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DIVISION II

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STATE OF WASHINGTON NO. 37542-7-II
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD JAMES CUTHBERT,

Appellant.

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

The Honorable Robert Lewis, Judge

APPELLANT'S OPENING BRIEF

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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A. SUMMARY OF THE CASE

Because the trial court did not allow Appellant Ronald Cuthbert to have a defense expert, present certain evidence, and instruct the jury on his theory of the case, Mr. Cuthbert did not receive a fair trial. As the guardian for the person and estate of his disabled son, Ryan, Mr. Cuthbert had broad authority to spend money awarded to Ryan in a medical malpractice suit. Contrary to what the State alleged, Mr. Cuthbert did not steal Ryan's money. Rather, Mr. Cuthbert spent the money for Ryan's mental and physical health as permitted. The trial court's rulings, however, impeding Mr. Cuthbert's ability to present his defense and the jury's ability to consider the legality of Mr. Cuthbert's actions. To that end, Mr. Cuthbert did not receive a fair trial. A new trial is required.

B. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT DEPRIVED RONALD CUTHBERT A FAIR TRIAL WHEN IT REFUSED TO EXPEND PUBLIC FUNDS SO MR. CUTHBERT COULD HIRE A FORENSIC ACCOUNTANT. MR. CUTHBERT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL INCLUDES THE NECESSARY HIRING AND PAYMENT OF EXPERTS TO HELP HIM DEFENDANT AGAINST THE STATE'S CRIMINAL CHARGES.
2. THE TRIAL COURT DEPRIVED MR. CUTHBERT A FAIR TRIAL WHEN IT REFUSED TO ALLOW

DEFENSE WITNESS, NIKI TUCKER, TO TESTIFY TO THE COST OF ROUND-THE-CLOCK CARE OF RYAN.

- 3. THE TRIAL COURT DENIED MR. CUTHBERT A FAIR TRIAL WHEN IT REFUSED TO PERMIT EVIDENCE THAT MR. CUTHBERT WAS ENTITLED TO MONIES FROM ONE OF RYAN'S CHECKS DEPOSITED BY MR. CUTHBERT IN DECEMBER 2004 AFTER BEING REMOVED AS THE GUARDIAN OF RYAN'S ESTATE.**
- 4. THE TRIAL COURT DENIED CUTHBERT A FAIR TRIAL WHEN IT REFUSED TO INSTRUCT THE JURY USING CUTHBERT'S GOOD FAITH CLAIM OF TITLE INSTRUCTION.**
- 5. THE TRIAL COURT DENIED MR. CUTHBERT DUE PROCESS OF LAW UNDER U.S. CONST. AMEND. 14 AND WASH. CONST. ART. 1, SECT. 3 WHEN IT FOUND SUFFICIENT EVIDENCE OF FIRST DEGREE THEFT ON COUNTS 2, 8, AND 13.**
- 6. THE TRIAL COURT'S CUMULATIVE ERRORS DEPRIVED MR. CUTHBERT DUE PROCESS OF LAW AND A FAIR TRIAL.**

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. IN PREPARING HIS DEFENSE, MR. CUTHBERT REQUESTED PUBLIC FUNDS TO HIRE A FORENSIC ACCOUNTANT TO REVIEW, ORGANIZE, AND ANALYZE THOUSANDS OF FINANCIAL DOCUMENTS. AN ACCOUNTANT'S ANALYSIS WOULD SHOW BOTH THAT MR. CUTHBERT SPENT GUARDIANSHIP FUNDS FOR RYAN'S MENTAL AND PHYSICAL HEALTH AND THAT THE STATE ERRED IN CLAIMING OTHERWISE. DID THE TRIAL COURT'S DENIAL OF NECESSARY PUBLIC FUNDS DENY MR.**

CUTHBERT EFFECTIVE COUNSEL AND A FAIR TRIAL? (ASSIGNMENT OF ERROR 1)

- 2. THE TRIAL COURT LIMITED MR. CUTHBERT'S PROPOSED EVIDENCE IN TWO WAYS. FIRST, IT WOULD NOT LET HIM PRESENT TESTIMONY ABOUT THE COST OF ROUND-THE-CLOCK CARE OF RYAN VIA DEFENSE WITNESS NIKI TUCKER. SECOND, IT WOULD NOT LET HIM PRESENT EVIDENCE THAT HE WAS ENTITLED TO THE MONEY FROM A CHECK OF RYAN'S THAT HE DEPOSITED AFTER BEING REMOVED AS RYAN'S GUARDIAN OF THE ESTATE. DID THE TRIAL COURT ABUSE ITS DISCRETION BY LIMITING EVIDENCE RELEVANT TO MR. CUTHBERT'S DEFENSE? (ASSIGNMENTS OF ERROR 2 AND 3)**
- 3. A DEFENDANT IS ENTITLED TO JURY INSTRUCTIONS THAT ACCURATELY STATE THE LAW AND SUPPORT HIS DEFENSE. MR. CUTHBERT PROPOSED AN INSTRUCTION THAT LEGALLY AND FACTUALLY SUPPORTED THE DEFENSE THEORY THAT HE OPENLY AND AVOWEDLY TOOK PROPERTY THAT HE BELIEVED HE HAD A LEGAL RIGHT TO TAKE. DID THE TRIAL COURT ERR IN REFUSING TO GIVE THE INSTRUCTION? (ASSIGNMENT OF ERROR 4)**
- 4. NO ONE FROM THE CONFEDERATE TRIBES OF THE GRAND RONDE TESTIFIED ABOUT RYAN'S DISBURSEMENT CHECKS AND MR. CUTHBERT'S AUTHORITY TO DEPOSIT AND USE THE CHECKS. WITHOUT SUCH TESTIMONY, DID THE STATE PRESENT SUFFICIENT EVIDENCE THAT MR. CUTHBERT DID NOT HAVE LAWFUL AUTHORITY TO DEPOSIT AND USE THE CHECKS?**
- 5. DID THE TRIAL COURT'S CUMULATIVE ERRORS DEPRIVE MR. CUTHBERT A FAIR TRIAL?**

D. STATEMENT OF THE CASE

1. Procedural Facts.

On June 12, 2006, the Clark County Prosecutor charged Ronald Cuthbert with 17 counts of first degree theft (counts 1, 3-18) and one count of second degree theft (count 2). CP 1-9. A Bill of Particulars filed by the State at Mr. Cuthbert's request clarified that the charges were broken into three general fact patterns. CP 61-66. The first fact pattern included only Count I. In Count I, it was alleged that Mr. Cuthbert, between February 1, 1994 and June 4, 2004, used a common scheme or plan to deprive the estate of his son, Ryan, of an amount exceeding \$200,000. CP 61-62. Mr. Cuthbert allegedly did this by converting checks payable to Ryan's guardianship account and checks from the Grand Ronde tribe payable to Ryan, to his own use. CP 61-62. Under the second fact pattern, Counts 2, 8, and 13, Mr. Cuthbert allegedly deposited checks to Ryan from the Grand Ronde tribe in his personal account. CP 62-63. Under the third fact pattern, counts 3-7, 9-12, and 14-18, Mr. Cuthbert allegedly deposited checks from Safeco¹ payable to Ryan into his personal account. CP 63-66. The State

¹ The settlement checks are paid by Safeco.

amended the information after it rested its case. CP 220-228; 16RP² 794-97. The amended information deleted Count 18 and shortened the time span on Count 1 to end on June 30, 2004. CP 220-228.

Mr. Cuthbert was tried to a jury. Mr. Cuthbert was the only defense witness allowed to testify.

The jury returned guilty verdicts on all counts. CP 267-301. On both the original and the amended information, the State listed statutory aggravating factors for the jury's consideration. CP 1-9; CP 220-228. The jury was given the sentencing interrogatories and found all of aggravating factors. CP 267-301.

At sentencing, the trial court did not find that any of the aggravating factors supported an exceptional sentence. Instead, the court imposed concurrent sentences of 43 months on all of the first degree thefts and 29 concurrent months on the second degree theft. CP 342.

2. Trial Facts.

Appellant Ronald Cuthbert is the father of Ryan Cuthbert. 15RP 639. Ryan has been severely disabled since his birth in 1973. 15RP 639-40. After the settlement of a medical malpractice

² The report of proceedings (RP) is proceeded by the volume where the page number is found.

lawsuit in 1983³, Mr. Cuthbert was made the guardian of Ryan's person and estate. 15RP 643; See Trial Exhibits 2, 3, 9. The letters of guardianship gave Mr. Cuthbert broad authority to spend the settlement monies as long as it was for Ryan's physical and mental needs. See Trial Exhibits 2, 3, 9. The settlement money was to be deposited in an interest bearing account of Mr. Cuthbert's choosing. Trial Exhibit 3. The terms of the guardianship also obligated Mr. Cuthbert to make an accounting to the court on the estate's behalf every three years. Trial Exhibit 2. When Ryan turned 18, the guardianship was continued based on Ryan's continuing and perpetual incapacity. Trial Exhibit 9.

Ryan is legally blind. 15RP 642. He attended school until he was 21 but always in special education classes. 15RP 641. Mentally he functions about at the level of a first grader. 15RP 642. He has an adult-sized body. He has never lived on his own and he never will. 15RP 642. His only caregivers have been, and

³ The settlement allowed for an immediate payment of \$160,000. After that, there were monthly payments of \$200 until Ryan turned 18, \$1,000 monthly until Ryan turned 21, and \$4,000 monthly until Ryan death. Also there were a series of six lump sum payments to be made every five years as follows: \$50,000 in 2004; \$50,000 in 2009; \$75,000 in 2014; \$100,000 in 2019; \$100,000 in 2024; and \$1,000 in 2029. See Trial Exhibit 1; 15RP 644-46.

currently are, his parents, Ronald and Deborah Cuthbert. 15RP 642. Ryan must have round-the-clock care. He is not toilet trained. 15RP 640. Ryan will never get "better."

Up until Ryan was about 21 years old in 1994, Mr. Cuthbert abided by the every three year guardianship accounting condition. 15RP 647-48. His attorney for the guardianship was Dennis Gregg. 14ARP 422-23. Mr. Dennis assisted Mr. Cuthbert in filing the guardianship accountings with the Clark County Superior Court.⁴ 14A 428, 15RP 647.

Once Ryan reached 21, Mr. Cuthbert thought of Ryan less as a child and more as a member of the household who was responsible for his own care. 15RP 647. Mr. Cuthbert did not resist providing the required round-the-clock care to Ryan but now he felt that the guardianship should pay for it. 15RP 647. As such, Mr. Cuthbert began taking Ryan's share of the housing and food from the guardianship funds. 15RP 647. Mr. Cuthbert also began paying himself the reasonable amount of \$2,500 a month to compensate him for Ryan's round-the-clock care. 15RP 649. Although Mr. Cuthbert continued to file the three-year guardianship accountings with the court, he did not disclose the full amount of

⁴ The Cuthbert family lived in Vancouver.

money he felt entitled to take from the guardianship to compensate him for Ryan's care and caregiving. 15RP 648-50, 724.

Mr. Cuthbert retired from his work as a sales tax auditor for the State of Washington in 1999. 15RP 643. In his many years with the state, Ron noted the inefficiencies of bureaucracy. 15RP 650. Knowing what it took to care for Ryan based on his 26 years of providing Ryan's care, by 2001 Mr. Cuthbert chose to bypass the reporting requirement spelled out in the letters of guardianship. 15RP 647-50. Mr. Cuthbert also did not always deposit Ryan's monthly settlement checks in an account he had established for that purpose. Rather, he deposited the checks in his and Deborah's personal account to compensate them for Ryan's round-the-clock care. 15RP 647-50.

Mr. Cuthbert had a retirement from the State of Washington that paid him \$1,900 a month. 15RP 643. Post-retirement, he used his retirement funds and equity from rental property to start an antique business and to buy a laundromat. 15RP 693-700.

Mr. Cuthbert had a second story built on the small family home to give everyone more space. 15RP 651-52. Because one-half of the new rooms were built for Ryan's use, Mr. Cuthbert used

money from Ryan's guardianship funds to pay for one-half of the addition. 15RP 651.

Ryan also received disbursements of money as an enrolled member of the Grand Ronde Tribe. 15RP 701-03. The disbursements were related only to Ryan's tribal membership and had nothing whatsoever to do the medical malpractice lawsuit or the corresponding settlement agreement. Id. At trial, no one from the tribe testified about the disbursements or who had authority to deposit or keep the disbursements.

In 2002, Clark County's guardianship monitoring program discovered that the 2001 accounting on Ryan's guardianship had not been filed. 13RP 365-71. Mr. Cuthbert did not immediately respond to letters from the court requesting the accounting. The court issued a show cause order compelling Mr. Cuthbert to file the accounting or appear in court. 13RP 370-80. Although Mr. Cuthbert did neither immediately, he did respond to the order. The court appointed a guardian ad litem to look into the welfare of Ryan and the status of the guardianship estate. 13RP 390-99. Trial Exhibit 31. In June 2004, Mr. Cuthbert was removed as the guardian of Ryan and the estate. 13RP 399. The court also appointed a guardianship firm, Beagle Burke and Associates (BBA)

to investigate and make an accounting of the estate. 13RP 399. The Vancouver Police Department also began an investigation into Mr. Cuthbert's use of the guardianship funds. 14ARP 480-82.

After being removed as the guardian, Mr. Cuthbert, in December 2004, deposited a Grand Ronde check into his and Deborah's personal checking account.⁵ 15RP 701-03.

E. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO ALLOW PUBLIC FUNDS FOR A FORENSIC ACCOUNTANT DENIED MR. CUTHBERT A FAIR TRIAL AND HIS RIGHT TO COUNSEL.

The trial court should have authorized the expenditure of public funds to allow Mr. Cuthbert to hire a forensic accountant. The accountant was essential to Mr. Cuthbert's defense. The accountant would have reviewed, organized, and analyzed thousands of financial documents in support of Mr. Cuthbert's defense that he spent Ryan's money as authorized for Ryan's mental and physical health. The denial of the accountant's services denied Mr. Cuthbert a fair trial and his right to counsel.

The Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate

⁵ See Count 2

defense. Ake v. Oklahoma, 470 U.S. 68, 72, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985); State v. Punsalan, 156 Wn.2d 875, 878, 133 Wn.2d 934 (2006). Washington discharges its obligation to provide indigent criminal defendants necessary expert assistance under CrR 3.1(f). See State v. Kelly, 102 Wn.2d 188, 201, 685 P.2d 564 (1994) (holding CrR 3.1(f) "incorporates constitutional requirements"). Under CrR 3.1(f)(1), "a defendant is entitled to the appointment of experts if financially unable to obtain them and if the services are necessary to the defense." State v. Hoffman, 116 Wn.2d 51, 90, 804 P.2d 577 (1991). "Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services on behalf of the defendant." CrR 3.1(f).

The general rule, stated in Melos, is that CrR 3.1(f) mandates appointment of an expert at public expense if such services are necessary to an adequate defense. Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court and shall not be overturned absent a clear showing of substantial prejudice. State v. Melos, 42 Wn. App. 638, 640, 713 P.2d 138, review denied, 105 Wn.2d 1021 (1986). Abuse of discretion is "discretion

manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Mount Vernon v. Cochran, 70 Wn. App. 517, 523, 855 P.2d 1180 (1993).

In Poulsen, this Court found that a denial of a defense expert at public expense was an abuse of discretion. State v. Poulsen, 45 Wn. App. 706, 726 P.2d 1036 (1986). Poulsen was charged with a felony assault on his mother. While preparing Poulsen's case, defense counsel learned that Poulsen may have an organic brain disorder that inexplicably caused Poulsen to "explode" and "flip out" thus impacting Poulsen's ability to form the required specific intent element of assault. The trial court denied Poulsen the use of public funds for a psychologist to determine if Poulsen had a brain disorder and could not form the requisite intent. Poulsen was convicted of second degree assault.

On review, this Court reversed Poulsen's conviction finding that when an indigent defendant makes a clear showing to the trial judge that he has information that needs to be developed, and such information could help him at trial, then the judge has a duty to appoint an expert. Id. at 710-11. "[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceedings in

which his liberty is at stake.” Id. at 710 (quoting Ake v. Oklahoma, 470 U.S. at 76).

More recently, in Hermanson, Division I considered the arguments of two defendants who asserted that CrR 3.1(f) mandated the expenditure of public funds for sexual deviancy evaluations. State v. Hermanson, 65 Wn. App. 450, 451, 829 P.2d 193, review denied sub nom, State v. Heath, 120 Wn.2d 1016, 844 P.2d 436 (1992). Hermanson was offered an opportunity for a reduction of charges, either in number or degree, if he obtained a favorable evaluation. The other defendant, Heath, sought the evaluation solely for use at sentencing. In resolving these cases, the court made it clear that CrR 3.1(f) does not mandate the expenditure of public funds for a sexual deviancy evaluation at public expense unless the evaluation will affect criminal liability or is necessary to rebut similar, adverse evidence presented by the State at sentencing. Hermanson, at 453. The court thus concluded that the denial of the expenditure for Hermanson amounted to an abuse of discretion since the evaluation was linked to the issue of liability. Hermanson, at 455. Conversely, the court found no abuse of discretion in the denial of Heath's requested

appointment since the evaluation was solely for the purpose of sentencing. Hermanson, at 455.

Here, Mr. Cuthbert, indigent and represented by court appointed counsel, filed a motion requesting the expenditure of public funds to hire a forensic accountant to aid in the preparation of his case. Through the language of the 18-count information and Mr. Cuthbert's familiarity with the case, it was apparent that the State intended to argue that Mr. Cuthbert, as guardian of the estate for his disabled son, Ryan, exerted unauthorized control of the estates funds with the intent to deprive Ryan of the funds. For the purpose of the motion, Mr. Cuthbert conceded that the State could likely prove that Mr. Cuthbert did not strictly comply with the requirements of the guardianship but that he never intended to deprive Ryan of the guardianship funds. Instead, Mr. Cuthbert used the funds to benefit Ryan.

At the hearing to request funds, Mr. Cuthbert's counsel explained how he had received approximately 4,000 pages of discovery, much of it references to bank accounts and banking transactions. The State had the benefit of a court-appointed guardian of the estate who organized and prepared a summary of the transactions and how guardianship funds were spent. Mr.

Cuthbert did not agree with the accounting and felt that he had a right to prove where the money went to and how the spending supporting his defense that the money was spent on Ryan and not taken or used with the intent to deprive Ryan in any way. To that end, Mr. Cuthbert asked for public funds to hire a forensic accountant to review and rebut the State's accounting and to prepare a summary that would support his defense of using the funds only for Ryan's benefit as was required by the letters of guardianship. 4RP 43. At the motion hearing, the prosecutor explained how the professional guardian appointed to take over the estate used a Quicken program to reconstruct the guardianship account. 4RP 47-48. The prosecutor described that is a "[C]omplex problem because tracing money through a number of accounts I've found myself to be pretty confusing." 4RP 48-49. Mr. Cuthbert expressed concern that the guardian of the estate who had prepared the accounting, Beagle Burke and Associates (BBA), would be bias. 4RP 49. The court held that Cuthbert had not made the required showing that the expert services were necessary and could add anything to the work already done by Beagle Burke. 4RP 57. The court denied Mr. Cuthbert's requesting finding that he had not made the requisite showing of necessity.

As in Poulsen and Hermanson, the trial court's denial was an abuse of discretion in that it denied Mr. Cuthbert an effective and necessary tool to prepare his defense. The denial was an abuse of the trial court's discretion in that it deprived Mr. Cuthbert a fair trial and access to truly effective, prepared counsel.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING RELEVANT EVIDENCE INSTRUMENTAL TO MR. CUTHBERT'S DEFENSE.

The trial court abused its discretion when it excluded certain relevant evidence offered by Mr. Cuthbert. In excluding the relevant evidence, the trial court abused its discretion and denied Mr. Cuthbert a fair trial.

Under the Washington State Rules of Evidence, relevant evidence is presumptively admissible. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. A trial court may exclude otherwise relevant evidence if the probative value is outweighed by the dangers of confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403; State v. French, 157 Wn.2d 593, 605, 141 Wn.3d 54 (2006).

Although a trial court's evidentiary ruling is afforded great deference, it is nonetheless reviewable under an abuse of discretion standard. State v. Luvane, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995).

Mr. Cuthbert's defense against all of the theft charges was that he did not act with the intent to deprive Ryan of any money or part of his estate. In fact, the monies that he spent from the estate went toward Ryan's mental and physical well-being as required by the letters of guardianship. By limiting the following evidence, the court unfairly and improperly limited Mr. Cuthbert's defense which was an abuse of the trial court's discretion.

(a) Niki Tucker's testimony.

Early in the case, the trial court approved public funds for the defense to hire social worker Niki Tucker to prepare a report of the costs of providing round-the-clock care of Ryan. CP 22-28. The report was prepared and offered during the defense case. 15RP 733. See Exhibit 49 (marked and admitted for purposes of the record but not provided to the jury.) The trial court refused to allow the report as evidence or to allow Ms. Tucker to testify to its contents. The court held that the report was confusing and not relevant. However, the report was relevant because it supported

Mr. Cuthbert's assertion it was expensive to provide round-the-clock care for Ryan and that he was entitled, as a caregiver to a reasonable amount of compensation from Ryan's guardianship funds.

(b) Off-set from Beagle Burke and Associates (BBA).

The trial court similarly abused its discretion when it refused to admit evidence that Mr. Cuthbert was entitled to receive the monies from the Grand Ronde check he deposited in December 2004⁶ after being removed as the guardian of Ryan's estate. In the civil proceedings over the guardianship, the court approved payment of \$1,500 per month to Mr. Cuthbert to compensate him for Ryan's care. "[BBA] will pay Mr. Cuthbert \$1500 per month for Ryan's living expenses commencing June 10, 2004 less the \$5770.00 check received by Mr. Cuthbert from the Grand Ronde[.]" See Defendant's Proposed Exhibit 48. This evidence supported Mr. Cuthbert's defense that he was entitled to compensation for providing round-the-clock care to Ryan and took money from the estate as compensation and not with any intent to deprive Ryan of any money or part of his estate.

⁶ Count 2

3. INSTRUCTIONAL ERRORS BY THE TRIAL COURT DEPRIVED MR. CUTHBERT OF A FAIR TRIAL AND HIS RIGHT TO A JURY BY PRECLUDING HIS PRESENTATION OF THE DEFENSE THEORY OF THE CASE.

- (a) A criminal defendant is entitled to have the jury instructed on his theory of the case where there is sufficient evidence of his theory.**

The constitutional right to due process of law provides all defendants the right to a fair trial. U.S. Const. Amend. 5, 14; Wash. Const. Art. 1 § 3; State v. Van Antwerp, 22 Wn. App. 674, 591 P.2d 844 (1979). Defendants are also constitutionally entitled to a trial by jury. U.S. Const. Amend 6; Wash. Const. Art. 1 § 21.

Jury instructions themselves are designed to “furnish guidance to the jury in its deliberations, and to aid it arriving at a proper verdict, . . . to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved.” State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978).

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A

criminal defendant is entitled to have the jury instructed on his theory of the case when there is evidence to support that theory. State v. Hughes, 106 Wn.2d 107, 126, 985 P.2d 365 (1999). Failure to so instruct constitutes reversible error. State v. Landiges, 66 Wn.2d 273, 277, 401 P.2d 977 (1965) (holding that failure to instruct on the essential element of reasonable belief of danger where there was evidence constituted reversible error); State v. Bernardy, 25 Wn. App. 146, 148-49, 605 P.2d 791 (1980) (holding that a “defense of others” instruction must be given whenever there is evidence from which the jury could conclude reasonableness); State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (holding that denial of diminished capacity instruction where there was sufficient evidence constituted reversible error). The refusal of the trial court to allow Mr. Cuthbert to have the jury instructed on his claim of title defense deprived him of his right to a fair trial and a trial by jury.

(b). Mr. Cuthbert presented sufficient evidence for the jury to be instructed in that he had a claim of title to guardianship money.

Mr. Cuthbert presented sufficient evidence of his claim and was thereby entitled to an instruction supporting his defense theory that he was entitled to funds from Ryan’s estate. Mr. Cuthbert

proposed a modified version of WPIC 19.08 based upon 9A.56.020.

In a prosecution for theft, it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.

As argued above, while the evidence suggested that Mr. Cuthbert did not abide by the three-year accounting requirement, he did abide by the letter of the guardianship that required the money be spend on Ryan's mental and physical health. He did that by providing round-the-clock care for all of Ryan's extensive needs. Mr. Cuthbert did not hide the money. He did not spend it on anything luxurious, impractical, or unnecessary.

(c). Reversal is the appropriate remedy.

A criminal defendant is entitled to have the jury instructed on his theory of the case where there is evidence to support the theory. Hughes, 106 Wn.2d at 191. Failure to instruct constitutes reversible error. Landiges, 66 Wn. 2d at 277. Mr. Cuthbert provided sufficient evidence to support the instructions of open and avowed claim of title. The failure of the court to use his instruction deprived Mr. Cuthbert of a fair trial and his right to a trial by a jury resulting in prejudicial error that requires reversal.

4. THERE WAS INSUFFICIENT EVIDENCE THAT MR. CUTHBERT WAS GUILTY OF THEFT OF THREE GRAND RONDE CHECKS.

There was insufficient evidence to find Mr. Cuthbert guilty of the individual thefts relating to the Grand Ronde checks.⁷ No one from the Grand Ronde tribe testified that Mr. Cuthbert was prohibited from depositing the Grand Ronde checks in his personal account or spending the money in any way he felt appropriate. As there was insufficient evidence of theft, the State failed to prove the charges beyond a reasonable doubt. As such, Mr. Cuthbert's convictions on those charges must be reversed and dismissed.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const. Art. 1, § 3. "The reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective

⁷ Counts 2, 8, and 13

state of certitude on the facts in issue.” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).⁸

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt; the reviewing court

⁸ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

need only be satisfied that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), review denied, 119 Wn. 1003, 832 P.2d 487 (1992), abrogated on other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994).

A person being tried on a criminal charge can be convicted only on evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 144, 22 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 932 (1999). Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn. 2d 634, 638 P.2d 99 (1980).

As charged in the original and amended information and clarified in the Bill of Particulars for Counts 2, 8, and 13, and further refined in the jury instructions, Mr. Cuthbert's would only be guilty of first degree theft if he wrongfully obtained⁹ or exerted unauthorized

⁹ Counts 8 and 13

control over¹⁰ property of Ryan's valued at over \$1,500. CP 1-9, 61-66, 220-228. See also, RCW 9A.56.020(1)(a), 9A.56.030(1)(a), and 9A.010(18)(c).

"Wrongfully obtains" or "exerts unauthorized control" means:

(a) To take the property or services of another;

(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

RCW 9A.56.010(19)

As no one from the tribe testified, there was no evidence of Mr. Cuthbert's authority as it related to Ryan's checks from the tribe. Mr. Cuthbert may very well have had authority to deposit the money in his own account and spend it on Ryan's physical and mental health. Without someone from the tribe testifying to the

¹⁰ Count 2

nature and any restrictions on the checks, the evidence was insufficient to prove that Mr. Cuthbert wrongfully obtained or exerted unauthorized controls over the checks.

Counts 2, 8, and 13 should be dismissed. Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1081 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). A person whose conviction has been reversed based upon insufficient evidence cannot be retried. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982) (citing Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 1 (1978)).

5. THE TRIAL COURT'S CUMULATIVE ERRORS DEPRIVED MR. CUTHBERT A FAIR TRIAL.

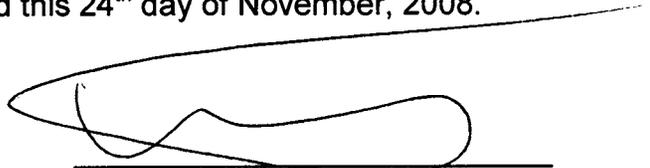
An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Jones, 144 Wn. App. 284, 300-01, 183 P.3d 307 (2008); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying

there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Cuthbert's convictions, the cumulative effect of these errors materially affected the outcome of his trial, and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

F. CONCLUSION

Mr. Cuthbert's convictions should be reversed and remanded. On Counts 2, 8, and 13, the proper remedy is dismissal with prejudice due to the insufficiency to the evidence. On the remaining counts, Mr. Cuthbert is subject to retrial.

Respectfully submitted this 24th day of November, 2008.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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DIVISION II

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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	No. 37542-7-II
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Respondent,)	
)	CERTIFICATE OF MAILING
vs.)	
)	
RONALD JAMES CUTHBERT)	
)	
Appellant.)	
_____)	

I, Lisa E. Tabbut, certify and declare:

That on the 22nd day of June, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Appellant's Brief and Certificate of Mailing (on Court and PA only) addressed to the following parties:

David C. Ponzoha, Clerk Court of Appeals Div. II 950 Broadway, Suite 300 Tacoma, WA 98402	Phillip A. Meyers Clark County Prosecuting Attorney's Office P.O. Box 5000 Vancouver, WA 98666-5000
Ronald Cuthbert 220 S.E. 149 th Ct. Vancouver, WA 98684	

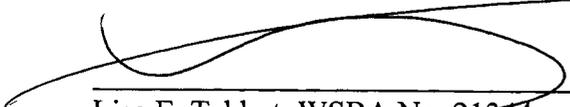
LISA E. TABBUT
ATTORNEY AT LAW

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of November 2008 in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant