

68937-1

68937-1

NO. 68937-1-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

SYLVIA KNOPP,

Appellant.

---

---

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

The Honorable Sharon S. Armstrong, Judge

---

---

BRIEF OF APPELLANT

---

---

JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

614 11:19 AM  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
NO. 68937-1-I

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	2
C. <u>ARGUMENT</u> .....	7
1. THE STATE FAILED TO PROVE KNOPP’S USE OF HER MOTHER’S MONEY WAS NOT AUTHORIZED BY THE POWER OF ATTORNEY.....	7
a. <u>The State Failed to Prove the Money Was Not Used for Maria Volz’s Benefit.</u> .....	8
b. <u>The State Failed to Disprove Knopp’s Defense of Good Faith Claim of Title.</u> .....	10
2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT WHEN SHE REPEATEDLY MISSTATED AND DISTORTED THE LAW REGARDING KNOPP’S DEFENSE.....	13
a. <u>The Prosecutor Misstated the Law of Theft and the Good Faith Claim of Title Defense.</u> .....	14
b. <u>The Misstatements of the Law Were So Pervasive and Central to the State’s Argument that No Instruction Could Have Cured the Combined Prejudicial Effect.</u> .....	20

**TABLE OF CONTENTS CONT'D**

	Page
3. KNOPP'S ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTORIAL ARGUMENT THAT DEPRIVED KNOPP OF THE BENEFIT OF HER DEFENSE. ....	22
D. <u>CONCLUSION</u> .....	24

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>Brown ex rel. Richards v. Brown</u> 157 Wn. App. 803, 239 P.3d 602 (2010).....	15
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	21
<u>State v. Ager</u> 128 Wn.2d 85, 904 P.2d 715 (1995).....	10, 15, 19
<u>State v. Allen</u> 150 Wn. App. 300, 207 P.3d 483 (2009).....	23
<u>State v. Crowder</u> 103 Wn. App. 20, 11 P.3d 828 (2000).....	9, 16
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	14
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	23
<u>State v. Gotcher</u> 52 Wn. App. 350, 759 P.2d 1216 (1988).....	14
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	8
<u>State v. Hawkins</u> 157 Wn. App. 739, 238 P.3d 1226 (2010).....	11, 18
<u>State v. Maurice</u> 79 Wn. App. 544, 903 P.2d 514 (1995).....	22
<u>State v. Mermis</u> 105 Wn. App. 738, 20 P.3d 1044 (2001).....	15, 17

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Mora</u> 110 Wn. App. 850, 43 P.3d 38 (2002).....	10, 15
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	22
<u>State v. Thompson</u> 153 Wn. App. 325, 223 P.3d 1165 (2009).....	8, 16
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	14, 20, 21

**FEDERAL CASES**

<u>Coffin v. United States</u> 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895).....	9
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	7
<u>Jackson v. Virginia</u> 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	7
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	22

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
2 Wayne R. LaFave & Austin W. Scott, Jr. <u>Substantive Criminal Law § 8.6 (1986)</u> .....	15
RCW 9A.56.010 .....	8
RCW 9A.56.020 .....	8, 10, 14, 15, 19
RCW 9A.56.030 .....	8
U.S. Const. amend. 6 .....	22
Wash. Const. art. 1, § 22.....	22

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove appellant exerted unauthorized control over her mother's money.

2. Closing argument that misstated the law of appellant's defense was prosecutorial misconduct that violated her right to a fair trial.

3. Appellant was denied her right to effective assistance of counsel when her attorney did not object to prosecutorial argument that misstated the law pertaining to her defense.

Issues Pertaining to Assignments of Error

1. A conviction for theft requires proof that a person exerted unauthorized control over the property of another. The durable power of attorney authorized appellant to spend her mother's money for her mother's benefit. With no proof of how it was spent, did the State fail to prove the money was not spent for the mother's benefit?

2. Appellant raised the statutory defense that the property was taken openly under a good faith claim of title. This defense negates the element of intent when there is a legal and factual basis for the defendant's belief of a right to the property, even if that belief turns out to be incorrect. The prosecutor argued repeatedly that this defense only applied if she mistakenly believed the money was hers to begin with, rather than that she was entitled to take it. The prosecutor also argued it did not matter how

the money was spent; by taking it, appellant exerted unauthorized control despite the power of attorney that authorized her control. Did these repeated misstatements of the law violate appellant's right to a fair trial?

3. The constitutional right to effective assistance of counsel is violated when the attorney performs deficiently and there is a reasonable probability the error affected the outcome of the trial. Was appellant's attorney ineffective in failing to object to repeated instances of prosecutorial misconduct that were likely to mislead the jury regarding the law pertaining to the defense theory of the case?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Sylvia Knopp with one count of first-degree theft and alleged the victim was particularly vulnerable and that Knopp used a position of trust to facilitate commission of the offense. CP 15-16. The jury found Knopp guilty and answered "yes" to the special verdicts on both aggravating factors. CP 36-37. The court imposed a standard range sentence. CP 74, 76. Notice of appeal was timely filed. CP 80.

2. Substantive Facts

Between December 2008 and October 2009, while acting as attorney-in-fact for her elderly mother, Maria Volz, under a durable power of

attorney, Knopp withdrew and spent \$12,000 for which she does not have receipts or a clear accounting. RP 816, 970. She explained she used the money to reimburse herself for expenses she incurred as her mother's attorney-in-fact. RP 8220-21. Her inability to provide documentation was because her former brother-in-law was living at her mother's house and stole the receipts in an attempt to send Knopp to jail. RP 826, 829; Exs. 25, 26.

She admitted she did not spend the money to pay her mother's nursing home bill at Providence Mount Saint Vincent because she felt Providence was deceiving her and taking advantage of her mother. RP 729-32, 802. Therefore, Knopp moved her mother to Park Vista, an assisted living facility. RP 751-53. Although Knopp made some payments to Park Vista, a large debt accrued there as well. RP 812-13.

Knopp admitted she did not provide the additional financial documentation required to process her mother's application for Medicaid. RP 804. Medicaid would have taken all but a small personal and residential allowance from her mother's funds and applied it to her long-term care. RP 806. Knopp explained she spoke with someone at the Medicaid office who told her mother did not qualify because her income was more than \$2,000 per month. RP 738. The guardian who later took over Volz's affairs verified that, based on the type of care Volz currently needed and her income, she did

not qualify for Medicaid at that time; the guardian applied twice on Volz' behalf, and both applications were denied. RP 865, 867, 869-70.

The State presented evidence that over half the cash withdrawals were made from ATM machines located inside casinos. RP 684-85. Knopp explained this was because the casino in Suquamish was a part of her social life, and she often visited the casino in the evening and picked up cash before visiting her mother in Seattle the next day. RP 758-59. Therefore, it was no surprise that her player's card frequently showed her gambling within a day of withdrawing cash at a casino ATM. RP 702.

She used the cash to purchase money orders to pay her mother's bills, to give her mother spending cash, to reimburse herself for travel expenses and food for her mother, and to pay herself for services she would have otherwise had to hire someone to perform for her mother such as mowing the lawn, cleaning the house, and (after her mother moved from the nursing home into assisted living) bathing her mother. RP 747-48, 759-65, 811. She additionally paid herself hourly for time and expenses she would not have had to spend were she not her mother's attorney-in-fact, such as time spent opposing a guardianship petition that was filed and defending herself against the criminal charges in this case. RP 820-21, 825. Knopp was employed full-time, and had income of her own during this period. RP 724-25; Ex. 42.

The express purpose of the durable power of attorney was to avoid having a guardian appointed. Ex. 1. The durable power of attorney did not entitle Knopp to compensation or to make gifts of her mother's property.

Ex. 1. However, it gave Knopp the power to:

advance all reasonable and desirable expenses in the exercise of the responsibilities within this power of attorney, and, further, to reimburse the attorney-in-fact for reasonable and desirable expenses advanced by such attorney-in-fact. The attorney-in-fact is further authorized and encouraged, when said attorney-in-fact deems it desirable or necessary, to employ others to aid in the management of the principal's assets and person including, but not be limited to, lawyers, accountants, physicians, nurses, and other medical paramedical personnel.

Ex. 1. Knopp testified the attorney who drew up the document told her she could pay herself for any service that her mother would otherwise have to pay someone to do for her. RP 759-60, 822-23.

Beginning in March 2009, Knopp's use of her mother's money was being investigated by Adult Protective Services and later the Seattle Police. RP 501-02, 530-31, 553. Her spending patterns did not change significantly once she knew she was under investigation. RP 694-96. When an officer called her about her mother's finances in April 2009, Knopp admitted she had withdrawn cash at casinos, but explained she only took amounts she was entitled to. RP 554-55. In May 2009, a guardianship petition was filed. RP 194. In June 2009, the court entered an order prohibiting Knopp from

further accessing her mother's accounts. RP 233, 235-37. However, for whatever reason, the bank continued to permit Knopp to withdraw money. RP 297, 400-01. Moreover, the durable power of attorney was still in effect. RP 301. Knopp continued to access her mother's accounts in essentially the same patterns as before the court's order. RP 694-96.

In August 2009, the court entered another order permitting Knopp limited access to the accounts in order to pay for her mother's insurance premiums and medication. RP 237-38. Although she was aware of these court orders, Knopp continued to withdraw cash from her mother's account and use the debit card in much the same way as in the past. RP 694-96. In October 2009, a guardian was appointed and Knopp's durable power of attorney was terminated. RP 784, 862.

At trial, Knopp argued the State failed to prove she did not spend the money on her mother. RP 1048. Knopp argued that even if all the expenses she paid were not actually authorized, she had a good faith claim of title because she believed her actions were authorized by the durable power of attorney at the time. RP 1058-59. She requested, and the court gave, jury instructions that the State was required to prove the absence of the defense of good faith claim of title. CP 50, 57, 66.

The State argued the jury could convict Knopp of theft if it found it unreasonable for Knopp to pay herself for her own services before paying

the nursing home bills. RP 1030. The State argued the good faith claim of title defense only applied if Knopp mistakenly believed the money was hers to begin with, and did not apply if Knopp only believed she was entitled to pay herself under the durable power of attorney. RP 1036.

C. ARGUMENT

1. THE STATE FAILED TO PROVE KNOPP'S USE OF HER MOTHER'S MONEY WAS NOT AUTHORIZED BY THE POWER OF ATTORNEY.

The record shows that nearly \$12,000 of Maria Volz's money was removed from her account in cash withdrawals and is unaccounted for. But the burden is not on Knopp to prove where the money went. The burden is on the State to prove she appropriated it to her own use instead of using it for her mother's benefit. Since there is no evidence where the money went, the State failed to meet its burden.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is, viewed in the light most favorable to the prosecution, is there sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt? Jackson v. Virginia, 443 U. S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21,

616 P.2d 628 (1980). Even under this generous standard, the State failed to meet its burden.

a. The State Failed to Prove the Money Was Not Used for Maria Volz's Benefit.

First-degree theft, as charged in this case, requires proof the defendant exerted unauthorized control over the property of another with the intent to deprive that person. RCW 9A.56.020; RCW 9A.56.030. Exerting unauthorized control requires proof that the defendant secreted, withheld, or appropriated the property to his or her own use or the use of anyone other than the true owner. RCW 9A.56.010(22)(b). Here, because there was no evidence where the cash withdrawals went, there is also no evidence the cash was appropriated to the use of anyone other than Maria Volz.

The lack of evidence is not sufficient. In similar power-of-attorney theft cases, where evidence has been held sufficient, the State has showed the money was appropriated to the use of the defendant, rather than merely relying on the lack of evidence. For example, in State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009), the couple with power of attorney for an elderly family friend sold the principal's home, gifted the money to themselves, and used the proceeds to pay off their own vehicle and credit card loans and to buy a boat for their fishing business. Id. at 331. The court

held there was sufficient evidence the couple intentionally deprived the principal of hundreds of thousands of dollars. Id. at 335-36.

Similarly, in State v. Crowder, 103 Wn. App. 20, 11 P.3d 828 (2000), the caregiver who obtained power of attorney for an elderly widower transferred approximately \$230,000 from his Merrill Lynch account to her own personal account and used the money for “vacation time shares, an annuity in her name, loans or gifts to friends, a new car, and travel.” Id. at 23-24. The court held the evidence was sufficient to show this use of the money was unauthorized by the power of attorney because it did not grant authority to make gifts. Id. at 28-29.

By contrast, in this case, there is no evidence where or how Knopp spent the cash. The only evidence on this point was Knopp’s testimony that she spent it for her mother’s benefit: on spending cash for her mother, on upkeep for her mother’s home, on small luxuries for her mother while she was in the nursing home and assisted living, and on reimbursing herself for expenses she incurred in caring for her mother and executing her duties as attorney-in-fact. RP 747,760-65, 820-25. The presumption of innocence means that a lack of evidence favors the defense. Coffin v. United States, 156 U.S. 432, 453-54, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Knopp may not be convicted because of a lack of receipts or other concrete evidence proving how she spent the cash.

b. The State Failed to Disprove Knopp's Defense of Good Faith Claim of Title.

Even if Knopp's use of the money was not actually authorized, the State must disprove her defense that she believed her expenses to be authorized under the durable power of attorney. It is a defense to theft that the property was "appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a) (emphasis added). This defense negates the essential element of intent to steal and, therefore, the State bears the burden of disproving it beyond a reasonable doubt. State v. Mora, 110 Wn. App. 850, 855, 43 P.3d 38 (2002).

This defense is established when 1) the property is taken openly and 2) there is some legal or factual basis for the claim of entitlement. State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715, 720 (1995). In Ager, the court explained what that legal or factual basis might look like. Id. at 97. Ager was an officer of a failing insurance company who paid out assets to himself in the form of unauthorized advances. The court listed evidence that might suffice to show a good faith claim of entitlement: "past practices of the company with respect to advances, acts showing that past advances of this nature were approved or acknowledged by the board of directors, or

statements by directors of the company that might have been interpreted by Defendants as authorizing them to take advances.” Id.

Notably, this defense does not require, as the State claimed in closing argument, that the defendant actually but mistakenly believe the property was hers to begin with. Id. at 95-97. On the contrary, a mistake of fact as to ownership of the property does not implicate the statutory defense of good faith claim of title. See State v. Hawkins, 157 Wn. App. 739, 749-50, 238 P.3d 1226 (2010) (“Hawkins did not claim in good faith that he owned the RLF Kubota tractor. Rather, he thought the tractor he was possessing was his own tractor. This mistake of fact presents issues of unwitting possession and lack of knowledge that the tractor was stolen. It does not present a factual basis for finding that he believed he was entitled to ownership.”).

The durable power of attorney authorized Knopp to reimburse herself for “reasonable and desirable expenses” including employing others “to aid in the management of the principal’s assets and person.” Ex. 1. Nothing in the power of attorney precluded paying herself for those services. The powers granted in the durable power of attorney provide a legal and factual basis for Knopp’s belief that she was authorized to act as she did in managing her mother’s affairs.

The fact that she continued her conduct even after she became aware she was being investigated shows that she took the property openly. RP 694-

96. When first questioned by the police, she admitted she had withdrawn cash at casinos and explained she only took amounts she was entitled to. RP 554-55. The record contains evidence from which a reasonable person could conclude this defense was met. The State failed to present evidence that would disprove either the open nature of the taking or Knopp's good faith belief it was authorized by the durable power of attorney.

Second-guessing Knopp's priorities as to the best way to care for her mother does not amount to proof beyond a reasonable doubt that the expenses were unauthorized. For example, the State argued in closing that Knopp should not have reimbursed herself for time and expenses she spent fighting against the guardianship petition that was filed. But the intent of the durable power of attorney, as expressly stated in that document was "to obviate the need for appointment of a guardian." Ex. 1. Specifically, the power granted to the attorney-in-fact was to be "so broad" that a guardian would not be necessary. Ex. 1. Given this clear expression of her mother's wishes, Knopp reasonably believed that the time and money she spent contesting the guardianship was reasonable, desirable, and to her mother's benefit.

Even after the court order forbade her from accessing her mother's accounts, Knopp reasonably, and accurately, believed her duty as attorney-in-fact continued. RP 941-43. It was uncontested at trial that until late

October, 2009, the durable power of attorney was still in effect. RP 301. Therefore, Knopp remained under a fiduciary duty to ensure her mother was cared for and her bills were paid. RP 199, 801. If she did not access her mother's accounts, essential bills such as insurance premiums would not be paid. Knopp reasonably believed that, despite the court order, she was under a continuing duty to care for her mother's best interests. RP 957-58. The fact that she did so is not proof that her use of the money was not authorized.

The heavy burden of proof beyond a reasonable doubt does not permit conviction merely because the jury second-guesses Knopp's judgment regarding what was in her mother's best interests. The State has provided no evidence the money was spent anywhere other than on expenses Knopp believed to be reasonable and desirable to effectuate her mother's care as permitted and required under the durable power of attorney. The absence of a paper trail as to how the money was spent is not sufficient evidence to support a conclusion that it was spent improperly beyond a reasonable doubt.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT WHEN SHE REPEATEDLY MISSTATED AND DISTORTED THE LAW REGARDING KNOPP'S DEFENSE.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Walker, 164 Wn. App. 724,

736, 265 P.3d 191 (2011). “A prosecutor’s misstatement of the law is a serious irregularity having the grave potential to mislead the jury.” Id. (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). When the prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the verdict, the right to a fair trial is violated. Id. (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)).

Knopp testified she reasonably believed she was legally entitled to the money she took as reimbursement for reasonable expenses and payment for services rendered. If believed, her testimony establishes the statutory defense of good faith claim of title. RCW 9A.56.020. But the prosecutor repeatedly distorted the meaning of this statutory defense during closing argument. The cumulative effect of the prosecutor’s repeated and improper comments could not have been cured by instruction and requires reversal of Knopp’s conviction.

a. The Prosecutor Misstated the Law of Theft and the Good Faith Claim of Title Defense.

The prosecutor incorrectly argued the failure to fulfill the fiduciary duty under the power of attorney is a crime:

And because caring for another person is such a serious matter, we as a society decided to make it a crime not to fulfill that duty. . . . And if we assume a fiduciary duty to take care of someone who’s vulnerable and can’t make decisions

for themselves and abandon that duty, we as a society have decided that's criminal.

RP 1015. Towards the end of the argument, the prosecutor returned to this theme, arguing, "With each cash withdrawal that she made, each ATM visit that she made, the defendant chose to fulfill her greed, rather than to fulfill her fiduciary duty towards her mother. And that is not just immoral. It's criminal." RP 1047. This is a misstatement of the law.

Conviction for theft requires proof of intent to steal. RCW 9A.56.020; State v. Mora, 110 Wash. App. 850, 855, 43 P.3d 38, 41 (2002). But a person can violate a fiduciary duty without criminal intent or any specific mental state. For example, Knopp may have violated her fiduciary duty if her subjective assessment of the expenses was not objectively reasonable. That alone does not make her guilty of theft. See Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 817, 239 P.3d 602, 609 (2010) (difference between tort of conversion and crime is wrongful intent); Ager, 128 Wn.2d at 92 (difference between conversion and embezzlement is criminal intent) (quoting 2 Wayne R. LaFare & Austin W. Scott, Jr., Substantive Criminal Law § 8.6(a) at 379 (1986)); State v. Mermis, 105 Wn. App. 738, 748, 20 P.3d 1044, 1050 (2001) ("The difference between theft and breach of contract or failure to pay a debt is criminal intent.").

The State also argued, “It doesn’t matter where the defendant was spending this money. . . . What matters is she was withdrawing cash from her mother’s account without authority.” RP 1018. This is again patently untrue under the law. So long as the money was used for her mother’s benefit, Knopp had authority to use it. The durable power of attorney authorized Knopp to spend her mother’s money in her mother’s best interests. Ex.1. The burden of proof was on the State to prove Knopp’s use was not authorized, not on Knopp to prove that it was. See Thompson, 153 Wn. App. at 331, 335-36 (sufficient evidence of theft where attorney-in-fact spent principal’s money on personal car, fishing boat for agent’s own business and personal credit card bills); Crowder, 103 Wn. App. at 23-24 (sufficient evidence of theft where attorney-in-fact spent principal’s money on “vacation time shares, an annuity in her name, loans or gifts to friends, a new car, and travel.”). Therefore, this entire case hinges on how the money was spent.

The State told the jury, “So it’s up to you, ladies and gentlemen, to decide whether that’s a legitimate explanation for this money. Is the defendant entitled to pay herself before she pays her money, or before she pays for her mother’s care?” RP 1030. The fact that reasonable persons might disagree as to the order of priority of expenses is not, in and of itself, proof that Knopp exerted unauthorized control. In her view, the bill from

Providence Mount Saint Vincent was an unwarranted waste of her mother's money. Her decision to dispute this bill is not proof of theft, nor is her decision to prioritize her own personal care for her mother in doing things like bathing her and traveling to care for her needs over payment to the nursing home. State's witness Henry Judson, an elder law attorney and guardian ad litem, admitted durable power of attorney laws do not provide a hard and fast rule for prioritizing some expenses of the principal over others. RP 199, 194, 293. The language used in the document itself is "reasonable and desirable." Ex. 1. Unreasonable or undesirable expenses might be a breach of fiduciary duty, but they are not necessarily a crime. See Mermis, 105 Wn. App. 738, 748 (difference between civil breach and theft is criminal intent). Jurors were to decide whether Knopp had criminal intent to steal, not whether they disagreed with her priorities in paying for her mother's care.

The State also blatantly misstated the law pertaining to the good faith claim of title defense:

This is often used when people take a car, because they believe it belongs to them. When they think property is actually theirs, and when they in good faith take that property thinking it's theirs.

In this case, the defendant is going to argue to you that this is basically a good faith claim of entitlement. Not that it's a good faith claim of title. In other words, the truth is that the defendant did not ever believe that this was her

money. She may have believed she was entitled to it because of the work she allegedly did for her mom, but she never believed this money was actually hers to start with.

She testified she knew it was her mother's income. She knew it was her mom's Social Security and her pension. So I would argue to you that this instruction should not apply here. In other words, the defendant had no good faith basis to believe this money was actually hers.

And I would urge you not to confuse good faith claim of title with good faith claim of entitlement. In other words, it's not okay to do something for someone and decide that you're owed money and then steal that money from them because you think they are supposed to pay you for something. That's not how we work in this society. If you have a claim, and you are believed you are owed money, and that person is not going to pay you, then you need to deal with that in some other way than stealing it from that person or taking it from that person. So I would argue to you that this is not a case of good faith claim of title.

The defendant never really believed this money was hers to start with. She does believe it's hers, that she's entitled to it apparently. But that's very different. She knows full well this is her mother's money.

RP 1036-37. The accompanying Powerpoint slide declared, "Not about whether the defendant believed she was owed the money," and "Defendant must believe the money was hers to begin with." Ex. 50.

As discussed above, the good faith claim of title defense is not, as the State claimed, about a mistaken belief that "this money was actually hers to start with." See Hawkins, 157 Wn. App. at 749-50 (mistake of fact as to who owns the property is separate from defense of good faith claim of entitlement to the property). If there was a legal and factual basis (even if

mistaken and untenable) for Knopp to believe she was entitled to disburse this money to herself as payment for services rendered, then her use of the money was not unauthorized and she is not guilty. RCW 9A.56.020(2)(a); Ager, 128 Wn.2d at 95. The durable power of attorney provides that legal and factual basis. The prosecutor's argument misstates the law.

The prosecutor also misstated the law when she argued the jury could convict Knopp if it disagreed with her prioritization of other expenses over the disputed nursing home bill:

And the dispute in her mind is whether or not she is entitled to it before the nursing homes or her mother's other bills, her other financial interests are entitled to that money. . . . And she also knew it was her duty to pay her mother's nursing home bills first and foremost as power of attorney. She testified to that. She told you she knew what a fiduciary duty was. And she knew she had a duty to pay her mother's nursing home bills. And she knew her mother would be evicted for nonpayment of those bills. And you heard Henry Judson testify about the duty of a power of attorney. . . .

So it goes without saying the defendant knew it was in her duty. It was her duty to act in her mother's best interest and to pay her nursing home bills before she paid herself. So even if she believed this money was actually hers, she still did not do the right thing with that money. So it's not a legitimate defense."

RP 1037-38. The State argued repeatedly that Knopp had a legal duty to pay herself last and that a violation of that legal duty was equivalent to theft:

And maybe, if there's any money left over after you paid all of her necessary expenses, you could pay yourself for items or things that you could hire out for. That's what the defendant testified she had authority to do. That's what she

said the attorney Karl Flaccus said she could do, is pay herself for things she could hire out for.

So if you had money left over, and you needed – your mother’s lawn needed to be mowed, and you wanted to mow it yourself, arguably you could pay yourself to mow your mother’s lawn if you were inclined to do that.

RP 1044. These arguments misstate the law. The mere fact that the jury might find dispute Knopp’s priorities in terms of which of her mother’s expenses to pay first does not negate her good faith belief, based on the power of attorney, that she was entitled to pay them.

- b. The Misstatements of the Law Were So Pervasive and Central to the State’s Argument that No Instruction Could Have Cured the Combined Prejudicial Effect.

Prosecutorial misconduct is reversible error when the misconduct is so flagrant and ill intentioned as to be incurable by instruction to the jury. Walker, 164 Wn. App. at 737. Even if an instruction might have cured an isolated misstatement, the cumulative effect of repeated prejudicial misconduct may require reversal. Id. That was the case in Walker, and that is the case here.

The prosecutor in Walker made arguments, previously condemned by Washington courts, that minimized the burden of proof beyond a reasonable doubt and misled the jury regarding Walker’s defense. 164 Wn. App. at 731-32, 735. The court reversed, despite the lack of objection below. Id. at 739. First, the Walker court explained the physical evidence

left room for reasonable doubt and the case essentially came down to credibility. Id. at 738. Thus, the nature of the evidence created a situation in which “the prosecutor’s improper arguments could easily serve as the deciding factor.” Id.

Additionally, the Walker court noted the prosecutor did not make only one or two isolated comments. Id. On the contrary, the prosecutor used the improper comments, “to develop themes throughout closing argument.” Id. The court also noted these themes were “further emphasized by the prosecutor’s Powerpoint slides.” Id.; accord In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 714, 286 P.3d 673 (2012) (repeated improper comments reinforced by Powerpoint slides held to be reversible error despite lack of objection below).

The Walker court’s three concerns are also present in this case. The validity of Knopp’s defense hinged on her credibility as to how she spent the cash withdrawals. The prosecutor’s misstatements of the law of theft and good faith claim of title were the predominant theme in closing argument. RP 1015-44. And the improper arguments were further emphasized by Powerpoint slides. Ex. 50. Essentially, the State’s closing argument was designed to convince the jury that, even if it believed every aspect of Knopp’s testimony, her defense was not legally valid. These misstatements of the law negated her defense and deprived her of a fair trial.

3. KNOPP'S ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTORIAL ARGUMENT THAT DEPRIVED KNOPP OF THE BENEFIT OF HER DEFENSE.

Alternatively, if this Court concludes this issue was not preserved, Knopp was denied her right to effective assistance of counsel when her attorney failed to object to the misconduct. The federal and state constitutions guarantee all defendants the right to effective representation at trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing U.S. Const. amend. 6; Const. art. 1, § 22). Ineffective assistance of counsel is a constitutional error that may be considered for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The two-part test set forth in Strickland is used to determine ineffective assistance of counsel. Thomas, 109 Wn.2d at 225-26. Regarding the first prong, the court must determine if counsel's performance was deficient. Id. Defense counsel's representation is deficient if falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Under the second prong, the court must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different.” Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694).

Here, defense counsel’s performance was unreasonably deficient when she failed to object to the State’s closing argument that misled the jury regarding the law pertaining to Knopp’s defense. If this Court finds the error could have been cured by instruction to the jury, counsel was ineffective in failing to request such an instruction to ensure the jury would give proper consideration to the defense theory of the case. Additionally, counsel was ineffective in failing to preserve the error for appellate review. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel’s performance, the outcome of the trial would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice requires reversal whenever the attorney’s error undermines confidence in the outcome. Id. That confidence is undermined here.

The evidence against Knopp was circumstantial. There was no proof of how the cash withdrawals were spent. The prosecutor argued that even if

it believed Knopp as to how she spent the money, her defense was not legally valid. Without curative instruction, this argument was likely to tip the scales in favor of a guilty verdict.

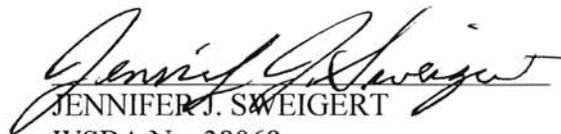
D. CONCLUSION

With no evidence the cash withdrawals were spent in any way other than to benefit Knopp's mother, the State failed to prove Knopp's use of the money was unauthorized by the durable power of attorney, and the evidence was insufficient to convict her of theft. Additionally, the prosecutor's repeated comments, and counsel's failure to object, during closing argument likely misled the jury regarding the law supporting Knopp's defense. The cumulative effect of this misconduct deprived her of a fair trial and requires reversal of her conviction.

DATED this 8th day of April 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over the printed name.

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

SYLVIA KNOPP,

Appellant.

COA NO. 68937-1-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8<sup>TH</sup> DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE  
W554 KING COUNTY COURTHOUSE  
516 THIRD AVENUE  
SEATTLE, WA 98104  
[Bora.Ly@kingcounty.gov](mailto:Bora.Ly@kingcounty.gov)

[X] SYLVIA KNOPP  
4511 MAYVOLT SE  
PORT ORCHARD, WA 98366

2013 APR - 8 PM 4:18  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

SIGNED IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF APRIL, 2013.

x Patrick Mayovsky