

64409-2

64409-2

NO. 64409-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

TYRONE DASH,

Appellant.

2010 SEP 30 PM 4:59  
X  
COURT OF APPEALS  
STATE OF WASHINGTON

---

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

---

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Tyrone Dash befriended Francis Taylor after she had taken out a large mortgage and owed a significant amount of money. He helped her try to repair two apartment buildings she owned, manage construction costs, and renegotiate the low rents she charged her tenants. He accompanied her as she met with loan representatives and attorneys to discuss her finances. He also helped her personally, taking care of errands and paying bills. He provided her with copies of all bills, bank statements, and credit card account information. As payment for his services as well as gifts for his friendship, he was reimbursed with Taylor's approval or permitted to use her credit cards and ATM card to purchase items for her as well as himself.

A friend of Taylor's discovered she had suffered financial ruin in the time she was friends with Dash and blamed him. She had to sell her apartment buildings to pay her loans and still could not afford the bills she incurred. The prosecution charged Dash with one count of first degree theft along with the aggravating factors of major economic offense and particularly vulnerable victim. In the course of the trial, the jury never determined that the charges were brought within the statute of limitations. The

prosecution relied on testimony by absent witnesses in plain violation of the confrontation clause. The prosecution misrepresented the legal elements of the crime charged to dilute its burden of proof. It encouraged the jury to find it proved aggravating factors without an accurate understanding of the requirement of unanimity. For these reasons, Dash's conviction and sentence must be reversed.

B. ASSIGNMENTS OF ERROR.

1. The prosecution violated the statute of limitations for theft.

2. Dash was denied his right to a jury finding that the offense occurred within the period allowed by the statute of limitations as required by the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

3. The State violated Dash's right to confront witnesses against him, contrary to the Sixth Amendment and Article I, section 22 of the Washington Constitution.

4. The court's jury instructions regarding the responsibilities of a fiduciary, agent, or power of attorney inaccurately portrayed the legal elements of theft, confused the jury, and constituted a

comment on the evidence contrary to Article IV, section 16 of the Washington Constitution.

5. The court improperly instructed the jury on a fiduciary's responsibility under civil law. CP 248 (Instruction 19).

6. The court improperly instructed the jury on the authority provided under a Power of Attorney. CP 249 (Instruction 20).

7. The court improperly instructed the jury on the responsibilities of an attorney-in-fact. CP 250 (Instruction 21).

8. The court improperly instructed the jury on the duties of a fiduciary to account for assets. CP 251 (Instruction 22).

9. The court improperly instructed the jury on the definition of undue influence. CP 252 (Instruction 23).

10. The court improperly instructed the jury on a fiduciary's ability to obtain a gift. CP 253 (Instruction 24).

11. The prosecution misrepresented the essential elements of theft and the legal requirements of a good faith claim of title.

12. The cumulative error arising from the incorrect legal instructions, the court's comment on the evidence, and the prosecution's misrepresentation of the law denied Dash his right to due process of law.

13. The court improperly instructed the jury that its verdict must be unanimous in deciding whether the State proved the aggravating factors in the special verdict forms. CP 245 (Instruction 16).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The statute of limitations for theft in the first degree is three years. The jury must expressly find that the charged offense occurred before the expiration of the limitations period. Where the jury did not find that the offense occurred within three years of when the prosecution brought charges, and the jury may have rested its verdict upon acts that occurred more than three years before the charges were filed, has the prosecution violated the statute of limitations?

2. The confrontation clause of the Sixth Amendment and the right to confront witnesses face to face under Article I, section 22, demand that an accused person have the opportunity to challenge a witness who offers testimony on behalf of the prosecution. The prosecution relied on a videotaped interrogation of the non-testifying complainant conducted by a prosecutor. Also, a State agent investigating criminal allegations repeated out of

court statements by others. Did the State's use of evidence that Dash could not confront violate his right of confrontation?

3. Although a court may tell the jury to use testimony for a purpose other than its truth, a limiting instruction does not cure a confrontation clause violation unless the evidence is genuinely critical to the prosecution's case and is redacted to remove statements that likely to be used by the jury for their truth notwithstanding the limiting instruction. The court instructed the jury to use unfronted testimony as evidence of the complainant's state of mind and her understanding of events, rather than the truth of the matters asserted. Where the complainant's state of mind was a central legal and factual issue in the case, the State did not redact the out of court statement to remove references to the factual matters pertaining to the case, and it would be impossible for jurors to disregard the material content of the unfronted evidence, did the court's limiting instruction fail to erase the confrontation clause violation?

4. A person does not commit theft if he had a believed he had a good faith claim of title to property he received. The prosecutor misrepresented the elements of this defense by repeatedly informing the jury that, as a matter of law, it only applied

to the actual owner. Where caselaw clearly establishes that the good faith claim of title defense extends to a person who believes he is entitled to property, and not simply the actual owner of the property, did the prosecutor's repeated misrepresentation of a critical legal principle deny Dash a fair trial?

5. The elements of theft are set forth in a criminal statute, unlike the civilly enforced legal responsibilities of a fiduciary. Over the defense's objection, the court gave numerous instructions defining a fiduciary's legal duties under civil law. The prosecutor told the jury that the judge believed that these legal principles governed the entire case. By issuing six non-pattern instructions defining fiduciary responsibilities in the context of civil law, did the court confuse the legal standard and comment on the evidence?

6. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it must be unanimous in deciding whether the State proved the two aggravating factors, and this unanimity requirement applied to both "yes" and "no" answers. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect

instruction undermine the jury's special verdict findings as dictated by the recent Washington Supreme Court decision in Bashaw?<sup>1</sup>

D. STATEMENT OF THE CASE.

In 1999, Francis Taylor was in her late eighties. 9/23/09RP 38-39.<sup>2</sup> She owned two apartment buildings on Capitol Hill in Seattle and actively participated in their upkeep and maintenance, including climbing on the roof to fix problems. 9/28/09RP 22-23, 42. She befriended her tenants and charged minimal rent. 9/28/09RP 23, 28.

In 1998 or 1999, Taylor contracted with a construction company owned by Abel Cordova to renovate these two buildings. 9/24/09RP 34, 43, 105. The tenants disliked the sporadic and disruptive nature of the renovations and thought Taylor did not know what the construction company was doing. 9/28/09RP 27, 50. One tenant contacted the State's offices of the attorney general and adult protective services to complain that Taylor was being taken advantage of by the construction company. 9/24/09RP 105, 110. Adult Protective Services worker Catherine Baker

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<sup>1</sup> State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

<sup>2</sup> The verbatim report of proceedings (RP) is referenced herein by the date of the proceeding followed by the page number. Although two separate volumes refer to proceedings on September 23, 2009, one of those volumes pertains solely to jury voir dire and is not referred to herein.

interviewed Taylor and a number of others with knowledge of Taylor's finances to determine whether she was being exploited as a vulnerable adult. 9/24/09RP 109-17. Baker did not find evidence of exploitation or current vulnerability and closed her investigation.

In 2000, Cordova asked Tyrone Dash to help Taylor with processing a loan application that would be used to pay Cordova for the extensive repairs and remodeling. 9/28/09RP 124-25. Dash and Taylor became friends and Dash switched from working for Cordova to helping Taylor with managing her finances and her apartment buildings. 9/28/09RP 128-31, 143-44, 148-49.

When Dash met Taylor, she had already mortgaged property that she formally owned outright in order to pay Cordova for construction costs. 9/28/09RP 130. With Dash's assistance, Taylor negotiated additional loans to meet the existing mortgage payments and construction costs and she exhausted her personal finances in order to pay off debt arising from the various mortgages. 9/24/09RP 43-44; 9/28/09RP 136, 154, 163-70.

Dash accompanied Taylor in meetings with attorneys to sort out her financial situation. 9/24/09RP 171; 9/28/09RP 154; see Exs. 20, 21 (containing letters from attorney summarizing meetings). Taylor had previously placed her apartment buildings in

a trust to go to her church upon her death, as Taylor had no heirs. 9/28/09RP 152; Ex. 21. Because Taylor could not take out mortgages on the property while they were in a trust, she altered the trust agreements. 9/24/09RP 39, 44. With an attorney's assistance, Taylor revoked the power of attorney that she formally had given to her church, and named Dash as personal representative upon her death with instructions that her property would go to a charity. Ex. 22. Her final will also deeded property to Dash, but Taylor sold that property shortly after putting that clause in her will. Ex. 20.

As payment for his services, and as gifts for his friendship, Dash used credit cards and an ATM card to purchase items for Taylor and himself. 9/28/09RP 155. Taylor provided copies of the bills and account statements in her home. 9/23/09RP 42, 44-45; 9/28/09RP 149, 175. He took her to the doctor, helped her get food, and paid for expenses. 9/28/09RP 176-88. Some of the charges were clearly for Taylor, such as a hearing aid, but others were for Dash. 9/29/09RP 147. Dash believed Taylor consented to the charges. 9/28/09RP 149, 155-56, 161, 181.

As Taylor aged, she declined in her cognitive abilities but remained "fiercely independent." 9/23/09RP 74; 9/28/09RP 85.

Her fellow church choir singers noticed she did not organize her music as well as she used to during weekly choir practice and church services, although she regularly attended and participated in the choir. 9/25/09RP 144, 146; 9/28/09 RP 11, 16. She did not dress as well, had a bad body odor, and her home was cluttered with papers. 9/23/09RP 73; 9/24/09RP 138; 9/28/09RP 103.

In late March 2005, Robert Forgrave took Dash out for a birthday dinner with his family. 9/23/09RP 39. Taylor seemed less talkative and uninformed about her personal finances. 9/23/09RP 40. The next day, Forgrave's wife noticed Taylor's home was in foreclosure. 9/23/09RP 43. Forgrave took charge of Taylor's finances. 9/23/09RP 44. He realized Taylor had lost almost all of her wealth, and blamed Dash. 9/23/09RP 54; 9/24/09RP 22-23.

On May 16, 2005, a prosecutor and police detective interviewed Taylor in videotape. 9/23/09RP 49; Ex. 24. They questioned her about Dash, her finances, and her memory. CP 309-11, 314, 316-17.

They did not ask her about a car accident she had been in while driving her car in March 2005, which required hospitalization and may have been caused by a stroke, or ask her about any

medical issues. 9/24/09RP 59-60; 9/28/09RP 74. Dash did not participate in the interview.

Almost three years later, on March 18, 2008, the State filed charges against Dash, alleging he committed one count of first degree theft with two aggravating factors: major economic offense and particularly vulnerable victim. CP 1. The jury convicted Dash as charged, and the court imposed an exceptional sentence of 66 months in prison. CP 256-58; 289-92.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. WITHOUT A JURY FINDING THAT THE PROSECUTION PROVED A CRIMINAL ACT OCCURRED BEFORE THE STATUTE OF LIMITATIONS EXPIRED, REVERSAL IS REQUIRED

a. The statute of limitations bars the State from prosecuting Dash for an offense the occurred more than three years earlier. In a criminal case, the statute of limitations is jurisdictional and “creates an absolute bar to prosecution.” State v. Novotny, 76 Wn.App. 343, 345, 884 P.2d 1336 (1994). It “cannot be waived” and may be raised for the first time on appeal. State v.

Walker, 153 Wn.App. 701, 705 & n.2, 224 P.3d 814 (2009); RAP 2.5(a)(1).

The statute of limitations for first degree theft is three years after its commission. RCW 9A.04.080(h). When an offense is part of a continuing criminal impulse, the statute of limitations does not begin to run until the final theft. State v. Mermis, 105 Wn.App. 738, 745-46, 20 P.3d 1044 (2001).

“Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury.” Mermis, 105 Wn.App. at 746. In Mermis, this Court found that there was a factual dispute as to the date of the theft for which the jury found the defendant guilty. Mermis was charged with theft in mid-September 1998, but underlying acts occurred in early and late September 1995. The three year statute of limitations would have expired if the jury concluded that the theft occurred in early September 1995.

The Mermis Court held that neither the jury instructions nor the verdict form specified whether the jury convicted Mermis of a crime that was committed within the available charging period. Id. at 752. Factually, the jury could have based its verdict upon unanimous agreement that the theft occurred more than three

years before the State charged Mermis with theft. Absent a clear jury finding, the conviction could not stand.

Similarly, Dash was charged with committing first degree theft within a time period ranging from January 1, 2000 to March 31, 2005. CP 34. The State did not charge Dash with a crime until March 18, 2008. CP 1. Accordingly, the jury needed to find the criminal conduct continued and occurred after March 18, 2005, in order to extend the statute of limitations. Mermis, 105 Wn.App. at 743, 752.

b. The jury did not find Dash committed an offense within the statute of limitations. In Washington, the right to a jury trial is “inviolable.” State v. Williams-Walker, 167 Wn.2d 889, 225 P.2d 913, 918 (2010); Wash. Const. art. I, § 21 (“[t]he right of trial by jury shall remain inviolable”). The jury must “explicitly” find, beyond a reasonable doubt, all factors essential to punishment. Id. at 898. The court may not infer necessary jury findings. Id.

Washington’s jury trial right is even more protective than the federal right encompassed by the Sixth Amendment, which also requires that a conviction and sentence be authorized by jury verdict. Id. (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Further, the right to due

process of law requires the State to prove every element of a charged offense beyond a reasonable doubt. Apprendi, 530 U.S. at 476-78.

The prosecution alleged Dash committed numerous unauthorized transactions spanning from January 1, 2000 to March 31, 2005, but did not charge him with a crime until March 18, 2008. CP 1. Most of the underlying activity occurred before 2005. Taylor sold the apartment buildings in 2002 and 2003, and she did not enter into new mortgages in 2005. 9/23/09RP 55-56. The State focused on credit card transactions and cash withdraws before 2005 as evidence of financial gain Dash received. See 9/29/09RP 19, 22-39 (discussing money spent in 2001, 2002, and 2003); Exs. 7, 8, 10 (ATM and credit card account withdraws). The only transactions that occurred after March 18, 2005, were some ATM withdraws from Taylor's account. Ex. 7. Dash testified that the late March 2005 ATM withdraws involved reimbursement for money he spent paying Taylor's bills. 9/29/09RP 54-55.

The State conceded that Dash made legitimate and authorized purchases for Taylor and it did not deem every transaction to be a wrongful taking. See e.g., 9/29/09RP 147 (prosecutor told jury, "[s]urely some of those [credit card charges]

were for her”); 9/29/09RP 149 (prosecutor argued, the “pricey hearing aid, \$5900, and that was Frances’s hearing aid. That’s not one that Mr. Dash should be held responsible for.”).

As in Mermis, there is no basis for concluding that the jury rested its verdict upon a finding that conduct that was part of the criminal impulse occurred after March 18, 2005, which is necessary to extend the statute of limitations. The State did not charge Dash with a crime until March 18, 2008. CP 1. The prosecution brought the charges within the statute of limitations only if the jury’s verdict expressly found that Dash committed the offense at some time after March 18, 2005. Rather than seek a specific determination that Dash acted with the necessary criminal impulse in late March 2005, the prosecutor told the jury there were multiple, various ways and times in which they could rest their verdict. 9/29/09RP 142, 146-51. The prosecutor did not seek a clear finding that the offense continued through late March 2005, and instead emphasized that the jury need not agree upon which alternative means or acts Dash committed the charged theft.

This court cannot speculate as to the basis of the jury’s verdict. Williams-Walker, 168 Wn.2d at 898. The jury was never asked to determine whether the State proved the offense occurred

on or after the period necessary for the statute of limitations. Thus, reversal is required.

2. THE STATE VIOLATED DASH'S RIGHT TO CONFRONT WITNESSES AGAINST HIM BY PRESENTING TESTIMONIAL STATEMENTS WITHOUT AFFORDING HIM THE OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT

One consequence of the State's delay in charging Dash for three years after the alleged misconduct ended was that Taylor had passed away by the time of trial. Several years earlier, on May 16, 2005, the prosecutor and a police detective interviewed Taylor and recorded that interview on videotape. The purpose of the interview was to ascertain whether Dash had committed a crime against Taylor. Dash was not present or represented by a lawyer during the State's interrogation of Taylor.

The prosecution introduced the DVD of Taylor's formal interview with the prosecutor at trial. Taylor did not testify at trial and was never cross-examined by Dash. The trial court told the jury to consider the substance of Taylor's statements on the videotape for "her state of mind" and "understanding" of events, rather than for the truth of the matter asserted. Regardless of the court's instruction, because of the testimonial nature of the interview, the importance of Taylor's understanding of events prove

an element of the charged crime, and the impossibility of any reasonable juror could ignore the substance of Taylor's statements against Dash, their admission violated Dash's right of confrontation as protected by the state and federal constitutions.

a. Testimonial statements elicited by prosecutorial authorities are inadmissible absent confrontation of the declarant.

The Sixth Amendment right of confrontation prohibits the prosecution from eliciting out-of-court statements by non-testifying witnesses when there has not been an opportunity for adequate cross-examination. Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224, 237 (2006); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004); State v. Mason, 160 Wn.2d 910, 920, 162 P.3d 396 (2007); U.S. Const. amend. 6 (guaranteeing a defendant the right, "to be confronted with witnesses against him."); Wash. Const. art. I, § 22 (guaranteeing the accused the right "to meet the witnesses against him face to face.").

Statements recounting completed criminal acts to investigating officers are "inherently testimonial." Davis, 547 U.S. at 830. "Statements taken by police officers in the course of

interrogations are . . . testimonial under even a narrow standard.”  
Crawford, 541 U.S. at 52.

The confrontation guaranteed by the Sixth Amendment is live testimony before the trier of fact with an opportunity for cross-examination. It is by confronting the declarant that the accused may explore the honesty and competence of the declarant’s statements. Melendez-Diaz v. Massachusetts, \_\_U.S. \_\_, 129 S.Ct. 2527, 2538, 174 L.Ed.2d 314 (2009). Furthermore, evidence need not be “accusatory” to constitute testimony that the accused has the right to confront. Melendez-Diaz, 129 S.Ct. at 2533-35. A person’s statements are subject to confrontation even where the declarant is seemingly neutral or recounting objectively verifiable information. Id. at 2536.

The prosecution bears the burden of proving that statements it wishes to elicit are non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009); see Melendez-Diaz v. 129 S.Ct. at 2540 (“fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses”). The record is examined objectively and reviewed *de novo*, as a question of law. Koslowski, 166 Wn.2d at 421.

b. Taylor's interview with the prosecutor and police detective was testimonial. The prosecution's interview with Taylor satisfies the requirements of testimonial evidence dictated by Crawford and its progeny.

Taylor's prosecutorial interview occurred months after the charged crime was over and involved historical facts. See Davis, 547 U.S. at 822, 830; Koslowski 166 Wn.2d at 422-29. There was no on-going emergency or immediate peril. Taylor's friend Robert Forgrave had taken over Taylor's finances and Taylor had no more involvement with Dash. 9/23/09RP 47. The interview occurred in what appears to be the prosecution's office with the active involvement of a prosecutor and police detective. Ex. 24. "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime" and any reasonable participant in such an interview would presume that the information gathered would be available for use in a prosecution. Davis, 547 U.S. at 830.

During the interview, in response to the prosecutor's question, Taylor said she did not authorize Dash to work for her. CP 309-11. She said she did not participate in and understand the sale of her apartments which Dash had orchestrated. CP 310-11.

She said "I just trusted" Dash. CP 310. Dash was helping her manage her apartments and arranged the apartment sales. CP 310-11. But she was unaware of Dash helping her with her finances and did not direct Dash to write checks for her. CP 311. She said she did not recall signing checks that Dash filled out, she did not recall receiving investment advice from Dash, and she did not understand that she had a mortgage on her home but thought Dash "had something to do with it." CP 310-11. All of this information was part of the crux of the State's case against Dash.

Taylor also verified that she did not use credit cards or bank machines to withdraw cash. CP 314. The prosecution accused Dash of withdrawing a large amount of money from Dash's account via ATM transactions, and claimed the fact that Taylor did not use such machines demonstrated Taylor did not make any of those withdraws herself. 9/29/09RP 136-37.

Taylor's videotaped statement contained material evidence indicating Taylor did not know what Dash was doing with her finances and she did not authorize his actions. The prosecution alleged that even though she received regular bank statements and signed various mortgage loan applications, a power of attorney document that would apply upon her death, and a will which

contains a notarized witness statement that Taylor was of sound mind, she did not understand what she was doing.

Taylor's interview with a prosecutor and police detective bears the definitive hallmarks of testimony requiring confrontation. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." Davis, 547 U.S. at 830 (emphasis in original). The prosecution sought to circumvent the confrontation clause by arguing they were not admitted for the truth of the matter asserted. As discussed below, these limiting instructions did not eradicate the obvious violation of the confrontation clause.

c. The complainant's testimony during her formal interview with the State is not insulated from the confrontation clause by a "state of mind" limiting instruction.

i. Crawford narrowly limits the use of testimonial statements for purported nonhearsay purposes. It is possible that testimonial statements may be used for purposes other than establishing the truth of the matter asserted without

violating the confrontation clause. Crawford, 541 U.S. at 60 n.9.<sup>3</sup> But the Washington Supreme Court has warned against using hearsay analysis to subvert the confrontation clause. Mason, 160 Wn.2d at 921-22. Evidentiary hearsay rules are irrelevant to confrontation clause protections. Crawford, 541 U.S. at 61 (divorcing confrontation clause from the “vagaries of the rules of evidence” or “amorphous notions of reliability”).

In Mason, the Court held that evidence admitted under the state of mind exception to the hearsay rule does not “immunize[ ] the statement from the confrontation clause.” 160 Wn.2d at 922. Regardless of whether a hearsay exception could reasonably apply, the reviewing court determines *de novo* whether “the statement was intended to establish a fact and that it was reasonable to expect it would be used in a prosecution or investigation; in other words that it was testimonial.” Id. at 922.

Furthermore, Crawford requires more than simply identifying a nontestimonial purpose for the admission of out of court statements by non-testifying witnesses. Crawford referenced Street for its analysis of the non-testimonial use of an out of court

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<sup>3</sup> In a parenthetical at the end of a footnote, Crawford noted, “(The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471

statement. In Street, the Court acknowledged the danger of introducing out of court statements for a nonhearsay purpose, because even with a limiting instruction, there is a risk the jury will improperly consider the statement for its truth. 471 U.S. at 414.

According to the holding of Street, when testimonial statements directly incriminate the defendant such that there is a substantial risk that the jury will disregard limiting instructions to consider the statement for a narrow nonhearsay purpose, the prosecution must show: (1) it has a genuine need to use the evidence for this nonhearsay purpose, and (2) the statement cannot be redacted or rephrased to eliminate the risk of improper use by the jury. 471 U.S. at 414-15.<sup>4</sup>

There was a substantial risk the jury would rely heavily on Taylor's statements from her videotaped interview. The prosecution had other avenues of showing Taylor suffered from declining cognitive ability. Several acquaintances from church saw her weekly and testified about Taylor's deteriorating ability to negotiate her regular routines from 2000 to 2005. 9/24/09RP 146, 155; 9/28/09RP 11, 16-18. Taylor's friend Forgrave testified that

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U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).” 541 U.S. at 60 n.9.

<sup>4</sup> Additionally, it must be recognized that Street engages in some reliability analysis that is no longer valid reasoning under Crawford.

he never knew Taylor to have a credit card or use an ATM machine, and yet suddenly, from 2000 to 2005, there were a significant number of transactions in Taylor's credit card and bank accounts. 9/23/09RP 95, 106. A former tenant testified about Taylor's odd behavior as a landlord during 2000. 9/28/09RP 23. A doctor testified about the apparent effects of Alzheimer's on Taylor, although this doctor had not officially examined her. 9/28/09RP 56-58, 66. If the point was that Taylor had trouble understanding complex concepts such as financing mortgages, there was other available evidence that did not violate the Sixth Amendment.

Most egregiously, the court did not order all necessary redactions to the videotape, over defense objection. 9/21/09RP 20-23. Rather than strictly limiting the videotape to Taylor's answers to innocuous questions such as who is the president and what year is it, the prosecution introduced Taylor's discussion of Dash and her awareness of her finances, which were the material, factually substantive issues in the case. CP 309-18. The State's failure to completely redact references to the legal and factual issues in the case guaranteed the jury would use Taylor's statements as evidence against Dash.

ii. The videotaped statement was offered and used as direct evidence against Dash. Under ER 803(a)(3) a court may admit a “statement of the declarant’s then existing state of mind, emotion, sensation or physical condition.” To be admissible under this rule, statements must be relevant to a fact at issue. State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995); ER 401 (relevant evidence must tend to a fact “of consequence to the determination of the action more probable or less probable”). There must be some necessity to use the out-of-court declaration. State v. Parr, 93 Wn.2d 95, 98-99, 606 P.2d 263 (1980).

Even if Taylor’s statement was used only to show her “state of mind,” this state of mind was a central factual issue that the State was required to prove and her descriptions of her state of mind were necessarily substantive and accusatory. Taylor’s out of court statements, including what she knew of Dash’s activities and what she authorized, was part of the State’s proof. Indeed, evidence must be relevant to meet the requirements of ER 803(a)(3), but its relevance to the prosecution indicates its material probity as evidence against Dash that he was not permitted to confront or cross-examine. The prosecution conceded its substantive materiality when it urged the court to admit the

videotape because it showed her “lack of knowledge of events,” which was an element of the crime. 9/21/09RP 17.

In its closing argument, the State portrayed Taylor’s videotaped interview as substantive evidence of her lack of understanding of Dash’s activities. 9/29/09RP 129-30. The prosecution appealed to the jury to consider her videotaped statement that she wished to be remembered “as a decent person,” for its truth. 9/29/09RP 174. Her videotaped claim that she did not use credit cards or ATM machines was used to show that Dash was responsible for the withdraws. Her lack of familiarity with her financial status lent material support to the prosecution’s claim that Dash orchestrated these financial maneuvers without explaining them and accounting for them.

Taylor’s videotaped answers were used to prove the elements of the offense and thus, constitute testimony “against” Dash, in violation of the Sixth Amendment and Article I, section 22 of the Washington Constitution.

iii. The limiting instruction provided no genuine protection against the confrontation clause violation. After the prosecutor played the videotape for the jury, the court gave the following instruction:

The videotape that you witnessed contains a number of statements by Ms. Taylor. Those statements should not be considered by the jury for the truth of any of the factual assertions in any of the statements. It's not testimony, in other words. The only purpose of introducing the videotape is to give you some evidence concerning the capabilities and understanding and cognitive capacities of Ms. Taylor at the time the videotape was created.

9/24/09RP 16-17 (emphasis added). In the court's final written instructions to the jury, it said, "[s]tatements allegedly made by Frances Taylor, including the video tape" were "admitted only as evidence of her state of mind at the time she made the statements." CP 231 (Instruction 6).

There was a substantial risk the jury considered Taylor's statements as evidence against Dash. The court's instruction that the jury could consider Taylor's statements about Dash as evidence of her "capabilities and understanding" places her statements squarely within the ambit of testimony against Dash. Taylor was indeed a witness against Dash by virtue of the videotaped statement about her relationship with Dash. Even if the jury followed the court's limiting instruction and considered Taylor's testimony only for the purpose of her cognitive understanding, her statements would be used for the truth of her perception of events concerning Dash.

Furthermore, her statements about Dash were unnecessary to showing her level of competence and cognitive abilities. Had the State simply wished to test her memory, it could have redacted every reference to Dash or facts related to the case from the police interview. Under Street, the failure to conduct the necessary redactions enhances the risk that the improperly admitted evidence was improperly used and violated the confrontation clause. 541 U.S. at 414.

Finally, the United States Supreme Court has acknowledged the legal fallacy that a limiting instruction necessarily cures a constitutional violation. As recognized in Street, a jury cannot be expected to disregard some types of information, such as a witness's claim that the accused person participated in a crime. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). A limiting instruction to disregard inculpatory evidence is the equivalent of asking a jury to perform, "a mental gymnastic which is beyond, not only their powers, but anybody's else." Id. at 132 n.8 (citing Nash v. United States, 54 F.2d 1006, 1007 (2<sup>nd</sup> Cir. 1932)); see also Dunn v. United States, 307 F.2d 883, 887 (5<sup>th</sup> Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.").

There was a great risk the jury would draw heavily from Taylor's videotaped interview and any reasonable juror would have trouble disregarding her claims that she did not know what Dash was doing and would not have authorized or engaged in the financial transactions that Dash entered into. The violation of Dash's right to confront witnesses cannot be ignored by virtue of the court's instruction to use the evidence only for proof of Taylor's "understanding" and cognitive abilities.

d. Testimony of the details of an Adult Protective Services investigation constituted a further confrontation clause violation. In 2000, an Adult Protective Services employee Catherine Baker interviewed Taylor and others in her capacity as a state official charged with determining whether Taylor was a vulnerable adult who was being exploited by others. 9/24/09RP 119-20. Baker's duties involved investigating past or current exploitation, not the possibility of future exploitation. Id.

Baker recounted the information she received from people she interviewed in the course of her investigation. She testified about the statements she obtained in interviews with Taylor, police detective Stish, attorney Barbara Isenhour, bank loan officer Joseph Scott, Taylor's physician Dr. Plut, and an official from

Taylor's church named Catherine Lacy. 9/24/09RP 113-20. None of these witnesses testified at trial but Baker repeated what they told her about Taylor's understanding of her financial issues and her relationship with Dash. 9/24/09RP 113-20. Taylor told Baker she "trusted" Dash. 9/24/09RP 109.

Although Baker was not a police officer, she was a government official charged with investigating potential criminal activity. She was investigating Cordova as an "alleged perpetrator," who was the construction company owner. 9/24/09RP 104-05. She interviewed numerous people in her official capacity and discussed current and past events with them. 9/24/09RP 113-20.

An objective witness would reasonably believe that their statements to Baker would be available for use at a later prosecution or investigation of a crime. Crawford, 541 U.S. at 52; Mason, 160 Wn.2d 923. In Mason, the court held that statements to a victim's advocate were testimonial, even if the declarant was "in his own mind" seeking protection from the victim's advocate. 160 Wn.2d at 923. Similarly, even if the witnesses were motivated by a desire to help Taylor, or dissuade the State from believing Taylor needed help, their statements to Baker in the course of her official investigation into whether Taylor was being financially

exploited by others were elicited for the objective purpose of investigating a potential crime and qualify as testimonial.

The prosecution bears the burden of proving that statements are not testimonial. State v. Alvarez-Abrego, 154 Wn.App. 351, 364, 225 P.3d 296, rev. denied, 168 Wn.2d 889 (2010). In Alvarez-Abrego, the Court of Appeals held “we cannot assume, in a record devoid of factual development” that a conversation between a child and her mother reporting a crime was casual and private when “[w]e are unable to discern” where it occurred, who was present, and whether it was prompted by police investigators. Thus, the prosecution must demonstrate the nontestimonial nature of out of court statements to state officials.

Baker spoke to numerous witnesses in her official capacity to investigate whether Taylor was being abused or exploited by others. Baker’s testimony repeating statements by multiple non-testifying witnesses about material facts was testimonial evidence that violated Dash’s right of confrontation.

e. The extremely compelling videotaped testimony of the sympathetic complainant and additional confrontation clause violations undeniably affected the jury’s deliberations. The State has the burden of demonstrating beyond a reasonable doubt that

confrontation violations did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5<sup>th</sup> Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict); Fields v. United States, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

Taylor’s videotaped testimony was compelling in both tangible and intangible ways and it is impossible to treat it as minor evidence in the case. It was the only opportunity to see and hear from the person whose perspective and life history were the focal point of the trial. Furthermore, she claimed to have little or no knowledge of her finances and never used credit cards or ATM machines. Baker’s testimony cemented Taylor’s accusations as a

person who had little ability to navigate her finances on her own. Dash had no opportunity to explore the honesty, accuracy or bias of these witnesses who gave statements but were never cross-examined.

It is impossible for the prosecution to prove the uncontroverted evidence against Dash did not contribute to the verdict obtained. A new trial is required.

3. INCORRECT JURY INSTRUCTIONS SETTING FORTH THE ESSENTIAL ELEMENTS, EXACERBATED BY THE PROSECUTOR'S MISREPRESENTATION OF THE CRITICAL LEGAL ELEMENTS DENIED DASH A FAIR TRIAL.

Rather than simply providing the jury with the pattern instructions used to explain the essential elements of first degree theft, the court gave additional instructions regarding the civilly enforceable responsibilities of a fiduciary. These instructions were incorrect or fundamentally misleading. Dash objected to the court giving these instructions. In its closing argument, the prosecution used these instructions to misrepresent its burden of proof and the necessary elements of the charge. These errors denied Dash a fair trial.

a. The court's instructions to the jury must completely and accurately explain the necessary legal requirements for a conviction and the prosecution may not misrepresent its burden of proof. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi, 530 U.S. at 476-77; State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77; U.S. Const. amends. 6 & 14.

The court's instructions to the jury are the critical vehicle for conveying the prosecution's elements to the jury and they must be accurate. State v. Williams, 136 Wn.App. 486, 493, 150 P.3d 111 (2007). "[A] trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." Id.

The prosecution may not misrepresent the legal elements of a crime or its burden of proof to the jury. A prosecutor's misleading and inflammatory arguments may violate a defendant's due process right to a fair trial. Darden v. Wainwright, 477 U.S. 168, 181-82, 106 S.Ct. 2464, 91 L.Ed.3d 144 (1986); U.S. Const. amend. 14; Wash. Const. Art. I, §§ 3, 22. It is a manifest constitutional error for the prosecution to misstate the governing law, incorrectly convey to the jury its proper role, and shift the burden of proof. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997). A prosecutor's misstatement of the law is misconduct which is a "serious irregularity" having "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763.

b. The prosecutor misrepresented the essential requirements of Dash's good faith claim of title. In order to convict Dash of theft, the prosecution was required to disprove, beyond a reasonable doubt, that Dash had a good faith claim of title to the financial compensation he received from Taylor. RCW 9A.56.020(2). The good faith claim of title defense negates the

element of intent required for a theft. State v. Ager, 128 Wn.2d 85, 92, 904 P.2d 715 (1995).

Good faith claim of title has two requirements. First, the property is taken openly and avowedly. Id. at 95. Second, the accused has some legal or factual basis upon which he subjectively believes in good faith that he has a claim of title to the property. Id. The claim of title may be untenable, but if it is made in good faith, the prosecution does not establish the intent to steal necessary for theft. RCW 9A.56.020(2).

The required “claim of title” means that the defendant “has the rights of ownership or is entitled to possession of the property.” State v. Mora, 110 Wn.App. 850, 855, 43 P.3d 38, rev. denied, 147 Wn.2d 1021 (2002). Title is not limited to the actual owner of the property. Id.

The prosecutor repeatedly insisted in his closing argument that the requisite claim of “title” only applies to the owner of the property. 9/29/09RP 124-26; 173-75. The prosecutor explained that as a matter of law, you “need ownership” for this defense to apply. 9/29/09RP 124. Pointedly, the prosecutor argued, “If the jury finds this was a claim of entitlement,” then it necessarily finds “this defense doesn’t exist.” 9/29/06RP 125-26.

The prosecution repeated this refrain several times. It began the rebuttal portion of its closing argument by again emphasizing its concocted requirement that Dash must believe he is the owner of the property, rather than believing he was entitled to possess it. 9/29/09RP 173-75. The prosecutor argued that “title” is a different thing than feeling you are entitled to something.

9/29/09RP 174-75. The prosecutor claimed,

The word in the instruction is carefully chosen. It does not say “entitlement.” It does not say “good faith claim of right.” It says “good faith claim of title.” And title, as you know if you’ve got a car, that’s ownership.

9/29/09RP 175.

Contrary to the prosecutor’s legal exposition, “good faith claim of title” means “a subjective belief that he or she has the rights of ownership or is entitled to possession of the property.” Mora, 110 Wn.App. at 855. It does not require a legal transfer of title, as car ownership laws dictate under the analogy relied on by the prosecutor. The prosecutor directly and distinctly misrepresented the law central to Dash’s defense and misled the jury about the elements that the State needed to prove.

c. The prosecutor misused the legal definitions of fiduciary relationship to alter its threshold of proof. Dash objected to instructions 19, 20, 21, 22, 23, and 24. 9/29/09RP 113-17 (attached as Appendix A). Each instruction defined aspects of the duty a person owes in the context of a fiduciary relationship and were drawn directly from civil legal authority. CP 248-53.

Each instruction was based on a civil legal principle without citation to criminal law authority. The instructions provided as follows:

A fiduciary . . . must exercise the utmost good faith . . . and must use his principal's property solely for his principal's benefit.

CP 248 (Instruction 19). This instruction was drawn from Moon v. Phipps, 67 Wn.2d 948, 956, 411 P.2d 157 (1966) (civil action to quiet title); Supp. CP \_\_, sub. no. 40 (prosecution's proposed instructions, including citations to authority on which instruction based).

A person acting under authority of a Power of Attorney does not have the power to . . . make gifts of property owned by the principal.

CP 249 (Instruction 20) (citing RCW 11.94.050, setting forth obligation of a power of attorney).

An attorney-in-fact is an agent to whom the principal has given authority to act in his or her stead for the purposes set forth in the power of attorney. In that role, the agent becomes a fiduciary who is bound to act with the utmost good faith . . . and to fully disclose all facts related in his interest in and actions involving the affected property; the agent must also deliver all benefits derived from or inuring to the property from the agent's breach of the fiduciary relationship to the principal.

CP 250 (Instruction 21) (drawn from Bryant v. Bryant, 125 Wn.2d 113, 882 P.2d 169 (1984), involving transfer of real property under community property laws).

Inherent in the fiduciary relationship between principal and attorney-in-fact is the duty to account for the assets managed by the attorney-in-fact.

CP 251 (Instruction 22) (taken from Crisman v. Crisman, 85 Wn.App. 15, 22, 931 P.2d 163 (1997), case involving fraudulent conversion civil suit).

Whether a gift to the fiduciary is the product of undue influence is a factual question to be determined in light of the following factors: the donor's age and mental condition; her prior intentions and concerns as to the disposition of her property, the size of the gift and the financial condition in which it leaves the donor, her knowledge and understanding of the terms of the gift, and the presence or absence of independent advice to the donor prior to the gift.

CP 251 (Instruction 23) (citing McCutcheon v. Brownfield, 2 Wn.App. 348, 467 P.2d 868 (1970), an action to set aside deed for undue influence).

A fiduciary may not exert undue influence over the party in the fiduciary relationship in order to obtain a gift from the person.

CP 252 (Instruction 24) (citing Doty v. Anderson, 17 Wn.App. 464, 563 P.2d 1307 (1977) (action to recover money from joint account).

Although each instruction was predicated on authority from civil cases or principles, none of these authorities had ever been relied on to set a criminal legal obligation. The legislature sets forth the elements of an offense. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). The court instructed the jury as to the legal definition of theft, including whether a person has exerted unauthorized control. CP 233 (Instruction 7); CP 237 (Instruction 9A). But the multiple additional instructions conflated the meaning of exerting unauthorized control with the civil principles of undue influence or breach of a fiduciary duty.

The prosecutor used these statements of the law to assert that once a fiduciary relationship exists, the agent has specific duties that apply to all interactions with the principal. Under this

theory, Dash necessarily committed the underlying theft by violating the duties of a fiduciary.

As the prosecutor argued, Dash had control over Taylor's finances "under some agreement with her," and this agreement "created a fiduciary relationship because she trusted and relied on him." 9/29/09RP 137. Once Dash became a "fiduciary," which arose from Taylor's trusting relationship with him, all of the written instructions from 19 through 24 created more specific legal obligations on Dash's part, the prosecution claimed. 9/29/09RP 137. The prosecutor contended Dash had to comply with a heightened standard of behavior, including a detailed accounting of all money spent, and his failure to do so made him guilty of theft by fiduciary/trusted friend. 9/29/09RP 137-46.

As the prosecution explained, a fiduciary must be "extremely careful with money" and must "use it only for the benefit of the person that gave him that fiduciary power." 9/29/09RP 137. As a fiduciary, employee, or agent, Dash had special "limits on what he could do, and those limits are defined by the fiduciary relationship." 9/29/09RP 138.

The prosecutor referred to these fiduciary-related jury instructions as statements of the law that "spell[ ] out in detail" what

Dash could or could not do. Id. One particular requirement is that everything you do must be “for the benefit” of the principal. Id. If Dash “violated that fiduciary relationship” as explained in the jury instructions, “then that’s an exertion of unauthorized control.” Id. Because Dash spent money that benefitted him alone, he violated his fiduciary duty even if Taylor knew about it and allowed it.

When Dash objected to this array of instructions equating civil responsibilities with criminal culpability, the court acknowledged that it is “arguable” that “a violation of a fiduciary duty is not necessarily a crime,” but since the word fiduciary was used, it would give further instructions defining a fiduciary. 9/29/09RP 114. The court told Dash he could argue, validly, that “this is not a case about whether he lived up to his fiduciary duty,” but rather whether he committed theft. 9/29/09RP 115.

Defense counsel tried to make the argument suggested by the court, that the jury should ignore those instructions because the question was whether he committed theft and not whether he had other duties or obligations. 9/29/09RP 167-68. But the prosecutor’s rebuttal demonstrated the futility of this argument.

In rebuttal, the prosecutor told the jury it must disregard Dash’s argument that instructions 19, 20, 21 and on, do not apply.

By giving these instructions to the jury, the prosecutor told the jury, "Judge Fox is telling you, 'This is what you are supposed to do.'"

9/29/09 176-77.

It further argued,

It doesn't matter to you whether [the instruction is] criminal, civil, or from the Land of Oz. These are Judge Fox's instructions to you, and he said as much when he said, "The law is contained in my instructions to you."

Don't let Mr. Stoddard [defense counsel]'s attempt to make it seem like there are civil instructions which don't apply. These are the instructions that apply from beginning to end.

9/29/09RP 177.

The court's instructions altered the legal elements of theft, by equating theft with breaching a fiduciary's responsibility to clearly account for all services, never to accept a gift that does not benefit the principal, and to use all of the principal's property solely for the principal's benefit. CP 248-53; 9/29/09RP 137-38, 177.

These misstatements of the criminal law confused and contorted the legal issues and denied Dash due process of law.

d. The court commented on the evidence by indicating Dash owed a higher duty as a fiduciary or agent. Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment

thereon, but shall declare the law.” Since a comment on the evidence violates a fundamental constitutional prohibition, a criminal defendant may raise this issue on appeal even if not objected to below. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

An instruction improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). Article IV, section 16 prohibits a judge from “instructing a jury that matters of fact have been established as a matter of law.” Levy, 156 Wn.2d at 721. “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” Id.

The prosecution’s closing argument demonstrated the effect of the court’s instructions regarding a fiduciary’s responsibility upon the jury. Once the court instructed the jury about the very specific duties of a fiduciary, without asking the jury to decide whether Dash was, in fact, a fiduciary when he received money from Taylor or access to her accounts. the court made it impossible for the jury to conclude anything other than these instructions applied to Dash’s conduct. Indeed, this is exactly what the prosecution argued.

According to the prosecution, by telling the jury of these specific responsibilities of a fiduciary, "Judge Fox is telling you, 'This is what you are supposed to do.'" 9/29/09 176-77.

According to the prosecutor, Judge Fox believed these instructions must be applied to Dash's conduct. Having become an attorney-in-fact, by virtue of the power of attorney contained in Taylor's will, Dash had an express duty to provide a detailed accounting of all money spent. CP 250-51 (Instructions 21 and 22). As an attorney-in-fact, Dash could not receive a gift that was not expressly authorized in writing. By failing to account for all money spent he breached his duty and necessarily exerted unauthorized control.

In addition to extending criminal culpability to a fiduciary's civil law obligations, these instructions made Dash's duties as a fiduciary a foregone conclusion rather than a question for the jury. The prosecutor explicitly argued that by giving these instructions, the judge was telling the jury that they applied to Dash, thus demonstrating that these instructions constituted a judicial comment on the evidence.

e. These errors require reversal. Whenever a judge comments on the evidence, it is presumed prejudicial. Levy, 156 Wn.2d at 722. “A judicial comment is presumed prejudicial and is only not prejudicial if the record affirmatively shows **no prejudice could have resulted**.” Id. at 725 (emphasis added). Furthermore, together with the unnecessary jury instructions and the prosecution’s misrepresentations of the basic elements of the legal requirements for a conviction, these errors denied Dash a fair trial. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996).

As evidenced by closing arguments, the central question was whether Taylor consented to give Dash the money she gave him. After fundamentally misrepresenting the elements of this statutory defense to make it impossible for Dash to avail himself of this defense, the prosecutor raised equated the breach of fiduciary duty with theft, when the two are not the same legal principles. Finally, to the extent there was any question whether Dash was acting as a fiduciary, the prosecutor told the jury that Judge Fox believed he was and the requirements of a fiduciary governed the case from beginning to end. It was impossible for the jury to separate fact from fiction in the prosecution’s representation of the

law and based on the court's issuance of overbroad and inapplicable instructions. Dash was denied a fair trial.

4. THE COURT IMPROPERLY REQUIRED UNANIMITY IN ANY SPECIAL VERDICT FOR AGGRAVATING FACTORS, RENDERING DELIBERATIONS FATALLY FLAWED

a. The court must accurately instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a “yes” or “no” answer. Bashaw, 169 Wn.2d at 139; Goldberg, 149 Wn.2d at 894. The Supreme Court held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg<sup>5</sup> then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

Bashaw, 169 Wn.2d at 146.

The jury instruction given in Bashaw for the special verdict form told the jurors, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury's less than unanimous verdict "is a final determination that the State has not proved that finding beyond a reasonable doubt." Id. at 145.

Similarly to Bashaw, the trial court told Hernandez's jury that their special finding must be unanimous to decide the sexual motivation aggravating factor either "yes" or "no." The court's instruction directing the jury to consider the special verdict form stated in pertinent part,

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In

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<sup>5</sup> In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either "yes" or "no." 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 245 (Instruction 16).

The jury instruction in the case at bar presents the identical error identified in Bashaw. The court erroneously told the jury that they could not vote “no” in the special verdict form unless they were unanimous in finding the State had not proven the aggravating factors contained in the special verdicts.

b. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in “the procedure by which unanimity would be inappropriately achieved.” 169 Wn.2d at 147. This instructional error creates a “flawed deliberative process” and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

The Court in Bashaw looked to the example of the deliberative process in Goldberg, where several jurors had initially answered “no” to the special verdict, but after the trial judge told them they must be unanimous, they returned with a “yes” finding on the aggravating factor. Id.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict findings must be unanimous. CP 21. This Court may not guess the outcome of the case had the jury been correctly instructed. Bashaw, 169 Wn.2d at 147; CP 38-39.

F. CONCLUSION.

For the reasons stated above, Mr. Dash respectfully asks this Court to reverse his conviction and sentence. The aggravating factors should be dismissed and the case remanded for a new trial.

DATED this 30<sup>th</sup> day of September 2010.

Respectfully submitted,



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## **APPENDIX A**

No. 19

A fiduciary, in handling another's (the principal's) property, must exercise the utmost good faith, disclose fully all facts relating to his interest in and his actions affecting the property involved in the fiduciary relation, and must use his principal's property solely for his principal's benefit.

C00248

No. 20

A person acting under authority of a Power of Attorney does not have the power to make, amend, alter or revoke the principal's wills, and does not have the power, unless specifically provided otherwise in the document, to make gifts of property owned by the principal.

000249

No. 21

An attorney-in-fact is an agent to whom the principal has given authority to act in his or her stead for the purposes set forth in the power of attorney. In that role, the agent becomes a fiduciary who is bound to act with the utmost good faith and loyalty and to fully disclose all facts relating to his interest in and his actions involving the affected property; the agent must also deliver all benefits derived from or inuring to the property from the agent's breach of the fiduciary relationship to the principal.

000250

No. 22

Inherent in the fiduciary relationship between principal and attorney-in-fact is the duty to account for the assets managed by the attorney-in-fact.

000251

No. 23

Whether a gift to a fiduciary is the product of undue influence is a factual question to be determined in light of the following factors: the donor's age and mental condition; her prior intentions and concerns as to the disposition of her property, the size of the gift and the financial condition in which it leaves the donor; her knowledge and understanding of the terms of the gift, and the presence or absence of independent advice to the donor prior to the gift.

000252

No. 24

A fiduciary may not exert undue influence over the other party in the fiduciary relationship in order to obtain a gift from the person.

2

000253

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64409-2-I
v.	)	
	)	
TYRONE DASH,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> TYRONE DASH 300087 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2010.

X \_\_\_\_\_  


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