

NO. 40068-5-II

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY Or
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

ANN MARIE SILVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 08-1-04620-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in admitting evidence of common scheme or plan under ER 404(b)?
2. Whether the trial court properly denied the defendant's motion for recess to conduct a video deposition where the defendant failed to demonstrate the required circumstances under CrR 4.6(a)?
3. Whether the defendant was entitled to a jury instruction that was not supported by the evidence?
4. Whether the trial court erred in returning stolen money to the victim?
5. Whether the defendant was denied a fair trial through cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

October 3, 2008, the Pierce County Prosecuting Attorney (State) charged Ann Silvis (the defendant) with 14 counts of theft in the first degree. CP 1-7. On March 10, 2009, as the trial approached, the State amended the Information to charge a total of 15 counts of theft in the first degree and to allege aggravating factors that the victim was particular vulnerable or incapable of resistance, for an exceptional sentence. CP 16-

22. The trial began October 26, 2009. 1 RP 2 ff.¹At the conclusion of the trial, the jury found the defendant guilty of all counts, and found aggravating factors proven on all counts. CP149-177.

On December 4, 2009, the court imposed an exceptional sentence of 171 months. CP 190, 204-206. The court ordered restitution in the amount of \$129,650. CP 180. At a later hearing, the court ordered that the funds remaining in the defendant's bank account, \$26,869.79, be transferred to the Clerk of the Superior Court to be applied to the restitution. CP 202-203.

The defendant filed a timely notice of appeal on the same day that the sentence was imposed. CP 198.

2. Facts

Mary Finley (the victim) was an elderly woman who was able to live independently in her own home for many years. 5 RP 285, 289. Although she was very independent, the victim gave her niece, Arlene Symmons, power of attorney to assist her. 6 RP 354. After suffering a stroke, her family began to help her with her lawn, home upkeep, and

¹ The VRP of the trial is labeled and contained in 12 volumes with sequentially numbered pages. Therefore, the trial RP will be referred to by volume and page, e.g. 1 RP 2. References to Proceedings without a volume number will be labeled with the hearing date, e.g. 11/10/2009 RP 3

errands. 5 RP 194, 289. After the victim was injured in an auto accident, her family had her move to an assisted living residence. 5 RP 196, 292.

The victim was a very frugal woman. 5 RP 202, 204, 294. Because the cost of the assisted living residence was so high, she moved to an apartment in the Gibson House, a seniors-only complex. 5 RP 201, 296. She hired movers and moved to the apartment complex without the assistance or knowledge of her family. 5 RP 200.

At the Gibson House, the victim met the defendant through a neighbor, James Cassidy, sr. 5 RP 214, 6 RP 464. The defendant befriended the victim and began to do small tasks for her and run errands. 6 RP 464. Soon after meeting the defendant, large checks were written from the victim's account, payable to the defendant. 6 RP 354.

The victim began to refer to her new friend "Ann." The victim told her nieces, Ms. Symmons and Ms. McCollough, that "Ann" was helping her with tasks. 5 RP 215. Although "Ann" seemed to be a frequent visitor, the victim was secretive regarding her. 5 RP 215. Symmons and McCollough thought there were "red flags." 5 RP 217. They decided to meet with "Ann." 5 RP 221, 226. At the meeting, Symmons and McCollough informed the defendant that the victim had been moved to a new assisted living residence. 6 RP 347. They informed the victim that the

staff there and the family would take care of the victim's needs and that there was no reason for the defendant to be there. 5 RP 228, 6 RP 347.

After the victim was injured in a fall at her apartment, Symmons and McCollough had the victim moved to a new assisted living residence, Merrill Gardens. 5 RP 218, 305. Even after this meeting, the defendant continued to visit the victim at the new residence. 5 RP 234, 6 RP 349. Symmons and McCollough learned that the defendant was visiting the victim frequently. 6 RP 351. They contacted Adult Protective Services. *Id.* They obtained a restraining order preventing the defendant from contacting the victim. 6 RP 393.

Ms. Symmons decided to check the victim's bank accounts. 6 RP 354. She discovered 3 large checks had been written to the defendant, her husband and her son, totaling \$29,000. *Id.* Alarmed, Symmons went to the victim's home where she discovered that the victim's check registers and bank statements were missing. 6 RP 355. She went to the police to report the events and request an investigation. 6 RP 355.

Ms. Symmons went to another bank where the victim had an account. 6 RP 357. There, she discovered that numerous checks, for thousands of dollars had been written to the defendant. *Id.* She went to a third bank where the victim had an account. 6 RP 358. There, she discovered the same thing; numerous checks written to the defendant for

thousands of dollars. *Id.* She reported the additional findings to the police. *Id.* After this, Symmons took over the victim's finances. 6 RP 364. She closed all the accounts and opened new ones. *Id.*

Detective Visnaw of the Puyallup Police Dept. was assigned to investigate the case. 7 RP 553. When he examined copies of the checks, he noted that they appeared to have been filled out by two different persons. 7 RP 570. The signature line looked "shaky," like it had been written by an older person. *Id.* The "pay to" section printing was different. *Id.* With a search warrant, he got the defendant's bank records. 7 RP 572. He saw that there was a lot of money going out of the defendant's account. 7 RP 575. Det. Visnaw supervised as the defendant completed a handwriting exemplar. 7 RP608. He sent it to the Washington State Patrol crime lab for analysis. 7 RP 609.

Brett Bishop, a forensic scientist at the WSP lab examined the documents and samples submitted. 11/10/2009 RP 32. He found that the victim did not sign or write 8 of the checks. 11/10/2009 RP 52, 59, 60, 61, 66. The signatures were "simulations," meaning an imitation of a genuine signature. 11/10/2009 RP 32. On all but one check, the defendant could not be excluded as the person who wrote the check. 11/10/2009 RP 62.

Det. Visnaw discovered that the victim had an account with Vanguard investments. 7 RP 591. He found that the account had rapidly diminished recently. 7 RP 591. He obtained recordings of phone calls

from the victim to Vanguard wherein the defendant took over the call when the victim is unable to make the requested large transfer of funds to her bank account. 8 RP 669-670.

At trial, the defendant admitted that she took the money from the victim. 10 RP 988, 1073. She asserted that the victim gave her all the money as gifts. 10 RP 989. She admitted that she put the money in her checking account. 10 RP 1079. She acknowledged that she writes her personal checks in a similar format all the time. 10RP 1104. She further acknowledged that the checks drawn on the victim's accounts were written in a format similar to her own. 10 /11/2009 RP 1112.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE UNDER ER 404(b).

Under ER 404(b), evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith.

ER 404(b). However, such evidence may be admissible for other purposes. The rule states:

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.

ER 404(b). The rule's list of purposes for which evidence of misconduct may be admitted is not exclusive. *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

When the State seeks admission of evidence of the defendant's prior bad acts under ER 404(b), the trial court must (1) determine by a preponderance of the evidence that the acts probably occurred, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

The trial court's decision to admit evidence under ER 404(b) will not be reversed absent an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

The State must demonstrate by a preponderance of the evidence that the claimed misconduct occurred. *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981); *State v. Bythrow*, 114 Wn.2d 713, 719, 790 P.2d 154 (1990). This burden is met when a defendant confesses to the acts in question. *State v. Krause*, 82 Wn. App. 688, 694, 919 P.2d 123 (1996).

It is not necessary to hold a pretrial evidentiary hearing to determine whether or not the prior bad acts alleged by the State probably occurred:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for the defendants.

State v. Kilgore, 147 Wn.2d 288, 292-295, 53 P.3d 974 (2002). The court may rely on the State's offer of proof as to what the witnesses will testify to in order to make a pretrial ER 404(b) ruling. *Id.*

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P. 3d 119 (2003), the Supreme Court held that the admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *Id.*, at 21. The Court found that such evidence is relevant when the existence of the crime is at issue. *Id.*

In *DeVincentis*, the defendant was charged with rape of a child and child molestation in the second degree. The defendant hired a neighborhood girl to do work around his house. As she worked, he walked around in his underwear. He eventually talked the girl into having sex with him. At the trial, the State moved to introduce evidence of the defendant's similar sexual misconduct in New York several years before. The facts were very similar. The defendant had used a similar approach to the young girl, who was a friend of the defendant's daughter. The trial court found

the prior act was admissible under ER 404(b) as part of a common scheme or plan. The Supreme Court agreed.

In *State v. Kennealy*, 151 Wn. App. 861, 214 P. 3d 200 (2009), the defendant was charged with child rape and molestation of neighborhood children. *Id.*, at 869. At the trial, evidence that the defendant had molested his own children years before was admitted under the common scheme or plan exception of ER 404(b). Although the prior misconduct was not as similar as in *DeVincentis*, this Court held that it was properly admitted. *Kennealy*, at 889.

In determining relevancy, (1) the purpose for which the evidence is offered “must be of consequence to the out-come of the action,” and (2) “the evidence must tend to make the existence of the identified fact more . . . probable.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), citing *State v. Salterelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994).

Evidence to prove knowledge is admissible when knowledge is an element of the crime charged, is relevant in the general sense, and has a tendency to prove the defendant’s knowledge of the facts in the case at hand. *State v. Bacotgarcia*, 59 Wn. App. 815, 801 P.2d 993 (1990); *State v. Stanton*, 68 Wn. App. 855, 845 P.2d 1365 (1993). Evidence of prior crimes, wrongs, or bad acts is admissible to prove knowledge when the

defendant claims the charged crime stemmed from an accident or mistake, or the defendant claims he was acting in good faith. *State v. Dewey*, 93 Wn. App. 50, 966 P.2d 414 (1998).

The defendant's statements largely increased the need for, and probative value of, this evidence. Therefore, the trial court did not abuse its discretion by admitting the 404(b) evidence against the defendant.

The State sought to admit the checks written to and accepted by the defendant on James Cassidy Sr.'s bank account as evidence of the defendant's common scheme or plan to unlawfully obtain money from trusting, elderly adults that she had befriended for her own financial gain. ER 404(b) specifically provides that evidence of prior bad acts or wrongs is admissible to prove a "common scheme or plan." Crimes or misconduct other than the charged crime may be admitted for the purpose of proving a scheme or plan of which the offense charged is a manifestation. *State v. Lough*, 125 Wn.2d at 853.

There are two different types of "common scheme or plan" for purposes of admitting evidence under this exception to ER 404(b). *Lough*, 125 Wn.2d at 854-855. The first is where several crimes constitute parts of a plan in which each crime is but a piece of a larger plan, such as committing one crime in order to accomplish a subsequent crime. *Id.* The second type occurs when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. *Id.* at 855. In the

present case, the defendant's current and prior bad acts constitute the latter.

A common scheme or plan is established by evidence reflecting that the defendant committed "markedly similar acts of misconduct against similar victims under similar circumstances." *State v. Lough*, 125 Wn.2d at 855-56 (citing *People v. Ewoldt*, 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr.2d 646 (1994)). The similarity may be proved circumstantially by evidence showing that the defendant performed acts having "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations." *Id.*

In *State v. Bythrow*, the defendant was charged with robbery. 114 Wn.2d 713, 718, 790 P.2d 154 (1990). The defendant also had another robbery case pending. The appellate court noted that evidence of the other pending robbery case to prove intent was not precluded just because there was no conviction. The court noted that the burden of proof for admission of other crimes is preponderance of the evidence. *Id.*

ER 404(b) evidence has also been considered in fraud related cases. In *State v. Donald*, 68 Wn. App. 543, 546, 844 P.2d 447 (1993), the defendant was charged with attempting to obtain a controlled substance by fraud. There, the defendant went to an emergency room and gave a false name in an effort to obtain Percocet. Pursuant to ER 404(b), the trial court and the subsequent appellate court permitted evidence that the defendant

did the same thing on two prior occasions. The court found that the evidence was probative of the defendant's guilty knowledge, intent and fraud. *Id.* at 547. The court also noted that the probative value of the evidence outweighed its prejudicial effect as fraud-related crimes speak inherently and directly to the suspect's disregard for the truth. *Id.*

In the present case, there was evidence of the defendant's recent previous relationship with another elderly person Mr. Cassidy. Like the victim, he lived on his own. Like the victim, unbeknownst to the man's care-taking family, the defendant received several large checks, which totaled over \$100,000. This was an apparent pattern of predatory behavior. This evidence was admissible in the trial to prove that the defendant had a common scheme or plan for obtaining money from trusting and elderly adults whom the defendant has befriended.

a. Preponderance of the Evidence

Under the first prong of the *Lough* test, the State proved by a preponderance of the evidence that the defendant committed the prior bad acts that the State sought to admit. This was done largely through the bank records that detailed all of the checks and deposits, and through James Cassidy Jr. 9 RP 762-805. For the incidents that were offered by the State regarding James Cassidy, Sr., which had not resulted in a conviction, the court could rely on the State's offer of proof to make its ruling. *State v. Killgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

b. Proof of Common Scheme or Plan

Under the second prong of the *Lough* test the defendant's prior bad acts constituted a common scheme or plan. The State sought to admit the prior incidents for this reason. The common scheme or plan was established largely through bank records.

c. Relevance to rebut defense.

Pursuant to the Affirmation of Statutory Defense (CP 230) filed by the defendant on September 28, 2009, the defendant asserted that Ms. Finely openly and avowedly gave the defendant almost \$130,000 in the span of 18 months. The defendant's prior bad acts were relevant to rebut the defense.

Use of other crimes and acts to rebut a defense or any material assertion by a party is a well-established exception to ER 404(b). *See e.g., State v. Hall*, 41 Wn.2d 446, 451-52, 249 P.2d 769 (1952) (finding evidence of a narcotics investigators' purchase of marijuana from the defendant relevant to rebut the defendant's claim that he could not recognize marijuana); *State v. Fernandez*, 28 Wn. App. 944, 953, 628 P.2d 818 (1980) (finding ER 404(b) evidence relevant to rebut the defense of accident in a murder case), *State v. Roth*, 75 Wn. App. 808, 819, 881 P.2d 268 (1994) (finding ER 404(b) evidence relevant to rebut defense that death of wife was an accident.).

Prior misconduct is also admissible to rebut a material assertion of a party, regardless of whether the evidence fits in a traditional category such as knowledge or accident. *See e.g., State v. Wilson*, 60 Wn. App. 887, 890-91, 808 P.2d 754 (1991) (finding evidence of prior assaults on the same victim admissible in a rape and indecent liberties case to show the reason for the victim's fear and delay in reporting the offense); *State v. Longuskie*, 59 Wn. App. 838, 843-44, 801 P.2d 1004 (1990) (finding evidence of defendant's sexual abuse of a different child, although inherently prejudicial, admissible to rebut the defendant's contention that sexual dysfunction prevented his arousal); *Williams v. State*, 110 So.2d 654 (Fla. 1959) (finding evidence of a common plan relevant to rebut defense of consent in a rape case), *certiorari denied, Williams v. Florida*, 361 U.S. 847, 4 L. Ed. 2d 86, 80 S. Ct. 102 (1959), cited with approval in *Lough*, 125 Wn.2d at 857 n. 14.

Relevant evidence is that having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. *State v. Powell*, 126 Wn.2d at 259. Even though the prejudicial effect of ER 404(b) evidence is high where the defense claims that the crime never took place, there are no eyewitness, or the question of guilt necessarily turns on the credibility of the accused's

version of events, such evidence is admissible where it is crucial to a central issue at trial, and thus its probative value outweighs potential prejudice. *See Roth*, 75 Wn. App. at 822.

In the present case, the defendant claimed that the victim gave her almost \$130,000 out of the goodness of the victim's heart. That the defendant previously used similar pretexts to target and approach an elderly and trusting adult was relevant and probative both to show that she used a common scheme in choosing and gaining access to her victims in order to unlawfully obtain money from them with relative ease and to rebut her defense that the money was given to her out of these elderly persons' uncharacteristic generosity.

The evidence at issue was highly probative, and the need for such proof is unusually great given the nature of the scheme. As the *Lough* court stated, "[t]he purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case." 125 Wn.2d at 859. In this case, introducing evidence of the defendant's prior bad acts was necessary to rebut the defendant's assertions. For these reasons, the trial court did not err in admitting evidence that the defendant had taken a large amount of money from James Cassidy, Sr. under similar circumstances, to show a common scheme or plan under ER 404(b).

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION FOR VIDEO DEPOSITION OF JAMES CASSIDY, SR.

CrR 4.6(a) establishes that the trial court may order or permit a witness deposition only when certain conditions exist:

Upon a showing [1] that a prospective witness may be *unable to attend or prevented from attending* a trial or hearing or if a witness refuses to discuss the case with either counsel *and* [2] that his testimony is *material and* [3] that it is *necessary* to take his deposition *in order to prevent a failure of justice*, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

CrR 4.6(a) (emphasis added). The decision whether to order a deposition, as with the admissibility of evidence, is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *See State v. Smith* 77 Wn.2d 267, 270, 461 P. 2d 873 (1969); *see, gen., State v. Hamlet* 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

In the present case, after the state had rested, the defendant requested an extended recess in order to take the deposition of James Cassidy, Sr. 10 RP 835. The defendant did not demonstrate that the witness' testimony was material. The defendant declined, indeed refused to make an offer of proof as to what the witness would have testified to. 10 RP 841. When pressed, counsel alleged that Mr. Cassidy, Sr. would testify

that the defendant did not induce him to give her money, that the money was a series of gifts, based on their friendship. 10 RP 841.

In denying the motion to recess, the court pointed out that the defendant failed to show that the witness was unable to attend and testify. 10 RP 842. The court went on to point out that the defendant would not be prejudiced because witness James Cassidy, Jr. had already testified to all the facts the defendant alleged and more: that Mr. Cassidy, Sr. was generous when he wanted to be, giving \$30,000 on one occasion to the ACLU; that he liked the defendant; that the defendant had befriended Cassidy, Sr. and provided services to him; that Cassidy Sr. was very independent and did as he pleased with his money; that Cassidy, Sr. refused to testify against the defendant; and that Cassidy, Sr. so opposed the investigation of the defendant that he chose his friendship with the defendant over his relationship with his family. 10 RP 843.

Here, the defendant failed to show that the witness was 1) unavailable, 2) material, and 3) necessary to prevent failure of justice. The trial court did not abuse its discretion in denying the defendant's motion under CrR 4.6(a).

3. THE DEFENDANT FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE WHERE SHE FAILED TO OBTAIN A DEPOSITION TO PRESERVE TESTIMONY OF AN AVAILABLE, COOPERATIVE WITNESS.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d at 225-26. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In the present case, the defendant had subpoenaed James Cassidy, Sr. and planned to call him as a witness. CP 230. Defense counsel and her investigator had interviewed Mr. Cassidy, Sr. 10 RP 918. He was cooperative and available. *Id.*, 11 RP 1099. Therefore, defense counsel did not believe that there were grounds for obtaining a video deposition for preservation of testimony. *Id.*

During the period of the trial, the health of Mr. Cassidy, Sr. dramatically declined. 11RP 1090. Mr. Cassidy, Sr. developed an irregular heartbeat (atrial fibrillation) and an intestinal obstruction (ileus). 11 RP 1090. He was on pain medication that could have altered his cognition. *Id.* His doctor reported that Mr. Cassidy, Sr. was not in a condition to make statements in a proceeding or in court. *Id.*

Here, defense counsel's performance was not deficient. It was her intent or strategy to call the witness. 11 RP 1099. She could not be expected to foresee that Mr. Cassidy, Sr. would become unavailable to testify. 11 RP 1099-1100. Also, even if counsel's performance fell below that of a reasonable practitioner, the defendant was not prejudiced. As pointed out above, all of the information that the defense sought from Mr. Cassidy, Sr. was obtained through his son, who did testify. The defendant can show neither deficient performance by counsel, nor prejudice thereby. This argument fails.

4. THE TRIAL COURT CORRECTLY DECLINED TO GIVE AN INSTRUCTION THAT WAS NOT SUPPORTED BY THE EVIDENCE.

Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (finding reversible error where

the trial court refused a duress instruction because it judged the harm to the defendant was not immediate). A trial court has discretion to decide how jury instructions are worded and whether to give a requested instruction. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

An instruction is appropriate if it informs the jury of the applicable law, is not misleading, and allows the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). However, a defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. *See, e.g., State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). It is error for a trial court to give an instruction which is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P. 2d 715 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).

The good faith claim of title is an affirmative defense. *See State v. Casey*, 81 Wn. App. 524, 527, 915 P.2d 587 (1996). In order to be entitled to an instruction on the good faith claim to title, the defendant must present evidence:

- (1) that the property was taken openly and avowedly and (2) showing circumstances which support an inference that there was some legal or factual basis upon which the

defendant, in good faith, based a claim of title to the property taken.

Ager, 128 Wn. 2d at 87.

In the present case, the defendant failed to produce evidence of either. The taking was not open and avowed. The defendant never contacted McCollough or Symmons to say that she was helping the victim with tasks. 5 RP 220. The evidence showed that the defendant tried to mislead McCollough and Symmons when she met them. She introduced herself using her maiden name, Ann Barnes. 5 RP 222. Even after being told that her “help” was no longer needed, the defendant continued to visit the victim. 5 RP 231, 234, 6 RP 349, 351.

The defendant never told McCollough or Symmons that she received and kept money from the victim. 6 RP 348. To the contrary, she specifically told them that the victim had given her no money. 5 RP 225. The defendant never told them that she attempted to get money moved from the Vanguard investment account to the victim’s checking account in order to make more money available for the checks. RP --.

Neither did the defendant produce evidence that the money was received in good faith, based on a claim of title. Although the defendant contended that the money she received were gifts, the victim did not remember writing the checks or giving the defendant the money. 6 RP

467-478. In fact, the evidence showed that the victim did not write the checks. 11/10/2009 RP 52, 59-61. The evidence showed that the victim was a confused elderly woman who was being manipulated by the defendant.

The trial court considered these factors before it denied an instruction on the affirmative defense. 11 RP 1149, 1153. Even without the instruction, the defendant was able to argue her theory of the case. She argued that there was no intent to steal; that the victim was an independent-minded individual who generously gave the defendant the money. 12 RP 1209. The court did not abuse its discretion in declining to instruct on a good faith claim to title.

5. THE TRIAL COURT CORRECTLY ORDERED THAT THE MONEY IN DEFENDANT'S BANK ACCOUNT BE RETURNED TO THE VICTIM.

Prior to trial, the court ordered that the defendant's bank account be frozen or seized to prevent the defendant from disposing of any more of the victim's money. CP 208-229. After the verdict and a hearing regarding ownership of the money, the court ordered the transfer of the defendant's Key Bank funds to the victim as partial payment of restitution. CP 202-203.

The defendant argued that because her husband deposited his paychecks into the shared Key Bank account, which is the same account

that the defendant deposited the stolen checks into, the entire balance should be released to Mr. Silvis. The defendant offered no accounting and ignored the fact that the money deposited into the Silvis bank account was stolen from the victim.

RCW 10.79.050 requires “[a]ll property obtained by larceny, robbery or burglary, shall be restored to the owner.” See *State v. Mermis*, 105 Wn. App. 738, 20 P.3d 1044 (2001).

The same principle applies where money is stolen. It makes no difference whether the stolen money is stored in a bank account, a safe deposit box, or in a kitchen cupboard. The law requires the court to return the stolen money to the rightful owner.

In the present case, the defendant deposited all of the stolen money into her personal checking account with Key Bank. 11 RP 1079, 1080. This was the only account that the defendant used. 11 RP 1050, 1081. Although the checking account was shared with her husband, Rick Silvis, the defendant wrote all the checks from this account and took care of the family finances. 11RP 1053. The defendant admitted that the money remaining in the account at the time of trial, approximately \$30,000, was from the victim. 11 RP 1079.

The defendant committed the multiple acts for the direct financial benefit of her and her family. The defendant used \$24,000 of the money stolen from the victim was also to make extra mortgage payments on the defendant’s home. 11 RP 1080. Large checks were written to the

defendant and her husband as joint payees (11 RP 1078), to the husband individually (*Id.*), and to their son (11RP 1079).

Whether Mr. Silvis knew of his wife's criminal activity is irrelevant. A thief has no legitimate claim in stolen property. See *State v. Mermis*, 105 Wn. App. at 748. Here, the defendant stole money from the victim in 15 transactions. Some of those transactions were for the specific benefit of her husband and son. Where the defendant had no legitimate claim to the stolen money, she could not launder or "convert" the money to community property by labeling it as for her family or by merely depositing it into a joint bank account. The money was never lawfully theirs. The money was always the property of the victim. The court properly seized the money, in the form of the account; and ordered it returned to the victim.

In the trial court (1/29/2010 RP 4, 9) and in the defendant's appeal (App. Br. at 29), the legal discussion focused on the liability of the community property assets –the bank account- to satisfy a criminal judgment. As argued above, the money remaining in the account was stolen from the victim was never an asset of the marital community. Nevertheless, even under a community property analysis, the court acted properly.

Where a member of a marital community commits a crime also characterized as a tort, the marital community can be held liable for the monetary judgment against the perpetrator. In *Clayton v. Wilson*, 168

Wn.2d 57, 227 P.3d 278 (2010), Mr. Wilson employed a young Mr. Clayton to mow the lawn and perform other yardwork at various rental properties that the Wilsons owned. Wilson groomed and eventually molested Clayton on numerous occasions. When Clayton turned 18, he disclosed the sexual misconduct. The State charged Wilson for the criminal behavior and Clayton sued Wilson for the tortious behavior. The Supreme Court held that the marital community assets could be held liable for Mr. Wilson's behavior because it occurred while Wilson was employing and supervising Clayton in benefiting the marital community assets: the yardwork. 168 Wn.2d at 65-66.

Likewise, in *Bergman v. State*, 187 Wash. 622, 60 P.2d 699 (1932) the husband was convicted of arson for setting ablaze the building where the family business was located. *Bergman* held that when a tortious act of one spouse is committed in the management of community property or for the benefit of the marital community, such community is liable for the act. *Id.* at 626.

Other cases have demonstrated and supported this rule as well. In *McHenry v. Short*, the court found that the marital community was liable when the husband assaulted and caused the death of another. 29 Wn.2d 263, 273, 186 P.2d 900 (1947). The court found that the husband was acting as an agent of the community and the assault was committed in the management of community real property and in the prosecution of the community's business. *Id.* at 274. This opinion was issued in 1947 and

even then the court acknowledged the “long line of decisions” that have established the settled rule of law that the tortuous acts of a spouse committed in the management of community property renders the community liable for the act. *Id.* This rule was acknowledged under the doctrine of respondeat superior. *Id.*

In *deElche v. Jacobsen*, the Washington Supreme Court stated, “[T]he best rule for dealing with tort recoveries from married persons is one which will impose liability on the community when a tort is done for the community’s benefit, protect the property of the innocent spouse if the tort was separate, and at the same time allow recovery by the victim of a solvent tortfeasor.” 95 Wn.2d 237, 244-45, 622, P.2d 835 (1980).

While the above cases support the action of the trial court in the present case, they are also all distinguishable in one factual aspect. In all of the above cases, the action was brought to attach or seek payment from legitimate, pre-existing community assets. Notably, *Bergman* distinguishes between illegally acquired assets and legitimate assets in the opinion. *Bergman* 187 Wash. at 627-628. In the present case, the contents of the bank account consisted of money stolen from the victim. The defendant failed to present any evidence what amount, if any, could be characterized as community property. Under the defendant’s argument, half of the victim’s money became Mr. Silvis’ property by operation of its deposit into a joint bank account. The money was not a community asset. The court properly ordered it returned to the victim.

6. CUMULATIVE ERROR DID NOT DENY THE DEFENDANT A FAIR TRIAL.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

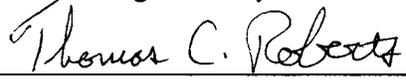
The record of this case, as a whole, shows that the defendant received a fair trial. As argued above, the court correctly admitted evidence, instructed the jury, and returned the stolen property to the victim. She was represented by effective counsel. There was no such accumulation of error to deprive the petitioner of a fair trial.

D. CONCLUSION.

The defendant received a fair trial where the court correctly instructed the jury on the law and was able to argue her theory of the case. The State respectfully requests that the judgment be affirmed.

DATED: NOVEMBER 5, 2010

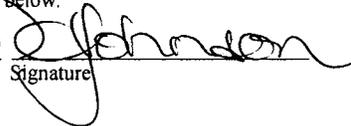
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/10/10 
Date Signature