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Court of Appeals  
Division III  
State of Washington

32734-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VICKI S. BARRETT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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APPELLANT'S BRIEF

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Janet G. Gemberling  
Attorney for Appellant

JANET GEMBERLING, P.S.  
PO Box 8754  
Spokane, WA 99203  
(509) 838-8585

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#### A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports finding Ms. Barrett committed theft from Clarence Swanson.
2. The court erred in admitting hearsay testimony as to an essential element of the charged offense.
3. The State relied on evidence in violation of the Confrontation Clause.
4. Defense counsel's failure to object to evidence that violated the Confrontation Clause constituted ineffective representation under the Sixth Amendment.

#### B. ISSUES

1. Absent evidence a defendant exercised her power of attorney to divert funds from her father's account for her own benefit, does the evidence she failed to use funds to pay her father's nursing home bills establish the elements of theft from her father?
2. A witness was not personally involved in any of the events that gave rise to the criminal charge. The deputy prosecutor asked the witness whether it was his "understanding that there was a check from the VA paid to

Mr. Swanson but spent by Ms. Barrett. . . .” The witness was permitted to answer the question over defendant’s objection and responded “yes.” (RP 107-08) Did the witness’s response constitute inadmissible hearsay?

3. Three witnesses became involved in this case after the events that gave rise to criminal allegations, and during the pendency of guardian ad litem proceedings and investigation of a referral to Adult Protective Services regarding the alleged victim. Each testified to facts obtained from the records and employees of the third party that had initiated both proceedings, and opinions based thereon. Did this testimony violate the defendant’s rights under the Confrontation Clause of the Sixth Amendment?
4. In *Melendez-Diaz*, the United States Supreme Court stated in dicta that the defense always bears the burden of objecting to evidence that violates the Confrontation Clause. Does this statement abrogate Washington’s procedural rule permitting appellants to raise manifest constitutional issues to which no objection was made at trial?

5. Defense counsel did not object to the testimony presented by three witnesses based on their interviews with employees of a business that had initiated legal proceedings implicating the defendant in criminal conduct. In failing to object to this testimony, did defense counsel provide the effective assistance of counsel required by the Fifth Amendment?

### C. STATEMENT OF THE CASE

In October 1996 Clarence Swanson asked his daughter, Vicki Barrett, to come and take care of him. (RP 135) Ms. Barrett was a registered nurse's assistant experienced in working with physically disabled patients. (RP 132, 134) She and her husband and son lived with Mr. Swanson until 2006, when he began to require a wheelchair. (RP 134-36) His home was not equipped with a ramp or wheelchair accessible shower, so he eventually moved to a nursing home. (RP 136)

While living in the nursing home Mr. Swanson was receiving his social security and a VA pension. (RP 79) These were paid to the nursing home and the balance of his obligation was paid by Medicaid. (RP 79-80)

In 2010 Mr. Swanson reportedly received a check for about \$16,980. (RP 62, 79-80) As a result DSHS stopped making the Medicaid

payments in 2011 and advised the nursing home that payment would not resume until Mr. Swanson provided proof the proceeds of the check had been spent on his medical needs. (RP 79-80, 88)

In 2011, attorney Robert Redmond drafted a quitclaim deed for Mr. Swanson to convey his residence to Ms. Barrett. (RP 31-32) He met with Mr. Swanson who, although physically impaired, appeared competent to execute the quitclaim deed. (RP 32-33) Mr. Redmond satisfied himself that Mr. Swanson knew his own identity, who his family were, the extent of his personal assets and the nature and practical consequences of executing the quitclaim deed. (RP 36-37) Mr. Swanson executed the quitclaim deed on January 8, 2011. (Exh. 2, p. 3)

Mr. Swanson remained at the nursing home until his death in 2012. (RP 82) At the time of his death his total obligation to the nursing home was about \$64,000. (RP 82)

In July 2012 the State charged Ms. Barrett with two counts of first degree theft, alleging that she: (1) “on or about January 8, 2011, did wrongfully obtain . . . a house located at 1029 West Fredrick, Spokane, Washington worth approximately ONE HUNDRED FIVE THOUSAND DOLLARS (\$105,000), belonging to CLARENCE FREDRICK SWANSON, . . . with intent to deprive CLARENCE FREDRICK SWANSON of such property . . .” and (2) “on or about between June 28,

2010 and January 7, 2011, did wrongfully obtain and exert unauthorized control over proceeds of a Veterans Administration check in an amount over SIXTEEN THOUSAND DOLLARS (\$16,000), belonging to CLARENCE FREDRICK SWANSON . . .” with intent to deprive Mr. Swanson of such property. (CP 1-2)

In 2011 a guardianship proceeding had been initiated by an unidentified private party. (RP 53) Attorney Richard Perednia testified that he had been appointed as Mr. Swanson’s guardian ad litem on April 19, 2011. (RP 53, 56) In that capacity he had interviewed Mr. Swanson, who said he was opposed to the apparent guardianship proceeding. (RP 58) Mr. Perednia arranged to have Mr. Redmond appointed to represent him. (RP 58)

According to Mr. Perednia, Mr. Swanson had a Banker’s Casualty long-term care policy, and Mr. Perednia believed that Mr. Swanson may have received a refund on that policy and as a result Ms. Barrett has ended up with a check for her father for about \$16,000. (RP 62-63) Mr. Perednia understood that Ms. Barrett had Mr. Swanson’s power of attorney. (RP 66) Mr. Perednia testified that Ms. Barrett told him she deposited the check into her father’s bank account and used some of the proceeds to pay off the mortgage and taxes due on Mr. Swanson’s residence. (RP 63)

Chris Frazier began working for the nursing home as a “cost reimbursement analyst” beginning in May 2011. (RP 76) Mr. Frazier explained to the jury that if a person who is in the Medicaid program receives payments that bring the person’s resources above \$2,000, the person is off the program until the excess resources have been used for medical expenses. (RP 79) He testified that according to the nursing home records, there was correspondence from DSHS at undisclosed times advising that Mr. Swanson had been taken off Medicaid, and the payments from DSHS ceased. (RP 80)

Although he was not working at the nursing home at the time, Mr. Frazier testified that he believed that the superintendent and someone named Marv King had met with Ms. Barrett on January 26, 2011. (RP 81) The Medicaid issue was apparently not resolved and at the time of his death in 2012 Mr. Swanson owed the nursing home about \$64,000. (RP 82)

In 2011 the nursing home referred Mr. Swanson’s case to Adult Protective Services. (RP 93-94) Martin Yacker was employed in 2011 investigating referrals of allegations of abuse or neglect or exploitation of vulnerable adults for Adult Protective Services. (RP 93) He testified that he interviewed Ms. Barrett and was told that Mr. Swanson had received a lump sum of about \$16,000. (RP 96) Ms. Barrett told him she had spent

half that sum paying the taxes and mortgage on Mr. Swanson's home. (RP 63) He did not know what became of the remainder of the money. (RP 96) He prepared a summary report of his investigation and the case was referred to law enforcement. (RP 98-99)

Dr. Thomas Prenger told the jury he worked as medical director for the nursing home. (RP 14) He prepared a report for the guardian ad litem indicating Mr. Swanson had Parkinson's disease with dementia, along with a history of strokes, cancer and macular degeneration. (RP 19) Dr. Prenger opined Mr. Swanson was incapable of managing his financial affairs. (RP 20)

Detective Kirk Kimberly testified that he reviewed the medical report prepared in the guardianship proceedings along with Mr. Yacker's report and submitted a request for a charge of theft to the prosecuting attorney's office. (RP 106-07) Based on Mr. Yacker's report, over defense counsel's hearsay objection, he told the jury it was his understanding that "there was a check from the VA paid to Mr. Swanson but spent by Ms. Barrett." (RP 107-08)

A jury acquitted Ms. Barrett on the theft charge relating to her father's residence but convicted her of the theft of the proceeds of the check. (RP 224)

## D. ARGUMENT

### 1. THE CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF THEFT FROM THE ALLEGED VICTIM.

Theft is defined as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Intent to “permanently” deprive is not an element of the theft statute. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989). Except in cases involving theft of intellectual property, “deprive” is given its common meaning. *Id.* at 814–15 (citing former RCW 9A.56.010(5)); *see also* RCW 9A.56.010(6) (defining “deprive” for purposes of theft and robbery). Our Supreme Court has defined the common meaning of “deprive” as “[t]o take something away from”; “[t]o keep from having or enjoying”; or “[t]o take.” *Komok* at 815 n. 4 (final alteration in original) (citing Webster’s II New Riverside University Dictionary 365 (1984); Black’s Law Dictionary 529 (4th ed. 1968)).

Theft of property worth more than \$5,000 is an essential element of first degree theft. RCW 9A.56.020 and .030(a).

Evidence is sufficient to support a conviction if, “after viewing the evidence in the light most favorable to the State, any rational trier of fact

could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980)). A reviewing court draws all reasonable inferences from the evidence for the State and interprets them most strongly against the defendant. *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977)). “[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Ms. Barrett was charged with theft of a Veteran’s Administration check in the amount of about \$16,000. Neither the check nor any copy of the check from the VA was entered into evidence. Ms. Barrett told Mr. Perednia she had deposited a check for about that amount into her father’s checking account; Mr. Perednia understood this to be a refund on Mr. Swanson’s long-term care policy. The only evidence as to the existence of the check came from Ms. Barrett, who also stated she deposited the check to her father’s account. The State presented no evidence suggesting any other disposition of the check.

No witness testified as to the date on which any check for about \$16,000 was received by Ms. Barrett or deposited into Mr. Swanson’s bank account. The State did not introduce into evidence any bank records

or other documents showing withdrawals from Mr. Swanson's account at any time, nor any evidence of the balance in the account at the time of his death.

The only evidence that Ms. Barrett had made any payments from her father's bank account consisted of her own statements to the jury and Mr. Perednia's and Mr. Yacker's understanding of what she had told them:

Well, there was -- there is a -- Mr. Swanson had a Banker's casualty long-term care policy. And, apparently, and I never did figure exactly where the money came from, but, apparently, they gave some kind of a refund on the policy. And Vicki Barrett ended up with a check to her father for \$16,980. And she indicated to me when I interviewed her on May 11, 2011, that she wasn't very good with money. She kept saying that all the time. And she said she deposited that money into her father's account and paid bills with it. And she paid off the mortgage on the house and she also paid off the real estate taxes, the past due real estate taxes on it. . . . It was kind of vague. And so my -- and my overall impression was that it got paid out of -- the house got paid off and taxes got paid off out of the \$16,900 from Banker's Life Casualty long-term care policy.

(RP 62-63)

Ms. Barrett acknowledged that there had been a check for her father and testified that at his request she had used the proceeds to pay off the mortgage and taxes on his residence:

Q. There's been a lot of talk about the \$16,000 check that you received for your dad, and what sort of big ticket items did you pay for with that check?

A. Was to pay off the rest of the mortgage and the back taxes. That was most of it.

...

Q. Do you recall what the taxes and mortgage, how much those were?

A. I think he only owed about \$4,000 on the mortgage and \$4,000 on the taxes. That's approximate. I don't remember precisely.

(RP 140-41)

Q. When you paid off his mortgage and his taxes, did you believe that you were doing that as his power of attorney in his interest?

A. Yes. Well, I asked him what he wanted me to do, and he said he wanted to do that, because, well, he was still paying a mortgage through his bank account. It was an automatic payment through his bank account.

(RP 142) She also testified that she had been trying to get the VA to remodel Mr. Swanson's residence so that he would be able to return home, and she had used some of the money to purchase a bed, bedding, and a wheelchair-accessible table for him. (RP 144) The defense introduced into evidence a list of purchases from Costco between October 2010 and March 2011 totaling \$1,578.61. (Exh. 6) Ms. Barrett testified that many of these purchases, such as clothing and personal care items, were made for her father. (RP 145-48) It is unclear from her testimony whether these items were purchased with funds drawn on her father's bank account.

Neither Ms. Barrett, Mr. Yacker, nor Mr. Perednia testified as to when the tax and mortgage payments were made. The State presented no

evidence indicating when the payments were made. The evidence is fully consistent with Ms. Barrett's having made the tax and mortgage payments with funds from Mr. Swanson's bank account during the time when the house belonged to him. Use of Mr. Swanson's funds to pay debt obligations related to a house that belonged to him cannot be theft. Absent evidence, that Ms. Barrett paid the mortgage and taxes on the house after she acquired title on January 8, 2011, no reasonable trier of fact could conclude, beyond a reasonable doubt, that she wrongfully deprived Mr. Swanson of the \$8,000 she admitted using to pay those debts.

The State's case focused almost entirely on the allegation of theft of the residence. The State argued more or less in passing, that because the check proceeds went to pay off Mr. Swanson's debts relating to the house and Ms. Barrett stole the house, she effectively stole the proceeds of the check. But the jury found that Ms. Barrett did not steal the house. (RP 224) The State presented no evidence that Ms. Barrett used funds from her father's bank account to pay the taxes and mortgage after she had acquired ownership of the house.

The only other evidence that Ms. Barrett converted any of her father's funds to her own use came from her own statements and the defense exhibit, which, assuming a trier of fact chose to believe she used her father's money and not to believe that any of the purchases were for

Mr. Swanson's benefit, would support the inference she may have used about \$1,500 to purchase items from Costco for her own benefit. Theft of property between \$750 and \$5,000 is second degree theft, a crime with which Ms. Barrett was not charged and of which she was not found guilty.

2. THE COURT IMPROPERLY ADMITTED TESTIMONY IN WHICH THE WITNESS AFFIRMED HIS UNDERSTANDING OF ESSENTIAL FACTS BASED ON INFORMATION HE HAD LEARNED FROM A WRITTEN REPORT THAT WAS NOT INTRODUCED INTO EVIDENCE.

The deputy prosecutor asked detective Kimberly: "Reviewing the report, is it your understanding there was a check from the VA paid to Mr. Swanson but spent by Ms. Barrett?" (RP 107) In overruling defense counsel's objection, the court stated: "You can answer that yes or no, not say what anyone told him." (RP 108) Detective Kimberly then answered "Yes." (RP 108)

The trial court appears to have misapprehended the hearsay rule: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A "declarant" is a person who makes a statement. ER 801(b). Failure to identify the declarant whose statement is repeated by a witness in court does not immunize the statement; the

statement is still hearsay. By answering the question with “yes,” Detective Kimberly effectively told the jury that the report contained statements that “there was a check from the VA paid to Mr. Swanson but spent by Ms. Barrett.” The statement was clearly offered for the truth of the matter asserted since it directly stated most of the facts the state sought to prove.

The report was based on Mr. Yacker’s investigation, which included talking with Mr. Swanson, Ms. Barrett and several employees of the nursing home including Marv King, Jenney Fauby and “other people” who were in the financial office. (RP 94-97) Insofar as the report relates information provided by these people, the sources relied upon by Mr. Yacker, who prepared the report, are also declarants, and the substance of their statements is hearsay within hearsay. See *In re Detention of Coe*, 175 Wn.2d 482, 505, 286 P.3d 29 (2012).

When a report is based on the out-of-court statements of one or more declarants, testimony as to the contents of the report is inadmissible unless the declarants, on whose statements the report is based, are identified and their statements are determined to fall within an exception to the hearsay rules. *Coe*, 175 Wn.2d at 505 In *Coe*, the court held inadmissible a database containing information about numerous incidents of a particular type of crime, based on reports prepared by police officers

who investigated the incidents, and whose reports rely on the victims' statements to the police. The court noted that the underlying police reports were not admissible as business records because they reflect "the exercise of skill, judgment, and discretion" 175 Wn.2d at 505 (citing 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.37 (5th ed.2007) (citing *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006))). The court further noted that because the reports contain the statements of the victims, they represent an additional level of hearsay. 175 Wn.2d at 505-06.

Here, Detective Kimberly testified to the substance of statements in Mr. Yacker's report; Mr. Yacker exercised judgment and discretion in preparing his report, and he based the report on the statements of other individuals. The underlying statements of the nursing home employees were hearsay, and Mr. Yacker's statements in his report were hearsay. Detective Kimberly's testimony was inadmissible hearsay, and its admission was error.

3. MS. BARRETT'S CONVICTION RESTED ON TESTIMONY THAT VIOLATED HER RIGHT TO CONFRONT THE WITNESSES AGAINST HER.

A criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation

Clause bars the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004). Confrontation clause violations are reviewed *de novo*. *Id.* at 901 (citing *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

- a. Failure To Challenge The Admissibility Of Testimony Of Mr. Frazier, Mr. Yacker, And Detective Kimberly Did Not Waive Ms. Barrett’s Constitutional Right To Confront Witnesses.

A violation of the Confrontation Clause may be raised for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007); *see also* RAP 2.5(a)(3).

The Court of Appeals has recently ruled that failure to object to evidence on Confrontation Clause grounds waives a defendant’s right to confrontation and may not consider the issue when presented for the first time in the appeal. *See State v. Prado*, No. 31275-5-III, 2015 WL 127899, at \*18 (Wash. Ct. App. Jan. 8, 2015); *State v. Berniard*, 182 Wn. App. 106, 124, 327 P.3d 1290 (2014); *State v. O’Cain*, 169 Wn. App. 228, 248, 279 P.3d 926 (2012). The cases rely primarily on language taken, out of

context, from *Melendez–Diaz v. Massachusetts*: “The defendant *always* has the burden of raising his Confrontation Clause objection; . . . .” 557 U.S. 305, 327, 129 S.Ct. 2527, 174 L. Ed. 2d 314 (2009) (emphasis in original).<sup>1</sup>

Since deciding *Kronich*, Washington’s Supreme Court has not addressed the issue of whether confrontation rights are waived by failure to assert them in the trial court. *State v. Hayes*, decided after *Melendez–Diaz*, provides persuasive argument that where the record suggests defense counsel did not make a knowing and deliberate decision to forego objection at trial, the reviewing court may grant review if it determines the admission of such evidence was a manifest constitutional error. *State v. Hayes*, 165 Wn. App. 507, 265 P.3d 982 (2011), *review denied*, 176 Wn.2d 1020 (2013).

More importantly, *Melendez–Diaz* does not hold that in all cases involving the Confrontation Clause a trial court objection is an absolute precondition for appellate review. The issue in *Melendez–Diaz* was whether statements contained in “affidavits reporting the results of

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<sup>1</sup> Elsewhere, the court framed the duty to object in more permissive language: “The right to confrontation may ... be waived ... by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.” *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 314, 129 S.Ct. 2527, 2534 n. 3, 174 L. Ed. 2d 314, 323 n. 3 (2009).

forensic analysis” were testimonial and therefore “subject to the defendant’s right of confrontation under the Sixth Amendment.” 557 U.S. at 307.

The defendant in *Melendez–Diaz* had objected to admission of the affidavits on Confrontation Clause grounds. 557 U.S. at 309. The Court’s language purportedly establishing the mandatory waiver effect of failure to make a timely objection in the trial court is therefore dictum. Justice Scalia’s majority opinion was merely responding to the claim, asserted in Justice Kennedy’s dissent, that in order to prevent overwhelming the system with gratuitous demands for in-court testimony of the affiants, the States would employ regulations that compel the defendant to object to out-of-court statements, in some cases even before trial. *Melendez–Diaz*, 557 U.S. at 326; 557 U.S. at 355; see *Cropper v. People*, 251 P.3d 434, 441 (Colo. 2011).

Justice Kennedy’s dissent suggested that such regulations would “ ‘impos[e] a burden . . . on the defendant to bring . . . adverse witnesses into court.’ ” *Melendez–Diaz*, 557 U.S. at 355, quoting 557 U.S. 327. Hence the majority’s riposte: “The defendant *always* has the burden of raising his Confrontation Clause objection; . . . .” *Id.*, 557 U.S. at 314. The very point of this language is that requiring the defendant to object is nothing new. It certainly should not be construed as abrogating

Washington's long-held case law permitting the reviewing court to consider manifest constitutional error first challenged on appeal. *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988).

Read in context, the language upon which recent Washington decisions have relied to claim a blanket rule barring consideration of a confrontation clause issue that was not presented in the trial court, simply does not support that conclusion. The Court merely recognizes the defense burden of preserving objections in the trial court, which is always subject to exceptions within the structure of each State's rules governing trial court and appellate court procedures.

b. The Confrontation Clause Violations Were Highly Prejudicial Manifest Constitutional Errors.

Under RAP 2.5(a), Washington courts have long held that "manifest" constitutional errors may be raised for the first time on appeal. A "manifest" error is one that is "unmistakable, evident or indisputable." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The appellant must also make an affirmative showing of actual prejudice resulting from the alleged error. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). To satisfy RAP 2.5(a)(3), an appellant first must identify a

constitutional error and then show how the alleged error affected his rights at trial. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

The essence of the Sixth Amendment right to confrontation is the right to meaningful cross-examination of one's accusers. *Crawford*, 541 U.S. at 50, 59. *Crawford* restricts the use of testimonial hearsay because there is no opportunity to cross-examine. *Id.* at 68–69. The determination of which statements are testimonial places emphasis on the intent and expectations of the out-of-court declarant. *Id.* at 51. In *Crawford*, “the ‘core’ class of ‘testimonial’ statements included those ‘pretrial statements that declarants would reasonably expect to be used prosecutorially.’ ” *State v. Mason*, 160 Wn.2d 910, 918, 162 P.3d 396 (2007) (quoting *Crawford*, 541 U.S. at 51), *cert. denied*, 553 U.S. 1035, 128 S.Ct. 2430, 171 L. Ed. 2d 235, 76 (2008).

Statements “are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *State v. Mason*, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007). “[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” are an example of a “core class of ‘testimonial’ statements.” *Crawford*, 541 U.S.

at 51. A statement is considered testimonial if it is made for the purpose of reporting a crime or to assist in apprehension and prosecution of a suspect. *State v. Powers*, 124 Wn. App. 92, 98, 99 P.3d 1262 (2004).

Apart from Ms. Barrett's own statements, both in and out of court, nearly all the substantive evidence against her was provided by the testimony of Mr. Frazier, who related the relevant events of 2010 until April 2011, when Mr. Perednia became involved in the guardianship proceedings. Mr. Frazier was not employed by the nursing home until May 2011. By that time the nursing home had referred this case to Adult Protective Services, Mr. Yacker had begun the investigation of those allegations, and Mr. Perednia had been appointed in pending guardian ad litem proceedings. It is unlikely that any of the nursing home employees was unaware that the nursing home was pursuing a claim against Ms. Barrett and suspected she had wrongfully obtained her father's property.

Nearly all the factual information to which Mr. Frazier testified was necessarily derived from conversations with nursing home employees and undisclosed written records that Mr. Frazier consulted in the course of his testimony:

- Q. Now, in terms of Mr. Swanson, was he at all times he was there current in his obligations to the facility?
- A. I show the records, yes, right up until 2010, when this retro check kind of hit and then it kind of fell

through the, account kind of fell. We didn't receive a check from them. DSHS kind of said you need to show proof, and we're getting all this correspondence from DSHS saying "Can you help?" And then next letter we got is he's off of Medicaid and he's on private pay from then on.

(RP 80) Mr. Frazier is relating information contained in letters that he may or may not have read personally and which may or may not have been business records.

Q. Do your records indicate or do you know personally if there was an attempt to contact family members of Mr. Swanson?

A. Yes.

Q. Do you know who was contacted?

A. I believe on January 26, 2011, there was a meeting between Vicki, Marv King, and the superintendent regarding the account in the superintendent's office.

Q. Did you participate in that meeting?

A. No, I did not. That was before I actually started working there.

(RP 81) Despite the prosecutor's suggestion that Mr. Frazier should testify based on personal knowledge or business records, it is apparent from Mr. Frazier's response that he had no personal knowledge of the alleged meeting and it is unclear what records he may have relied on in determining the subject matter and attendees at the alleged meeting, and whether such information was provided to him in anticipation of pending litigation against Ms. Barrett.

Q. And last count, what was the total arrearage?

A. Our final letter said \$64,269.99.

Q. There is more than \$64,000 owed to the facility?

A. That is correct.

(RP 82) There is no indication who prepared the “final letter” or when or to whom it was sent.

Q. During the time that you worked there, do you know if there were any efforts to work with the family to resolve the situation of money due?

A. We sent letters, but we would get the letters back saying the address was incorrect. So we tried and phone numbers and addresses were just disconnected.

(RP 82-83) Mr. Frazier’s use of the pronoun “we” strongly suggests that he did not personally prepare the alleged letters, or that he had personal knowledge of their contents or when they were sent.

Q. You’ve talked about the attempts to resolve the arrearage, and I think we left off with more letters went out, but they came back as wrong address or something?

A. Correct. Undeliverable.

Q. After those letters, was there ever a successful effort at reaching any family member of Mr. Swanson’s?

A. No.

(RP 84) Whether there was never a successful effort at reaching any family member is not something Mr. Frazier could know without consulting with, and accepting the statements of, other employees at the nursing home. And apparently Mr. Frazier obtained most of his information from conversations with other nursing home employees:

- Q. Did you have any conversations with anyone regarding Mr. Swanson prior to now?
- A. I would talk to our superintendent, what we call our VB, veterans benefit specialist, Marv King, trying to figure out where we stand. Marv was the go-between DSHS and the family trying to get the paperwork to DSHS, kind of help facilitate the family to get him back on Medicaid because it's more beneficial for the resident and the home to follow the guidelines.
- Q. So Mr. King is the one who did all the work with the family because you weren't employed at that time, correct?
- A. Correct.
- Q. And you weren't employed until May of 2011?

(RP 86)

Like Mr. Frazier, Mr. Yacker had no first-hand information about the relevant facts in this case. He interviewed employees at the nursing home in the course of preparing his written report:

I spoke to people at the Veterans Home, including Marv King and Marv King and Jenney Fauby, who was, I don't remember their titles, but she was more into the financial part. And he was, Marv, I don't remember what his title was. He worked directly with families and setting things up at the home. I had some extensive conversations with other people in the office who were focused on the financial. They were what they call financial workers, financial specialists, who would have approved the State assistance if certain things had been in place. It was their job to figure out whether Clarence was eligible or not.

(RP 98) He told the jury that his report was reviewed by a panel of supervisors and then the case was referred to law enforcement. (RP 98-99) What becomes apparent from Mr. Frazier's testimony is that the

person who knew the underlying facts in this case was Marv King, and it is highly likely that Mr. Frazier was, in effect, relating Mr. King's statements to the jury. The record is silent as to Mr. King's unavailability.

Mr. Yacker's report was based in large part on statements made to him by Marv King and other nursing home employees. His testimony indicates that, based on that information, a panel of supervisors referred the matter to law enforcement, which was effectively a statement of that group indicating its determination that based on the report there was enough evidence to justify a criminal prosecution. Thus, his testimony in effect provides a summary of the out-of-court statements of a number of individuals as to allegations of abuse of Mr. Swanson as well as relating the collective statement of Adult Protective Services that the allegations supported an inference of criminal activity. Neither the supervisors nor the nursing home employees testified at Ms. Barrett's trial. There is no evidence that none of the nursing home employees or the Adult Protective Services supervisors was unavailable for trial.

Finally, Detective Kimberly testified that it was his "understanding there was a check from the VA paid to Mr. Swanson but spent by Ms. Barrett." His testimony merely summarizes Mr. Yackley's report, which summarizes the statements of various employees of the nursing home who may have relied on information derived from undisclosed sources. There

is no evidence Detective Kimberly undertook any independent investigation of any of the underlying facts of this case.

In short, apart from Ms. Barrett's own admissions, all of the relevant evidence against her consisted of testimony as to statements by various individuals, none of whom testified at trial, and documents, none of which was admitted into evidence. This is precisely the scenario the Confrontation Clause was intended to prevent. Defense counsel had no opportunity to cross-examine Mr. King, or the various members of the nursing home financial department, or the authors of various letters from DSHS, to determine either the basis of their knowledge or their possible biases or propensity for telling the truth.

“Confrontation Clause errors [are] subject to *Chapman* harmless-error analysis.” *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Stephens*, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980). *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Given the overwhelming absence of any evidence that Ms. Barrett used the funds in her father's bank account, which were proceeds of a

check made payable to him, for any personal purchases or investments, and the jury's guilty verdict, the error cannot be considered harmless.

4. DEFENSE COUNSEL'S FAILURE TO OBJECT TO CONFRONTATION CLAUSE VIOLATIONS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Alternatively, if this court concludes Confrontation Clause violations may not be raised for the first time on appeal, then in failing to preserve this issue counsel's representation fell below the Sixth Amendment standard for effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Id.* To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, 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, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Where defendant claims ineffective assistance based on counsel's failure to

challenge the admission of evidence, he must show that an objection to the evidence likely would have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, the State solicited testimony that was necessarily based on hearsay, but without the telltale signal of asking the witness what someone told him. This technique may result in hearsay evidence that escapes recognition by even an experienced and perceptive attorney. In this case, however, the deputy prosecutor repeatedly elicited testimony about out-of-court statements to such a degree that, under the circumstances, failure to recognize and object to such testimony was not reasonable.

The resulting prejudice is self-evident. Absent the State's extensive use of information provided by non-testifying declarants, the evidence would have shown merely that Ms. Barrett deposited a check to her father's account, used some of the proceeds to pay the prior outstanding debts related to the residence that belonged to him, and failed to pay the proceeds of the check to the nursing home. As a result, at the time of his death Mr. Swanson had incurred debts to the nursing home in which he was residing. These facts are insufficient to support a charge of first degree theft. If this court concludes that the State's evidence is sufficient to support the jury's verdict it can only be because extraordinary amounts of hearsay evidence were presented to the jury in violation of the

defendant's rights under the Sixth Amendment to which defense counsel failed to make timely objections.

E. CONCLUSION

Ms. Barrett's conviction rests on hearsay, rumor, and innuendo. The State failed to present factual evidence sufficient to support the conviction, which should be reversed and dismissed.

Dated this 2nd day of March, 2015.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489  
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

|                      |   |                 |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, | ) |                 |
|                      | ) |                 |
| Respondent,          | ) | No. 32734-5-III |
|                      | ) |                 |
| vs.                  | ) | CERTIFICATE     |
|                      | ) | OF MAILING      |
| VICKI S. BARRETT,    | ) |                 |
|                      | ) |                 |
| Appellant.           | ) |                 |

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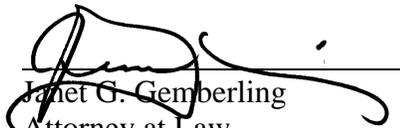
I certify under penalty of perjury under the laws of the State of Washington that on March 2, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Brian O'Brien  
SCPAappeals@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on March 2, 2015, I mailed a copy of the Appellant's Brief in this matter to:

Vicki S. Barrett  
511 S. Sullivan Rd  
Apt 103  
Spokane Valley, WA 99037

Signed at Spokane, Washington on March 2, 2015.

  
Janet G. Gemberling  
Attorney at Law