

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

STATE OF WASHINGTON,

Respondent,

v.

ANN MARIE SILVIS,

Appellant.

FILED
CLERK OF COURT
STATE OF WASHINGTON
PIERCE COUNTY
MAY 11 2011

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

The Honorable Frank E. Cuthbertson

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of an allegedly prior bad act as evidence of a common scheme or plan under ER 404(b).

2. The trial court erred in denying appellant's motion to conduct a video deposition of a material defense witness.

3. Appellant was denied her constitutional right to effective assistance of counsel.

4. The trial court erred in refusing to give a good faith claim to title instruction proposed by appellant.

5. The trial court erred in ordering funds from a joint bank account for restitution.

6. Cumulative error denied appellant her constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err by admitting evidence as a common scheme or plan under ER 404(b) when there was no evidence that appellant committed markedly similar acts of misconduct against similar victims under similar circumstances? (Assignment of Error 1)

2. Did the trial court err in denying appellant's motion to conduct a video deposition of a material witness who was unavailable to testify in court? (Assignments of Error 2 and 3)

3. Did the trial court err in refusing to give a good faith claim to title instruction proposed by appellant where the evidence supported the defense? (Assignment of Error 4)

4. Did the trial court err in exceeding its authority by ordering the transfer of funds from a joint bank account to satisfy restitution? (Assignment of Error 5)

5. Did the accumulation of errors deny appellant her fundamental and constitutional right to a fair trial? (Assignment of Error 6)

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 3, 2008, the State charged appellant, Ann Marie Silvis, with 14 counts of theft in the first degree with an aggravating factor that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 1-7. On February 12, 2009, the State amended the information adding another count of theft in the first degree with an aggravating factor that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 16-22. Following a trial before the Honorable Frank E.

¹ There are 16 volumes of verbatim report of proceedings: 1RP - 01/23/09; 2RP - 03/10/09; 3RP - 10/27/09; 4RP - 10/29/10; 5RP - 11/02/09; 6RP - 11/04/09; 7RP - 11/05/09; 8RP - 11/09/09; 9RP - 11/10/09 a.m.; 10RP - 11/10/09 p.m.; 11RP - 11/12/09; 12RP - 11/16/09; 13RP - 11/17/09; 14RP - 11/18/09; 15RP - 12/04/09; 16RP - 01/29/10.

Cuthbertson, a jury found Silvis guilty of 15 counts of theft in the first degree with an aggravating factor for each count. CP 149-178.

On December 4, 2009, the court imposed an exceptional sentence of 171 months in confinement and entered an order setting restitution. CP 179-80, 187; Sub. CP ____ (Findings and Conclusions on Exceptional Sentence, 01/29/10). The court held a restitution hearing on January 29, 2010 and entered an order directing the release and transfer of funds from a joint bank account to apply toward restitution. Sub. CP ____ (Order Directing Release and Transfer of Funds, 01/29/10).

Silvis filed this timely appeal. CP 198.

2. Substantive Facts

Detective Jason Visnaw of the Puyallup Police Department worked in the investigations unit responsible for fraud and identity theft cases. 8RP 550-51. Following a report of a theft filed by Arlene Symmons and Layne McCullough, Visnaw was assigned to investigate Ann Silvis on August 22, 2008. 8RP 552-59. Visnaw learned that Silvis was married to Richard Silvis and they lived in Puyallup. 8RP 560-61. Visnaw obtained copies of checks that were written to Silvis provided to the police department by Symmons and McCullough. 8RP 564-65. Visnaw met with the alleged victim, Mary Finley, at her home in an assisted living facility. 8RP 561-63. Visnaw testified that Finley seemed “very frail

physically” and “somewhat frail mentally,” but she “held up well” during the 45-minute interview. 8RP 563-64. When asked about Silvis, Finley “talked about what a great person she was, how smart she was,” but when Finley spoke about the “missing money,” she was “very angry” and seemed embarrassed. 8RP 566-67. Visnaw showed Finley the checks and she seemed surprised and a little confused. 8RP 567-71. After his interview with Finley, Visnaw contacted the fraud unit of the prosecutor’s office. 8RP 571.

Thereafter, Visnaw obtained and served a search warrant upon Key Bank in Lakewood to examine the bank records of Silvis and her husband. 8RP 572-74. While inspecting the records, he noticed some checks written to Jim Cassidy. Visnaw recalled that Finley had mentioned that she met Silvis through Cassidy who was a resident at a senior apartment complex. 8RP 575. Visnaw suspected that “possibly Mr. Cassidy was being taken advantage of as well,” so he located Cassidy at Gibson House Apartments. 8RP 579-82. Visnaw and his supervisor went to Cassidy’s apartment and spoke with him for about two minutes after identifying themselves and explaining why they were there. Cassidy “seemed confused about who we were, what we wanted, even though we continually tried to explain it to him.” 8RP 585-86. They left after the brief conversation because “I don’t think he had a lot to say.” 8RP 587.

Visnaw eventually contacted Cassidy's son, Jim Cassidy, Jr., and discussed concerns about his father's financial welfare. 8RP 605-07.

Under cross-examination, Visnaw explained that during his interview with Finley when he showed her the checks, Finley said she wanted to pay Silvis for helping her but she could not remember how much she intended to pay her. Finley recalled a check for \$12,000 and \$30,000. Over the course of the interview, Finley gave inconsistent statements but acknowledged that she intended to give the monies to Silvis. 8RP 629-30.

Finley, who was 93 years old, is the aunt of Layne McCullough's husband. 6RP 186-88. McCullough testified that although she knew Finley since she was a senior in high school and spent special occasions and holidays with her, she did not become active in her life until 2007. 6RP 190-91. After Finley's husband passed away, she continued to live at their home in Spanaway until she was injured in a car accident in 2006. 6RP 191-94. Following the accident, Finley's niece, Arlene Symmons, moved her to an apartment at Silver Creek, a convalescent home where they provided her with meals. 6RP 196-98. Finley maintained her independence, handled her own finances, and used the shuttle for transportation. 6RP 198. In November 2006, Finley contacted a moving company herself and moved to Gibson House because Silver Creek was

too expensive, “[s]he was very frugal.” 6RP 199-202. Gibson House was an apartment complex for senior citizens 55 and older but they did not provide any special assistance. 6RP 205-07.

Sometime in May 2007, when McCullough visited Finley, she noticed flowers in her apartment and Finley said they were from a friend. When McCullough wanted to know more about her friend, Finley would only say that her name was “Ann,” so McCullough talked to the office personnel at Gibson House. 6RP 214-16. The office staff knew the friend and told McCullough that she did work for Jim Cassidy which raised “all kinds of red flags.” McCullough called Symmons and told her “there’s something happening, and we need to look into this.” 6RP 216-17.

In October 2007, Finley fell and was taken to the emergency room where the doctor recommended that she move to an assisted living facility. 6RP 209-10. Symmons was caring for her daughter who had cancer so McCullough offered to help with moving Finley. 6RP 211. In December 2007, McCullough moved Finley to Merrill Gardens, an assisted living facility. Finley’s physical and mental abilities had declined, but “it wasn’t anything of great significance at that time.” 6RP 218-20. McCullough managed to get a phone number for Finley’s friend Ann and called to introduce herself and they spoke for about 45 minutes. Ann said she had never heard McCullough’s name before and she did not realize that she

was Finley's niece. Ann told her about a hot day in July when she discovered Finley dehydrated and on the bathroom floor of her apartment and said she was taken to the emergency room. 6RP 221. Ann mentioned that she helped Finley with a problem she had with her insurance company. 6RP 224. McCullough asked Ann what her last name was and she said it was Barnes. 6RP 221-22.

McCullough invited Ann to visit her home, "I wanted to see who this person was." 6RP 226. When Ann came over and met McCullough and Symmons, they explained that family members and the staff at Merrill Gardens would take care of Finley so her services were no longer needed. 6RP 231. McCullough learned later that Ann's last name was Silvis and that she was still visiting Finley at Merrill Gardens. 6RP 227-28, 233-35. In August 2008, Symmons, who had a power of attorney and was helping Finley pay her bills, discovered three checks that were drawn from Finley's bank accounts. One check for \$12,000 or \$13,000 was written to Silvis, another to her husband, and a third one to her son. 6RP 237-40. McCullough and Symmons obtained a no-contact order against Silvis and went to the Puyallup Police Department. Detective Jason Vinsaw was assigned to their case and he instructed them to place a freeze on Finley's three banking accounts. 6RP 240-41. After reporting the matter to the

police, McCullough and Symmons told Finley about what happened. Finley appeared hurt and shocked. 6RP 246-47.

During cross-examination, McCullough acknowledged that Finley made philanthropic donations to different organizations and liked to help people. Finley was fond of Silvis and called her a friend. 6RP 266-67. McCullough admitted knowing that Finley wanted to at least give Silvis the \$12,000 or \$13,000 for helping her with her insurance predicament. 6RP 269-70.

Finley's niece, Arlene Symmons, testified that Finley had been very independent until she was injured in a car accident and hospitalized in January 2006. 6RP 287-88, 290-91. Symmons was told that Finley should not live alone so she invited Finley to live with her but Finley "refused to come home with me." 6RP 292. Symmons found a place for Finley at Silver Creek Assisted Living but after several months Finley wanted to move because of the cost. 6RP 292-96. Finley decided to move to an apartment at Gibson House so Symmons helped her move and Finley was "doing pretty good" physically. 6RP 296-98. While Finley was living at Gibson House, Symmons' daughter became very ill so she asked her sister-in-law, Layne McCullough, to help take care of Finley. 6RP 301-03. In October or November of 2007, Finley fell in her apartment and was taken to the emergency room. When Symmons went to pick her up at

the hospital, the doctor told her that Finley needed to relocate to an assisted living facility. 6RP 303-04. Thereafter, McCullough found a place for Finley at Merrill Gardens. 6RP 305.

Symmons recalled that while living at Gibson House in April or May of 2007, Finley began talking about a “friend,” but she would not tell Symmons her name. 7RP 309-10. Symmons eventually learned from McCullough that the friend’s name was Ann Silvis. 7RP 310-11. Symmons met Silvis at McCullough’s house when they explained that Finley had moved to Merrill Gardens where she would be well taken care of so “there was no reason for Ann to be there.” 7RP 347. When Finley kept mentioning that her friend came to see her, Symmons learned from the staff at Merrill Gardens that Silvis was still visiting Finley. 7RP 349-50. In the spring of 2008, Symmons consulted Finley’s attorney, Hillary Holmes, because she started growing suspicious of Silvis. Homes advised her that she could exercise her power of attorney and inspect Finley’s bank accounts. 7RP 353. Symmons went to Westside Bank and discovered three checks “written out to Ann Silvis, Richard Silvis, and a son equaling \$29,000.” 7RP 354. She and McCullough then went to Washington Mutual and Columbia Bank and found that many more checks were written to Silvis. They reported the matter to the Puyallup Police Department. 7RP 357-58.

In response to questions by defense counsel, Symmons acknowledged that in obtaining a restraining order against Silvis, she was worried about Finley changing her will. 7RP 393-95. She recognized that her answers at trial differed from her answers at a previous interview regarding Finley's finances but claimed she was nervous at the interview. 7RP 848-53.

The State presented the testimony of Mary Evelyn Finley using a video deposition taken in February 2009, after the court determined that Finley was not competent to testify in court. 7RP 339-43, 449. Finley met Silvis through a neighbor when she was living at an apartment complex for residents 50 or older. 7RP 458-59. Finley's neighbor thought Silvis was very nice and he hired her to work for him so Finley hired her to do some work such as cooking and cleaning her apartment. 7RP 464. Finley was not paying Silvis at first but decided she should start paying her, "it turned out that I was giving her thousands, and I didn't realize I was giving her that much." 7RP 465. Finley identified 15 checks written to Silvis and her family marked as exhibits.²

² Ex. 1, a check to Silvis for \$15,000, which Finley gave Silvis for cooking and cleaning. Finley stated that she "probably gave her that much without realizing it until later." 7RP 466, 8RP 503-04; Ex. 2, a check for \$6000 to Silvis. Finley recognized her signature but did not think the rest was her writing. She recalled giving Silvis a check for a "pretty large" amount but could not remember how much. 7RP 467, 506-06; Ex. 3, a check for \$6000 to Silvis. The signature looked like hers but the "6,000" did not look like her writing. During cross-

During cross-examination, Finley recalled that Silvis had helped her a lot by cooking meals, picking up her prescriptions, taking her to the hospital when she fell, saving her from paying \$70,000 in medical bills, running errands, and giving her rides. 8RP 493-97. Finley was asked if she recognized documents which contained her handwritten statements

examination, Finley thought the “6,000” looked a lot like her writing. Finley stated that she wrote Silvis “a big check or two once before. I’m just not sure.” 7RP 468; 508. Ex. 4, a check to Silvis for \$5000. Finley recognized her signature except for the “F” in Finley, but she did not remember writing the check. 7RP 469; 511. Ex. 5, a check to Silvis for \$5000. The signature looked like Finley’s, but she did not know if she wrote out the rest of the check although it looked like her writing. Finley remembered that the check might have been for helping her and cooking and cleaning. 7RP 469-70, 516. Ex. 6, a check for \$5000. During direct examination, Finley did not think the signature and “5,000” looked like her handwriting, but on cross-examination she thought it might be her writing. 7RP 470-71, 512-14. Ex. 7, a check to Silvis for \$6850. During cross-examination, Finley thought the signature looked like hers but she did not know about the rest of the writing. On cross-examination, she thought the rest of the writing looked like hers. Finley stated that it was quite a bit of money but Silvis might have earned that much over a period of months. 7RP 471, 515. Ex. 8, a check to Silvis for \$12,000. Finley recognized her signature but did not remember writing the check but it looked like “gift” was written on the check. 7RP 472, 517; Ex. 9, a check for \$12,000 to Richard Silvis. The signature looked like Finley’s writing even though she did not remember writing a check to Ann’s husband but his name looked like her writing. 7RP 473, 518; Ex. 10, a check to Silvis for \$2000. During cross-examination, Finley recognized her signature but stated, “I could have signed -- not signed them until she had filled it in, but maybe I did.” On cross-examination, she thought the name Ann Silvis looked like her writing. 7RP 474-75, 520; Ex. 11, a check to Silvis for \$5000. The signature and other writing looked like Finley’s and she recalled giving Silvis some money but did not remember \$5000. 7RP 475-76, 521; Ex. 12, a check to Rick and Ann Silvis for \$30,000. Finley recognized her signature but did not remember giving Silvis “that much at a time.” 7RP 476, 522. Ex. 13, a check for \$9000. The signature could be hers but Finley did not remember writing out the check. 7RP 477, 524-45; Ex. 14, a check for \$5000 with Finley’s signature. Finley stated that the check could have been for the work Silvis did for her but she did not remember paying that much. 5RP 477-78; Ex. 15, a check to Royce Silvis for \$5000. The signature looked like her writing. 7RP 478-79, 526-27.

that she was gifting money to Ann and Rick Silvis. She replied that she forgot she wrote the statements. She might have changed her mind after writing the statements but she did not believe she ever intended to give them so much money. 8RP 536-42; Ex. 21, 22, 23. Finley acknowledged that Silvis was very good to her and she wanted to give her money but did not know how much. 8RP 548.

James Cassidy, Jr. is the son of James Cassidy, Sr. who was 97 years old. 11RP 764. Cassidy testified that he helped his father move to Gibson House in April 2006. 11RP 766. While his father lived at Gibson House, he maintained his independence, his health was fair, and he handled his own finances. 11RP 772-73, 802. Cassidy took over his father's financial matters when he was moved to Heritage Retirement Home in September 2008 after falling down. 11RP 769-70, 775-76. Cassidy recalled that his father "talked of Ann Silvis continuously." 11RP 785. Every time he saw his father, he would speak about Silvis "in a very good way." 11RP 786. His father told him that Silvis visited him at Gibson House. 11RP 786.

In November 2008, the Puyallup Police Department contacted Cassidy and asked him to obtain his father's bank records. When Cassidy called his father's bank and requested checks from 2002 to 2008, he discovered numerous checks written to Silvis totaling \$101,198. 11RP

787-89. Cassidy turned the checks over to the police and asked his father about them but he did not want to talk about the checks. 11RP 791. Cassidy called Silvis and she told him that his father never gave him that much money. 11RP 793. Cassidy was outraged about the situation which eroded his relationship with his father. 11RP 796-97.

During cross-examination, Cassidy acknowledged that Silvis and his father lived in the same neighborhood before he moved to Gibson House. They became friends and she took him to the doctor, invited him over for dinner with her family, and helped him with a number of things. 11RP 799-801. His father was involved with many organizations, made charitable donations, and liked to help people. 11RP 799, 803-04. When Cassidy told his father that he “needed to make a decision about Silvis’ actions,” his father said that he would not testify against Silvis. 11RP 804-05.

Ann Silvis is 45 years old, married to Rick, and has two sons, Royce and Ryan. 12RP 998-99. Silvis testified that she met Jim Cassidy, Sr. in 2003 when they were living in the same neighborhood in Puyallup. 12RP 262. Cassidy was walking his dog past her house one day when they started talking and became friends. 12RP 963. Silvis considered Cassidy a “grandfather figure, family, close family member.” 12RP 964. They went out to lunch or the park, he visited her home and came over for

Christmas and birthdays, and she and her sons helped maintain his yard. 12RP 964-68. When Cassidy was diagnosed with cancer, Silvis took him to chemotherapy for 14 weeks. 12RP 1029-30. In 2004 or 2005, Cassidy moved to Gibson House in Tacoma and they continued their friendship. Silvis visited him a couple times a week, helping him with household chores and taking him to doctor's appointments when he stopped driving and donated his car to charity. 12RP 968-71. Silvis never asked Cassidy for money but when her husband was out of work, he offered to help and she accepted. 12RP 972-73.

In December 2006, Silvis met Finley at Gibson House while she was visiting Cassidy, "I was over there one day, and he wanted me to meet one of his friends." 12RP 973. She and Finley learned that they had something in common when they shared stories about building their own homes. 12RP 977. Silvis began running errands for Finley, giving her rides to appointments and meetings, and taking her out to lunch. 12RP 975-78. Finley visited her home and met her family. 13RP 1065-66. In June 2007, Silvis went to Finley's apartment to return a suitcase that Cassidy had borrowed from her. She knocked on the door and heard someone inside but no one came to the door so she alerted the staff at Gibson House. An office worker unlocked the door and Silvis found Finley "laying on the floor all sweaty and pale." 12RP 979-80. Finley

was taken to the emergency room and hospitalized for several days. While visiting Finley at the hospital, the doctor told Silvis that she saved Finley's life. 12RP 980-81.

Silvis recalled assisting Finley with a medicare bill for \$77,000. Finley asked for her help so she made some calls and resolved the matter by having Finley's insurance company pay the bill which made Finley very happy. 12RP 982-84. Silvis also helped Finley with consolidating her Vanguard account to one bank account. Finley called Vanguard and had difficulty hearing so she asked Silvis to talk to the person on the phone.³ 12RP 985-86. When Finley wrote checks to pay her bills, she asked Silvis to make sure the amounts were correct, but Silvis never wrote checks for Finley or wrote checks to herself from Finley. 12RP 986-87. Silvis accepted money from Finley because she said she was in a position financially to help Silvis and her family and Finley insisted that she take the money. 12RP 988-89. When asked if she would do the same thing today, Silvis replied, "I wouldn't want to put my family or Jim or Evelyn through any of this. No, I would not accept it." 12RP 995-96.

During cross-examination, Silvis explained that she knew nothing about Cassidy's finances and she did not know how much money Cassidy gave her over the years. 13RP 1034-36. She was asked about various

³ The jury heard recordings of five phone calls to Vanguard. 10RP 669-671.

checks written to her between 2003 and 2008, but she could not recall what the checks were for except when it was indicated on the check. 13RP 1036-45. Cassidy offered Silvis the money to help her and she accepted because he never expressed any concern about whether he could afford to give her the money, which she used for daily living expenses. 13RP 1049-52. After meeting Finley, Silvis would go to see her whenever she called and asked Silvis to stop by. 13RP 1070-71. Silvis accepted money from Finley because she kept offering it to her and she never wrote out the checks given to her by Finley. 13RP 1075-79. Finley never mentioned her nieces until the time she left Gibson House and she was ashamed to say that her nieces were having her moved. 13RP 1083. When she met McCullough and Symmons, they misled her to believe that Finley was also invited and the four of them were going to lunch. 13RP 1084-85. When Silvis told Finley that they met, Finley was upset that she was not included. 13RP 1085.

Brett Bishop, a forensic scientist with the Washington State Crime Lab, examined electronic images of checks submitted as evidence. 10RP 32-33, 36. Bishop received samples of Finley's and Silvis' handwriting. 10RP 37-38. Bishop analyzed the 15 checks written to Silvis and determined whether Finley or Silvis signed the checks and wrote the payee information. 10RP 52-65.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT SILVIS ACCEPTED MONEY FROM CASSIDY SR. AS EVIDENCE OF A COMMON SCHEME OR PLAN UNDER ER 404(B).

Reversal is required because the trial court abused its discretion in admitting evidence that Silvis accepted money from Cassidy, Sr. as evidence of a common scheme or plan under ER 404(b) where there was no evidence that Silvis obtained the money through misconduct.

Interpretation of an evidentiary rule is a question of law, which appellate courts review de novo. State v. DeVincentis, 150 Wn.2d 11,17, 74 P.3d 119(2003). When the trial court has correctly interpreted the rule, its decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159(2002). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” DeVincentis, 150 Wn.2d at17. ER 404(b) prohibits admission of evidence to prove a defendant has a criminal propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to “show character of a person to prove the person acted in conformity” with that character at the time of the crime. State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is a criminal-type person who would be likely to commit the crime charged. Id. at 175.

The State must meet a substantial burden when attempting to bring in evidence of a prior bad act under one of the exceptions. DeVincentis, 150 Wn.2d at 20. A common scheme or plan may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The degree of similarity for the admission of evidence of a common scheme or plan must be substantial and more than merely similar results. DeVincentis, 150 Wn.2d at 20.

Before admitting ER 404(b) evidence, a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Foxhoven, 161 Wn.2d at 175. “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). If the evidence is admitted, a limiting instruction must be given to the jury. State v. Saltarelli, 98 Wn.2d 689, 699, 655 P.2d 697 (1982).

Here, the State charged Silvis with 15 counts of theft with the aggravating factor that she knew or should have known that the victim was particularly vulnerable and incapable of resistance. CP 16-22. During motions in limine, defense counsel moved to exclude evidence that Silvis received money from Cassidy, Sr. as evidence of a common scheme under 404(b) because Silvis’ conduct did not constitute a prior bad act and the situations with Cassidy and Finley were different. 3RP 21-25. The State argued that the facts were extremely similar and established a common scheme or plan. 3RP 26-32. The trial court denied the motion and found the evidence admissible concluding that (1) the State proved by a preponderance of the evidence that Silvis “obtained over \$100,000 from a

frail elderly person over 90 years old” predicated on bank records and there is “certainly an inference” that Silvis exercised undue influence over Mr. Cassidy, (2) the State presented evidence of a common scheme or plan, (3) the evidence is relevant to show a common scheme or plan and rebut the defense that the funds were gifts and obtained in good faith, and (4) the evidence was more probative than prejudicial. 3RP 38-40.

The trial court abused its discretion in admitting the evidence because the record substantiates that there was insufficient evidence of a common scheme or plan. The record reflects that Silvis was not charged with any crime against Cassidy, Sr., the State did not allege that any of the checks from Cassidy, Sr. were written by Silvis, Cassidy, Sr. refused to press charges against Silvis and would not cooperate with the State, and Silvis and Cassidy met as neighbors and were friends for many years. 3RP 24-33, 36. Consequently, the State failed to prove that Silvis obtained money from Cassidy through misconduct. The State’s offer of proof consisted of bank records showing that Silvis received checks from Cassidy totaling \$112,000 and evidence that Silvis befriended Cassidy and Finley who were both over 90 years old living in the same apartment complex. 3RP 24-33, 36. Clearly, the State’s offer of proof that Silvis received a lot of money from Cassidy and Finley who were both elderly failed to meet the substantial burden of proving that Silvis committed

markedly similar acts of misconduct. DeVicentis, 150 Wn2d at 150; Lough, 125 Wn.2d at 852.

To convict Silvis of theft in the first degree the State had to prove that Silvis wrongfully obtained or exerted unauthorized control over property of another that exceeded \$1500 in value and she intended to deprive the other person of the property. CP 116-48. Without the inadmissible evidence, the State failed to prove beyond a reasonable doubt that the checks Silvis accepted from Finley were not gifts. It is evident from the State's closing argument that it primarily relied on its theory of a common scheme or plan. 14RP 1177-79, 1190-91, 1197-99, 1228-29, 1233-34, 1235. Significantly, the State began its argument emphasizing that the judge "is allowing you to consider the evidence regarding Jim Cassidy, Sr., in your determination as to whether or not the defendant used a common scheme or plan to take money, unauthorized money for elderly folks." 14RP 1177-78.

The evidence that Silvis received money from Cassidy was prohibited under 404(b) because the evidence improperly suggested that Silvis had the criminal propensity to likely commit the crime charged. Foxhoven, 161 Wn.2d at 174-75. Reversal is required because there is a reasonable probability that had the error not occurred, the outcome of the trial would have been materially affected. Smith, 106 Wn.2d at 780.

2. THE TRIAL COURT ERRED IN DENYING SILVIS' MOTION FOR A VIDEO DEPOSITION OF CASSIDY, SR. IN VIOLATION OF SILVIS' DUE PROCESS RIGHT TO PRESENT A DEFENSE.

Reversal is required because the trial court erred in denying Silvis' motion for a video deposition of Cassidy, Sr., a material witness, thereby depriving Silvis of her due process right to present a defense.

The right to present evidence in one's defense is a fundamental element of due process. State v. Ellis, 136 Wn.2d 498, 527-28, 963 P.2d 843 (1998); U.S. CONST. amend. VI, XIV. The right to compulsory process includes the right to present a defense. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)(quoting Chambers v. Mississippi, 410 U.S 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Under CrR 4.7, a trial court may order testimony by deposition upon a showing that a prospective witness may be unable to attend or prevented from attending a trial and his testimony is material and necessary to prevent a failure of justice. Here, defense counsel moved for a recess to have Cassidy, Sr.'s testimony taken by deposition because he unexpectedly fell and broke his hip and consequently could not attend

court to testify. Counsel informed the court that Cassidy would testify that he and Silvis were friends and he chose to give her the money and she did induce him in any way. Counsel argued that his testimony was essential to Silvis' defense to refute the State's accusations that Silvis scammed elderly people. 12RP 834-36, 839-40, 841-42. The court denied the motion, finding that Silvis would not be prejudiced because defense counsel cross-examined Cassidy, Jr., "I believe his testimony paralleled everything that you indicated that you would elicit from James Cassidy, Sr." 12RP 842-43. The following day, defense counsel modified and renewed her motion to present Cassidy, Sr.'s testimony from the nursing home where he was recovering via live webcam to avoid delaying the trial. 13RP 1090-92, 94-95. The court denied counsel's motion again, stating that Cassidy's physician has indicated that he is frail and not feeling well and in bed recuperating. The court concluded that it would not put Cassidy on camera where he could be embarrassed or his health could be compromised. 13RP 1095-96.

The record substantiates that the trial court erred in denying the motion for a deposition or testimony via webcam because Cassidy's testimony was critical to Silvis' defense. The record reflects that Cassidy's doctor was primarily concerned about Cassidy participating in an out-of-court proceeding. 13RP 1090-91. Defense counsel therefore

proposed testimony via webcam so that Cassidy would not have to leave the nursing home. 13RP 1094-95. In light of the fact that Cassidy's testimony would have been more compelling than testimony provided by his son, the trial court erred in excluding his testimony thereby violating Silvis' due process right to present a full defense.

Should this court determine that the trial court properly exercised its discretion, Silvis was denied her constitutional right to effective assistance of counsel which requires reversal. Both the Sixth Amendment of the United States Constitution and article I, section 22 (Amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced him. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Given the importance of Cassidy's testimony and the fact that he was 97 years old, counsel's performance was deficient for failing to preserve his testimony by video deposition prior to trial and Silvis was clearly prejudiced by counsel's deficient performance because Cassidy's testimony was necessary to rebut the State's claim of a common scheme or plan.

3. THE TRIAL COURT ERRED IN FAILING TO GIVE A GOOD FAITH CLAIM OF TITLE INSTRUCTION WHERE SILVIS PROVIDED SUFFICIENT EVIDENCE TO SUPPORT THE INSTRUCTION.

Reversal is required because the trial court abused its discretion in failing to give a good faith claim of title instruction where Silvis provided sufficient evidence to support the instruction.

Appellate courts review the trial court's decision whether to give a particular jury instruction for abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support that theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). RCW 9A.56.020(2) provides "In any prosecution for theft, it shall be a sufficient defense that . . . [t]he property or service was appropriated openly and avowedly under claim of title made in good faith, even though the claim be untenable." A defendant is entitled to an instruction on this defense only if he presents evidence (1) that the property was taken openly and avowedly and (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property. State v. Chase, 134 Wn. App.

792, 803, 142 P.3d 630 (2006). If evidence supports an instruction on the good faith claim of title defense, it is reversible error to refuse to give the instruction. State v. Hicks, 102 Wn.2d 182, 186-87, 683 P.2d 186 (1984).

Here, defense counsel proposed a good faith claim of title instruction, arguing that the evidence supported giving the instruction which is necessary for Silvis' defense that Finley gave her the money. 13RP 1149-50, 1152-53; 14RP 1168-70; CP 97-115. The trial court refused to give the instruction, primarily relying on State v. Self, 42 Wn. App. 654, 713 P.2d 142 (1986):

And again, I would cite to the Self case where the court held that the defense is only available to a defendant who is attempting to recover his or her own property. And there's no indication here that Ms. Silvis claims any title to any monies that belonged to Ms. Finley or that Ms. Finley's money or checks were in any way her own property.

13RP 1147-49, 1153-54, 14RP 1172-73.

The trial court abused its discretion because its decision was based on an erroneous view of the law. In Self, the defendant was charged with robbery and proposed a good faith claim to title instruction. This Court determined that he was not entitled to the instruction because he was a third party and the defense is generally only available to the party claiming title or entitlement to the specific property taken from him. 42 Wn. App. at 658-59. Self is distinguishable from this case which does not involve a

robbery and therefore the trial court erred in concluding that the defense was not available based on this Court's holding in Self.

This case is more like State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995), which involved embezzlement. In Ager, there was no evidence that the insurance company authorized advances to officers or employees. Consequently, the State Supreme Court concluded that “[s]tatutory recognition that an insurance company may authorize advances to certain officers, directors or employees, and statutory accounting measures regarding those advances do not create a right in any individual employee or agent to take an advance of any desired amount for any desired purpose.” Id. at 96. However, the Court reasoned that the defendants may have been entitled to the good faith claim of title defense if other evidence existed:

Evidence which might give rise to an inference that Defendants' belief that they had a right to take and use the funds was held in good faith could include past practices of the company with respect to advances, acts showing that past advances of this nature were approved or acknowledged by the board of directors, or statements by directors of the company that might have been interpreted by Defendants as authorizing them to take advances, rather than loans, from the company.

Id. at 97.

The record reflects that there was evidence in this case analogous to the evidence used as an example by the Court in Ager. Finley testified

that Silvis was very good to her and she wanted to give her money but did not know how much and did not realize how much she gave her. 7RP 645; 8RP 548. Detective Visnaw testified that over the course of his interview with Finley, she gave inconsistent statements but acknowledged that she intended to give the monies to Silvis. 8RP 629-30. Silvis explained that she accepted the money because Finley said she was in a position financially to help her and her family and Finley insisted that she take the money. 12RP 988-89. Had the jury been properly instructed, it may have believed that Silvis accepted the money in good faith.

Reversal is required because the trial abused its discretion in refusing to give the good faith claim of title instruction where the evidence supported the instruction and it was critical to Silvis' defense that the money was a gift. Hicks, 102 Wn.2d at 186-87.

4. THE TRIAL COURT ERRED IN ENTERING AN ORDER TO APPLY FUNDS FROM A JOINT BANK ACCOUNT TOWARD RESTITUTION.

Reversal is required because the trial court erred in entering an order to apply funds from a joint bank account shared by Silvis and her husband for restitution.

The authority to order restitution is derived entirely from statute. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). “[I]f a party is convicted of a separate crime, for which he alone could be, and was,

prosecuted and convicted, the judgment, both as to the penalty and as to its incident, the costs, operated upon him and him alone, not the marital community.” Bergman v. State, 187 Wn. 622, 628, 60 P.2d 699 (1936); Dean v. Lehman, 143 Wn.2d 12, 30, 18 P.3d 523 (2001).

Here, the State moved for an order to apply funds from the Silvis joint bank account toward restitution which the court had previously ordered. 16RP 4-7. Defense counsel argued that Bergman precluded the court from applying the funds toward restitution because the joint bank account was owned by the community. 16RP 8-10. The trial court granted the State’s motion and ordered \$26,000 for restitution. The trial court distinguished Bergman, concluding that “even though this is a criminal action and not a tort action, that at least \$47,000 can be identified as going to benefit Mr. Silvis and Ms. Silvis’ son or her family.” 16RP 12.

The trial court erred in declining to follow Bergman because it is well settled that unlike tort cases, when one spouse commits a crime, the community is not liable regardless of whether it benefited from the criminal act. Furthermore, the trial court’s authority to order restitution is based on the statutory provisions articulated in RCW 9.94A.753. Consequently, the trial court exceeded its authority because the statute does not allow the court to order funds from a bank account to satisfy restitution.

The trial court's order must be reversed because the court abused its discretion in ordering funds from the Silvis bank account to apply toward restitution.

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED SILVIS HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).

Here, the record substantiates that an accumulation of errors affected the outcome of the trial: 1) the trial court erroneously admitted evidence that Silvis received money from Cassidy as evidence of a prior bad act under 404(b); 2) the trial court erroneously denied Silvis' motion to present Cassidy's testimony by deposition where his testimony was material to her defense; 3) the trial court erroneously refused to give the

good faith claim of title instruction where the evidence supported the defense.

Reversal is required because cumulative error denied Silvis her constitutional right to a fair trial.

D. CONCLUSION

For the reasons stated, and as justice requires, this Court should reverse Ms. Silvis' convictions and remand for a new trial.

DATED this 16th day of August, 2010.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Ann Marie Silvis

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Ann Marie Silvis, DOC # 336560, MB-261, Washington Corrections Center for Women, 9601 Bujacich Road NW, Gig Harbor, Washington 98332-8300.

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

DATED this 30th day of July, 2010 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

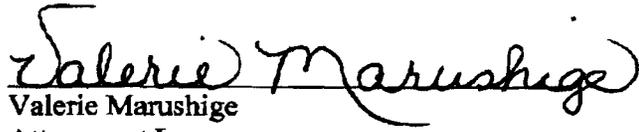
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Valerie Marushige
Attorney at Law
WSBA No. 25851

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