

NO. 71311-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID WOODLYN,

Appellant.

2015 JUN 25 PM 2:55
COURT OF APPEALS DIV I
STATE OF WASHINGTON
LITTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

To affirm a conviction where the jury is instructed on alternative means of committing an alleged crime, a reviewing court must find that: (1) substantial evidence supported each alternative means on which evidence or argument was presented, or (2) evidence and argument was presented on only one means. Here, the State presented evidence and argument on only one means and clearly elected to proceed under the theory that the defendant had obtained money by color and aid of deception from an elderly victim suffering from dementia. Was there thus no danger that the jury based its guilty verdict on the unsupported alternative means?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant David Woodlyn was charged by information with theft in the second degree; the State also alleged the aggravating circumstance that the defendant knew or should have known that the victim was particularly vulnerable. CP 1-2. The State alleged that Woodlyn wrote checks to himself totaling more than \$1,800 from the account of Dora Kjellerson, an elderly woman who was clearly suffering from dementia. CP 4-5. The first trial ended in a mistrial

after a juror indicated, midtrial, that she had once lived with one of the State's witnesses. RP 327-51, 358-59. At the second trial, the jury convicted Woodlyn as charged. CP 87-88.

2. SUBSTANTIVE FACTS.

Dora Kjellerson has lived at 9245 21st Avenue SW in the White Center neighborhood for more than 20 years. RP 476. Her son, Robert, and her live-in partner, Mike, had passed away in 2010-2011, so she was living alone during the summer of 2011. RP 478, 598, 602.¹ She was 76 years old. RP 474.

That summer, Kjellerson's family and friends began noticing her declining mental state. Her sister, Margaret Fennell, observed that Kjellerson, an avid walker, had become forgetful and was getting lost on her walks, could not remember where she lived, and could not recognize Fennell or even remember Fennell's name. RP 479-80. Fennell's daughter, Darcie Pacholl, also believed that her aunt's mental capacity was deteriorating; Kjellerson was making choices she would not normally make, ending up at places and not remembering how she had gotten there, becoming disoriented and forgetting that certain people had passed away. RP 597-98.

¹ The verbatim report of proceedings consists of 13 consecutively paginated volumes which will be referred to as RP.

noted that the lawn had not been mowed and the grass was up to her knees. RP 478. Fennell believed she might have seen Woodlyn at the house once that summer but had never seen him doing any yard work there. 4RP 481-82. Pacholl also testified that whereas Kjellerson's yard used to be beautifully maintained, during the summer of 2011 the lawn needed to be cut and was about 10-12 inches high and up to her shins. RP 600.

Kjellerson banked at the Bank of America branch in White Center, which was about 2-3 blocks away from her home. RP 605-06. She was a long-time client of Cindy Cleary, who was the bank's assistant manager during the summer of 2011, and who had worked at the White Center branch since 1998. RP 605-06. Kjellerson had come in regularly to the bank once or twice per week for the past thirteen years. RP 647. During that time, Cleary came to know Kjellerson's handwriting well. RP 610, 648.

At the beginning of 2011, Cleary started having concerns about Kjellerson's state of mind; by the summer, she felt that Kjellerson's mental health was declining. RP 612, 635. Cleary testified that it was "very obvious over the past several months that it was getting difficult for [Kjellerson] to remember things." RP 612. Kjellerson had always been "on top" of her banking, knew exactly

how much money she had, and lived very frugally, but as time went on she became confused and neither knew how much money she had nor why her balance was going down, unable to maintain her checkbook the way she used to. RP 613, 648.

Woodlyn started coming in to the White Center branch that summer to cash checks, which he told Cleary came from yard work. RP 608. He did not personally have a Bank of America account, cashing only checks written on accounts there. RP 607. The amounts varied from \$40-\$60, a figure generally verified by two other lawn customers called as witnesses by Woodlyn.² RP 608, 698, 705. The first time that Woodlyn presented a check written to him by Kjellerson, Cleary became concerned because Kjellerson's signature looked a bit "off" to her. RP 610. Out of concern, she called Kjellerson, who affirmed that the check was valid. RP 610-11.

Soon after that incident, Woodlyn came into the White Center branch with Kjellerson at his side on August 27, 2011. RP 609. Although the pair initially approached a different teller window, Cleary stepped in out of an individualized concern for Kjellerson due to her demonstrably failing mental state, as well as Cleary's general policy to step in whenever an elderly person came in with someone they

² In fact, Woodlyn's witnesses testified that he only charged them \$30-35 to mow lawns, showing that he had increased his "prices" for Kjellerson. RP 698, 705.

normally did not come with. RP 612-13. Cleary noticed that Woodlyn “was doing the talking” for Kjellerson, so she asked him how much he needed. RP 613. Woodlyn responded by asking how much Kjellerson had. RP 614.

Alarmed, Cleary asked to speak to them in the lobby and informed Woodlyn that she was not going to give him Kjellerson's balance. RP 614. When Woodlyn became agitated and moved as if to grab Kjellerson by the elbow and leave, Cleary took Kjellerson to a manager's office out of concern for her safety. RP 614-15. By the time Cleary returned to the lobby, Woodlyn was gone; video surveillance showed him leaving the bank. RP 617-19. Cleary called the police. RP 615-16. When Cleary asked Kjellerson why she needed money that day, Kjellerson told her that Woodlyn needed money to cut the grass; when asked how much, Kjellerson did not know. RP 616.

King County Sheriff's Deputy Michael McDonald responded to the bank and asked Kjellerson why she was at the bank that day. RP 686. She appeared terrified but after McDonald reassured her, she said that Woodlyn needed money for mowing the grass. RP 687. When asked if she knew how much money she had given to him in the month of August, she said it was about \$60. RP 687. McDonald

brought Kjellerson home and did a perimeter check of her house and yard to ensure her safety. RP 688. During the check, he noticed that the grass in the front, side, and back yard was “pretty high, about a foot, and it was just kind of overgrown” to the point where the grass had started to lay over. RP 688-90.

Bank of America investigated Kjellerson’s accounts and discovered that from July 25, 2011 to August 12, 2011, Woodlyn had cashed seven checks written to him on Kjellerson’s account at Bank of America branches in White Center and nearby Westwood. RP 451-56, 459-61, 465. The checks began in relatively small amounts such as \$60 but quickly rose to figures above \$400 each, ultimately totaling more than \$1,800. RP 745-51. Woodlyn admitted at trial to filling in his name and the amount in each check, while Kjellerson had signed her name. RP 746-51.

After the incident, Margaret Fennell obtained power of attorney over Kjellerson’s accounts in order to protect her from further financial abuse. 4RP 481. She also sought out a mental health assessment of Kjellerson by Judith Newman, a trained geriatric mental health specialist and social worker at Evergreen Hospital who had worked with their crisis team for 21 years. RP 489, 513. Working mostly with patients suffering from dementia, Newman conducted assessments

of seniors with potential cognitive impairments to get a comprehensive picture of their functional abilities, address their safety and plan for the future. RP 521.

Newman came to Kjellerson's house on September 9, 2011 to evaluate her and meet with her extended family. RP 525. After speaking with Kjellerson for an hour and performing a mini mental status exam to evaluate how her brain was functioning, Newman concluded that Kjellerson was suffering from "moderate to severe dementia" and was "vulnerable to financial exploitation" because of severe memory loss and calculation deficits. RP 538-39. Her ultimate opinion was that Kjellerson had Alzheimer's disease. RP 541. A score of 28-30 on the mini mental status exam is considered normal; Kjellerson scored only 15, putting her in the range requiring a supervised living situation or a total care facility. RP 528.

Kjellerson performed "quite poorly" on her orientation exam, scoring only 2 out of 10, unable to verify her own address or the date. RP 531-32. She had "no short-term memory" and impaired long-term memory; could not even start the calculations that would demonstrate her understanding of numbers; and displayed judgment that "definitely" was not intact. RP 533-37. Because of her nonexistent short-term memory, "[i]t w[ould]n't take long" for someone to tell that

Kjellerson had dementia, according to Newman: “[P]robably by about the second or third sentence [she spoke], somebody would know something was wrong.” RP 543. Newman’s overall impression was that Kjellerson was “clearly and obviously quite demented and vulnerable.” RP 554.

On September 28, 2011, King County Sheriff’s Detective Laura Alspach and Adult Protective Services (APS) investigator Susie Goodwin visited Kjellerson at home to interview her about the Woodlyn incidents.³ RP 419, 567. By that time, bank manager Cindy Cleary had informed Alspach of the seven checks written to Woodlyn on Kjellerson’s account. RP 427-28. Alspach attempted to speak with Kjellerson on September 28 for about an hour and a half but was unable to conduct a true interview. RP 432. Kjellerson could not answer basic questions such as the identity of the current President or the date, and could not carry on a normal conversation. RP 421-23, 441-42. Alspach “absolutely” noticed that something was wrong after spending only a short period of time with Kjellerson. RP 441-42.

³ Goodwin had become involved after initially receiving confidential referrals for possible neglect by Teresa Jones and financial exploitation by a family acquaintance named Mike Swodik (distinct from Kjellerson’s late partner Mike). The first investigation was determined to be unsubstantiated, and the second was deemed inconclusive. RP 563-64, 570-72. Those investigations, however, led to Goodwin’s discovery of the incident with Woodlyn. RP 564.

Goodwin had tried to visit Kjellerson twice that month before the interview with Alspach, but both times Kjellerson (whom Goodwin had never met before) answered her door and did not appear to know her own name, telling Goodwin that "Dora Kjellerson" was down the street. RP 565-67. It was not until her third visit with Alspach that Goodwin realized that the lady who had answered the door previously was Dora Kjellerson. RP 567. During that third visit, Goodwin noted that Kjellerson appeared confused and did not know what city she was in, the date, or recognize Goodwin from her previous two visits. RP 568-69, 590-91.

Woodlyn testified at trial, stating that he was unemployed and only "cutting grass here and there."⁴ RP 716. He admitted knocking on Kjellerson's door sometime in 2011 and charging her \$60 to cut her grass. RP 719. He testified inconsistently after that, vacillating on the timeline and frequency of events. He claimed he returned to Kjellerson's house 2-3 weeks after his first lawn job and that it was there that he met Teresa Jones for the first time, accepting \$90 from her to mow and trim trees. RP 721. He later said he met Jones for

⁴ Woodlyn claimed that he was on social security/disability after being attacked by a woman for two months whose name he couldn't remember and who he claimed had "just got out of Purdy [because] she murdered her husband." RP 732-33.

the first time 1 ½-2 months after the first job, mowing Kjellerson's lawn 2-3 times in between. RP 738.

Woodlyn claimed to mow people's lawns "just because" and "for fun," but then insisted repeatedly that "if they don't have the money I ain't workin'." RP 739, 743-44. He attested to mowing Kjellerson's lawn 3-5 times before taking her to Bank of America on August 27, 2011, then said he didn't know and finally accused the prosecutor of "getting me mixed up, and other than that, I didn't steal from her. That's what I have to say." RP 722, 745.

Woodlyn insisted that Kjellerson asked him to cash the checks for her at White Center and Westwood and insisted that he was doing "a favor" for her. RP 729, 752. He claimed that Kjellerson had asked him to fill out the payee and amounts on each of the seven checks. RP 752. When pressed as to why she would do such a thing, he testified that he himself asked her why she couldn't fill out the whole thing herself because "she does a fine job of writing her name," but that he forgot the reason that she had given him. RP 752-53. He also acknowledged that she told him that she could not find her own bank and that he had to help her walk there and back; Woodlyn claimed to see nothing significant about this fact. RP 723.

Woodlyn also testified that he had run many other errands for Kjellerson that summer, fetching cigarettes and groceries and cleaning her home. RP 725, 730-31. Woodlyn was vague as to whether the money from the seven checks went towards his purported yard work, initially admitting that when Kjellerson did not have any money, he went with her to “see if she could get the money” to pay him for the lawn, but then insisting that he simply gave it to her and was unaware what she did with it. RP 722, 761, 765-66.

The State charged Woodlyn with theft in the second degree under two alternative means, alleging that he “did wrongfully obtain and exert unauthorized control over such property belonging to Dora Kjellerson; and did obtain control over such property belonging to Dora Kjellerson, by color and aid of deception.” CP 1. At trial, the jury was provided a “to-convict” instruction that set out two alternative means of committing theft in the second degree:

- (1) That during a period of time intervening between July 22, 2011, through August 12, 2011, the defendant
 - (a) wrongfully obtained the property of another; or
 - (b) by color or aid of deception, obtained control over property of another; and . . .

CP 72. The terms “by color and aid of deception” and “wrongfully obtained” were further defined in the instructions. CP 75-77.

During closing argument, the prosecutor relied solely on theft by deception, focusing on Woodlyn's attempts to deceive Kjellerson into believing she was paying him for yard work, her obvious dementia, and his exploitation of her vulnerable state to obtain signed checks from her. RP 786-97, 810-13. When the prosecutor read the "to-convict" to the jury, she eliminated any mention of the alternative means of "wrongfully obtaining." RP 791-92, 795-96. No remarks, argument or comments were made regarding a wrongful taking of Kjellerson's property.

C. ARGUMENT

THE JURY'S VERDICT DID NOT VIOLATE WOODLYN'S RIGHT TO A UNANIMOUS JURY BECAUSE THE STATE'S EVIDENCE AND ARGUMENT WAS LIMITED TO ONLY ONE OF THE ALTERNATIVE MEANS.

Woodlyn contends that his right to a unanimous jury was violated because the "to-convict" instruction included two alternative means, one of which was unsupported by the evidence. This argument fails. Because the State clearly elected as to one of the two alternative means, and the evidence and argument presented at trial pertained solely to that means, the jury's verdict did not violate Woodlyn's right to a unanimous jury.

Criminal defendants have a right to a unanimous verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In some circumstances, the right to jury unanimity includes the right to unanimity on the means by which the defendant committed the crime. State v. Allen, 127 Wn. App. 125, 130, 110 P.3d 849 (2005). Unanimity is not required, however, if sufficient evidence supports each alternative means. State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220 (2010).

If the evidence is insufficient under any of the alternative means submitted to the jury, the verdict will stand if either the prosecutor elected the particular means supported by the evidence, or the court instructed the jury to rely solely on those means. State v. Gonzalez, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006). To affirm a conviction under those circumstances, evidence and argument must have been presented on only one means. State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012); see also State v. Rivas, 97 Wn. App. 349, 352-54, 984 P.2d 432 (1999) (overruled on other grounds) (holding that “there was no danger that the jury’s verdict rested on an unsupported alternative means” where the State

focused on only one alternative during closing arguments and no evidence was offered at trial regarding the remaining alternatives).

In Witherspoon, the State instructed the jury on all three alternative means of witness tampering but presented evidence satisfying only two alternatives. 171 Wn. App. at 285. Both parties conceded that the State did not attempt to argue or prove the unsupported means. Id. at 286-87. The court held that no unanimity issue was therefore implicated. Id. at 287. Similarly, in State v. Fleming, the court affirmed a conviction for witness tampering where the court instructed the jury on all three alternative means for committing that crime but where, as Fleming himself conceded, the State had presented evidence of only a single means of committing that crime.⁵ 140 Wn. App. 132, 137, 170 P.3d 50 (2007).

In contrast, courts have found unanimity issues where no evidence was offered for at least one of the alternative means, but the State nonetheless instructed on those means and either failed to elect or argued the unsupported means. See e.g. State v. Lobe, 140 Wn. App. 897, 903-07, 167 P.3d 627 (2007) (finding “too unstable a foundation” where the jury was erroneously instructed on various

⁵ Although the court did not refer specifically to the prosecutor’s arguments, it stated that “[w]e can determine, from the record before us, that the verdict was based on only one of the alternative means . . . and that substantial evidence supports that alternative.” Id.

unsupported means in multiple counts of witness tampering, where the prosecutor argued one of those unsupported means); State v. Fernandez, 89 Wn. App. 292, 300, 948 P.2d 872 (1997) (noting that there was neither election by the State nor a special verdict form to indicate the means under which the jury convicted); State v. Savaria, 82 Wn. App. 832, 840-41, 919 P.2d 1263 (1996) (finding a violation of the right to jury unanimity “in the absence of a clear election by the State” where the prosecutor argued both prongs, one of which had insufficient evidence).

In State v. Allen, this Court reiterated that a conviction will not be reversed if the reviewing court “can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that means.” 127 Wn. App. 125, 130, 110 P.3d 849 (2005) (citations omitted). During Allen’s trial for multiple counts of burglary, the trial court instructed on the alternative means of entering *or* remaining unlawfully in various buildings. Id. at 127-30. No evidence of unlawful entry was presented, only that of lawful entry followed by unlawful remaining. Id. at 135-36.

This Court noted that although the State arguably conceded that there was no proof of unlawful entry in its initial closing remarks, the prosecutor argued in rebuttal that *anyone* who entered a building

with the intent to steal was guilty of burglary, a clear mischaracterization of the law. Id. at 136-37. Because the State essentially invited the jury to convict under the unsupported means, this Court concluded that “[u]nder the circumstances, we cannot be certain that the jury relied solely on the unlawful remaining alternative.” Id. at 137 (emphasis added).

Theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). The three alternative means include theft by: (1) wrongfully obtaining or exerting unauthorized control; (2) color or aid of deception, or (3) appropriating lost or misdelivered property or services. Id. at 647-49; RCW 9A.56.020(1)(a), (b), (c).⁶ The alternative of “wrongfully obtaining” property under RCW 9A.56.010(1)(a) is often called “theft by taking.” See e.g. State v. Smith, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990). The alternative of obtaining control over property by color or aid of

⁶ The full text of RCW 9A.56.020(1) defines the alternative means of theft thusly:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

deception under RCW 9A.56.010(1)(b) is often called “theft by deception.” Id.

Here, the State presented argument and evidence on only one means, theft by deception, which was supported by substantial evidence at trial. Not only did the prosecutor clearly elect during closing remarks, but the evidence was limited to expert opinion regarding Kjellerson’s vulnerable mental state and factual testimony regarding Woodlyn’s corresponding scheme to convince her to sign checks by color and aid of deception. No evidence of theft by taking was presented to the jury. Woodlyn therefore correctly argues that no evidence of non-consent was presented, only proof that the defendant obtained property “under false pretenses” through consent obtained by means of deception. App. Br. 9-11.

The prosecutor’s election to proceed under the alternative means of theft by deception was unambiguous. RP 786-97. Her very first words were: “Greed and *deception*. That is what this case is about.” RP 786-87 (emphasis added). She then detailed Kjellerson’s vulnerability to such deception, a theme repeated through the closing remarks, outlining Kjellerson’s age (“76 years old”), her condition (“suffering from dementia,” “confused,” “forgetful,” “mental state diminishing”), and the resulting opportunity for deceit that Kjellerson

presented to Woodlyn: "The defendant got Dora to sign over seven checks to him totaling over \$1800. The defendant convinced her that these checks were for mowing her lawn." RP 787.

To support the State's theory of theft by deception, the prosecutor repeatedly focused on facts supporting Kjellerson's failing mental capacity and illustrating how Woodlyn purposefully exploited that situation. She recounted the testimony of family members who described how Kjellerson's "judgment was slipping," how she would forget food on the burner, and how she got lost just walking around the neighborhood . RP 787. She also directed the jury's attention to the trained investigators who observed Kjellerson's obvious signs of incapacity, especially Newman, the geriatric mental health specialist:

In doing the assessment, [Newman] found that Dora's short term memory was severely impaired. She found her long-term memory impaired. She found her judgment was impaired. She found that Dora's knowledge and understanding of numbers and calculation was impaired. She described Dora as confused, as not being able to answer simple questions, and she diagnosed Dora with dementia and indicated that Dora even exhibited signs of Alzheimer's. She found that Dora was vulnerable to financial exploitation, and her conclusions were, and this is her quote, that Dora was clearly and obviously quite demented and vulnerable . . . These are the facts in this case. *The Defendant found his opportunity in Dora and he took it.* Those are the facts.

RP 790-91 (emphasis added).

Throughout this recitation of the facts, the prosecutor emphasized how Woodlyn deceived Kjellerson into believing the false impression he had created - that she was paying him to mow her lawn - and highlighted evidence demonstrating how Kjellerson believed and relied on those impressions when parting with her money: "Cindy [Cleary] testified that she asked Dora why she was getting her money out. And . . . Dora's response was, David needs money for mowing the lawn. That's what Dora said." RP 788. The prosecutor noted twice how the defendant had preyed on Kjellerson's lack of short-term memory to deceive her into believing that she had given him far less than she actually had: "When Deputy McDonald asked Dora if she knew how much money she had given the defendant for the month of August, her response was about \$60, not \$1700, about \$60." RP 788-90.

In keeping with her argument on theft by deception, the prosecutor portrayed how the yard work was a sham, with Woodlyn promising performance that he never intended to complete: "[Kjellerson's family] testified about the state of her home, her yard, that it was not being maintained, that the grass was overgrown. No one was mowing her lawn." RP 787-88. Kjellerson's own remarks that Woodlyn "needed money to mow her lawn" despite evidence that

“her lawn was about a foot high . . . [and] was not being mowed,” demonstrated how strong an impression Woodlyn’s false promises made on Kjellerson in her state of dementia. RP 792-93.

When the prosecutor read the “to-convict” instruction to the jury, she completely eliminated any mention of theft by taking and charged them only to find that “the defendant by (inaudible 2:15:52) or aid of deception, obtained control over the property of another.”⁷ RP 791. She then directed the jury to the law and instructions surrounding theft by deception, picking out the term “by color or aid of deception” and reading verbatim the definition of “deception” from Instruction 11: “Deception occurs when an actor knowingly creates or confirms another’s false impression which the actor knows to be false or fails to correct another’s impression which the actor previously has created or confirmed, or promises performance which the actor does not intend to perform or knows will not be performed.” RP 792-93; CP 77. No mention was ever made of Woodlyn “wrongfully obtaining” Kjellerson’s property or the definition of “wrongfully obtain” in Instruction 9. CP 75.

⁷ Although a small portion of the audiorecording was inaudible, it is clear by looking at the structure of the “to-convict” instruction from which the prosecutor was reading that no other word goes between the words “by” and “or aid of deception” except “color.” The word “by” does not precede the phrase “wrongfully obtained the property of another” nor would it make grammatical sense that this phrase was included in the prosecutor’s quote. CP 72; RP 791.

Woodlyn is correct that the State advanced a theory of “false pretenses” during closing argument. App. Br. 11. In accordance with the State’s election, the prosecutor argued: “The defendant had convinced her that he needed this money for mowing her lawn. And because she had dementia, because she was confused, she didn’t have good memory, good judgment, she believed him and was signing over these checks to the Defendant.” RP 793. Woodlyn, the prosecutor argued, preyed on Kjellerson’s deficiencies and “knew he was deceiving Dora. He knew that she was giving him this money or signing over these checks under false pretenses.” RP 793. The prosecutor concluded by stating that “again, the State has proven that the Defendant, *by color or aid of deception*, took over \$750 from Dora” and that “she signed the checks over to the Defendant because she believed the Defendant was mowing her lawn and that he needed this money for mowing her lawn.” RP 795, 797 (emphasis added). Not a single reference was ever made to a theft by taking, factually or under the law.

Nor could the prosecutor argue anything *but* theft by deception. The sole evidence presented at trial involved Woodlyn’s month-long act of deceiving Kjellerson, in her weakened mental state, into believing that she owed him money for mowing her lawn and

convincing her to sign checks to satisfy those fraudulent claims. Kjellerson told Deputy McDonald and teller Cindy Cleary that Woodlyn needed money to cut the grass, believing that she had given him only \$60 during the month of August 2011. RP 616, 686. Woodlyn himself continued to claim at trial that he had mowed her lawn a number of times, although he vacillated as to how often, and admitted that the trip to the bank on August 27 was for that purpose. RP 721-22, 738-44, 755, 758.

As proof of these fraudulent claims, multiple family members described how the yard was overgrown, the lawn had not been mowed, the grass was knee-high and 10-12 inches long, with dandelions 6-7 inches in length throughout the back, front and side yards. RP 478, 504-05, 600. Deputy McDonald testified that when he brought Kjellerson back home from the bank on August 27, 2011, the grass was a "foot long" throughout the overgrown yard, to the point where it had started to "lay over." RP 688-90.

Dovetailing with the State's election of theft by deception, the portrait painted by family members Margaret Fennell, Teresa Jones, and Darcie Pacholl illustrated a woman in mental decline during the summer of 2011. They described how Kjellerson could not recognize her own sister, got lost on walks in her own neighborhood despite

having lived there for more than 20 years, put lit cigarettes in the trash or left the stove on, and could not remember the date or even the year. RP 476, 479-80, 499-500, 598. Judith Newman portrayed not Kjellerson's physical vulnerability to a taking, but her mental susceptibility to deception, testifying that she suffered from moderate to severe dementia and was "vulnerable to financial exploitation because of the calculation [deficit] and the memory loss." RP 538-39. Thus, the State elicited testimony revealing how quickly anyone conversing with Kjellerson would realize her mental deficiencies: "[P]robably by about the second or third sentence, somebody would know something was wrong." RP 543.

Kjellerson's mental deficiencies were obvious to both Detective Alspach and APS investigator Susie Goodwin during their September 28th meeting with Kjellerson, during which Kjellerson manifested confusion, did not know that she was in Seattle, and did not appear to recognize Goodwin from her two previous visits to the home, having first told Goodwin that she was someone else. RP 565-67, 568, 589. The State drew testimony from Alspach that Kjellerson was unable to provide answers to most of the questions asked, including the identity of the current President, the date, or even the day of the week. RP 420-22.

Cindy Cleary's testimony established that this was a fraudulent scheme to steal money from a woman who had a mental condition in which it was "very obvious over the past several months that it was getting difficult for her to remember things." RP 612. When Cleary asked Woodlyn at the bank on August 27 how much he wanted, Woodlyn responded by asking how much Kjellerson had. RP 613-14. Woodlyn himself admitted that Kjellerson had told him that she could not find her own bank even though it was only 4 ½ blocks away, an obvious sign of her dementia. RP 723, 761. Moreover, even in the exculpatory account he gave on the stand, Woodlyn admitted that he had to fill out the payee and amount lines on the checks at issue because she said she "couldn't do it." RP 752-53. He acknowledged asking himself, "I don't understand. She does a fine job of writing her name. Why can't she write the rest?" RP 763.

Woodlyn acknowledges that a conviction may stand "[i]f the State presented evidence of only one means." App. Br. 12. He nonetheless asserts that this Court must reverse his conviction. In doing so, however, he points to no evidence upon which the jury may have relied to convict under theft by taking, but claims instructional error instead. First, he argues that the concept of "nonconsent" was not defined for the jury as a requirement of theft by taking, and that

they were thus not made aware that this was an essential element. He next argues that because the State encouraged the jury to find that Kjellerson signed the checks "under false pretenses" (i.e., deception), that the jury could have concluded that taking money by deception *equated* to taking money without consent, forming a possibility that the jury convicted under theft by taking. This argument is circular, unsound and speculative, with no evidence in the record to support it.

The State clearly elected one alternative means of theft and presented evidence and argument on only that means, for which there was substantial evidence. Woodlyn's argument thus fails.

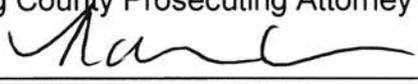
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Woodlyn's conviction.

DATED this 26 day of August, 2014.

Respectfully submitted,

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Certificate of 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 MAUREEN CYR, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVID EARL WOODLYN, Cause No. 71311-6-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.

U Brame
Name
Done in Seattle, Washington

8/26/14
Date