

NO. 69952-1-1

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

REC'D
NOV 06 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

SAMANTHA J. PIERCE,

Appellant.

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

The Honorable Bill A. Bowman, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	27
1. THE TRIAL COURT ERRONEOUSLY ADMITTED SUMMARIES OF BANK RECORDS THE STATE WAS NOT RELYING ON TO PROVE THEFT.	27
2. THE TRIAL COURT ERRONEOUSLY ADMITTED MR. DOCES' DEPOSITION TESTIMONY BECAUSE IT WAS NOT BASED ON PERSONAL KNOWLEDGE.	31
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Bernson
40 Wn. App. 729, 700 P.2d 758
review denied, 104 Wn.2d 1016 (1985)..... 29

State v. Brunner
53 Wn. App. 367, 768 P.2d 509
review denied, 112 Wn.2d 1020 (1989)..... 30

State v. Gatalski
40 Wn. App. 601, 699 P.2d 804
review denied, 104 Wn.2d 1019 (1985)..... 28, 29

State v. Halstien
122 Wn.2d 109, 857 P.2d 270 (1993)..... 31

State v. Hamlet
133 Wn. 2d 314, 944 P.2d 1026 (1997)..... 32

State v. Saldano
36 Wn. App. 344, 675 P.2d 1231
review denied, 102 Wn.2d 1018 (1984)..... 30

State v. Smith
87 Wn. App. 345, 941 P.2d 725 (1997)..... 32

State v. Wentz
149 Wn.2d 342, 68 P.3d 282 (2003)..... 30

RULES, STATUTES AND OTHER AUTHORITIES

ER 403 1, 27, 28, 29

ER 404 27

ER 602 2, 32

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting exhibit 94, a summary of financial transactions that occurred before and during the 21-month charging period of the first degree theft, because it was unduly prejudicial under ER 403.

2. The trial court erred by admitting exhibit 97, the complainant's videotaped deposition, because it is evident from the complainant's answers that he did not have personal knowledge of the things he said.

Issues Pertaining to Assignments of Error

1. The State based its first degree theft charge on 273 specified transactions that occurred between September 25, 2007 and June 11, 2009. The trial court nevertheless admitted Exhibit 94, a summary of about 5,000 transactions that occurred before and during the charging period. The probative value of the voluminous exhibit was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and unnecessary presentation of cumulative evidence. Did admission of the exhibit violate ER 403?

2. The parties conducted a videotaped deposition of the then-95-year-old complainant, whose health was failing. The complainant

could not recall many things, and certain answers suggested he was not testifying from personal knowledge. Did the trial court's admission of the videotape violate ER 602, which prohibits testimony from a witness who does not have personal knowledge of the subject matter?

B. STATEMENT OF THE CASE

After answering an advertisement and being interviewed by family members, Samantha J. Pierce was hired to care for an elderly couple and their large, lakefront Seattle home in the summer of 2005. 7RP 915-18; 18RP 2444-53.¹ The family patriarch, 89-year-old G. John Doces (Mr. Doces), had been a successful businessman and investor and was financially well off. 7RP 900-03; 9RP 1184-85; 10RP 1351-52; 15RP 1990.² At one time he owned five Seattle-area furniture stores. 9RP 1184.

¹ The verbatim report of proceedings, but for the January 25, 2013 sentencing hearing, is sequentially paginated. Pierce has nevertheless cited each volume separately, for ease of reference, as follows: 1RP – 10/23/12; 2RP – 10/24/12; 3RP – 10/25/12; 4RP – 10/29/12; 5RP – 10/30/12; 6RP – 11/8, 13, 14/12; 7RP – 11/15/12; 8RP – 11/19/12; 9RP – 11/20/12; 10RP – 11/26/12; 11RP – 11/27/12; 12RP – 11/28/12; 13RP – 11/29/12; 14RP – 12/3/12; 15RP – 12/4/13; 16RP – 12/5/12; 17RP – 12/6/12; 18RP – 12/10/12; 19RP – 12/11/12; 20RP – 12/12/12; 21RP – 1/25/13.

² Pierce refers to G. John Doces as "Mr. Doces." She refers to Mr. Doces' son, John, as "Dr. Doces." She refers to Mr. Doces' grandson, John, as "grandson." Finally, Mr. Doces' attorney, John T. John, is referred to as "Mr. John."

He also owned a home in the Palm Springs area of California and wintered there. 8RP 1026-27; 14RP 1862-63.

Mr. Doces was a strong-willed, demanding, opinionated individual who liked to make clear he was in charge. 8RP 1066-67; 15RP 1999-2001, 2013-14, 2024-25; 18RP 2458-59. A long-time friend said Mr. Doces "had a way of getting things his way." 14RP 1867-68. Another friend recalled, "Someone described him as kind of like the godfather." 15RP 2027. He was quick to voice his displeasure and was not afraid to offend anyone, especially employees. 8RP 1071-72. As well, Mr. Doces was frugal when it came to non-essential items. 8RP 994-95, 1091-92. He believed saving was the way to prosperity and often said, "There is nothing worse than waste." 8RP 995. He bought items when they were on sale and disdained credit. 8RP 994-95.

As he had done professionally, Mr. Doces negotiated the terms of Pierce's employment and made the decision to hire her. 8RP 1118; 10RP 1396. Pierce was to live at the home full time, drive the Doces around, receive free room and board, medical and dental care, a car for her use, and \$1,000 per month. 8RP 1118-21; 18RP 2449-51, 2454-60.

Mr. Doces had limited mobility and used a walker because of back and neck surgeries. 7RP 917-19; 19RP 2580-82. He did not drive. 18RP

2456. He also had high blood pressure, a heart disorder, prostate cancer, recurring infections, and was blind in one eye. 7RP 917-18, 8RP 1048-51; 9RP 1187-89; 19RP 2580-82. He took many medications, all of which Pierce was charged with managing. 7RP 918; 9RP 1188; 19RP 2583.

Despite Mr. Doces' controlling nature, his wife, Sophia, traditionally managed the family finances. 8RP 993; 9RP 1182-83; 10RP 1318-23, 1353, 1390-91. Mr. Doces was, however, "aware of everything." 10RP 1353.

When Pierce first assumed the job, Sophia was ambulatory. Pierce called Sophia a "very gracious lady" with whom she got along well. 18RP 2458-59. Sophia was in serious but stable medical condition in those days. 9RP 1182-83. She had been diagnosed with breast cancer and was receiving radiation and chemotherapy. 7RP 917; 9RP 1226; 18RP 2453-54; 2458. Her health deteriorated in late 2005. 9RP 1191. She had surgery for the cancer and became more ill with major heart failure. 9RP 1191. In 2006, Sophia was in and out of the hospital about 10 times and had open heart surgery. 7RP 924-25; 9RP 1191-93; 18RP 2500-02.

By this time, animosity had developed between Mr. Doces' children and Pierce. Family members believed Pierce spent a disproportionate amount of time with Mr. Doces to Sophia's detriment.

8RP 1009-11; 9RP 1193-94; 10RP 1400, 1403, 1465-66. They expressed concern that Pierce was not capable of meeting the many needs of their parents. 7RP 925-26; 8RP 1130-34; 9RP 1191-94, 1227-29. Mr. Doces' two sons, as well as his grandson, also believed Pierce was not formal enough and appeared to have more of a social than a caregiving relationship with their parents. 8RP 1015-16; 9RP 1199; 10RP 1399, 1442-43, 1469. They expressed their concerns to Pierce, but nothing seemed to change. 9RP 1194, 1203; 10RP 1404.

The family also wondered why Pierce's children, Katie and David, were at their father's residence as often as they were. 7RP 929; 8RP 1012-13; 9RP 1202; 10RP 1419-23, 1427-29, 1476-77. Mr. Doces knew they were there, however, and said nothing about it. 11RP 1501-02.

Because of the conflict with Mr. Doces' family, Pierce quit working for Mr. Doces in May 2006. 7RP 923-24; 18RP 2481-83; 2586. But at Mr. Doces' insistence, Pierce returned a couple of months later as his personal assistant rather than caregiver. 7RP 923-24; 8RP 1133-34; 9RP 1232-33; 10RP 1474. Mr. Doces' children and grandson disapproved of the rehire. 8RP 1083-87, 1136-38; 9RP 1233; 14RP 1876. Mr. Doces did not share their concerns. 9RP 1234; 10RP 1467-68, 1479-80. His children acknowledged Pierce played an important role in allowing Mr.

Doces to realize his ultimate goal of living his remaining days at his home. 7RP 936; 8RP 1045-46; 9RP 1198-1201, 1230; 10RP 1384. They also said Mr. Doces appeared to get along with, trust, and support Pierce. 7RP 929, 935-36; 8RP 1134; 9RP 1197, 1232; 10RP 1500.

None of Mr. Doces' family members knew the terms of the agreement or how Pierce was to be compensated. 8RP 1056, 1081-84, 1138-40; 9RP 1232-33; 10RP 1405-06, 1474. Pierce told Mr. Doces' accountant she was reimbursed for actual expenses and given room and board. 10RP 1338. The accountant asked Mr. Doces what he was paying Pierce. Mr. Doces said he did not know. 10RP 1338-39; 1349-50. He told the accountant Pierce "is being taken care of." 10RP 1350.

Mr. Doces' attorney, John T. John, was concerned his client did not have a written employment contract that spelled out Pierce's duties and benefits. 15RP 2120-21, 2129-30. Mr. Doces did not follow Mr. John's recommendation to draft a written document. 15RP 2122.

Mr. John observed Mr. Doces and Pierce appeared to have a "relaxed relationship, where he had trust and confidence in her ability to provide for his needs." 15RP 2119. Mr. Doces said his plan was to compensate Pierce after he died in one of two ways. The first would be to make her an executive secretary of a charitable foundation he discussed

forming. 15RP 2009-13, 2116-17, 2123. Alternatively, Mr. Doces would assign her his share of a hydroelectric project that generated income quarterly. 15RP 2123. Finally, Mr. Doces executed the title of a new Cadillac Escalade he had purchased for Pierce's use in Pierce's name. 15RP 2123-24, 2154.

Mr. John set up the foundation as a tax-exempt charitable organization to establish scholarships for students at the University of Washington. 12RP 2102-03. Mr. Doces intended to have family members on the board of the foundation, and formation of the board was a continuing issue. At one point, his son John Doces ("Dr. John") and grandson Johnny ("grandson") were on the list of possible board members. Both were later removed from the list by Mr. Doces, but Dr. Doces was later put back on. 15RP 2103-04.

In fall 2006, Sophia's health declined to the point where she had to be taken out of her home and eventually moved to a nursing home. 7RP 930-31; 9RP 1197-98. Pierce regularly drove Mr. Doces to the home so he could visit his wife. 7RP 931; 18RP 2504-05. Sophia died February 1, 2007. 7RP 932; 9RP 1199-1200. This was a painful time for the family; Mr. Doces' daughter, Helene Senn, recalled Pierce "helped in various ways and was present a lot of the time." 7RP 932-34.

In the period that followed, Senn drifted away because of the conflict between the family and Pierce. On more than one occasion, Mr. Doces told Senn she was not welcome at his home. 7RP 934-35; 8RP 1133. Neither Senn nor other family members could change their father's feelings at the time. 7RP 935. Mr. Doces came to trust Pierce closely. He allowed Pierce to care for the house as well as his affairs. 7RP 935-36. This included writing checks and paying bills. 7RP 936-37, 941, 943; 9RP 1203-04.

In September 2007, Mr. Doces opened a new checking account at Bank of America to be used for his expenses and otherwise for his benefit. 11RP 1544-46. A bank manager recommended a single-user account in Mr. Doces' name that he could transfer money into at any time from another existing account. 11RP 1546-47. Mr. Doces wanted Pierce to have access to the new account for his benefit. 11RP 1547-48, 1553-54.

After a discussion between Mr. Doces and Pierce, Mr. Doces decided to have the account be joint to include Pierce's name. 11RP 1548. He also ordered a joint credit card for Pierce to use to pay for Mr. Doces' expenses. 11RP 1549-50, 1556. Mr. Doces ignored his accountant's advice by making Pierce an authorized check signer. 10RP 1366-67.

The bank manager did not know the terms of Pierce's employment. 11RP 1552-54. The manager explained she would not have opened the account if she believed Mr. Doces did not understand what he was doing. 11RP 1556.

As time went on, Mr. Doces' short-term memory declined. 10RP 1441-42; 15RP 2006. He also had to use a permanent catheter for his non-functioning bladder. 7RP 939; 8RP 1105; 9RP 1207. He did not like the catheter and did not want to accept its necessity. Against Dr. Doces' medical advice – which came after consultation with a neurologist – Mr. Doces had major back surgery in 2008 to help him become more mobile and to try to have the catheter removed. 9RP 1206-08. The surgery achieved neither goal. 9RP 1208-09.

In December 2008, as he had often done before, Mr. Doces' grandson visited his grandfather at his California winter home. 8RP 996-1004, 1027, 1027-1030, 1101-03. The grandson said he was uncomfortable being there. 8RP 1104. Pierce was "antagonistic" toward him during his stay. 8RP 1038. For example, Pierce refused him the use of the Escalade that Mr. Doces bought for her to use. When the grandson said he wanted to take Mr. Doces to lunch using the Escalade, Pierce

intervened and said he had no "legal right" to take Mr. Doces. 8RP 1038-41.

The grandson took Mr. Doces to lunch in a car he had rented. 8RP 1042-43. After lunch, they went to the local branch of the Bank of America because the grandson wanted to see Mr. Doces' credit card statements. 8RP 1043, 1109-10. The statements, which they reviewed at the bank, revealed unusual spending activities. The card had been used at stores such as Gene Juarez, Anthropology, Eddie Bauer, and Nordstrom – places the grandson said Mr. Doces would not have visited. 8RP 1044-45.

When Mr. Doces saw the statements, he was shocked and asked, "Who will take care of me?" 8RP 1045-46. The grandson assured Mr. Doces that if Pierce were out of the picture he would help so that Mr. Doces did not have to move to a nursing home. 8RP 1110.

The grandson did not confront Pierce about what he had learned. 8RP 1047, 1110. When he returned to Seattle, he showed the statements to his father, Dr. Doces. 9RP 1209-10. He also spoke with Mr. John. 8RP 1052-53, 1116; 16RP 2133.

Mr. John was shown the bank statements. 11RP 1210-11, 16RP 2135. He flew to California and met with Mr. Doces and Pierce. 16RP 2135. Mr. Doces was sharp and interested in what was going on. He

knew Pierce had access to the joint account, reviewed the statements, and displayed no concern. 16RP 2137-38. After discussing the matter, Mr. John's focus became the conflict between Mr. Doces and his family, not use of the joint account. 16RP 2139. Mr. John advised Mr. Doces to personally discuss the matter with his family. 16RP 2139-40.

When Mr. John returned to Seattle, he met separately with Mr. Doces' two sons. Neither son expressed concern about what they were told. 16RP 2140-42. As a result of the conversations, Mr. John drafted an email message for the purpose of encouraging Mr. Doces to personally communicate his views to his children. 16RP 2143-44. Mr. John had no concerns about Mr. Doces' mental acuity and ability to understand the issues at the time. 16RP 2144-45. He saw no need to pursue a guardian for his client. 16RP 2145-46.

In spring 2009, Mr. Doces called Dr. Doces from a California hospital. 9RP 1211-12. Dr. Doces had been a part of his father's health care for many years. 9RP 1180-81, 1213. He learned his father's catheter had become dislodged and caused a "major wound infection." 9RP 1214-15. Mr. Doces ended up spending about two weeks in the hospital. Pierce did not notify Dr. Doces or any other family members about the hospitalization. 7RP 947-48, 951, 971; 9RP 1217; 10RP 1454. She did,

however, send Mr. John an email message detailing the incident. 7RP 969-71; 16RP 2146-47; Ex. 33.

Once out of hospital, Mr. Doces flew back to Seattle in the company of Pierce and a registered nurse. 7RP 951; 9RP 1215-16. He was thereafter successfully treated as an outpatient. 9RP 1217. According to Dr. Doces, his father did not understand the seriousness of his medical condition. From that point forward, Mr. Doces spent most of his time in bed. 9RP 1218-19. The incident added to Dr. Doces' concern that Pierce could not care for his father. 9RP 1219.

Dr. Doces notified Senn of their father's hospitalization. 7RP 947-48. Coincidentally, Senn had attended a conference on elder abuse at around the same time and said what she learned was "so reminiscent of everything that we were going through, I just couldn't believe it." 7RP 947-48. She called the Seattle police and spoke with Detective Litalien. A few days later Senn and her brother, Dean, met with Litalien and showed her copies of two months of credit card statements. 6RP 734-35; 7RP 949-52; 10RP 1455. Litalien suggested they obtain a vulnerable adult protective order against Pierce. They did just that on June 11, 2009. 7RP 952-54; 8RP 1143-44. The order prevented Pierce from having contact with Mr. Doces. 7RP 955.

Meanwhile, Litalien went to visit Mr. Doces at his home. 6RP 738. Mr. Doces was in bed at the time. She spoke with him for about 30 minutes. 6RP 740, 756. Litalien identified herself to Mr. Doces and explained why she was there. 6RP 741-42. He seemed to understand, but asked her who she was two or three times during the conversation. 6RP Litalien asked why he did not pay Pierce for the work she had done for him. Mr. Doces said Pierce was "something like the nuns." 6RP 756.

Litalien reviewed the credit card statements with Mr. Doces. According to Litalien, Mr. Doces appeared "shocked, surprised, confused" about the contents of the statements. 6RP 742-43. He said, "My god, I would never have authorized these charges. I did not know." 6RP 756; 19RP 2715. Litalien asked about two specific purchases, one to a jewelry store and the second to Nordstrom. Mr. Doces responded he did not know about the transactions. 19RP 2716. He said he had no idea Pierce charged hundreds of dollars to clothing and shoe stores and that if he had, he would not have approved the expenditures. 19RP 2717. He said he gave Pierce a credit card to use for "whatever we needed, including groceries." 19RP 2716-17. Mr. Doces told Litalien he asked Pierce to give him the credit card statements, but that she had not done so. 19RP 2717.

As she was leaving the residence, Litalien encountered Pierce in the courtyard. Pierce, who was crying, said she did not understand why she was being picked on when she did everything from gardening to taxes to paying bills. Litalien asked Pierce if she was being paid or if she had an employment contract. Pierce said there was no contract and that Mr. Doces pays for what she needs. She said she "had very little needs." 6RP 758-59. Litalien asked about evidence of excessive shopping, including for shoes. Pierce responded that Mr. Doces buys her whatever she wants. She said she reviews the credit card statements each month with Mr. Doces and Mr. John, who approves the purchases. 6RP 759.

Mr. John requested and received bank statements from Pierce listing check payments, with Pierce's handwritten notation explaining each transaction. 16RP 2147-48, 2161-62; Ex. 36. His intent behind the notated statements was to mollify Mr. Doces' children. 16RP 2162. He did not recall whether he reviewed the documents with Mr. Doces. 16RP 2148-49.

After her visit, Litalien contacted Bank of America and received credit card statements and copies of checks from one of Mr. Doces' other accounts. 6RP 760. She asked bank officials to freeze Mr. Doces' account. 6RP 761. After doing that, Litalien contacted the patrol officer

assigned to serve the protection order and directed him to arrest Pierce. 6RP 761.

Later that day, a Seattle police officer served a copy of the order on Pierce at Mr. Doces' residence and arrested her. 8RP 1147-48; 11RP 1572-75. Found inside Pierce's purse were three checks made out to Mr. Doces, six financial access cards in Pierce's name, a Bank of America document, handwritten notes, and several checkbooks. 6RP 762-79. The handwritten notes included Sophia Doces' and Mr. Doces' Social Security numbers, an address, and a "DOB" of "2/5/18." 6RP 771-72.

Pierce later called Mr. Doces on his cell phone. Dr. Doces, who was visiting his father at the time, took the phone and told Pierce she was violating the court order and was to have no contact with Mr. Doces. 7RP 974; 9RP 1219-21.

Mr. Doces took a standardized mental status examination one week after Pierce's arrest. 9RP 1283. The test is not designed to diagnose dementia or any other medical condition. 9RP 1289. Mr. Doces scored 20 of 30. 9RP 1286. The results of the test, as well as Mr. Doces' appropriate answers to questions during their conversation, suggested Mr. Doces had some memory deficiencies but was able to track questions. 9RP 1287, 1295-97.

With Pierce out of the picture, Dr. Doces became involved with his father's estate planning. 9RP 1243-44. He knew Mr. Doces spoke of creating a foundation, but did not know details. 9RP 1243. Mr. Doces had been advised that estate taxes did not apply to foundations. 10RP 1368. He also knew he could transfer wealth from the foundation only to charities; it was not a vehicle for gifting wealth. 10 RP 1368-69.

Dr. Doces and his siblings reviewed the foundation paperwork with their father. According to Dr. Doces, his father closed the foundation. 9RP 1244. In August 2009, Mr. Doces executing a power of attorney that gave his children power to manage his finances. 9RP 1244-46.

Senn spent most of the rest of the summer with Mr. Doces. 7RP 972-73. She found boxes of her father's financial records in Pierce's former living space. 7RP 958-59. She made the contents of the boxes available to Litalien. 6RP 780-807.

After lengthy investigation, the State charged Pierce with first degree theft occurring between September 25, 2007 and June 11, 2009. It also charged Pierce with a violation of the protection order. CP 1-20, 23-24. Finally, it alleged Pierce knew or should have known Mr. Doces was particularly vulnerable and abused her position of trust. CP 23-24.

Pierce filed a motion for a bill of particulars, noting the discovery included many pages of financial statements. Supp. CP __ (sub. no. 37, Motion for Order for Bill of Particulars, filed 5/31/2012). The State responded by informing Pierce it would focus on 325 transactions totaling more than \$182,000, and appended a list of the transactions to the response. Supp. CP __ (sub. no. 42, State's Response to Defense Motion for Bill of Particulars, filed 6/19/12). The State later shortened its list to 273 transactions totaling nearly \$168,000. Supp. CP __ (sub. no. 66A, State's Trial Brief, filed 10/22/12).

A financial analyst employed by the prosecutor's office reviewed bank records for three different bank accounts in Mr. Doces' name, including the joint account. 12RP 1614-17, 1644-46; 12RP 1784-87. The analyst, Rebecca Tyrell, divided the transactions into three time periods, then compared the average monthly expenditures for the three periods. 12RP 1638-41.

The first period, 15 months long, covered a time before Mr. Doces hired Pierce. The average monthly expenditures were \$1,790. 12RP 1639-41.

The second time period, encompassing 27 months, began at the time Mr. Doces hired Pierce and ended when Mr. Doces opened the joint

checking account shared with Pierce. 12RP 1640. The average monthly expenditures were \$4,390. 12RP 1642.

The third period was the 20-month charging period, and began when the joint account was opened. 12RP 1642. The average monthly expenditures were \$12,230. 12RP 1642. The sole check signer on the joint account during this period was Pierce. 12RP 1647-48. There were 60 funds transfers from Mr. Doces' two other accounts to the joint credit card account. The average transfer was \$4,500. 12RP 1651.

The records showed the bulk of the money that funded the joint account -- \$268,000 -- came from a previous account in Mr. Doces' name exclusively. 12RP 1662-63. Of that amount, \$245,000 was transferred online. 12RP 1663-64. According to Senn, her father was fascinated by computers but did not know how to use one on his own. 7RP 899-900. Mr. John understood that Mr. Doces was involved in the transfers, in that he was either making them himself or directing Pierce to do so. 16RP 2156, 2168.

Tyrell put together three binders of documents containing bank and credit card statements for the joint account as well as other documentation to corroborate the 273 transactions. 12RP 1676-80; Ex. 93. This

information revealed 39 transactions with Eddie Bauer from the joint credit card during the third period. Ex. 93 (binder 3, p. 1 of 5).

As an example of how to read the information in the exhibit, Tyrell noted an in-store purchase from Eddie Bauer for \$265.99 for women's clothing. 12RP 1681-84. Another Eddie Bauer purchase was for \$97.94. 12RP 1684. The total for the 39 purchases from Eddie Bauer exceeded \$17,000. Ex. 93 (binder 3, p. 1 of 5).

There were five purchases from Nordstrom using the joint account credit card. Ex. 93. As an example, Tyrell noted a purchase of \$599.26 for a dress, a shirt and a pair of women's shoes. 12RP 1695-98. The total spent at Nordstrom during the charging period from the joint credit card was \$1,972.60. 12RP 1701; Ex. 93 (binder 3, p. 1 of 5).

The evidence also showed purchases totaling \$1,072.28 from the Gap, \$2,019.70 from Old Navy, and 939.83 from shoeline.com. 12RP 1701-08; Ex. 93 (binder 3, pp. 1 and 2 of 5). In addition, Tyrell compiled information showing online transactions using PayPal totaling \$3,854.23. 12RP 1709-12; Ex. 93 ((binder 3, pp. 3 and 4 of 5).

Checks were written to David and Katie Pierce during the charging period. Tyrell received no corresponding invoices indicating the Pierces were being paid for work completed. 12RP 1721-22. Checks written to

David totaled \$108,051 and to Katie \$16,450.64. 12RP 1728-29; Ex. 93 (binder 3, pp. 3-5 of 5).

David Pierce and his girlfriend moved from Portland to Seattle in fall 2008 because Mr. Doces offered him a job as property manager of a building he owned in Edmonds. 17RP 2245-46, 2249-50. Specific terms were not discussed, but David recalled Mr. Doces said he would be paid more than he was earning at his Portland job. 17RP 2247. Mr. Doces said they could live in the boat house on the Seattle property for as long as necessary. David said he needed a written agreement, but Mr. Doces refused, declaring that "we are family." 17RP 2247-48.

Part of the agreement was that David would work at Mr. Doces' Seattle residence for three or four months. 17RP 2250-51. He patched the roof on the house, built a rock retaining wall, landscaped the property, remodeled some of the interior of the house, and did some car maintenance – all at either his mother's or Mr. Doces' direction. 17RP 2251-58.

Meanwhile, Mr. Doces' business partner, who was the property manager of the Edmonds building, refused to relinquish the position. Mr. Doces never told David about his partner. 17RP 2258-59. Once the property manager position fell through, Mr. Doces suggested David

formulate a business plan they could discuss. 17RP 2260. David did so, then presented the plan to Mr. Doces because he needed an investor. Mr. Doces agreed to finance the business. David hand-drafted loan documents for \$125,000 that Mr. Doces signed. Ex. 30. But the next day, Mr. Doces backed out of the loan agreement without explanation. 17RP 2260-67, 2284-86.

Despite his displeasure over these events, David remained in Mr. Doces' employ to house sit and care for anything that happened at the Seattle property over the winter months. 17RP 2265, 2268. He flew to California and drove the Escalade, as well as Mr. Doces' dog, back to Seattle while his mother and Mr. Doces flew back north. He had done that "[q]uite a few times" before. 17RP 2268. David was paid by his mother with checks consistent with the agreement he made with Mr. Doces. 17RP 2270.

Katie said she moved into Mr. Doces' home with Mr. Doces' permission. She had her own medical problems that prevented her from working. 16RP 2186-95; 17RP 2403-04. She helped prepare dinner as necessary, and also looked after the house during two winters when Mr. Doces and her mother went to California. She was not compensated. 16RP 2197-99; 17RP 2359.

Her role later changed and she began working for Mr. Doces. Her duties included running errands, shopping, cooking dinner and helping Mr. Doces get to bed. She also served as companion to Mr. Doces by watching movies with him. 16RP 2204-06. She and Mr. Doces agreed to a monthly wage of about \$2,000. She was paid by checks drawn from the joint account. 16RP 2207-08. The arrangement lasted from about November 2008 to June 2009. 16RP 2209; 17RP 2353, 2368.

Mr. Doces also paid for some of her medication and a trip to Europe. 16RP 2213-16; 17RP 2361-62, 2368-70. Katie wrote eight checks to herself in 2008 when her mother and Mr. Doces were in California. 17RP 2386-87.

Maria and Theodore Kaltsounis testified on Pierce's behalf. They were the Doces' friends for about 40 years and bought a home near Mr. Doces' residence in California. 14RP 1859-62, 1935-39. They also often visited Mr. Doces in Seattle and continued to do so after Sophia's passing. 14RP 1864, 1878. This was in contrast with Mr. Doces' children, who visited less often after Sophia died because of their conflict with Pierce. 14RP 1875-76.

Ms. Kaltsounis observed Pierce cook, clean, and garden. 14RP 1867, 1872. She said Pierce "was always doing something" around the

house. 14RP 1874. Pierce was always cheerful and willing to help. 14RP 1873. Neither Sophia nor Mr. Doces complained or expressed displeasure with Pierce. 14RP 1869-70, 1880-81. It appeared to Ms. Kaltsounis that Mr. Doces at times expected too much out of Pierce. Pierce "worked seven day a [week], 24 hours a day and on holidays." 14RP 1878. Mr. Doces and Pierce nevertheless had a good relationship and Mr. Doces appreciated her efforts. 14RP 1879.

Mr. Kaltsounis said Mr. Doces was aware of the joint bank account and could not understand why others would be troubled about it. 14RP 1951-52. During one conversation about the joint account, Mr. Doces told Mr. Kaltsounis he did not care how much money Pierce spent. 15RP 1981. He told Ms. Kaltsounis he would permit Pierce to buy what she wished until he dies. 14RP 1932. Mr. Doces told Mr. Kaltsounis he did not pay Pierce a wage because he feared it would give her a chance to leave her job. 14RP 1954-55; 15RP 1987.

Although he found Mr. Doces' refusal to pay Pierce a wage "odd," Mr. Kaltsounis said he never questioned Mr. Doces' mental capabilities. Mr. Doces was lucid, sharp, aware, and "definitely capable of handling" his financial situation with Pierce. 14RP 1952-53.

Mr. Doces told Mr. and Ms. Kaltsounis he would take care of Pierce after he passed. He mentioned leaving Pierce his share of the income from a hydroelectric plant, buying her a home, appointing her as secretary in a foundation he planned to create, and giving her the Escalade. 14RP 1881-82, 1892-93, 1909-11, 1930-31, 1950-51, 1962-63.

Pierce testified she never asked for an employment contract because she trusted Mr. Doces and Sophia. 18RP 2461-62. The agreement was that as long as she continued to work for Mr. Doces for the rest of his life, she would "be taken care of." 18RP 2494-96. Pierce understood that to mean from that day forward, her needs would be met even after Mr. Doces died. 18RP 2495-97. She had no reason to question the validity of the agreement because Mr. Doces' "word was his word" and she trusted him as a father. 18RP 2497-98. No one else was privy to their agreement. 18RP 2498-99.

Mr. Doces told Pierce that after he passed, she would become a permanent employee of the foundation with a salary pegged to the cost of living. 18RP 2539-40.

With respect to the joint bank account, Pierce understood she could write checks as well as use debit and credit cards linked to the account. 18RP 2514. Mr. Doces reviewed each of her purchases. 18RP 2514-16.

She kept all receipts and records in several boxes. 18RP 2520-22. Mr. Doces sat with her at the computer and she would show him different things. 18RP 2523. Mr. Doces authorized all transfers of money from his accounts into the joint account. 18RP 2523-25; 19RP 2606-07.

More generally, all financial transactions were personally authorized by Mr. Doces, including checks written to Pierce's children. 19RP 2587-89, 2603-06, 2611-23. Pierce explained she purchased clothing and other items during Mr. Doces' hospital stay with his permission, because he wanted her to leave the items at the California home so she would not have to pack. 19RP 2629-39. Throughout her employment, Pierce believed she was authorized to use the joint account and had done nothing wrong. She received no compensation for her services from the Doces family. 18RP 2562-63; 2670-71.

Pierce wrote checks to her children, David and Katie, as payment for helping around the house. Katie generally helped with cooking, cleaning, dinner, and providing companionship for Mr. Doces. 18RP 2532-34. David did "[a] lot of heavy labor. Mostly outside." 18RP 2534.

Pierce said she kept medical records and created notebooks to keep track of Mr. Doces' medications and their side effects. 18RP 2527-29; 19RP 2577-83. She estimated she spoke with Mr. Doces' doctor once a

week and kept the medical records. 18RP 2544-45. He was hospitalized for an infection caused by his catheter. 18RP 2545-46. With Mr. Doces' permission, Pierce called Mr. John to inform him Mr. Doces was in the hospital. Mr. Doces refused to allow her to contact family members. 19RP 2594-96. Pierce arranged for a nurse to accompany Mr. Doces to Seattle after he was discharged. 18RP 2547-49; 18RP 2596-97.

Upon arrest, Pierce was booked into jail and spent the night there. The next day, she appeared before a judge and was released. 18RP 2551-53. She was not served with any document and did not know about the protection order. 18RP 2553-54. She called "home," to Mr. Doces' residence. Dr. Doces interrupted their conversation and said she was no longer allowed to contact Mr. Doces. She later learned of the protection order. 18RP 2554-55. She never contacted Mr. Doces again. 18RP 2556.

After hearing this evidence, the jury found Pierce guilty of first degree theft and not guilty of violating the protection order. CP 181-82. The jury also found Pierce knew or should have known Mr. Doces was particularly vulnerable, and used her position of trust to facilitate commission of the theft. CP 183-84.

Pierce's offender score was zero. CP 185. Her standard range was zero days to 90 days. RCW 9.94A.510. Relying on the jury-found

aggravating factors, the trial court imposed an exceptional sentence of 12 months and a day. CP 185-200, 216-17; 21RP 48-49. The court also ordered Pierce to pay restitution of \$167,923.32. CP 214; 21RP 49.

C. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY ADMITTED SUMMARIES OF BANK RECORDS THE STATE WAS NOT RELYING ON TO PROVE THEFT.

The State planned to prove its case by establishing Pierce was involved in 273 transactions during the charging period. 4RP 498-99; Ex. 93. It nevertheless sought to introduce a summary of bank records showing about 5,000 transactions, many of which occurred long before the charging period. 4RP 498-99, 503-04; 5RP 543-49. The State acknowledged it would prove up only the 273 transactions listed in their trial brief. 5RP 506-07; Supp. CP __ (sub. no. 66A, at 13-19). The records of the other transactions, the prosecutor explained, provided context and were relevant to show opportunity, intent and common scheme or plan. 4RP 507; 5RP 543-49.

Defense counsel objected to publication of the records to the jury, arguing the evidence was inadmissible under ER 403 and ER 404(b). 4RP 496-98, 500-04; 5RP 550-54, 557. Counsel primarily claimed the evidence would be cumulative to the testimony, confusing to the jury, and

"extremely prejudicial," none of which could be cured with a limiting instruction. 4RP 500-04; 5RP 550-54, 556-57.

The trial court overruled Pierce's objection, finding the evidence admissible to show context, opportunity, intent, and common scheme or plan. 5RP 558-59. The court also found the prejudicial effect of the evidence did not outweigh its probative value. 5RP 559-61. The State presented the evidence, in the form of exhibit 94, during the testimony of Tyrell. 12RP 1624-27. The trial court gave jurors the following limiting instruction:

The State's charges allege only those transactions that are included in State's Exhibit #93.

Other transaction evidence, not included in State's Exhibit #93, has been admitted in this case for the limited purpose of considering the defendant's opportunity, intent, and plan. You may not consider it for any other purpose.

This evidence consists of other transactions that are not part of the State's charges, and are not included in State's [E]xhibit #93. Any discussion of this evidence during your deliberations must be consistent with this limitation.

CP 156 (instruction 6).

This Court reviews a trial court's ruling under ER 403 for an abuse of discretion. State v. Gatalski, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). The rule provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Inclusion of the word "unfair" requires the trial court "to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant." State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758, review denied, 104 Wn.2d 1016 (1985).

One factor to consider in applying ER 403 is whether the State had other means of available proof. Gatalski, 40 Wn App. at 611. As defense counsel emphasized, the State had Tyrell available to present testimony about what the records showed, to identify differences in spending patterns during three different time periods, and to explain the 273 transactions listed in Exhibit 93. Providing the jury with a massive batch of financial summaries was not necessary to understand Tyrell's testimony or methods.

The evidence was also overwhelming, cumulative to Tyrell's testimony, and likely to confuse and mislead jurors. See State v. Brunner, 53 Wn. App. 367, 380, 768 P.2d 509 (1989) (additional witness testimony regarding aggressiveness of man who interrupted defendant's burglary deemed unnecessary because man's own testimony established his aggressiveness; additional testimony would confuse jury), review denied,

112 Wn.2d 1020; overruled on other grounds, State v. Wentz, 149 Wn.2d 342, 350, 68 P.3d 282 (2003).

As defense counsel noted, the evidence invited jurors to comb through all the transactions occurring during the charging period and to question why a particular transaction did not qualify for the State's chosen list of 273 transactions. In that way the evidence would distract jurors from determining whether the State proved that each of the 273 transactions constituted a theft.

The trial court therefore erred by admitting exhibit 94. Pierce anticipates the State may argue that the court's denial of the defense pretrial motion to exclude exhibit 94 is not reviewable because it was not renewed during the course of the trial. But where a trial court's pretrial ruling is final, and neither tentative nor advisory, it is not necessary to renew the objection at trial. State v. Saldano, 36 Wn. App. 344, 347, 675 P.2d 1231, review denied, 102 Wn.2d 1018 (1984).

The court's limiting instruction did not cure the confusing and cumulative nature of the evidence. The sheer volume of the evidence was itself overwhelming and prejudicial. Asking jurors to compartmentalize the evidence and to use it for only limited purposes was not realistic.

Finally, the court' error was not harmless. Improper admission of evidence is not harmless if, within reasonable probability, the error materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Exhibit 94 invited confusion and distraction. It allowed jurors a rare glimpse into the financial activities of a wealthy man, one with several bank accounts and a winter home in the California desert. It raised an inference, albeit unproven, that Pierce targeted Mr. Doces as the victim of a calculated and ongoing theft.

It must be remembered that no one – other than Mr. Doces and Pierce – were privy to any employment agreement between the two. The experienced bank manager believed Mr. Doces knew what he was doing when he opened the joint account. Mr. Doces told several people he bought Pierce the things she wanted. It is therefore reasonable to believe that admission of the overwhelmingly prejudicial exhibit 94 materially affected the jury's verdict. This Court should reverse Pierce's conviction and remand for a new trial.

2. THE TRIAL COURT ERRONEOUSLY ADMITTED MR. DOCES' DEPOSITION TESTIMONY BECAUSE IT WAS NOT BASED ON PERSONAL KNOWLEDGE.

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal

knowledge of the matter.” ER 602. The rule prohibits a witness from relating facts that are based solely on the reports of others; however, in some circumstances, a witness's testimony may be admissible even if partly based on others' reports. State v. Smith, 87 Wn. App. 345, 351–52, 941 P.2d 725 (1997). When a witness testifies to facts that he knows personally in part and partly from others, a trial court should admit or exclude according to the reasonable reliability of the evidence. Smith, 87 Wn. App. at 352.

Pierce objected to admission of Mr. Doces' videotaped deposition testimony, contending his answers to questions indicated he lacked personal knowledge. 4RP 419, 424, 466-476; CP 48-51. The trial court disagreed and admitted the evidence, which was played for the jury. 4RP 469-70; 11RP 1565-67; Ex. 97. This Court reviews a trial court's admission of evidence for an abuse of discretion. State v. Hamlet, 133 Wn. 2d 314, 324, 944 P.2d 1026 (1997).

The deposition, taken more than two years after Pierce's arrest, lasted for about 74 minutes and the transcript of the proceeding is 56 pages long. Ex. 109. Mr. Doces had trouble remembering many things. He could not remember whether Pierce was his caregiver while his deceased

wife was still alive. Ex. 109 at 10. Nor did he remember whether Pierce had children or whether he gave them money. Ex. 109 at 22-23.

He did not remember how much he paid Pierce and did not think they ever discussed her compensation. Ex. 109 at 13, 46. He did not remember opening a joint bank account with Pierce, even after the prosecutor presented four checks that had his name and Pierce's name printed on them. Ex. 109 at 24-27. He did not remember whether he shopped at Eddie Bauer and did not remember \$17,000 of his money was spent at Eddie Bauer during the charging period. Ex. 109 at 17-18. He said he never dealt with Eddie Bauer, but insisted he paid the bills when they came due. Ex. 109 at 18. He did not remember buying clothes from Nordstrom, Old Navy, Anthropology, or Victoria's Secret. Ex. 109 at 18-20.

Mr. Doces said he did not know how he met Pierce. Ex. 109 at 38. He did not remember when he hired her, or for how long she worked for him. Ex. 109 at 42-43. He did not know why Pierce left her job. Ex. 109 at 43-44. He did not remember how Pierce paid for things. Ex. 109 at 54.

Answers to other questions suggested Mr. Doces lacked personal knowledge for his assertions. For example, when asked why Pierce attended the deposition, Mr. Doces said, "Something wrong must have

been done[.]" Ex. 109 at 28-29. Another instance occurred when the prosecutor sought to elicit information about the first employment agreement Mr. Doces made with Pierce. The prosecutor set up the desired answer with her question: "When [Pierce] first started working for you, okay, it looks like you paid her a thousand dollars a month; is that right?" Ex. 109 at 12-13. Mr. Doces answered, "Yeah." Ex. 109 at 13. In his next statement, Mr. Doces acknowledged he did not know how much he paid Pierce. Ex. 109 at 13.

Mr. Doces' answers show he lacked personal knowledge of what was discussed, especially regarding the core issue of Pierce's compensation. The trial court's conclusion to the contrary was an abuse of discretion.

The court's error was not harmless. The court itself recognized the danger in admitting the deposition evidence, stating it was concerned the State would use the deposition as an indication of Mr. Doces' mental state during the charging period. 4RP 469. But rather than excluding the evidence or limiting the jury's use of it, the court simply admonished the prosecutor not to argue that Mr. Doces' answers to questions during the deposition reflected his state of mind during the charging period. 4RP 470.

In addition, admission of the deposition may have misled the jury regarding creation of the joint account. Specifically, Mr. Doces said "it would be a surprise" to see Pierce's name on the checks for the account. Ex. 109 at 27. A reasonable juror could have inferred from the statement that Pierce tricked Mr. Doces into opening the account without realizing it. Such an inference, however, would clash with the testimony of the Bank of America branch manager, who said she would not have opened the account had she believed Mr. Doces did not know what he was doing.

Furthermore, the deposition invited jurors to base their verdict on sympathy for the elderly Mr. Doces, who no doubt had gotten worse during the more than two years that elapsed from the time of Pierce's arrest to the deposition. For these reasons, the trial court's error was not harmless. This Court should reverse Pierce's conviction and remand for a new trial.

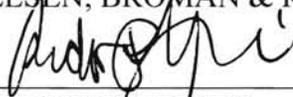
D. CONCLUSION

Because of the trial court's erroneous admission of evidence, this Court should reverse Pierce's conviction and remand for a new trial.

DATED this 6 day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69952-1-I
)	
SAMANTHA PIERCE,)	
)	
Appellant.)	

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 6TH DAY OF NOVEMBER 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] SAMANTHA PIERCE
2033 NE 24TH STREET
RENTON, WA 98056

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER 2013.

x Patrick Mayovsky

NOV 13 2013
11:00 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA