense to theft by embezzlement, but does not negate any particular element of that charge. *Ager* is thus not controlling here.

81 Wn. App. at 527.

The distinction drawn in *Casey* finds no support in *Ager*. First, in *Ager*, the court relied on its prior decision in *Hicks* to find that the statutory defense negated the element of intent, directly contradicting the Court's contention in *Casey* that RCW 9A.56.020(2)(a) does not negate an element of embezzlement. *Ager*, 128 Wn.2d at 92; *Hicks*, 102 Wn.2d at 184.

Second, even if the Court of Appeals' discussion of *Ager* was correct, this Court has repeatedly found that defendants are entitled to an instruction where the defense negates an element. For example, when examining a self-defense claim, this Court has found that self-defense negates an element of the charged crime because it is "impossible for one who acts in self-defense to be aware of facts or circumstances 'described by a statute defining an offense.'" *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984) (citing *State v. McCullum*, 98 Wn.2d 484, 492, 656 P.2d 1064 (1983); *State v. Hanton*, 94 Wn.2d 129, 132, 614 P.2d 1280 (1980)). Once some evidence of self-defense is presented at trial, she is entitled to the instruction. *Acosta*, 101 Wn.2d at 619.

In this instance, the plain language of the statute directs that good faith claim of title "shall be a sufficient defense." RCW 9A.56.020(2)(a). Ms. Green's statements to the agent provided evidence of this defense, and because the defense negated an element of the crime, it was constitutional error for the trial court to deny her request for the instruction. *See State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014); *Smith v. United States*, 568 U.S. 106, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) U.S. Const. Amend. XIV; Const. art. I, § 3. This issue presented is one of substantial public interest and this Court should grant review. RAP 13.4(b)(4).

2. Review should be granted because this Court's decision in *State v. Allen* required the trial court to provide the requested supplemental jury instruction on knowledge.

In order to render its verdicts on the charges against Ms. Green, the jury was required to determine whether Ms. Green had knowledge of certain facts. As defense counsel informed the jury in opening, "really the trial is going to be about my client and what she knew." 1 RP 177.

As to the charge of theft, the jury needed to find the following in order to conclude Ms. Green had engaged in deception:

> Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows

> to be false or fails to correct another's impression which the actor previously has created or confirmed.

CP 100; RCW 9A.56.010(5)(a). As to the charges of forgery, the jury was instructed:

> A person commits the crime of forgery when, with intent to injure or defraud, he or she possesses, offers, disposes of or puts off as true, a written instrument which he or she knows to be forged.

CP 102; RCW 9A.60.020(1)(1)(b). Thus, to reach its decision, the jury needed to evaluate what the State proved Ms. Green knew.

Under the general culpability statute, an individual must have actual knowledge, but the State may rely on circumstantial evidence to demonstrate the actual knowledge. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); RCW 9A.08.010(1)(b). The pattern knowledge instruction explains this to the jury by stating:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 108; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (3d ed. 2014).

The State, however, cannot satisfy a knowledge requirement by a showing that the defendant should have known the requisite fact. *Allen*,

182 Wn.2d at 374; *State v. Shipp*, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980). As this Court explained in *Allen*:

> Although subtle, the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant 'should have known' is critical. We have recognized that a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge "if an ordinary person in the defendant's situation would have known" the fact in question, or in other words, if the defendant "should have known."

182 Wn.2d at 374 (citing *Shipp*, 93 Wn.2d at 514).

Concerned that the jury would fail to appreciate this subtle distinction, defense counsel moved in limine to preclude any argument by the State that Ms. Green "should have known she was misleading the bank." 1 RP 35. The State immediately expressed its intention to do exactly that, and the trial court indicated it would read *Allen* but that it believed "should have known" was a reasonable inference that the jury was permitted to draw. 1 RP 35-36. After hearing Ms. Green's argument, the court reserved its ruling. 1 RP 37.

Ms. Green addressed this issue again when she sought to augment the pattern knowledge instruction with an additional instruction. 2 RP 63, 73. Defense counsel proposed two instructions, one of which correctly stated the law under *Allen*. CP 164. The proposed instruction stated:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury may only find that the person acted with knowledge of that fact if based on the evidence the jury is satisfied that the person had actual knowledge of that fact.

CP 164. This instruction clarified the language in the pattern instruction, which *Allen* acknowledged could mislead the average juror. 182 Wn.2d at 374.

The trial court denied Ms. Green's request, finding that *Allen* was inapplicable because it involved accomplice liability, and "that the jury, through the standard instruction, can determine whether reasonable person [sic] can in fact believe that they're – or know a fact which constitutes a crime." 2 RP 71.

Although the defendant in *Allen* was charged as an accomplice, this Court's analysis was not limited by that fact. The Court addressed the general culpability statute, which is relevant in Ms. Green's case because, like in *Allen*, the jury was required to find she acted with knowledge. 182 Wn.2d at 374. In addition, the court's explanation as to why the pattern instruction was sufficient demonstrates its failure to recognize Ms. Green's concern, which is that the jurors might be misled by the pattern instruction to find that, because a reasonable person would know, Ms. Green should have known. CP 108.

Taken as a whole, jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Without the additional instruction, the relevant legal standard was not apparent to the average juror.[5]

The supplemental instruction proposed by the defense stated the law correctly and addressed this ambiguity in the pattern instruction. When the trial court denied Ms. Green's request to properly instruct the jury, it erred. This Court should accept review because the Court of Appeals' decision is in conflict with *Allen* and raises an issue of substantial public interest. RAP 13.4(b)(1), (4).

3. Review should be granted because Ms. Green was denied a fair trial when the deputy prosecutor improperly shifted the burden to Ms. Green, mischaracterized the State's burden, and appealed to the passion and prejudice of the jurors in his closing argument.

Ms. Green's defense counsel properly directed the jury to the fact that her mother's "Personal Signature Card" document was from 2011 and

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[5] *See* Judge Alan R. Hancock, *True Belief: An Analysis of the Definition of "Knowledge" in the Washington Criminal Code*, 91 Wash. L. Rev. 177 Online (March 9, 2016) *available at*: https://www.law.uw.edu/wlr/online-edition/hancock (discussing how the WPIC does not provide the jurors with the instruction necessary pursuant to this Court's decisions in *Allen* and *Shipp*).

the State's witness had acknowledged the bank records may not be complete. 2 RP 116. On rebuttal, the deputy prosecuting attorney asserted that it was defense counsel's obligation to elicit whether the record was complete, and defense counsel had not done so because he was afraid of the answer. 2 RP 134-35.

A prosecutor may not comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). The "State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). "Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct." *Thorgerson*, 172 Wn.2d at 466. When the State argued it was the defense counsel's obligation to question the witness about this information, it improperly shifted the burden of proof to Ms. Green.

In addition, the deputy prosecuting argued Ms. Green was asking the jury to "bend over backwards" to find reasonable doubt. 2 RP 136-37. The State's argument is improper where it fails to convey the gravity of the State's burden. *See State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). In addition, our courts have long-recognized the impropriety of the "in order to find the defendant not guilty" argument.

State v. Anderson, 153 Wn. App. 417, 443, 220 P.3d 1273 (2009) (Quinn-Brintnall, J concurring) (citing *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)); *Fleming*, 83 Wn. App. at 213.

The jury was required to acquit Ms. Green unless it was convinced of her guilt beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213. The State's suggestion to the contrary, that the jury should convict unless it could find a reason not to, by bending over backwards, constituted misconduct.

Finally, the prosecuting attorney improperly argued Ms. Green's case was really about holding people accountable. 2 RP 137. After Ms. Green objected to the State's mischaracterization of reasonable doubt, the State cited the correct jury instruction but then immediately told the jury:

> This is not personal. It's not about Donna Green. It's not about the Social Security Administration's anger. It's not about any of that. It's about holding people accountable for the things that they do.

2 RP 137.

Mere appeals to the jury's passion or prejudice during argument are improper. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). In the State's final comments to the jury, it suggested that the case was about something bigger than Ms. Green. Similar to a statement that the jury should "send a message" by returning a guilty verdict, the

prosecuting attorney's statement that the jury needed to find Ms. Green guilty in order to hold people accountable, was an improper appeal to prejudice and patriotism. *See State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P.3d 838 (2006).

The Court of Appeals rejected Ms. Green's claims based on its finding that the State's comments were "a fair response to the defense closing argument." App. at 10. In fact, these statements were improper and constituted misconduct. This Court should accept review in the substantial public interest. RAP 13.4(b)(4).

4. This Court should accept review because Ms. Green's constitutional right to counsel was violated when the trial court repeatedly denied her motions for substitution of her court-appointed attorney.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; Const. art. I, § 22. This right entitles a defendant to conflict-free representation. *Daniels v. Woodford*, 428 F.3d 1181, 1196 (9th Cir. 2005), *cert. denied* 550 U.S. 968 (2007). While the Sixth Amendment does not guarantee a "meaningful relationship" between a client and his attorney, forcing a defendant to proceed to trial represented by an attorney with whom she has an irreconcilable conflict amounts to constructive denial of the right to

counsel. *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (citing *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970)).

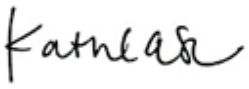
Ms. Green moved three times to discharge her attorney and have new counsel appointed. 1 RP 5, 10, 15. Each time she explained her attorney had not met with her to discuss the case. The court's denial of Ms. Green's motions constructively denied her right to counsel. *Daniels*, 428 F.3d at 1198. Review should be granted in the substantial public interest. RAP 13.4(b)(4).

E. CONCLUSION

For all of the reasons stated above, this Court should grant review of the Court of Appeals opinion affirming Donna Green's convictions.

DATED this 19th day of July, 2017.

Respectfully submitted,



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APPENDIX

COURT OF APPEALS, DIVISION I OPINION

June 19, 2017

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

THE STATE OF WASHINGTON, Respondent, v. DONNA ELIZABETH GREEN, Appellant.	)	No. 73954-9-I UNPUBLISHED OPINION FILED: June 19, 2017

SCHINDLER, J. — Donna Elizabeth Green seeks reversal of the jury convictions for one count of theft by color or aid of deception in violation of RCW 9A.56.020(1)(b) and .030(1)(a) and five counts of forgery in violation of RCW 9A.60.020(1)(b). Green contends the court erred by (1) refusing to instruct the jury on the statutory defense of good faith claim of title, (2) rejecting a supplemental jury instruction on knowledge, and (3) denying motions to substitute counsel. Green also asserts prosecutorial misconduct in rebuttal argument deprived her of the right to a fair trial. We affirm.

FACTS

Donna Mae Green received Social Security and survivor benefits. Each month, the Social Security Administration (SSA) deposited approximately $700 directly in her Bank of America checking account. Donna Mae Green was the only "authorized signer" on the account.

Donna Mae Green died on May 13, 2012. Donna Mae Green did not designate a "representative payee" to receive SSA benefits on her behalf. Because SSA was not notified of her death, SSA continued to deposit approximately $700 in her Bank of America account.

Donna Elizabeth Green (Green) is the daughter of Donna Mae Green. From May 8, 2012 until January 4, 2014, Green wrote approximately 24 checks to herself using her mother's Bank of America account. Green signed the checks as "Donna Green" and Bank of America cashed the checks.

In December 2013, the "death match alert program" notified SSA that Donna Mae Green died on May 13, 2012. SSA contacted Bank of America to recover the money deposited in the account after her death. Bank of America informed SSA that the remaining balance in the account was approximately $2,000.

In May 2014, SSA investigator Scott Henderson met with Green. Green said she knew SSA continued to deposit money in her mother's account after her mother died. Green told Henderson that she wrote checks on the account and used the money to pay expenses.

The State charged Green with one count of theft by color or aid of deception in the first degree in violation of RCW 9A.56.020(1) and .030(1)(a) and five counts of forgery in violation of RCW 9A.60.020(1)(b). Green entered a plea of not guilty.

SSA investigator Henderson and Bank of America fraud investigator Paul Lemon testified at trial on behalf of the State.

Henderson testified that Green told him that she and her mother "both opened accounts at the same time at Bank of America" and "she wasn't sure whether she was

the signature on her mother's account." Green said she knew SSA continued to deposit Social Security benefits in the Bank of America account after her mother died and admitted using the money "for her own personal use." When Henderson asked how much money she withdrew, Green admitted she withdrew "about $19,000" in Social Security benefits from her deceased mother's Bank of America account.

Henderson testified that Green told him she thought the Social Security payments would stop "when they were supposed to stop." When asked whether she attempted to contact SSA, Green told Henderson that she thought SSA "should have contacted her."

Bank of America fraud investigator Lemon testified that Donna Mae Green was the only "authorized signer" on the Bank of America account. Lemon stated that Bank of America does not allow someone who is not authorized to sign checks on the account. Lemon said video surveillance footage showed Green cashing one of the checks on her mother's account. The court admitted still photographs from the surveillance video into evidence.

Green did not testify or present any other evidence. The court refused to instruct the jury on the defense of good faith claim of title or give a supplemental instruction on knowledge. The court used 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC) to instruct the jury on the charged crimes of theft by deception and forgery and the meaning of "knowledge."

The jury found Green guilty of one count of theft by color or aid of deception in the first degree and five counts of forgery. The court imposed a first time offender sentence of 100 hours community restitution and 6 months community supervision.

ANALYSIS

Good Faith Claim of Title

Green contends the court erred in refusing to instruct the jury on the defense of good faith claim of title. We review de novo the refusal to give an instruction based on a ruling of law. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998); State v. Sullivan, 196 Wn. App. 277, 291, 383 P.3d 574 (2016).

The theft statute, RCW 9A.56.020(1), "sets out four distinct types of theft, including theft by taking, embezzlement, theft by deception, and appropriation of lost or misdelivered property." State v. Ager, 128 Wn.2d 85, 91, 904 P.2d 715 (1995). RCW 9A.56.020(1)(b) defines theft by deception as follows:

> "Theft" means . . . [b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

Consistent with the statute, the court instructed the jury on theft by deception in the first degree. Jury instruction 7 states:

> To convict the defendant of the crime of theft in the first degree, as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between May 13, 2012 and February 3, 2014, the defendant, by color or aid of deception, obtained control over property of another or the value thereof;
>
> (2) That the property exceeded $5000 in value;
>
> (3) That the defendant intended to deprive the other person of the property;
>
> (4) That the defendant's acts were part of a common scheme or plan, a continuing criminal impulse, or a continuing course of criminal conduct; and
>
> (5) That the acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2), (3), (4), and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count One.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5)[,] then

it will be your duty to return a verdict of not guilty as to Count One.

RCW 9A.56.020(2)(a) sets forth the defense of good faith claim of title. RCW 9A.56.020(2)(a) states:

> In any prosecution for theft, it shall be a sufficient defense that . . . [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.

Green proposed a jury instruction based on RCW 9A.56.020(2)(a):

> It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable. The State has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to the charge of Theft in the First Degree.

In State v. Stanton, 68 Wn. App. 855, 868, 845 P.2d 1365 (1993), we held a trial court is not required to instruct the jury on the defense of good faith claim of title where the charge is "theft by deception." Because the State must prove and the jury must find that the defendant obtained control of property of another by " 'color or aid of deception,' " such a finding establishes the defendant did not obtain control openly and avowedly. Stanton, 68 Wn. App. at 868 (quoting RCW 9A.56.020(1)(b)).

> The trial court was not required to give the proposed instruction where the charge was theft by deception. Before the jury can convict on such a charge, it must find that the defendant obtained control over the property of another "by color or aid of deception." RCW 9A.56.020(1)(b). Such a finding necessarily includes an implied finding that the defendant did not obtain control over the property "openly and avowedly under a good faith claim of title."[See RCW 9A.56.020(2)(a).] The jury need not consider the same finding a second time, and, thus, the court need not instruct on the defense of good faith claim of title.

Stanton, 68 Wn. App. at 868.[1]

[1] Emphasis in original.

In State v. Casey, 81 Wn. App. 524, 915 P.2d 587 (1996), we adhered to the decision in Stanton and rejected the argument that the legislature intended to make the defense of good faith claim of title available for theft by deception.

> We do not agree that this statute requires instruction on a defense of a good faith claim of title in cases where, as here, it is logically impossible to convict without implicitly rejecting any claim of good faith. A jury cannot convict on a charge of theft by deception without first rejecting any claim of good faith by the defendant. We therefore reiterate the conclusion we reached in Stanton: The good faith claim of title is inapplicable as a matter of law where the charge is theft by deception.

Casey, 81 Wn. App. at 527.

The cases Green relies on to argue she is entitled to an instruction on the good faith claim of title defense are inapposite. See Ager, 128 Wn.2d at 92 (embezzlement); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984) (assault); State v. McCullum, 98 Wn.2d 484, 492, 656 P.2d 1064 (1983) (murder); State v. Hanton, 94 Wn.2d 129, 132, 614 P.2d 1280 (1980) (manslaughter).

We adhere to the analysis in Stanton and Casey and conclude the court did not err in refusing to instruct the jury on the defense of good faith claim of title.

Jury Instruction on Knowledge

Green claims the trial court erred by refusing to give a supplemental jury instruction that states the jury must find "actual knowledge." Green's proposed jury instruction states:

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury may only find that the person acted with knowledge of that fact if based on the evidence the jury is satisfied that the person had actual knowledge of that fact.

The court used WPIC 10.02 to instruct the jury on the meaning of knowledge. Jury instruction 19 states:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

Green concedes WPIC 10.02 does not "misstate the law." We agree. In State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), the Washington Supreme Court expressly approved the use of WPIC 10.02 to instruct the jury on the meaning of "knowledge." See also State v. Allen, 182 Wn.2d 364, 372, 341 P.3d 268 (2015) (WPIC 10.02 "correctly stated the law regarding 'knowledge.' ").

Green relies on Allen to argue the court erred in refusing to give the supplemental instruction on knowledge. In Allen, the State charged the defendant as an accomplice with aggravated murder in the first degree. Allen, 182 Wn.2d at 369-70. The State had the burden of proving accomplice liability and that the defendant had "actual knowledge" of the crime. Allen, 182 Wn.2d at 371. The court instructed the jury on knowledge using WPIC 10.02.[2] Contrary to the jury instruction that correctly defined the meaning of knowledge, in closing argument, the prosecutor "repeatedly and

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[2] The knowledge instruction in Allen stated:

> "A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance.
>
> "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact."

Allen, 182 Wn.2d at 372.

improperly" used the phrase "should have known." Allen, 182 Wn.2d at 371. The court held the argument was improper and misleading because a juror could misinterpret the culpability statute and find the defendant should have known. Allen, 182 Wn.2d at 380, 374.

> We have recognized that a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge "if an ordinary person in the defendant's situation would have known" the fact in question, or in other words, if the defendant "should have known."

Allen, 182 Wn.2d at 374 (quoting State v. Shipp, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980)).

Here, unlike in Allen, the culpability statute is not implicated, and the record shows the prosecutor did not make an improper or misleading argument on the meaning of knowledge.[3] We conclude the court did not err in refusing to give the defense proposed jury instruction and instructing the jury on the definition of "knowledge" using WPIC 10.02.

Substitution of Counsel

Green contends the court erred in denying motions to substitute counsel. The Sixth Amendment to the United States Constitution guarantees in "all criminal prosecutions, the accused shall . . . have the assistance of counsel for [her] defense." But a defendant " 'does not have an absolute, Sixth Amendment right to choose any particular advocate.' " State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997)). The essential aim of the Sixth Amendment is to guarantee an effective advocate for a criminal

[3] We also note that unlike in Allen, the prosecutor did not improperly use the phrase "should have known" when describing the definition of knowledge. As defense counsel conceded in closing argument, "I think [the prosecutor] did a very fair and reasonable job of explaining that [knowledge] instruction to you."

defendant "rather than to ensure that a defendant will inexorably be represented by the lawyer whom [s]he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

"Whether an indigent defendant's dissatisfaction with [her] court-appointed counsel is meritorious and justifies appointment of new counsel is a matter within the discretion of the trial court." State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). To warrant substitution of counsel, a defendant must show good cause: " 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' " Varga, 151 Wn.2d at 200 (quoting Stenson, 132 Wn.2d at 734). A general loss of confidence in defense counsel by itself is not sufficient cause for substitution. Stenson, 132 Wn.2d at 734. The attorney and the defendant must be "so at odds as to prevent presentation of an adequate defense." Stenson, 132 Wn.2d at 734. Because the record does not show either an irreconcilable conflict in interest or a complete breakdown in communication, the court did not abuse its discretion by denying Green's motions to substitute counsel.

Prosecutorial Misconduct

Green contends prosecutorial misconduct during rebuttal argument deprived her of the right to a fair trial by shifting and mischaracterizing the burden of proof and appealing to the passion and prejudice of the jury.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). We review an allegedly improper comment in the full context of the arguments, issues, evidence, and instructions. State v. Russell, 125 Wn.2d 24, 85-

86, 882 P.2d 747 (1994).

Because the defendant has no duty to present evidence, a prosecutor cannot comment on the defendant's failure to present evidence. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). A prosecutor should not make arguments calculated to inflame the passion or prejudice of the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). However, the prosecutor is entitled in rebuttal argument to make a fair response to the defense closing argument. Russell, 125 Wn.2d at 87. Because the prosecutor's remarks during rebuttal argument were in fair response to the defense closing argument, Green cannot show prosecutorial misconduct.

We affirm.

Schindler, J.

WE CONCUR:

Spearman, J.

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73954-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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