

68937-1

68937-1

NO. 68937-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SYLVIA KNOPP,

Appellant.

2013 JAN 21 10:32 AM
SUPERIOR COURT
CLERK OF COURT
KING COUNTY

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The State presented evidence that Knopp withdrew \$16,000 in untraceable cash from her mother's account, made many of the withdrawals at casinos where she was gambling far in excess of her means, failed to pay any of her mother's important bills, and continued to withdraw thousands of dollars from the accounts even after explicitly ordered not to do so by a court. The State also demonstrated that Knopp did not take the money openly and avowedly under a good faith claim of title, as she did not prepare a timely accounting, the accounting she produced on the eve of trial was insubstantial, and her testimony that she withdrew the money to pay herself and her mother's bills was not credible. Did the State produce sufficient evidence that Knopp committed Theft in the First Degree?

2. A conviction should only be reversed if a prosecutor's unobjected-to misconduct was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a limiting instruction. Whether a prosecutor committed misconduct is judged by looking at the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Here, the prosecutor did

not misstate the law in her argument, but rather discussed the evidence and the law provided by the court. Knopp did not object. The jury was correctly instructed about the law regarding the defense of good faith claim of title, and that it must accept the law as declared by the court. Were the prosecutor's arguments proper in the context of the record as a whole? Has Knopp failed to show that any misstatement of the law was not flagrant and ill-intentioned? Does the fact that the evidence conclusively showed that Knopp did not act openly and avowedly, because she refused to produce an accounting as required, obviate any prejudice that could have ensued from the prosecutor's arguments?

3. A defendant claiming ineffective assistance of counsel bears the burden of proving that her counsel's performance was so deficient that she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the defendant was prejudiced by reason of her attorney's actions. Here, the law regarding the interaction of the defense of good faith claim of title with power of attorney and fiduciary duties is undeveloped. Has Knopp failed to show that her lawyer's performance was deficient, when she failed to object to the prosecutor's closing argument discussing these concepts? Further, has Knopp failed to show prejudice when she was unable to make out the good faith claim of title defense in any event, because her taking was not open and avowed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 23, 2011, the State of Washington charged the defendant, Sylvia Knopp, with one count of Theft in the First Degree, and further alleged two aggravating factors. CP 1-2. The State amended the Information on April 23, 2012, to clarify that the theft was based on a series of transactions. CP 15-16; RP 171-75.¹ The case proceeded to trial before the Honorable Sharon S. Armstrong. RP 1.

At trial, Knopp raised a defense of good faith claim of title. CP 29, 39. The jury was instructed in accordance with this defense. CP 50, 57. Knopp was convicted as charged. CP 36-37. Although the jury's verdict—which included findings that Knopp knew that the victim was particularly vulnerable and that she used her position of fiduciary responsibility to facilitate the crime—authorized an exceptional sentence above the standard range, the trial court imposed a standard range sentence of 90 days in custody. CP 37, 73-76. This appeal followed. CP 80-81.

2. SUBSTANTIVE FACTS

In 2008 and 2009, appellant Sylvia Knopp was in dire financial straits. She was employed at a casino, where she worked 40 hours a week, making \$10.71 an hour plus tips. RP 710, 724-25. As of October of 2009,

¹ The Verbatim Transcript of Proceedings consists of eight consecutively numbered volumes, and will be referred to in this brief as "RP."

she had grossed only \$21,000 in wages and tips for 2009. RP 710, 788; Ex. 42. Knopp's bank accounts revealed her severe financial strain: she frequently had a negative balance in her accounts, and in June 2009 was charged overdraft fees at least eight times.² Ex. 43.

Despite her financial circumstances, Knopp continued to spend. She frequented several casinos, gambling hundreds of dollars during each visit. Ex. 24; RP 611-19. At the Point Casino alone, Knopp lost over \$4,000 during the period December 2008 through October 2009.³ Ex. 24. She wagered more than \$40,000 during that period at that single casino.⁴ Ex. 24. In fact, even though Knopp suffered a stroke in March 2009 and was not able to drive, she was back gambling at casinos within five days. RP 949-50. While there, she made numerous withdrawals at the casinos' ATMs, often multiple times each day, even though each separate withdrawal cost \$3. Ex. 7, 32, 35, 47; RP 688, 700-01. She also was charged \$30 each time she overdrew her account. Ex. 43; RP 948.

² She may have overdrawn her account more times. It is impossible to tell, however, because the bank records that Knopp provided were incomplete. For instance, the records showing activity in June 2009 on Knopp's checking account cut off in the middle of the notation for June 24, 2009. Ex. 43, at 6.

³ Total net losses for the period can be calculated by summing the "Win/Loss" column on Exhibit 24. RP 617-18; see also Ex. 35.

⁴ The total amount wagered, or "handle," can be determined by summing the "Handle" column on Exhibit 24. RP 613-15; see also Ex. 35. The handle is the aggregate of all wagers made over the course of the day, including wagering money previously won. RP 613-15. Accordingly, a player's handle can be well in excess of the amount of money she brought to the casino. The win/loss amount, on the other hand, represents the difference between the amount of money a player began with and ended with. RP 617-18.

During the same period of time that she was struggling financially, Knopp had power of attorney with respect to the health care decisions and the finances of her mother, Maria Volz. Ex. 1. The power of attorney permitted Knopp to handle Volz's finances, but did not permit her to make gifts of Volz's property or to compensate herself, other than reimbursements for actual expenses. Ex. 1; RP 201-06. It also required Knopp to provide an accounting under certain circumstances. Ex. 1; RP 200, 202. As a fiduciary, Knopp had a responsibility to act in the best interests of the principal, including prioritizing payments so that Volz's care and other basic needs were met. RP 293-94.

In late December 2008, Volz suffered an injury and was admitted to Virginia Mason Hospital for care. RP 722-23. After her acute care ended, she was transferred to Providence Mount St. Vincent for rehabilitation, beginning on December 26, 2008. RP 317-19, 455, 725-28. Her health insurance ended its coverage for Volz's sub-acute care effective January 11, 2009. RP 318-19. Based on her needs, however, Volz had to remain in 24-hour residential care. RP 282, 322-25, 384-90, 514-20. Knopp advised the staff at Providence Mount St. Vincent that she wanted to move her mother to a different facility; the staff worked with her to apply for Medicaid benefits on Volz's behalf in order to enable her transfer to a less-intensive medical setting. RP 430-40, 486-508, 732.

Although she initiated a Medicaid application, Knopp did not complete it, perhaps because she learned that all of her mother's income, except for a \$58 per month personal stipend, would be required to go towards paying for Volz's medical needs. RP 488-508, 515, 738, 804-06. Knopp ultimately moved Volz to an assisted living facility, Park Vista, at the end of May 2009. RP 340-41, 457-63, 751-53. The move was against medical advice, because the services offered by Park Vista were inadequate to meet Volz's needs. RP 457-63, 751-53, 810; Ex. 17.

Throughout her hospitalization, Volz was clearly not in full possession of her mental faculties. For instance, Henry Judson, a guardian ad litem, visited Volz on April 14, 2009. RP 209-10. She was not tracking well, did not understand why she was there or who Judson was, and could not remember her address or provide any information about her financial affairs. RP 209-10. Volz's mental capacity did not improve at Park Vista. In June 2009, she could not find her way from her apartment at the assisted living facility to the dining room, and again could not describe her financial circumstances. RP 211-15. When an evaluator met with Volz in August 2009, she observed her attempt to use the restroom by going into a public hallway, pulling down her pants, and squatting. RP 377. Volz also could not explain what to do in case of emergency, even though there was a string to pull for help within arm's reach.

RP 377-78; see also RP 530-31, 796. The evaluator concluded that Volz suffered from dementia, and lacked the capacity to manage her own financial affairs. RP 378-83.

While Volz was hospitalized and both physically and mentally incapable of making any decisions for herself, Knopp began using Volz's money as her own. Between December 2008 and October 2009, Knopp withdrew \$16,550 in cash from Volz's checking account. Ex. 7, 31, 32, 33. Another \$6,500 was withdrawn via debit card, with expenditures covering such things as pet licensing, restaurant meals, gas, and casino fees. Ex. 7, 31. A further \$1,900 in cash was obtained by Knopp as cash back when she made deposits of checks into Volz's accounts. Ex. 7, 30. The total amount of Knopp's withdrawals from her mother's accounts was nearly identical to the amount of the deposits that Volz received from her pension, social security, a tax refund, and other sources. Ex. 7, 30, 31; RP 695-96, 798-99.

Knopp did not use this money to pay her mother's medical bills, housing bills, or property taxes or insurance on her home (her only asset). RP 239-43, 275-76, 333-48, 403-06, 448-50, 697, 800-02, 812-15. Instead, the cash withdrawals closely tracked Knopp's gambling activities. For instance, on January 25, 2009, Knopp gambled at the Point Casino, losing only \$2.63, but with a total handle of \$1,606.35. Ex. 24, 35. She

made four separate withdrawals from her mother's checking account while she was there, taking out \$300 and incurring \$12 in ATM fees. Ex. 7, 32, 35. She appears to have tried to make an additional withdrawal, but the transaction was denied. Ex. 7. Knopp also withdrew \$100 from the same casino's ATM both the day before and the day after that casino visit. Ex. 7, 35.

Similarly, on February 1, 2009, Knopp withdrew \$100 at the Point Casino, and gambled the same day, losing \$159.96 with a handle of \$548.75. On the same day, she also withdrew \$180 from Volz's account at a non-casino ATM, and another \$900 the next day, also from a non-casino ATM. Ex. 7, 35. In total, of the \$16,550 Knopp withdraw from her mother's accounts in cash, \$6,095 was withdrawn at casinos, and another \$5,324 at non-casino ATMs within one day of Knopp gambling at a casino.⁵ Ex. 35.

When questions were raised regarding Knopp's exercise of her fiduciary responsibilities, a guardianship proceeding was instituted; Henry Judson was appointed guardian ad litem on May 11, 2009.⁶ RP 194, 536. He met with Knopp and requested an accounting from her; she never provided one. RP 227-31. She also failed to provide accountings to Adult

⁵ These amounts include ATM fees.

⁶ Judson had been appointed to work on behalf of Volz prior to this date, arising out of different legal proceedings. RP 250, 287.

Protective Services, the Seattle Police Department, and even the court when ordered to do so. RP 532-37, 544, 554-58, 580, 817-18.

In June 2009, Hudson obtained a blocking order to preclude Knopp from accessing Volz's accounts. RP 233-37. Unfortunately, the bank failed to process the blocking order correctly. RP 235-37. Knopp then continued to access Volz's accounts, withdrawing over \$3,000 from June 19, 2009, through July 20, 2009, alone, and another \$1,650 on August 3, 2009. Ex. 7. On August 4, 2009, an order was entered partially unblocking the account so that Knopp could pay a Group Health insurance premium for Volz, but the order required Knopp to make such payments by check only, and forbade her from making any ATM or cash withdrawals whatsoever. RP 237; Ex. 3. Nonetheless, Knopp withdrew over \$2,400 from Volz's checking account from the time the order was entered until Knopp's power of attorney was terminated in October 2009. Ex. 7; RP 248. Other than the payment of the Group Health premium in the amount of \$327, nearly all of the withdrawals were cash withdrawals from an ATM, about half of them at casinos. Ex. 7, 32, 33, 35.

Moreover, once the investigation began, Knopp directed payors who had been depositing money into Volz's accounts via direct deposit to send that money to her instead. RP 825-26; Ex. 7. Specifically, instead of continuing to have Volz's pension and social security benefits deposited

directly into Volz's accounts, Knopp had the checks mailed to her own post office box. RP 825-26. This allowed her to access these funds without utilizing Volz's blocked bank accounts.

At trial, Knopp defended herself by claiming that all of the cash she had withdrawn from Volz's accounts was either to pay Volz's bills or to pay herself for services rendered. For instance, Knopp claimed that she withdrew cash from Volz's accounts to obtain money orders to pay Volz's bills, and did so because it was "easier." RP 746-47, 777-78. In fact, though, Knopp had Volz's debit card and checkbook, both of which would have been "easier" (and free) to use and would have provided documentation as to how Knopp actually spent the money. She also could have obtained cashier's checks from Volz's bank. RP 798; Ex. 7, 25, 26. Moreover, Knopp herself used debit cards and checks, not money orders, to make payments from her personal account, belying her claim that money orders were "easier." Ex. 43.

Similarly, Knopp asserted that she paid herself for shampooing the rugs, pressure washing the roof, doing the yardwork, and performing other maintenance at her mother's home. RP 747. However, the accounting she provided in court—years after she had refused to provide such an accounting to the guardian ad litem, Adult Protective Services, the police, and the courts—did not reflect such work, nor did it reflect payments to

herself that corresponded to withdrawals from Volz's accounts.⁷ Compare Ex. 41 with Ex. 7, 32, 33. Moreover, the guardian ad litem reported that as of September 2009, the home was dilapidated and disheveled, and the carpet reeked of pet urine and feces; there was no evidence any work had been done on the home. RP 245-47.

Knopp also contended that she withdrew money from casinos because they were convenient to the ferry that she took to get from her home in Port Orchard to visit her mother in Seattle. Ex. 25, 26; RP 996. In fact, though, the casino was out of the way, and there were ATMs that did not charge a fee much closer to Knopp's home, place of employment, and the ferry terminal. Ex. 36; RP 621, 704-09. Moreover, this explanation was inconsistent with Knopp's multiple withdrawals on the same day from the casino ATMs.

Finally, Knopp acknowledged on cross-examination that she had the responsibility to ensure her mother got proper care, which meant that she had to pay her mother's bills at her care facility so that she would not be evicted. RP 823. Knopp acknowledged that she did not do so, but chose to "pay" herself first, including paying herself to visit her mother,

⁷ Knopp had represented to the investigating detective that she had all the receipts for things she purchased for her mother. Ex. 25, 26. In fact, she provided a total of 14 receipts, some of which were incomplete, unreadable, or not clearly related to Volz's expenses. Ex. 37, 38, 39, 44, 45.

meet with the police investigating her financial exploitation of Volz, and oppose the guardianship. RP 823-25, 953-54.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT KNOPP'S CONVICTION FOR THEFT IN THE FIRST DEGREE.

Knopp claims that the State's evidence was insufficient to support a guilty verdict for Theft in the First Degree. Specifically, she argues that the State failed to show that Knopp used the money for herself, rather than for Volz. But the State's circumstantial evidence showed that the money went to pay for Knopp's gambling addiction, rather than Volz's care. Her claim should be rejected.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted). In assessing the

sufficiency of the evidence, circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict Knopp of Theft in the First Degree as charged in this case, the State had to prove beyond a reasonable doubt that she exerted unauthorized control over more than \$5,000 of Volz's money with the intent to deprive her of it. RCW 9A.56.030(1)(a), .020(1)(a); CP 15. To "exert unauthorized control" means to take the property of another or, when one already has control over the property through power of attorney, to secrete, withhold, or appropriate the property to one's own use or the use of any person other than the true owner. RCW 9A.56.010(22). Here, there is ample evidence in the record to support the jury's finding that Knopp converted her mother's funds to her own use.

The State's theory of the case was that Knopp withdrew cash from Volz's accounts and spent the money on herself rather than on the needs of her mother, whom she had a fiduciary duty to protect. Due to the fungible and untraceable nature of cash, Knopp's actions deprived the State of direct evidence as to how the funds were spent. Despite Knopp's claims to the contrary, however, this does not mean that the State cannot

meet its burden of proving that she misappropriated her mother's money.⁸ Rather, the State made a strong circumstantial case that Knopp spent the cash on gambling rather than on her mother.

First, as discussed above, Knopp withdrew over \$16,000 in cash from Volz's accounts during the period that Volz was hospitalized and incapable of caring for herself. Ex. 7, 31, 32, 33. Although she initially wrote a few checks to cover her mother's expenses—thereby creating a record as to how that money was spent—she stopped writing checks after only a few weeks of Volz's hospitalization. Ex. 7.

Second, at the time that Volz was hospitalized and unable to oversee her finances, Knopp was struggling financially. She made very little money at the same time that she was gambling away a significant portion of her earnings. Ex. 24, 42, 43.

Third, a large share of the cash withdrawn from Volz's accounts was withdrawn at casinos, where Knopp was gambling far in excess of her means. Ex. 7, 24, 31, 32, 33, 35, 42, 43; RP 611-19, 710, 724-25. She made multiple withdrawals from casino ATMs on the same day, despite

⁸ Citing State v. Thompson, 153 Wn. App. 325, 223 P.3d 1165 (2009), and State v. Crowder, 103 Wn. App. 20, 11 P.3d 828 (2000), Knopp suggests that the State has to show precisely where the money went in order to convict her. These cases do not support this proposition. Rather, the two cases are merely illustrations of sufficient evidence of theft. They do not hold that the State must prove how money was spent in order to prove that the defendant committed theft. Indeed, were this Court to reach such a conclusion, it would graft a new element onto Theft in the First Degree and preclude the State from calling to account those defendants who better cover their tracks by stealing cash rather than tangible assets.

the high ATM fees. Ex. 7, 32, 35. Moreover, the casinos were not convenient to any other of Knopp's activities, such as her home, place of employment, or route to the ferry. Ex. 25, 26, 36. This pattern was more indicative of impulsive or compulsive spending than of rational decisions about meeting bona fide expenses.

Fourth, the State demonstrated that, for the most part, Knopp did not use the funds withdrawn from her mother's accounts to the benefit of Volz. She did not pay Volz's medical bills, property taxes and insurance, or housing bills, putting her at risk of losing her only asset and being evicted from her living situation. RP 239-43, 275-76, 333-48, 403-06, 448-50, 697, 800-02, 812-15. Knopp acknowledged that she had the responsibility, as attorney-in-fact, to pay these bills, and that she did not do so. RP 800-02, 812-15.

Fifth, when the court appointed a guardian ad litem and entered an order blocking Knopp's access to the accounts, she continued to withdraw funds in direct contravention of the order. Ex. 3, 7, 32, 33, 35; RP 233-37, 248. While the initial blocking order was in place, Knopp withdrew over \$4,500; when the modified order was entered, explicitly directing her not to make any cash withdrawals, Knopp withdrew about \$2,000 more in cash. RP 233-37, 248; Ex. 7, 32, 33, 35. Taken together, this evidence permitted a rational juror to infer that Knopp was accessing Volz's funds

not in order to care for her mother, but to gamble. This was sufficient to support a conclusion that Knopp converted Volz's funds to her own use without authorization.

Knopp next argues that, even if the State proved these elements of Theft in the First Degree beyond a reasonable doubt, it failed to disprove her defense of good faith claim of title. It is a defense to a charge of theft that the property at issue was taken "openly and avowedly under a claim of title made in good faith, even though the claim be untenable."⁹ RCW 9A.56.020(2)(a). The defense negates the essential element of intent to deprive, so the State bears the burden of proving the absence of the defense beyond a reasonable doubt. State v. Ager, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984).

Here, while Knopp may have presented adequate evidence to put the good faith claim of title defense before the jury, the State met its burden of disproving the defense. First, Knopp's explanations that she used the cash withdrawals to pay some of her mother's bills and to pay herself for work done on her mother's behalf, which could support a conclusion that she had a good faith claim of title to Volz's money, were

⁹ The statute does not define any of the key terms—"openly," "avowedly," "title," "good faith," or "untenable"—and the jury instructions provided no additional guidance. CP 40-65.

simply not credible. For instance, Knopp's assertions that she had cared for her mother's house was flatly contradicted by Judson, the guardian ad litem. Compare RP 747 with RP 245-47. And, as discussed in detail above, her suggestions that she paid her mother's bills with money orders because it was "easier" and that she withdrew cash for her mother at casino ATMs were both absurd on their face and contradicted by other evidence. Similarly, Knopp's continued withdrawals from her mother's account in the face of an explicit court order prohibiting her from doing so belied any claim that she was acting in good faith. The jury was entitled to weigh the evidence and make any credibility determinations it saw fit. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (observing that the jury is free to believe certain witnesses and disbelieve the defendant, and that credibility determinations are not reviewable on appeal). By undermining Knopp's credibility, the State sufficiently demonstrated that she did not take Volz's money pursuant to a good faith claim of title.

Second, there was no evidence whatsoever that Knopp acted openly and avowedly. To the contrary, although directed to do so by the power of attorney document itself and by four different parties, including the court during the guardianship proceedings, Knopp failed to produce a timely accounting of her expenditures of Volz's funds. Ex. 1; RP 227-31, 532-37, 544, 554-58, 580, 817-18. The accounting she ultimately

produced on the eve of trial was incomplete, largely unsupported by receipts, and bore no relationship to the use of funds documented by the bank. In fact, the “accounting” did not reflect a single withdrawal from Volz’s accounts. Compare Ex. 7, 32, 33 with Ex. 37, 38, 39, 41, 44, 45. The failure to produce an accounting alone defeats Knopp’s defense of an open and avowed taking based on a good faith claim of title. Accordingly, the evidence was adequate to support the jury’s verdict of guilty. Knopp’s argument otherwise should be rejected.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT, NOR WERE HER ARGUMENTS FLAGRANT, ILL-INTENTIONED, AND THE CAUSE OF ENDURING PREJUDICE.

Knopp argues that her conviction should be reversed because of prosecutorial misconduct during closing argument. But the prosecutor’s arguments, which Knopp did not object to during trial, properly discussed the evidence in the case and addressed Knopp’s defense. They did not misstate the law. The court also instructed the jury that it must accept the law from the court, and disregard any arguments of the attorneys not supported by the law. There was no misconduct. Even if the prosecutor did misstate the law, her argument was not flagrant and ill-intentioned, nor was Knopp prejudiced. Knopp’s claims must be rejected.

A conviction should only be reversed when a defendant demonstrates both prosecutorial misconduct and resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To determine whether a prosecutor's argument was improper, a reviewing court must examine the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions to the jury. Russell, 125 Wn.2d at 85-86; State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). A prosecutor's misstatement of the law may constitute misconduct. State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). A defendant is prejudiced if a substantial likelihood exists that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Neslund, 50 Wn. App. 531, 561-62, 749 P.2d 725 (1988). The defendant bears the burden of demonstrating both that the argument was improper and that he was prejudiced. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

Even if a defendant was prejudiced by prosecutorial misconduct, however, defense counsel's failure to object constitutes waiver. Russell, 125 Wn.2d at 86. In the absence of an objection, a conviction will not be reversed for prosecutorial misconduct unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been obviated by a curative instruction or

other action. Stenson, 132 Wn.2d at 719; Belgarde, 110 Wn.2d at 507; Russell, 125 Wn.2d at 86. Counsel for the defendant may not remain silent, hoping for a favorable verdict, and then claim misconduct for the first time on appeal. Russell, 125 Wn.2d at 93.

- a. There Was No Prosecutorial Misconduct Because the State Did Not Misstate the Law and the Court Correctly Instructed the Jury.

Knopp complains about several different arguments made in closing. But taken in context, and given the current state of the law regarding the interaction between power of attorney and the defense of good faith claim of title, none of the prosecutor's arguments were improper.

First, Knopp contends that the prosecutor committed misconduct by arguing that "the failure to fulfill the fiduciary duty under the power of attorney is a crime." Brief of Appellant at 14-15. Knopp is correct that the mere failure to fulfill a fiduciary duty, standing alone, is not criminal. But in quoting the prosecutor's argument, Knopp leaves out key sentences that place the argument in context. In reality, the prosecutor first described the heavy burden that a fiduciary responsibility imposes, and then accused Knopp of abandoning that responsibility by stealing from Volz. Specifically, the prosecutor argued:

And the defendant, Sylvia Knopp, agreed to do that [handle Volz's health care and financial decisions]. She agreed to assume that weighty responsibility of making the decisions for another person's life.

It's not an insignificant thing to agree to do something like that, to take care of another person who's unable to care for themselves is an onerous responsibility. And it's one the defendant didn't have to do. But she decided to do that and she agreed to do that.

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 when we have accepted that duty. So if we have a child, and we neglect that child, it's criminal. If we adopt a child and we decide we really don't want the child after all, and we abandon that child, it's criminal.

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. And what we know in this case is that the defendant stole money from her mother, Maria Volz.

We know that beginning in December of 2008 and continuing on throughout October of 2009, she was the power of attorney for her mother. And she used that power of attorney again and again and again to take cash out and to make purchases that were for herself and not for her mother's benefit.

She chose again and again not to take care of her mother, but to fulfill her greed.

RP 1014-16. Reviewing the entire argument, as this Court must, the prosecutor did not misstate the law. She merely contextualized the fiduciary responsibility that Knopp had accepted, and introduced her

argument that Knopp used that responsibility to repeatedly victimize her mother.¹⁰

Second, Knopp argues that the prosecutor incorrectly told the jury that “[i]t doesn’t matter where the defendant was spending this money. . . . What matters is she was withdrawing cash from her mother’s account without authority.” Brief of Appellant at 16, quoting RP 1018. Again, Knopp is correct that, if she was using Volz’s money for Volz’s benefit, she did not commit theft. However, the ellipsis in her quotation is fatal to her claim of misconduct. What the prosecutor in fact said was:

So starting on December 30th, the withdrawals for cash at the casinos begins.

And I just want to stop for a minute and talk about this casino thing. You have heard exhaustively about casino withdrawals. It doesn’t matter where the defendant was spending this money. It doesn’t matter if she was gambling her mother’s money away, or spending it on her hobbies, whatever they might have been. What matters is she was withdrawing cash from her mother’s account without authority. And the fact that we can show these withdrawals were made at casinos is circumstantial evidence that she’s not spending that money on her mother’s behalf. But it really isn’t the point here. The point is, the defendant was withdrawing cash repeatedly and using it not for her mother’s benefit, but for herself.

¹⁰ Knopp additionally suggests that the prosecutor’s return to this theme at the conclusion of her argument is an additional misstatement of the law. Brief of Appellant at 15. But the prosecutor’s conclusion emphasizes that it is theft, not merely a failure to fulfill a fiduciary duty, that is criminal: “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.

RP 1018. In other words, the prosecutor properly argued that the State need not prove how Knopp spent Volz's money, as long as it proved she was spending it on herself instead of her mother. She further explained, again properly, that the withdrawals at casinos were circumstantial evidence that Knopp was gambling away Volz's funds instead of paying Volz's bills. This was not misconduct.

Third, Knopp claims that the prosecutor committed misconduct by arguing that Knopp's prioritization of expenses was criminal. Brief of Appellant at 16-17. Yet again, context is critical. The statements that Knopp complains of were part of a larger argument that discussed the element of theft that Knopp secreted or appropriated Volz's funds for her own use. RP 1029. In that discussion, the prosecutor pointed to specific admissions Knopp made about how she spent the money—such as paying herself for visiting Volz, paying herself for time being interviewed about the exploitation of her mother, and gambling—as evidence that Knopp “appropriated her mother's assets for her own use.” RP 1029-31. Questioning Knopp's use of the money to pay herself in this context is not—or not only—addressing the defense of good faith claim of title, but also whether the State met its burden of proof with respect to exerting unauthorized control before it even reached the question of the defense.

Taken as a whole, the prosecutor's argument was not a misstatement of the law, but a reasonable argument regarding the evidence and law.

Fourth, quoting the prosecutor's argument at RP 1036-37, Knopp contends that "[t]he State also blatantly misstated the law pertaining to the good faith claim of title defense." Brief of Appellant at 17-18. However, Knopp has failed to demonstrate that this argument misstated the law. For instance, the prosecutor's description of the defense as typically applying to physical property such as a car was correct. Indeed, the defense is available only where the defendant is attempting to recover specific, tangible property. State v. Self, 42 Wn. App. 654, 657, 713 P.2d 142 (1986); State v. Brown, 36 Wn. App. 549, 559, 676 P.2d 525 (1984) ("The good faith claim of title defense to theft applies only when a claim of title can be made to the specific property acquired."). Similarly, the prosecutor's argument that "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" was correct. State v. Larsen, 23 Wn. App. 218, 219, 596 P.2d 1089 (1979) (citing State v. Martin, 15 Or. App. 498, 516 P.2d 753 (1973)).

Knopp primarily focuses on the prosecutor's distinction in this portion of her argument between "good faith claim of title" and "good faith claim of entitlement." But the statute and the jury instructions both

use the word “title,” not “entitlement.” RCW 9A.56.020(2)(a); CP 57. Neither word was specially defined for the jury. The prosecutor’s argument that Knopp was asserting an entitlement, not a title, was a reasonable argument in light of the evidence adduced at trial and the law provided to the jury.¹¹ In light of the facts that a good faith claim of title defense must be asserted with respect to specific, tangible property, and that a defendant cannot use self-help to pay herself moneys owed, the argument did not misstate the law. See Self, 42 Wn. App. at 657; Brown, 36 Wn. App. at 559; Larsen, 23 Wn. App. at 219; Martin, 15 Or. App. at 503-04. There was no misconduct.

Finally, Knopp argues that the prosecutor misstated the law by arguing that “the jury could convict Knopp if it disagreed with her prioritization of other expenses over the disputed nursing home bill.”

Brief of Appellant at 19-20, quoting RP 1037-38, 1044. In context, this

¹¹ Knopp repeatedly cites to State v. Hawkins, 157 Wn. App. 739, 238 P.3d 1226 (2010). That case contains no discussion of the difference between “title” and “entitlement.” Moreover, the case is not compelling. First, because Hawkins was resolved on the basis that the good faith claim of title defense cannot be raised in a prosecution for possession of stolen property, the court’s discussion of whether mistake of fact is relevant to a good faith claim of title defense is dicta. Id. at 748 (“This case can be easily disposed of on the first Strickland prong—there was no error. By its very terms, the statutory defense in RCW 9A.56.020(2) applies to a ‘prosecution for theft.’ It does not address theft-related crimes such as possession of stolen property.”); Ass’n of Washington Bus. v. State of Washington, Dept. of Revenue, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005) (noting that, where statements are made in passing and are not directly related to the holding of a case, the language is not binding on the court). Second, the Hawkins court’s suggestion in dicta that mistake of fact is unrelated to the defense of good faith claim of title, when the statute specifically provides that the defense is available “even though the claim be untenable,” RCW 9A.56.020(2)(a), is surely incorrect. This language in the case should be discounted.

argument did not misstate the law. Rather, the prosecutor's remarks were addressed to the credibility of Knopp's claim that she acted in good faith. Specifically, the prosecutor discussed the evidence in the case—that Knopp had a fiduciary duty to act in the best interests of her mother, as Knopp herself acknowledged¹²—and contrasted it with Knopp's actions, to demonstrate that Knopp was not acting in good faith, but out of greed. Considering “the context of the total argument, the issues in the case, [and] the evidence addressed in the argument,” there was no misconduct. Russell, 125 Wn.2d at 85.

Not only did the prosecutor not misstate the law, but the jury was instructed by the court that it must accept the law in the court's instructions. CP 18. It was also instructed that it “must disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court's] instructions.” CP 19. Knopp does not contend that these instructions, or any others given by the court, were erroneous. A jury is presumed to follow the court's instructions. State v. Costello, 59 Wn.2d 325, 332, 367 P.2d 816 (1962).

¹² Compare RP 1037-38 (closing argument) with RP 203-06, 293-94 (testimony of Judson) and RP 800-02, 816-17, 821-24.

b. Knopp Waived Any Claim of Prosecutorial Misconduct by Failing to Object.

Knopp did not object to a single argument that is now the subject of this appeal. In the absence of an objection, a conviction should be reversed only when the misconduct was so flagrant and ill-intentioned that it creates an enduring prejudice that could not have been cured by a jury instruction or other action. Stenson, 132 Wn.2d at 719. Here, even if they were erroneous, there is no evidence that the prosecutor's arguments were flagrant and ill-intentioned. To the contrary, there is very little law regarding the defense of good faith claim of title, developing its contours, or even defining its terms. Moreover, there is virtually no law on the intersection of the good faith claim of title defense with power of attorney and fiduciary responsibilities. The prosecutor's arguments appear to be a reasonable discussion of the facts developed through testimony and exhibits and their relation to the law as provided in the jury instructions. Further, the arguments were not inflammatory or an inappropriate appeal to emotion. Compare Emery, 174 Wn.2d 741. Accordingly, to the extent that the prosecutor's arguments were incorrect, they were not flagrant and ill-intentioned so as to relieve the defense of its duty to object.

Moreover, there is no reason to believe that an instruction could not have cured any prejudice from the prosecutor's arguments. Indeed, to

the extent the prosecutor was misstating the law, additional instructions from the trial court could have informed the prosecutor, as well as the jury, of the correct interpretation of the law, and thus changed the prosecutor's argument.

c. Knopp Cannot Show Prejudice from Any of the Complained-of Arguments.

Finally, if any of the prosecutor's arguments constituted misconduct, Knopp was not prejudiced thereby. As noted above, prejudice occurs when there is a substantial likelihood that the misconduct affected the verdict. Belgarde, 110 Wn.2d at 508. When assessing prejudice, "closing argument cannot be likened to instructional error. Because jurors are directed to disregard any argument that is not supported by the law and the court's instructions, a prosecutor's arguments do not carry the 'imprimatur of both the government and the judiciary.'" Emery, 174 Wn.2d at 759.

Here, one element of Knopp's defense of good faith claim of title required that she assert her claim "openly and avowedly." RCW 9A.56.020(2)(a); Ager, 128 Wn.2d at 95. As discussed above, Knopp repeatedly failed to provide an accounting despite being required to do so by the power of attorney document, being asked to do so by the guardian ad litem, Adult Protective Services, and the Seattle Police

Department, and being ordered to do so by the trial court. Without any evidence whatsoever that her taking was open and avowed, Knopp cannot benefit from the good faith claim of title defense. She was not prejudiced by the prosecutor's closing arguments.

3. KNOPP HAS FAILED TO DEMONSTRATE THAT SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Knopp argues that she failed to receive the effective assistance of counsel at trial. Specifically, she claims that her attorney's performance was deficient because she failed to object to the prosecutor's statements in closing argument that "misled the jury regarding the law pertaining to Knopp's defense." Brief of Appellant at 23. But counsel's performance was neither deficient nor prejudicial. This claim should be rejected.

A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his attorney's actions, such that the defendant was deprived of a fair hearing. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (adopting the Strickland standard in Washington). Counsel is deficient if his "representation fell below an objective standard of

reasonableness based on consideration of all of the circumstances.”

State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991).

There is a strong presumption that counsel’s representation was effective. Lord, 117 Wn.2d at 883. The presumption of effectiveness will only be overcome by a clear showing of ineffectiveness derived from the record as a whole. State v. Hernandez, 53 Wn. App. 702, 708, 770 P.2d 642 (1989). The defendant bears the heavy burden of proving both deficient performance and prejudice. State v. Grier, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). Here, Knopp is unable to meet this burden.

First, Knopp has failed to demonstrate that her attorney’s performance was deficient. As discussed above, the prosecutor did not commit misconduct in closing argument; therefore, there was nothing to which counsel should have objected. Moreover, even if the prosecutor did misstate the law with respect to power of attorney and the defense of good faith claim of title, the law is not sufficiently developed in this area that counsel should have known that the arguments were an incorrect statement of the law.

Second, Knopp is unable to demonstrate prejudice. As discussed above, there was no evidence in the record that Knopp took Volz's money openly and avowedly. To the contrary, she repeatedly failed to provide an accounting as she was required to do. Where there is no evidence whatsoever as to an element of the defense, Knopp cannot avail herself of it. Any misconduct by the prosecutor as to other elements of the defense, and counsel's failure to object to it, could not have changed the outcome. Knopp's claim of ineffective assistance of trial counsel must fail.

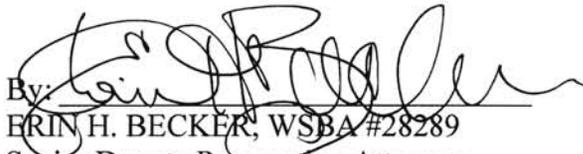
D. CONCLUSION

For all of the foregoing reasons, Knopp's conviction for Theft in the First Degree should be affirmed.

DATED this 17th day of July, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate by Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. SYLVIA KNOPP, Cause No. 68937-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 18th day of July, 2013

W Brame

Name

Done in Seattle, Washington