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JUN 18, 2015

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

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Does sufficient evidence support the jury verdict for theft?
2. Did a witness's answer, over a hearsay objection, to the question of whether a Veterans Administration (VA) check made out to Mr. Swanson and was spent by the defendant constitute inadmissible hearsay, and if so was it harmful?
- 3-4. Did the information given by three witnesses constitute a violation of the defendant's right of confrontation, where the information was not objected to by defense counsel, and the lack of objection was for strategic reasons and is neither manifest nor reviewable under RAP 2.5, and where the information was harmless because it was also established by the defendant's own statements and testimony?

5. Was defense counsel ineffective?

III. STATEMENT OF THE CASE

Mr. Swanson moved out of his own home and into the Spokane Veteran's Home in 2006, and stayed there until his death on February 19, 2012, at the age of 90. RP 17. His daughter, the defendant, continued to live with her husband and son in her father's residence after he moved into the nursing home in 2006. RP 21; RP 134-36.

Dr. Prenger, a Medical Director with the VA, testified that Mr. Swanson, who went by "Swanie," had suffered from prostate and bladder cancer. At the time of his last medical/psychological report in 2011, he was legally blind, suffered from dementia, and was frail and unable to manage his personal affairs. RP 17-20. It was Dr. Prenger's professional opinion that Mr. Swanson was also unable to manage his financial affairs because he was demented and that he needed around the clock care. RP 19-20.

The defendant testified she received a \$16,980 check from the VA in 2010 that was payable to her father. RP 151. She used this check to pay off the remaining \$5,000 mortgage and \$4,000 in back taxes on her father's house just shortly before she acquired clear title in January 2011, by quit claim deed - mortgage and tax-delinquency free. Exhibit S5 (Real estate excise tax affidavit re: quit claim deed (01/11/11)); RP 151-54. Her father was too debilitated to actually sign the quit claim document. RP 32; RP 154.

As a result of Mr. Swanson receiving the check that was spent by the defendant, DSHS stopped making 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, 88.¹ Attorney Richard Perednia was designated by the Court as the guardian ad litem for Mr. Swanson. RP 56. In the course of that representation, he spoke with Defendant: “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.” RP 63. Ms. Barrett could not account for the \$16,980, other than the amounts spent paying off the mortgage and the house taxes. RP 67.

At trial, the defendant testified that she used some of the check money to buy a patio shade for the house, some good silverware, and groceries. RP 144-47. She claimed that she bought these items for her father. RP 147. She provided receipts for some of these purchases through Defense Exhibit 6,²

¹ Because the Medicaid issue was not resolved, Mr. Swanson owed the nursing home about \$64,000 at the time of his death in early 2012. RP 82.

² The State stipulated to the admission of Defense Exhibit 6. RP 146. The defendant testified she had obtained these records. The records contain inserted markings that correspond to her testimony regarding some of the

which contains itemized lists of purchases from Costco between 11/09/10 and 03/07/11. She stated she paid for many of these items with the \$16,980 check her father received from the VA. RP 145; RP 144-47. One of the checked items includes a combination fruit tree with the notation of “yard/food,” which was purchased on 03/07/11 (last page, Defense Exhibit 6), some months after the quitclaim deed to the house placed title to the defendant (01/11/11), Exhibit S5. All of the purchases from Costco were made with a debit card. Defendant testified that all of the items she purchased, including groceries, were purchased for her father’s interest, and that these items would be used by her father when he came home. RP 147, lines 6-21.

The defendant was convicted of first degree theft. CP 30. By special verdict, the jury found that the defendant knew or should have known that the victim was particularly vulnerable. CP 32 (special verdict regarding particularly vulnerability of victim).

particular items Defendant brought to the jury’s attention that she said she purchased for her father with the money she had received from his check. For example, she testified that she bought him some good silverware and a patio shade (RP 147, lines 6-12). Exhibit 6, sales date 02/21/11, has the Roman Patio Shade checked off.

IV. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THE JURY VERDICT FOR THEFT

1. Standard of Review

There was sufficient evidence to support the jury's verdict of guilty for the theft. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

2. Application of the standard of review to the instant case.

In the instant case, it was Dr. Prenger's professional opinion that Mr. Swanson was legally blind, frail, and unable to manage his personal or financial affairs because he was demented. RP 17-20. Mr. Swanson was in need of around-the-clock care. *Id.* The defendant had power of attorney over Mr. Swanson's finances, and this enabled her to cash Mr. Swanson's VA check for \$16,980 at a time when Mr. Swanson was inflicted with dementia.

She cashed the check and could not account for the \$16,980, other than the amounts spent paying off the mortgage and the house taxes. RP 67. The mortgage and house taxes were paid on a house she was due to inherit, a house that was in fact quit-claimed to her by her blind, demented father who was unable to sign the quit claim deed. Because the \$16,980 was unaccounted for, Mr. Swanson was indebted to the nursing home at the time of his death in early 2012. RP 82.

In attempting to account for some of the money, defendant introduced Exhibit 6, showing purchases from Costco totaling \$1,578.61. She used some of the check money to buy a patio shade for the house, some good silverware, and groceries. She stated that these items were all for her father. RP 147. All of these purchases were paid by a debit card. Defendant maintained that these purchases, including groceries, were purchased for her father's interest, and that these items would be used by her father when he came home. RP 147, lines 6-21. Curiously, many of these items such, as the rotisserie chicken (11/14/10), butter croissants (11/09/10), and tomatoes on the vine (11/10/10), were perishable and inferentially not for her father's benefit as he was not due home at any particular time. The fruit tree purchased *after* she acquired the mortgage and delinquent tax-free house may have also been considered as an item obtained for her own use rather than for her father's use "when he came home." RP 147, line 19.

From these facts the jury could have found, and did find, that the defendant exercised unauthorized control over Mr. Swanson's money, over \$16,000, by appropriating the same to her own use, and in doing so, knew or should have known that Mr. Swanson, the victim, was particularly vulnerable. CP 30 (verdict of guilty); CP 32 (special verdict finding that defendant knew victim was particularly vulnerable); CP 21 (Instruction 13 defining wrongfully obtains). The evidence was more than sufficient to support the conviction for first degree theft of the money.

B. THERE WAS NO ERROR IN THE ADMISSION OF ONE "YES" TO THE QUESTION OF WHETHER IT WAS THE WITNESS'S UNDERSTANDING THAT A VA CHECK WAS PAID TO MR. SWANSON, BUT SPENT BY THE DEFENDANT.

Defendant complains the court erred in admitting hearsay testimony by allowing the detective to answer the question of whether the defendant had spent the money from a VA check that was sent to her father. Because the prior witness had already testified to the defendant's admission that she had spent the VA check, any error in the admission of the single word "Yes" response was harmless because the defendant testified that she had spent the VA check that Mr. Swanson had received.

Mr. Yacker, employed by DSHS Adult Protective Services, testified that he was told by the defendant that she had spent approximately half of her father's \$16,000 VA check on real estate taxes and the mortgage, but could not

account for the other half of the money. RP 96. The defendant's statement is not hearsay as it is an admission by a party opponent. ER 801(d)(2).³ On direct examination of the next witness, Detective Kimberley was asked if he had talked with the defendant. RP 107. He replied he had not. He was then asked whether he had reviewed the comments made by the defendant as noted by Mr. Yacker. He replied he had. He was then asked, in reviewing Mr. Yacker's report, whether it was his understanding that a check from the VA to Mr. Swanson was spent by Ms. Barrett. RP 107, lines 23-25. He was allowed, over objection, to respond "yes."

This is not hearsay. It was Ms. Barrett's statements made to Mr. Yacker, and therefore not hearsay pursuant to ER 801(d)(2). In any event, any error was harmless because the defendant testified that she had received a \$16,980 check from the VA. RP 152. She further explained how she spent the money on paying off back taxes, the outstanding mortgage, and other items.

³ **ER 801(d) Statements Which Are Not Hearsay.** A statement is not hearsay if –

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

RP 144-147; RP 151-52. The evidence was simply cumulative of the defendant's own testimony. Any error occurring in its admission is harmless.

C. THERE WAS NO CONFRONTATION VIOLATION, NOR WAS THERE AN OBJECTION MADE ON A CONFRONTATION BASIS TO PRESERVE THE ISSUE FOR APPEAL.

Any failure to object on confrontational grounds was a matter of trial tactics because the defendant would not want to force the state to bring in witnesses with more information to highlight and emphasize the information, where the defendant could raise the lack of personal knowledge on cross examination, and cast doubt on the information.

1. Appellant failed to timely object and preserve the issue regarding her belatedly raised complaint alleging a confrontation violation:

The defendant concedes that there was no objection made on confrontation grounds (or otherwise) to the admission of information she now claims violated her right of confrontation. Brief of Appellant, pp. 2-3. There is a clear line of authority standing for the proposition that failure to raise confrontation issues at or before trial bars any consideration on appeal. “A clear line of decisions—*Melendez-Diaz*, *Bullcoming*, *Jasper*, and *Hayes*—requires that a defendant raise a Sixth Amendment confrontation clause claim at or before trial or lose the benefit of the right.” *State v. O’Cain*, 169 Wn. App. 228, 248, 279 P.3d 926 (2012) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *Bullcoming v. New*

Mexico, —U.S. —, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012); *State v. Hayes*, 165 Wn. App. 507, 265 P.3d 982 (2011), *review denied*, 176 Wn.2d 1020 (2013)). The same rule applies to the article I, section 22 confrontation clause right of the Washington Constitution. *O'Cain*, 169 Wn. App. at 252. Therefore any allegations of confrontation issues are not properly preserved for review.

2. **The testimony at issue was not “testimonial” and therefore, not of constitutional magnitude. In any event, it was not objected to for tactical reasons.**

Defendant directs most of her discussion on the confrontation issue as it relates to the information provided by Mr. Frazier. Brief of Appellant, p. 21.⁴ The discussion assumes that because Mr. Frazier did not become employed by the Veteran’s Home until May 2011, all the information he related regarding records and events occurring before he was hired necessarily violate the Confrontation Clause. This is not the case, as will be discussed later.

First, any error in the admission of potential “confrontational testimony” was invited by the defendant for tactical purposes. It is apparent that the defendant’s attorney, Ms. Gannon-Nagle, knew how to object and to

⁴ “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,” Brief of App., page 21.

exclude evidence, if and when she wanted to. She was successful in excluding any:

[t]estimony regarding Adult Protective Services' findings of financial exploitation or neglect, and/or neglect of the ALJ's decision finding exploitation under ER 402 and 403. The defense argument is that it's not relevant to whether or not Ms. Barrett is guilty of theft in this case, and if it were admitted, it would be highly prejudicial and no probative value.

RP 5-6.

She successfully objected to witness Perednia testifying to what he was advised regarding DSHS paperwork. RP 64, lines 9-14. She successfully objected to witness Frazier testifying to something he was told regarding a reimbursement rate. RP 90, lines 19-23. She objected to Detective Kimberley's statement regarding his understanding from a report. RP 108.

If the defense attorney allowed the witnesses to use records made before they became employed at their position, she did it knowing she could successfully cross-exam them with these very same records.

She was able to have Mr. Yacker testify to records that the defendant had shown him, records that related to events from 2010⁵, when Mr. Yacker had not become involved in the matter until 2011. RP 93. She had Mr. Yacker testify that his notes reflected bank statements he had received for the defendant that showed a direct monthly payment or transfer from Progressive

⁵ RP 101, line 23.

Credit Union to the Veteran's Home of \$1,643.91, contradicting his direct testimony, and she thereafter had him agree that these notes were "the most accurate reflection of what happened" as opposed to his "memory" at the time of testifying,⁶ and that he was now retired. RP 101. The door to this information was opened when defendant's attorney, Ms. Gannon-Nagle, allowed the witnesses to discuss or use records they had reviewed, records that these individuals may or may not have been able to use as business records in any event.⁷ She effectively came in the open door and successfully cross-examined the witnesses, often on topics that were part of their notes of which they had no direct personal knowledge, which was a much better situation for the defendant than forcing the State to bring in many more witnesses with much more personal knowledge of the topics in the case.⁸

⁶ RP 100-101.

⁷ Whether the records were admissible as business records, or were otherwise admissible for experts offering an opinion is not established in the trial record, is discussed later in the argument dealing with whether any error was manifest. Generally, "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

⁸ "It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon [facts in the out-of-court statement]." *Melendez-Diaz*, 129 S. Ct. at 2534 n.3, at 2542 (the out-of-court statements here were those of forensic analysts). *Id.* At 2541

Defendant's attorney successfully used the patient ledger⁹ to cross-examine Mr. Frazier regarding the claim that Mr. Swanson owed the Home \$64,000. She established that only three monthly payments were missed. "So using that ledger, there were three months of missed payment, is that accurate?" Answer by Frazier: "Correct." RP 89.

The defendant's attorney was able to effectively and successfully¹⁰ weave these issues into her closing.

So the Veterans Home got upset. They said you didn't pay the \$7,000, and Chris Frazier said she didn't pay anything in the year 2010. So I showed him his records, and he went through them, you may remember, month by month. And then he said, "Oh, I guess it was only three months that weren't paid." \$7,000 adds up fast. It is not surprising that the Veterans Home believes they are owed \$64,000. But don't forget that Ms. Barrett met with Mr. Yacker, the investigator, and she showed him proof that she was paying \$1,643 a month to the Veterans Home. He saw the bank records himself and he testified to that. So don't forget that Ms. Barrett continued to pay the Veterans Home. She just didn't pay them what they wanted. They wanted the private pay amount of \$7,000 a month. *But I ask that you not let this muddy the waters because*

⁹ Mr. Frazier was a financial and compliance auditor for the VA. The patient ledger was likely a business record, as defendant established on cross examination of witness Frazier before using it to effectively impeach him.

Defense Atty: And is that something that you use in your employment?

Mr. Frazier: Yes.

Defense Atty: And what would it be used for in this purpose?

Mr. Frazier: Showing payments, payments coming in and bills going out.

¹⁰ As Appellant correctly points out, "The State's case focused almost entirely on the allegation of theft of the residence." Brief of App. page 12. The defendant was not convicted of that count. RP 224.

it's not the Veterans Home that's the victim. It's Clarence Swanson.

RP 210 (Emphasis added).

In light of the above, any statement that may have constituted “testimony” was not objected to for strategic reasons relating to the defense of the case.

It should be noted that the alleged hearsay statements of Mr. Frazier do not constitute *testimony* for the purposes of confrontational error analysis; they entail matters contained in business records, or expert testimony as to how eligibility for Medicaid is determined. Mr. Frazier was a financial and compliance auditor for the Veteran’s Home. He was, due to his profession, able to give an opinion how a participation rate would change if there was a change of resources in a person’s income. RP 77-79. See ER 702.

Again, if objectionable, the evidence was admitted for tactical reasons. The defendant had made statements prior to trial that she had used the \$16,000 check to pay off the mortgage and taxes. There was no escaping that evidence. That is the only issue in the case, because as the defendant’s closing (and information charged) aptly established, the Veteran’s Home was not the victim, it was Clarence Swanson.

3. **The Defendant's unpreserved claim does not constitute manifest constitutional error.**

As above, any error in the admission of evidence was either invited, planned, or not “testimonial.” Additionally, any error relating to the admission of this evidence at trial was not manifest, as is required by RAP 2.5. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. *See Harclan*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

There is nothing in appellant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that a judge trying the case could not have failed to ascertain a confrontational violation. Moreover, the record is not clear as to whether the records and examples of

testimony constitute business records, professional opinions,¹¹ or whether they were prepared for trial, as opposed to being prepared as financial records for the agencies involved with their patient, Mr. Swanson. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). There is no manifest error present in this case and Appellant’s claim fails.

4. **Any error in the admission of evidence was harmless.**

The defendant fails to establish any harm from the admission of the unspecified evidence. Defendant was acquitted on the more complicated house transfer count. The remaining count was a theft of \$16,980 from Clarence Swanson. Defendant testified she received a \$16,980 check from the VA payable to her father in 2010, and that she used her authority under the power of attorney to use this check to pay of the \$5,000 mortgage on her father’s house, and about \$4,000 in back taxes on the house, a house she soon acquired by quit claim - mortgage and tax-delinquency free - from her father in January

¹¹ Witness Attorney Perednia could give a legal opinion on how Medicaid eligibility is determined, and how you could become ineligible if you receive a benefit. RP 65. ER 702 allows qualified experts to testify regarding “scientific, technical, or other specialized knowledge” if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” “Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury.” *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

2011. Expert medical testimony established Mr. Swanson was unable to manage his personal or financial affairs due to dementia. Mr. Frazier, Mr. Perednia, and Mr. Yacker were not necessary witnesses to establish Defendant's receipt of or spending of the check, other than their testimony as to what she had told them.

D. DEFENDANT'S COUNSEL WAS EFFECTIVE

For the reasons outlined above, there was no ineffective assistance of counsel in the instant case. Defendant was found not guilty of the major count, and counsel did not allow preventable and damaging evidence into evidence. Counsel successfully objected when it suited her client's purpose.

Review of an ineffective assistance claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). ““To prevail on this claim, the defendant must show his attorneys were “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and their errors were “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”” *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687.

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. That showing has not been made,

factually or otherwise. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Again, no showing is made that the outcome would have been different in this case.

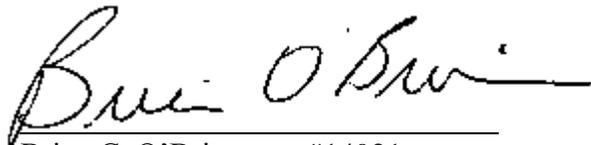
Defendant's counsel was effective.

V. CONCLUSION

Sufficient evidence supported the single conviction for theft. There was no manifest constitutional error occurring in the admission of evidence in the case. Counsel was effective in the representation of the defendant.

Dated this 18 day of June, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

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v.

VICKI S. BARRETT,

Appellant,

NO. 32734-5-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 18, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Janet Gemberling
jan@gemberlaw.com

6/18/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)