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NO. 65068-8-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BARBARA A. HOLDRIDGE,

Appellant

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

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

Barbara Adams Holdridge devoted her entire life to caring for her aging mother, Tamara Adams, which enabled Ms. Adams to remain in the family home in Ballard, even after she had suffered a series of strokes. Barbara Holdridge was her mother's full-time caretaker and she provided for all of Ms. Adams's needs.

Growing out of a friendship of over twenty years, Barbara later fell in love with family friend, Albert Holdridge, a real estate agent and developer. Barbara and Albert dreamed of opening a family bed and breakfast business in Capitol Hill, and approached Ms. Adams for assistance with funding. After the historic building was purchased, Ms. Adams visited the site to observe renovations and consistently inquired about the progress of the operation. Construction costs escalated higher than expected, and more loans were needed from Ms. Adams than anticipated. Barbara and Albert Holdridge borrowed money from Ms. Adams in good faith that Ms. Adams supported the project, and in furtherance of protecting the family's initial investment in the project.

Due to Ms. Adams's age and medical condition, other family members became concerned that Barbara and Albert Holdridge

had exerted undue influence over Ms. Adams's funds, leading to a series of charges of theft in the first degree.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Barbara Holdridge's right to confront witnesses, contrary to the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. The court's jury instructions regarding the responsibilities of a fiduciary 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.

3. Instruction 12 improperly instructed the jury on a fiduciary's responsibility under civil law.

4. The court erred by admitting several hearsay statements of the non-testifying complainant.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. 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 trial court improperly admitted a videotaped interview of the non-testifying complainant. Did the court's

admission of this evidence deny Ms. Holdridge her right of confrontation?

2. Although a videotaped statement may be redacted for references that may be prejudicial, this does not cure a confrontation clause violation. Where the complainant's state of mind was a central legal and factual issue in the case, and where it would be impossible for jurors to disregard the material content of the unfronted evidence, did the admission of a videotaped statement by the complainant violate the Sixth Amendment confrontation clause?

3. 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 a jury instruction defining a fiduciary's legal duties under civil law. By issuing a non-pattern instruction defining fiduciary responsibilities in the context of civil law, did the court confound the legal standard, thus confusing the jury and affecting the outcome?

4. In order for a hearsay statement to be admitted under the excited utterance hearsay exception, a statement must be made under the stress or excitement of a startling event, and the statement must relate to that startling event. Where there was

insufficient evidence establishing when the startling event occurred, and thus insufficient evidence connecting the declarant's statements to the event, did the trial court err by admitting the hearsay statements of the non-testifying complainant?

D. STATEMENT OF THE CASE

Barbara Adams Holdridge¹ was raised in the Ballard home of her mother, Tamara Adams, who at the time of trial, was in her late 80's. 11/10/09 RP 171; 11/18/09 RP 727.² Barbara, a skilled gardener, led a sheltered life, completing her GED and devoting herself to caring for her aging mother and grandmother, Anna Hitsenko, who lived five houses down the street until she died in 2002. 11/10/10 RP 183-89; 11/18/09 RP 727-30. Barbara was a dutiful daughter, remaining at home as her mother's full-time caregiver until she married Albert Holdridge, a longtime family friend, when she was in her mid-40's. 11/18/09 RP 727.

Over a period of approximately 20 years, the entire Adams family, including Barbara, had become friendly with Albert

¹ Since Barbara Holdridge and her husband and co-defendant, Albert Holdridge, share a last name, first names will be used at times. No disrespect is intended. Mr. Holdridge changed his name from Ronald to Albert before trial; the record refers to him by both names. 11/10/09 RP 182-83.

² The verbatim report of proceedings consists of fourteen volumes from September 25, 2009, to January 8, 2010, and is referenced herein by the date of the proceeding followed by the page number.

Holdridge, a neighbor who was also a real estate agent. 11/10/09 RP 187-88. When Barbara's grandmother Anna Hitsenko died, the family hired Albert Holdridge to sell her home. 11/10/09 RP 188-89; 11/12/09 RP 22-25; 11/17/09 RP 624-26. Following the sale of Anna's home, the proceeds from the sale were deposited into an existing trust, The Hitsenko Trust. 11/12/09 RP 22-25; Ex. 19 (Hitsenko Trust).

Barbara Holdridge also had a brother, Nick Adams, an attorney and MBA, who died of leukemia in 2004. 11/10/09 RP 168. Nick Adams's widow, Jill Tokarczyk Adams (Jill Tokarczyk), worked for Smith Barney as a licensed financial advisor, and managed the Hitsenko Trust, which at its height, held approximately \$378,000. 11/10/09 RP 164-66, 189, 196. The trust was established for the benefit of Anna Hitsenko and Tamara Adams during their lifetimes, and under the terms of the trust, Barbara and Nick Adams were co-trustees. 11/10/09 RP 188-92, 199-200; Ex. 19. When Nick Adams died in 2004, James Adams, the 21 year-old son of Nick Adams and Jill Tokarczyk, became co-

trustee with Barbara Holdridge.³ Under the terms of the trust, family members, including Barbara, were permitted to borrow up to 25 % of the trust's value. 11/10/09 RP 191.

After the sale of the Hitsenko home, the Adams family continued to do business with Albert Holdridge, including using him as a buyer's agent for a home purchase for James Adams when he began college in Seattle. 11/12/09 RP 22-25. Shortly before he died, Nick Adams also invested with Albert Holdridge in a real estate project in the Greenlake area. 11/12/09 RP 22-25. The Greenlake project involved a renovation and resale of an older home. 11/17/09 RP 626-28. It was agreed that the loss that Albert and the Adams family incurred on the Greenlake project was to be rolled into the family's next real estate venture, with Albert at the helm. 11/17/09 RP 626-29.

By 2005, Albert and Barbara had fallen in love and purchased a historic home in Capitol Hill, with the intention of opening a bed and breakfast together. 11/10/09 RP 226-30. To renovate the hotel and run the business, which the couple hoped

³ Barbara asked her sister-in-law Ms. Tokarczyk to substitute as co-trustee, but under the terms of her employment with Smith Barney, Ms. Tokarczyk was not permitted to serve as a trustee. 11/10/09 RP 199-200.

would be profitable within five years, Albert asked Barbara to take loans from the Hitsenko Trust, which she did. Id. at 230-32.

As the renovations continued into 2006, it became clear that The Musical House Bed and Breakfast (B & B), as the historic building was called, faced serious structural challenges due to the age of the building. 11/12/09 RP 71-78; 11/18/09 RP 655-57. When Ms. Tokarczyk denied further funding from the Trust, Barbara and Albert asked Tamara Adams for a loan of \$60,000, and she agreed. 11/17/09 RP 570-74, 599; 11/18/09 RP 660. Ms. Tokarczyk, who was still managing the Trust, suggested that Barbara and Albert could quitclaim the deed of the B & B to the Trust. 11/18/09 RP 655-57.

One day after Ms. Tokarczyk suggested quitclaiming the deed of the B & B, Tamara Adams told Barbara and Albert Holdridge that she wanted to move all of her funds from Smith Barney in Olympia to a different bank in Seattle.⁴ 11/18/09 RP 676-77. With the assistance of her own attorney, as well as Barbara and Albert, Ms. Adams transferred the Hitsenko Trust account and her personal investment accounts from Smith Barney

⁴ Moving the funds out of Smith Barney effectively removed the funds from the control of Ms. Tokarczyk, who was managing both Tamara Adams's personal account, as well as the Hitsenko Trust.

to Washington Mutual in early 2007. 11/10/09 RP 275; 11/17/09 RP 537-43, 546, 564-69, 592; 11/18/09 RP 676-77. In late 2006, Ms. Adams also executed a power of attorney naming Barbara as her attorney-in-fact and Albert as the alternate. 11/10/09 RP 263-65; Ex. 24. Under the power of attorney, Barbara was able to transfer money from Ms. Adams's Washington Mutual investment account into Barbara and her mother's new joint account at Bank of America, which she had opened. 11/16/09 RP 461.

The expenses for renovating the B & B continued to mount, and it became clear that Barbara and Albert faced defaulting on the mortgage unless the renovations could be completed and the B & B could remain open for business. 11/17/09 RP 574-75; 11/18/09 RP 659-60. Barbara wrote a series of checks to Albert from her joint account with her mother, in order to cover the expenses of the B & B, as well as modest personal expenses for them both. 11/18/09 RP 737-44, 750. Meanwhile, both she and Albert worked full-time to improve the property. 11/18/09 RP 715-17, 749-50.⁵

Barbara believed that her mother was "on board" with the B & B renovations and with the continued investment of her money in the ongoing project, as she had been all along with the prior

investments and loans. 11/18/09 RP 668, 743-44. Had the B & B failed, the entire investment of Ms. Adams, as well as that of the Hitsenko Trust, would have been lost. 11/18/09 RP 668, 697-98.

At approximately the same time as the B & B renovations were taking place, Tamara Adams began to suffer increased impairment following a series of strokes and aneurysms dating back to the 1990's. 11/18/09 RP 728-29. In early January 2008, Ms. Adams began complaining of hallucinations. 11/18/09 RP 661-64. This resulted in Barbara and Albert taking Ms. Adams to the hospital, after which she was released; Barbara continued to care for her at home. 11/18/09 RP 663-64, 731.

Shortly before the hospital visit, Jill Tokarczyk became concerned about Ms. Adams's welfare. 11/10/09 RP 281-82. Ms. Tokarczyk followed up with the police and Adult Protective Services (APS), who sent a social worker, Catherine Baker, to conduct a welfare check. 11/12/09 RP 162-87.

Ms. Baker administered a "mini mental status exam" and determined that Ms. Adams was "possibly" suffering from moderate to mild dementia. 11/12/09 RP 162-65. Ms. Baker stated that she observed nothing during her visit to indicate that Ms. Adams was

⁵ Barbara and Albert were married in May 2007. 11/17/09 RP 620.

being harassed or intimidated by her daughter Barbara, and that she saw no need for a protective order for Ms. Adams. Id. at 178. In mid-2008, Ms. Adams became the subject of a guardianship petition. 11/16/09 RP 3313-16, 329-31. After a guardian was appointed, the State charged Barbara and Albert Holdridge with nineteen counts of first degree theft; one charge for each of nineteen checks allegedly written from Barbara and her mother's joint account. CP 1-9.

By the time trial began in late 2009, the defense moved to exclude the testimony of Ms. Adams, because she was incompetent to testify. CP 36-40; 10/30/09 32-33. Although the State argued that Ms. Adams was competent, the prosecutor ultimately declined to call Ms. Adams as a witness. 10/30/09 RP 34-35. The State instead moved to admit a redacted video of a March 2008 interview with Tamara Adams in order to show her "state of mind," arguing the video was merely "like a photograph." Ex. 10, 31; 10/30/09 RP 35-41. The defense objected to the admission of the videotaped testimony, because it would violate the right to confront witnesses. 10/30/09 RP 39. Over defense objection, the videotape was admitted and played for the jury. 11/5/09 RP 61-62; 11/12/09 RP 128-30; Ex. 36.

The State also moved to admit several out of court statements made by Ms. Adams as excited utterances, over defense objection. 11/4/09 RP 88-101. These statements included statements that Ms. Adams had allegedly made by phone to her daughter-in-law, Ms. Tokarczyk on December 27, 2007, and later in January 2008. Id.

The State argued that under the excited utterance hearsay exception, the startling event provoking Ms. Adams's statements was her discovery that Barbara allegedly had been taking her money without her consent. 11/4/09 RP 88-101; 11/19/09 RP 922-25; Ex. 29. The State also argued that the police visit to Ms. Adams's home contributed to the stressful atmosphere prompting the statements. 11/4/09 RP 90-91.

The trial court made a partial ruling, admitting two statements and calling Ms. Tokarczyk as a witness in a pre-trial hearing before ruling further. 11/5/09 RP 66-67. At the hearing, Ms. Tokarczyk acknowledged that she did not know the date of the letter that Ms. Adams had shown her from the bank on December 27, 2007. 11/10/09 RP 130-31. She also stated that she had not visited Ms. Adams for several months prior to that visit, and could

make no comparative assessment of Ms. Adams's mental state at that time. 11/10/09 RP 139; 11/12 RP 34-35.

Conceding the lack of "clear guidance from the Appellate Court," the trial court admitted all of Ms. Adams hearsay statements as excited utterances. 11/10/09 RP 213.

The State also proposed a jury instruction defining fiduciary duty, over defense objection. 11/19/09 RP 901-02; CP 113.

Following a jury trial, Barbara and Albert Holdridge were acquitted of six counts and convicted of twelve of the nineteen counts; the remaining count was dismissed by the trial court. CP 162-64.

E. ARGUMENT

1. THE STATE VIOLATED BARBARA HOLDRIDGE'S RIGHT TO CONFRONT WITNESSES AGAINST HER BY PRESENTING TESTIMONIAL STATEMENTS WITHOUT AFFORDING HER THE OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT.

Ms. Adams did not testify at trial and was never cross-examined by Barbara or Albert Holdridge. Approximately a year and a half prior to trial, Ms. Adams was interviewed by a deputy prosecuting attorney representing the State. 11/12/09 RP 128. Detective St. John was present for the interview and told the jury

about its circumstances. Id. at 128-29. The trial court gave no limiting instruction to the jury. Id. Due to the testimonial nature of the interview, the importance of Ms. Adams's understanding of events proved crucial in establishing an essential element of the charged crime; the impossibility that any reasonable juror could ignore the substance of Ms. Adams's statements violated Barbara Holdridge'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 prohibits the prosecution from presenting 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. Ms. Adams's interview with the prosecutor and police detective was testimonial. Ms. Adams's prosecutorial interview occurred several months after the detective's visit to her home, and over a year after the bank account had been transferred and the checks withdrawn. See Davis, 547 U.S. at 822, 830; Koslowski 166 Wn.2d at 422-29. There was no on-going emergency or immediate peril. The interview occurred in Ms. Adams's home with the active involvement of a prosecutor and police detective. 11/12/09 RP 128; Ex. 36. Although portions of the interview had been redacted, "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.

The videotape was clearly shown to the jury to elicit sympathy for the complainant. Even the trial court, upon viewing the videotape, remarked merely that "she is a lovely woman with some hearing loss." 10/30/09 RP 38-39. Witnesses for the State, as well as the deputy prosecutor himself, stated that Ms. Adams

was in substantially the same condition at the time of trial, as she was in the videotape, and that her mild dementia had not noticeably progressed. Id. at 33-34.

Moreover, Tamara Adams's videotaped statement contained material evidence relevant to her state of mind, and therefore relevant to her understanding of the terms of the loans she agreed to give to her daughter, Barbara Holdridge. Meanwhile, the prosecution alleged that Ms. Adams was deprived of access to regular bank statements and signed various loan and power of attorney documentation under undue influence, or while not of sound mind. In the videotaped interview, the jury was permitted to see Ms. Adams musing that she seems unable to remember the names of the people in the room during the interview, who have been identified as a deputy prosecutor, a detective, and a caretaker. "I just call 'em all 'honey,'" she states on the videotape. Ex. 36. Ms. Adams also muses on the high cost of nursing home care, stating, "I was in a doggone nursing home," and asking the interviewer if she has any idea how much that costs." Ex. 36. This part of the interview, clearly intended to introduce the complainant as a frugal spender, was not subject to cross-examination.

In addition, Ms. Adams's remaining statements in the videotape were not relevant to the theft charges, and were an improper plea for sympathy for the absent complainant.⁶

Ms. Adams'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 the videotaped statements were not admitted for the truth of the matter asserted. As discussed below, a limiting instruction might have alleviated the violation of the confrontation clause, but the trial court failed to give one here.

⁶ By videotape, the complainant stated:

You know how I felt, I've got nobody else – they're all dead ... I'm supposed to have been the youngest, now I'm the oldest, so. Oh, I don't know. Everyone I know, of course, they were already kind of aging – and I never wanted to live this long, but the Savior must think different.

Ex. 36.

c. Ms. Adams's testimony during her videotaped interview with the State is not insulated from the confrontation clause.

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.9.⁷ 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 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

⁷ 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 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).)” 541 U.S. at 60 n.9.

cannot be redacted or rephrased to eliminate the risk of improper use by the jury. 471 U.S. at 414-15.⁸

There was a substantial risk the jury would rely heavily on Ms. Adams's statements from her videotaped interview. The prosecution had other avenues of illustrating Ms. Adams's state of mind to the jury. In fact, in arguing that the videotape was not hearsay, the prosecutor argued that "it would be like a photograph." 10/30/09 RP 39. So why not simply provide the jury with a photograph of Ms. Adams, which would not have violated the Sixth Amendment? The reason the prosecutor offered the videotape, rather than a photograph, is clear from his argument to the court. The prosecutor argued that the videotape is "close to the time, I believe, of the condition she was in at the time all this was going on." 10/30/09 RP 39. This statement belies the State's true motivation for admitting the videotaped statement into evidence. The State was improperly permitted to offer evidence of Ms. Adams's condition at the time of the alleged crime that was not subject to confrontation.

⁸ Additionally, it must be recognized that Street engages in some reliability analysis that is no longer valid reasoning under Crawford.

ii. The court's failure to give a limiting instruction resulted in no protection against the confrontation clause violation. Although the trial court noted the defense's previous objections to the videotape, Ms. Adams's recorded statement was played for the jury without benefit of a limiting instruction. Juries are presumed to follow instructions given by a trial court. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). It is not certain that a limiting instruction would have cured the confrontation clause violation; however, without any such instruction, there was a substantial risk the jury improperly considered Ms. Adams's statements as direct evidence against Barbara Holdridge.

d. The extremely compelling videotaped testimony of the sympathetic complainant undeniably affected the jury's deliberations. A constitutional error is presumed prejudicial, unless the State demonstrates beyond a reasonable doubt that the 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 (5th 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).

Ms. Adams’s videotaped testimony was compelling in both tangible and intangible ways, and it is impossible to treat it as minor evidence in the case. The videotape was the only opportunity to see and hear from the person whose perspective and life history were the focal point of the trial. It was much more than the two-dimensional “photograph” to which the prosecutor likened it.

10/30/09 RP 39. Lastly, Barbara Holdridge had no opportunity to explore the honesty, accuracy or bias of this witness, who gave a statement, but was never cross-examined.

It is impossible for the prosecution to prove the unconfrosted testimony did not contribute to the verdict obtained. A new trial is required.

2. INCORRECT JURY INSTRUCTIONS CONFUSING THE ESSENTIAL ELEMENTS OF THEFT, EXACERBATED BY THE PROSECUTOR'S MISREPRESENTATION OF CRITICAL LEGAL PRINCIPLES, DENIED BARBARA HOLDRIDGE 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 an additional instruction regarding the civilly enforceable responsibilities of a fiduciary. CP 116 (Jury Instruction 12); 11/19/09 RP 907. This instruction was fundamentally misleading and confusing to the jury, and Barbara Holdridge objected to the court giving this instruction. 11/4/09 RP 129-44; 11/19/09 RP 901-02. In its closing argument, the prosecution used this instruction to misrepresent and lower its burden of proof and the necessary elements of the charge. These errors denied Barbara Holdridge 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 v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); 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 elements of a crime 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 misused the legal definitions of fiduciary relationship to alter its threshold of proof. Barbara Holdridge objected to instruction 12, which defined the role of a fiduciary. 11/19/09 RP 901-02; CP 116. This instruction was not taken from the WPIC, but was drawn from civil legal authority. CP 116.

This instruction was based on a civil legal principle, rather than the criminal law. The instructions provided as follows:

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

CP 116 (Instruction 12). 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. 113 (prosecution's proposed instructions, including citations to authority on which instruction based).

Although the fiduciary instruction was predicated on authority from civil cases or principles, conflating the civil and criminal authorities was needlessly confusing for the jury.⁹ 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 110 (Instruction 6); CP 111 (Instruction 7). But the additional instruction improperly conflated an essential element of theft, ie: exerting unauthorized control, with the civil standard for breach of a fiduciary duty.

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

⁹ The trial court even remarked that the jury appeared confused, and that jurors had been asking the bailiff if they were permitted to look up words – specifically “fiduciary” – in the dictionary. 11/12/09 RP 2-4.

prosecution argued, Barbara Holdridge necessarily committed a theft by breaching the duties of a fiduciary.

The prosecutor argued Barbara Holdridge had control over her mother's finances as her attorney in fact, and thus had a fiduciary relationship with her. 11/19/09 RP 910. Once Barbara became her mother's "fiduciary," which arose from her position under the power of attorney, she acquired other legal obligations, the prosecution claimed. Id. The State essentially contended that Barbara Holdridge was required to comply with a heightened standard of behavior, particularly the requirement to never "self deal ... that's the bottom line." Id.

The prosecution asserted that, as a fiduciary, Barbara Holdridge "had a duty to spend the money only on Tamara. And she didn't." 11/19/09 RP 929. The prosecutor argued that by investing Tamara Adams's money (and the Trust's money) in the B & B, Barbara breached her fiduciary duty; by extension, the prosecutor argued that breach of the fiduciary duty was tantamount to theft. Id. The prosecutor's argument begged the question that Barbara and Albert's investment in the B & B benefitted themselves alone, and did not, as they argued, protect Tamara Adams's investment as well.

c. The court commented on the evidence by indicating Barbara Holdridge owed a higher duty as a fiduciary. 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 prosecutor’s closing argument aggravated the misguided 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 Barbara Holdridge was, in fact, acting as a fiduciary -- the court made it impossible for the jury to conclude anything other than that these instructions applied to Barbara Holdridge's conduct. Indeed, this is exactly what the prosecution argued, thereby lowering its burden of proof. According to the prosecution, Barbara breached her fiduciary duty by investing her mother's money in the B & B business, and it inevitably followed that Barbara had therefore committed theft in the first degree. 11/19/09 RP 929. By allegedly self-dealing, she had breached her duty and necessarily exerted unauthorized control.

This jury instruction extended criminal culpability to a fiduciary's civil law obligation, making Barbara Holdridge's duties as a fiduciary -- and her breach of those duties -- a foregone conclusion, rather than questions for the jury. 11/4/09 RP 129-44.

d. 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 Barbara Holdridge 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 Ms. Adams consented to Barbara and Albert Holdridge using the money for the B & B project. By conflating the breach of fiduciary duty with theft, when the two delineate different legal standards, the prosecutor impermissibly lowered the burden of proof. Finally, to the extent there was any question whether Barbara Holdridge was acting as a fiduciary, the jury instructions informed the jury that the requirements of a fiduciary governed the case from beginning to end. It was impossible for the jury to adjudicate this case based upon principles of criminal law, due to the court's issuance of overbroad and inapplicable instructions. Barbara Holdridge was thus denied a fair trial.

3. THE COURT ERRED IN ADMITTING MS. ADAMS'S HEARSAY STATEMENTS.

a. Hearsay may not be admitted at trial unless it falls under a specified exception, such as an excited utterance. A hearsay statement is one made by a declarant not testifying at trial, offered in evidence to prove the truth of the matter asserted. ER

801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay such as the exception for excited utterances. ER 802; ER 803(a)(2).

An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2); Warner v. Regent Assisted Living, 132 Wn. App. 126, 139, 130 P.3d 865 (2006). The underlying rationale is that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747 at 195 (1976)). The statement of a person in this excited condition is considered “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,’ rather than an expression based on reflection or self-interest.” Chapin, 118 Wn.2d at 686 (quoting 6 J. Wigmore at 195).

A statement must meet three requirements to qualify as an excited utterance: 1) there must be a startling event or condition; 2) the declarant must make the statement while still under the stress or excitement of the event or condition; and 3) the statement

must relate to the event or condition. Chapin, 118 Wn.2d at 686; Warner, 132 Wn. App. at 139. The statement need not be contemporaneous to the event, but it must be spontaneous, and made under circumstances negating the concern that it was made by design or after premeditation. Id.; see also State v. Young, 160 Wn.2d 799, 813, 161 P.3d 967 (2007). The State has the burden of demonstrating a hearsay exception applies. United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000). The trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); State v. Ramires, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). ER 803(a)(2) must be interpreted in a restrictive manner, so as to “not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary ... to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.” State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

b. Ms. Adams’s statements did not qualify as excited utterances, and thus should not have been admitted. The State moved to admit several out of court statements made by

Ms. Adams as excited utterances, over defense objection. 11/4/09
RP 88-101. These statements included statements that Ms. Adams had allegedly made to Ms. Tokarczyk by phone on December 27, 2007, including: 1) that Barbara and Albert have “written a lot of checks” and “swindled her out of her bank accounts;” 2) that Barbara had taken Ms. Adams’s bank statements; 3) that Ms. Adams had retrieved a bank statement from the mail and hidden it, but Barbara found and took it; and 4) that Ms. Adams was “stupid” to trust Barbara. Id. The State also sought to admit statements from Ms. Tokarczyk’s visit to Ms. Adams’s home a few hours after the phone call, including: 5) that Ms. Adams gave Ms. Tokarczyk a flier from her bank on which she had written certain the words “swindler” and “what a daughter” and said, “This is all I have to go on now;” 6) that Barbara took good care of Ms. Adams but there wasn’t much money left; 7) that Ms. Adams asked Ms. Tokarczyk, “What makes a good person turn bad?” and 8) that Ms. Adams regretted giving Barbara and Albert the \$60,000 loan because “now they just keep taking my money.” Id. The State also sought to admit an additional statement allegedly made by Ms. Adams in early January 2008, following the

police welfare check: “Now they’re telling me the money was a loan.” 11/12/09 RP 47-49, 85; 11/19/09 RP 924.

At trial, Ms. Tokarczyk testified consistently with her hearing testimony concerning Ms. Adams’s hearsay statements, with a few exceptions. Ms. Tokarczyk quoted Ms. Adams as saying she was sorry for getting her daughter-in-law “mixed up in this,” and that Ms. Adams had given Barbara and Albert a \$60,000 loan, but “now they had taken all of my funds.” 11/10/09 RP 294-95. Ms. Tokarczyk also testified that Ms. Adams had stated, “now they’re telling me the money was a loan.” 11/12/09 RP 47-49, 85. A photocopy of the bank flier with Ms. Adams’s handwritten words, “swindler” and “what a daughter” was also admitted into evidence. 11/10/09 RP 283; 11/12/09 RP 89; 11/19/09 RP 879, 922-23; Ex. 29.

Here, although there was evidence that on December 27, 2007, Jill Tokarczyk spoke to Ms. Adams and found her to be upset, there was no evidence establishing a precise timeline for precisely when the upsetting event occurred. 11/10/09 RP 281-82. See, e.g., Reed v. Thalacker, 198 F.3d 1058, 1061-62 (8th Cir. 1999) (holding child’s statement to mother alleging assault by father inadmissible as excited utterance, when record did not reveal how much time passed between alleged assaults and child’s

statements); United States v. Kenyon, 481 F.3d 1054 (8th Cir. 2007) (child's statements inadmissible when made three years after first incident of abuse and one week after most recent incident).¹⁰

The State argued that the startling event was Ms. Adams's discovery that her bank account balances had been reduced. 11/4/09 RP 88-89; 11/12/09 RP 36; 11/19/09 RP 922-23. The State failed to specify how Ms. Adams was notified that her accounts had been diminished, since the State simultaneously argued that Barbara Holdridge concealed her mother's bank statements.

Although the State argued that Ms. Adams was in a consistent state of shock and upset, the State alternatively argued that Ms. Adams had no idea of the status of her accounts, due to the malfeasance of Barbara and Albert Holdridge. 11/4/09 RP 88-89. It was impossible for the trial court to determine a date for the alleged shocking event or condition, which is the precondition for a finding of the excited utterance exception to the rule barring hearsay.

¹⁰ Excerpts of Ms. Adams's journals were admitted over defense objection, purportedly to show her state of mind during periods of dementia. 11/4/09 RP 76-86. These entries did not contain hearsay statements.

c. The court abused its discretion by admitting Ms. Adams's hearsay statements, without sufficient evidence of a nexus between the alleged startling event and the statements themselves. In Warner, this Court held that two hours was too long a delay between the notification of an event and a statement occurring after the event, because the prosecution could not prove that the declarant maintained an ongoing state of excitement during those two hours. 132 Wn. App. 140-41. The time lapse here was far greater, particularly since several of Ms. Adams's hearsay statements were made the day or the week after her alleged notification of the diminishment of her account. In addition, without knowing the specific date that Ms. Adams was notified of the alleged diminishment of her accounts, the court could not assess whether she legitimately remained under the stress of any startling event.

Because the trial court's ruling lacked evidentiary support, it was untenable. A court abuses its discretion if it bases its ruling on an erroneous interpretation of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). A court's evidentiary ruling may likewise be an abuse of discretion if it is based upon facts that are not supported by the evidence. Ramires, 109 Wn. App. at 757;

Quismundo, 164 Wn.2d at 504. There was no way for the court to evaluate Ms. Adams's statements as the law requires. Since the State failed to meet its burden to show that Ms. Adams's statements were admissible as excited utterances, they were inadmissible as a matter of law.

d. The admission of the hearsay statements was unduly prejudicial and requires reversal. When a court errs by admitting hearsay that does not fall into a hearsay exception, this Court must consider whether the hearsay affected the outcome of the trial. Dixon, 37 Wn. App. at 875.

Because of the trial court's improper admission of Ms. Adams's out of court statements, the jury learned that Barbara allegedly concealed bank statements from Ms. Adams, and that Ms. Adams concluded that the pair not only "swindle[d]" her out of her money, but attempted to convince her that it was a "loan."
11/10/09 RP 281-86, 292-95; 11/12/09 RP 47-49, 84-85.

This evidence was extremely prejudicial to Barbara Holdridge, as Ms. Adams's hearsay statements not only rebutted her defense, but undoubtedly provoked an emotional reaction from the jury. As the State argued, the scrawled statements of Ms. Adams – "swindler" and "what a daughter" – contradicted Barbara

Holdridge's testimony that her mother was aware that the couple was using her money for improvements to the B & B, in order to protect the family's investment in the property. 11/18/09 RP 751-53; 11/16/09 RP 454-56; Ex. 29.

The hearsay testimony also rebutted Barbara and Albert Holdridge's assertion that the use of the funds was consistent with Barbara's duty as power of attorney. 11/16/09 RP 456; 11/19/09 RP 948-49, 970-73. The hearsay statements were crucial to the State's theory that Barbara and Albert Holdridge's use of Ms. Adams's funds was unauthorized – an element the State was required to prove beyond a reasonable doubt. These statements were also critical to rebutting the Holdridges' defense that they invested Ms. Adams's funds in good faith, in order to improve the B & B, and ultimately, to protect the family investment.

The trial court's improper admission of the hearsay statements was unduly prejudicial, completely undermining Barbara Holdridge's defense. Because the admission of these statements clearly affected the outcome of the trial, reversal is required.

Dixon, 37 Wn. App. at 875.

F. CONCLUSION

For the reasons stated above, Barbara Holdridge respectfully asks this Court to reverse her conviction and sentence and remand for a new trial.

DATED this 15th day of November, 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

