IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RONALD J. HOLDRIDGE, aka ALBERT J. HOLDRIDGE, Appellant.	)	NO. 65039-4-I (Consolidated with No. 65068-8-I) DIVISION ONE UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. BARBARA A. HOLDRIDGE, aka BARBARA A. ADAMS-HOLDRIDGE, Appellant.	)	 FILED: October 24, 2011

Leach, J. — In these consolidated appeals, Albert and Barbara Holdridge challenge their convictions for 12 of 19 charged counts of first degree theft. The trial court did not violate the defendants' right of confrontation by admitting a redacted video recording of the victim, Barbara's mother, Tamara Adams, because the video contained no testimonial statements that were offered for the

truth of the matter asserted. Given the undisputed evidence of Barbara's fiduciary relationship with Tamara as her attorney-in-fact, the court did not comment on the evidence or otherwise err in providing an accurate jury instruction describing the legal status of a fiduciary. And given the jury's split verdict and the nature of the evidence, any error in admitting statements by Tamara to her daughter-in-law as excited utterances was harmless. We affirm.

BACKGROUND

Tamara Adams was born in China in 1922.[1] She and her mother, Anna Hitsenko, immigrated to the United States and settled in Seattle. Tamara married James Adams and had two children: Nicholas, who became an attorney, and the defendant, Barbara Holdridge. James died in 1986, leaving Tamara with investments, a pension, and her house in Ballard. In 1999, Anna Hitsenko established a trust with her own inherited assets called the Hitsenko trust. It was designed to provide for her and Tamara during their lifetimes. She named Nicholas and Barbara co-trustees. Anna Hitsenko died in 2001.

Nicholas was married to Jill Tokarczyk-Adams, an investment advisor in the Olympia office of Smith Barney. Jill managed the Hitsenko trust account and

[1] Understanding the interrelated family and financial connections among the defendants, the victim, and witnesses in this case is helpful. We use first names for the sake of clarity and intend no disrespect.

Tamara's personal accounts. When Nicholas died in 2004, his son James became co-trustee of the Hitsenko trust with Barbara.

Through most of her adult life, Barbara lived with Tamara. She spent most of her time taking care of Tamara and her grandmother, Anna Hitsenko, until Anna passed away. During the 1990s, Tamara suffered from aneurisms and minor strokes. She largely recovered, but family members noted some aftereffects.

Albert Holdridge met Tamara and Barbara in 1988 when he purchased the house next door to Tamara. He became a friend of the Adams family. In 2002, Nicholas hired Albert to remodel Anna's home after she passed away. Soon after that, the family invested in a home near Green Lake that Albert purchased to remodel. Although the deal ultimately lost the family money, they remained on friendly terms with Albert and planned future projects together.

By 2005, Albert and Barbara had become romantically involved. They purchased an historic Spanish-style home on Capitol Hill, which they planned to operate as a bed-and-breakfast called the Musical House. Albert obtained two bank mortgages and personal loans from Barbara to purchase the house and begin renovations. In addition, in 2005 and 2006, Albert obtained loans of $50,000 and $80,000 from the Hitsenko trust through Barbara and Jill to

continue renovations. In December 2006, Albert asked Jill for another $60,000 loan from the trust for further renovations. Jill and James did not agree because the trust agreement limited loans to family members to 25 percent of the trust property, and the loans to Barbara already exceeded that amount.

Albert and Barbara were unhappy with this decision and prevented Jill and James from seeing Tamara at Christmas. On December 30, 2006, they hired an attorney for Tamara who drafted a durable power of attorney giving Barbara control over Tamara's personal assets as attorney-in-fact. The power of attorney named Albert as the alternate attorney-in-fact.

In February 2007, Albert and Barbara arranged a meeting with attorneys and bank employees at Tamara's house. Tamara signed papers transferring securities valued at over $350,000 from her Smith Barney investment account to an investment account at Washington Mutual in Seattle. They also discussed whether Tamara would make a personal $60,000 loan to Barbara and Albert for the bed-and-breakfast to be secured by a third position deed of trust.

The same group met with Tamara again on March 20 to further discuss the proposed $60,000 loan. According to defense witness Michael Malnati, one of the attorneys Albert brought in to advise Tamara, Tamara resisted and asked why she should do this when no one had ever given her anything. Albert

explained that the $60,000 loan would let the bed-and-breakfast get over a financial hump to become revenue producing, but Tamara declined to sign the new loan papers, insisting that she wanted to sleep on it. Later in March, however, Tamara did sign the papers for the $60,000 loan, although Malnati was not present when she did.

During the 14 months after obtaining the power of attorney, Barbara sold more than $200,000 of Tamara's investments and transferred the proceeds to a joint checking account she shared with Tamara at Bank of America. From January 2007 to March 2008, Barbara wrote checks on that account totaling more than $190,000 to Albert and to his credit card and finance companies.

On December 27, 2007, Jill received a telephone call from Tamara. Tamara was very upset. She remained so during the phone call and meetings Jill had with her later that day and the next. In her statements to Jill, Tamara complained that Barbara and Albert had swindled her out of her funds. She also provided Jill a bank flyer on which she had written the December 27 date and the words "Swindler" and "What a daughter."

On January 4, 2008, Jill called Seattle Police to arrange a welfare check on Tamara. When she arrived at Tamara's house, she found Albert talking to police. According to Jill, he told them he had a power of attorney and Jill was

not allowed to see Tamara. Jill eventually was allowed five minutes with Tamara. Tamara, again very upset, said that Albert and Barbara had received a $60,000 loan from her but now had taken all of her funds and were telling her the money was a loan. Jill returned to Tamara's home the next day with an attorney and family friend, but Barbara and Albert prevented her from seeing Tamara.

A few days later, Seattle Police Detective Pamela St. John and Adult Protective Services worker Cathy Baker went to Tamara's home. Barbara spoke with Detective St. John. She became agitated when the detective asked to speak to Tamara alone. Barbara told the detective she did not like Jill's control over Tamara's accounts, so she had transferred Tamara's investments to the Washington Mutual account.

Because Tamara had recently suffered nighttime hallucinations, Ms. Baker administered a preliminary mental status examination and concluded Tamara possibly suffered from mild to moderate dementia. Ms. Baker followed up that visit with others and eventually requested a guardianship for Tamara. During one of their conversations, Tamara discussed the circumstances surrounding the loan and the bed-and-breakfast. She described the business as not a good one because the house was too old and had too few bathrooms.

On March 13, 2008, Albert called Detective St. John, saying he wanted to give her information about the case. The detective met Albert and Barbara at the bed-and-breakfast. Albert said he had been frustrated with Jill's refusal to loan more money from the trust. He also brought up the bank flyer Tamara had written on and given to Jill. Referring to Tamara's money as a "pile of dough," he said he was angry that Jill was spreading rumors that he and Barbara "had stripped Tamara's accounts of $200,000." According to Detective St. John, when she specifically asked if Tamara had ever agreed to loan them money, Albert responded that "Tamara agreed to—and then he had a really long pause—to loan him $60,000."

The State charged Albert and Barbara with 19 counts of first degree theft. The charges covered 19 checks of at least $1,500 payable to Albert drawn against Tamara Adams's bank account in 2007. The defendants were tried together.

Before trial, counsel for the defendants jointly moved to exclude Tamara from testifying, arguing she was incompetent due to her mental health condition, which caused the hallucinations. The State argued that Tamara was competent but ultimately did not call her as a witness. Instead, the State offered a video interview of Tamara taken by a detective and deputy prosecutor. When the

defense objected on confrontation grounds, the prosecutor offered a heavily redacted version that removed any reference to either of the defendants or any of the incidents or evidence leading to the charges. Defense counsel thereafter objected to only part of the redacted video on other grounds. After directing the State to remove an additional small portion of the video, the court authorized admission of the redacted video to demonstrate Tamara's mental condition and not for the truth of any assertions.

The State also sought a pretrial ruling admitting Tamara's statements to Jill from December 27, 28, and January 4 as excited utterances. The defense objected that there was insufficient evidence to show when the startling event prompting the statements had taken place. After an evidentiary hearing, the trial court admitted the statements.

The defendants testified that they believed that Tamara had approved all checks that Barbara wrote to Albert. On cross-examination, Albert specifically identified the checks connected with counts four through nine as the payments for the $60,000 loan Tamara had authorized in March of 2007.

The State proposed jury instructions defining "unauthorized control" and "fiduciary." Defense counsel objected to the instruction on "fiduciary" but offered no competing instruction. The trial court gave the instructions.

The jury found the defendants guilty as charged in counts 1, 3, and 10 through 19 and acquitted them of counts 4 through 9.[2]

ANALYSIS

The Video Interview of Tamara Adams

Barbara and Albert first contend[3] that the trial court violated their right of confrontation by admitting testimonial hearsay in the form of the video interview with Tamara recorded by the prosecutor and detective. Because the Holdridges did not object to individual statements in the heavily redacted version of the video ultimately shown to the jury and because any error in its admission was harmless, we disagree.

In May 2008, prosecutor Ulrey and Detective St. John recorded a 26-minute video interview with Tamara in which she discussed, among other things, the facts leading up to the charges against Barbara and Albert.[4] After the State proposed playing the video for the jury, the defense initially objected that it would violate confrontation. The State conceded that portions of the video did contain testimonial hearsay and indicated it would prepare a redacted version of

[2] Count 2 was dismissed on motion of the defense.

[3] Counsel for Albert did not separately brief the first two issues addressed here but has adopted those arguments in Barbara's brief pursuant to RAP 10.1(g)(2).

[4] Other parts of the record suggest this took place in March 2008, but the actual recording itself recites that it took place on May 19, 2008.

the video. The prosecutor asserted the redacted video would not contain statements regarding any aspect of the case that could be taken for the truth of the matter asserted and would offer it only to demonstrate Tamara's mental state.

After counsel for the defendants received and reviewed a copy of the redacted video, which was just over six minutes long, the defense agreed to the admission of the first three minutes of the video but objected to the remainder. Counsel argued that the jury would likely draw the inference that there was a redaction at the instance of the defense. The defense also objected that parts of the second portion of the redacted video would not be relevant because it merely showed the prosecutor comforting Tamara. After its own review, the court rejected the argument that the jury would necessarily draw any inference adverse to the defense from the mere fact of editing but ordered the State to remove a portion in which Ulrey had comforted Adams. The court otherwise permitted the State to present the video.

The state and federal constitutions guarantee criminal defendants the right to confront the witnesses that bear testimony against them.[5] The confrontation clause limits out-of-court statements made by a nontestifying

[5] U.S. Const. amend. VI; Wash. Const. art. I, § 22.

witness offered for their truth.[6] But a right to confrontation may be waived by a failure to object.[7] We review de novo challenges to the admission of out-of-court testimony under the confrontation clause.[8]

The State edited the video to remove each individual assertion to which the Holdridges objected. The Holdridges affirmatively told the trial court that they had no objection to the first three minutes of the tape. Under these circumstances, the Holdridges failed to preserve their confrontation claim for appeal. Moreover, under the facts of this case and the defense theory of the case, the admission of the redacted tape was harmless beyond a reasonable doubt.[9]

The Holdridges also argue that the absence of a limiting instruction created a substantial risk that the jury improperly considered Tamara's

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[6] Davis v. Washington, 547 U.S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); State v. Davis, 154 Wn.2d 291, 300, 111 P.3d 844 (2005) (testimonial out-of-court statements are admissible when the declarant is unavailable and the defendant was afforded an opportunity to cross-examine the declarant).

[7] See Melendez-Diaz v. Massachusetts, ___, U.S. ___, 129 S. Ct. 2527, 2534 n.3, 174 L. Ed. 2d 314 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.").

[8] State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

[9] We note that the State's position regarding the implications of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), may be inaccurate. See State v. Dash, 163 Wn. App. 63, ¶¶ 20-22, 259 P.3d 319 (2011).

statements for their truth. However, the Holdridges never requested a limiting instruction. "[A] request for a limiting instruction is a prerequisite to a successful claim of error on appeal."[10] "[A]bsent a request for a limiting instruction, the trial court is not required to give one sua sponte."[11] Because no request was made, the trial court had no affirmative duty to give a limiting instruction.

Jury Instruction on Duties of a Fiduciary

Next, the Holdridges argue that the trial court erred by giving the jury instruction defining the duties of a fiduciary. They contend the instruction was improper because it was drawn from the civil law rather than the criminal law, and it constituted a comment on the evidence, reduced the State's burden of proof, and likely confused the jury. We disagree with each of these contentions.

Jury instructions are proper when, as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case.[12] The challenged instruction here was based on Moon v. Phipps[13] and provided,

> A fiduciary, in handling another's (the principal's) property,

[10] State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011) (quoting State v. Noyes, 69 Wn.2d 441, 447, 418 P.2d 471 (1966)).

[11] Russell, 171 Wn.2d at 123.

[12] State v. Reed, 150 Wn. App. 761, 770, 208 P.3d 1274 (2009) (quoting State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004)).

[13] 67 Wn.2d 948, 954-56, 411 P.2d 157 (1966).

> must exercise the utmost good faith, disclose fully all facts relating to his or her interest in and his actions affecting the property involved in the fiduciary relation, and must use his or her principal's property solely for his principal's benefit.

This language, drawn almost verbatim from two portions of the Moon opinion, is an accurate statement of the law. The defendants do not contend otherwise but argue instead that the language is legally irrelevant because it is drawn from the civil law rather than the criminal law. They cite no authority for this proposition, however, and we reject it.[14]

The defendants were charged with theft by means of unauthorized control of Tamara's property. The evidence was undisputed that Barbara acted solely under the authority of the power of attorney when she wrote Albert the checks that led to the charges. It was proper to instruct the jury on the applicable limits of that authority, and it allowed both sides to argue their respective theories. The instruction was not misleading and did not reduce the State's burden of proof.

Nor did the giving of the instruction constitute an impermissible comment on the evidence. Article IV, section 16 of the Washington Constitution prohibits a judge from "conveying to the jury his or her personal attitudes toward the

[14] See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to authority will not be considered).

merits of the case" or instructing a jury that "matters of fact have been established as a matter of law."[15] "But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence."[16] The Holdridges did not dispute that the authority granted by the power of attorney carried fiduciary responsibilities.[17] The instruction did not act to convey the judge's attitude to the jury about any disputed question of fact.[18]

Tamara's Statements as Excited Utterances

Finally, the defendants argue that the trial court erred by admitting Tamara's statements to Jill at the end of December 2007 and beginning of January 2008 as excited utterances. The State argues alternatively that the trial

[15] State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

[16] State v. Winings, 126 Wn. App. 75, 90, 107 P.3d 141 (2005) (citing State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981)).

[17] This was supported not only by the actual language of the power of attorney document, which was admitted into evidence, but also by the testimony by a lawyer-witness and the testimony of each of the defendants.

[18] In a footnote, the defendants suggest that the instruction was confusing to the jury based on a communication that took place with the bailiff. They fail to consider, however, that the communication in question took place early in the trial, well before the jury received the instruction in issue. Whatever issue may or may not have been involved in the jury communication, it necessarily could not have had anything to do with the challenged instruction.

court did not err and that even if it did, any error was harmless. We agree with the State's alternative argument.

The statements began with Tamara's telephone call to Jill on December 27, 2007. Jill described Tamara as extremely upset. Tamara said she was afraid she had no money because Barbara had swindled her out of her funds. She said Barbara had taken her bank statements, including one she had hidden under her bed, and she feared she would not have money to pay bills.

Jill drove to Seattle from Olympia to see Tamara. Tamara showed her the bank flyer on which she had written "Swindler" and "What a daughter." Tamara said she regretted loaning Barbara and Albert the $60,000 because they had taken a lot more than that. Jill returned to Tamara's house the next day. Still very upset, Tamara showed Jill an empty drawer in her dining room where she had kept financial paperwork. She said she had nothing, that Barbara had taken it, and began to cry. Jill called Bank of America and discovered the balances in Tamara's checking account and investment accounts had been greatly reduced. On January 4, 2008, when Jill returned and was allowed to speak briefly with Tamara, Tamara, again visibly upset, said she was sorry to have involved Jill and said that Albert and Barbara were now saying all the money was a loan.

After the State identified the statements from Tamara to Jill that it sought

to admit, the trial court held an evidentiary hearing. Jill was the State's sole witness. In a detailed oral ruling, the trial court found the statements admissible.

We review a trial court's evidentiary rulings for an abuse of discretion.[19] A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.[20] An error in admitting evidence that does not prejudice the defendant is not grounds for reversal.[21] "[W]e apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred."[22]

The trial court admitted Tamara's statements under ER 803(a)(2), the excited utterance exception to the hearsay rule. An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[23] A court may admit a hearsay statement as an excited utterance if the following requirements are met: (1) a startling event or condition occurred, (2) the statement was made while the declarant was still under the stress of the startling event, and (3) the statement related to the startling event.[24] A statement that is the product of

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[19] In re Det. of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).
[20] Duncan, 167 Wn.2d at 402.
[21] State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).
[22] State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); accord State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).
[23] ER 803(a)(2).

reflection or deliberation is not an excited utterance.[25] Spontaneity, the passage of time, and the declarant's state of mind are factors courts consider to determine whether a statement is a product of reflex or instinct rather than a deliberate assertion.[26]

The trial court here specifically identified Tamara's discovery of the alleged embezzlement as the startling event but made no finding as to when that occurred. The defendants argue that the trial court abused its discretion because the State failed to provide proof of the timing of the exciting event. Without such proof, they argue, the trial court was in no position to make the critical determination of whether the passage of time between the startling event and the statements provided Tamara the opportunity for reflection.[27]

The State contends that the record supports a finding that the startling event occurred on December 27 because that was the date Tamara wrote on the bank flyer she gave Jill. But Jill's testimony does not support this inference. Rather, she testified on cross-examination that she could not tell from Tamara's statements when Tamara had discovered the money had been taken, which had

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[24] State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).
[25] See State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001).
[26] State v. Palomo, 113 Wn.2d 789, 796, 783 P.2d 575 (1989).
[27] Warner v. Regent Assisted Living, 132 Wn. App. 126, 140-41, 130 P.3d 865 (2006).

occurred over a period between February and December 2007. Tamara had only said that she did not have a lot of money from the last time she had seen a statement and did not identify when that last time was. Nor did she identify the time at which Barbara had supposedly taken the statements.

As the trial court candidly acknowledged in making its ruling, there is little in the way of closely analogous case law. We note the court's detailed ruling admitting the statements but choose to resolve this case based on the State's alternative argument of harmless error.

We conclude that the admission of the challenged evidence was harmless. First, to reach the split verdict it did, the jury clearly relied primarily on Albert's statements to police and his testimony on cross-examination. When Albert and Barbara were confronted by Detective St. John with the specific question of how much money Tamara had agreed to loan them, the only answer offered was Albert's reference to the single $60,000 loan. Even though Barbara and Albert both testified at trial that they thought Tamara was agreeable to the further checks, neither of them repudiated Albert's statement to the detective or argued the detective had recounted it inaccurately. Nor did either offer any specific document or any oral statement or statements by Tamara in which she actually approved any one of the checks for which they were convicted.

Moreover, the challenged statements were partially cumulative of other hearsay statements by Tamara, admitted through Cathy Baker, concerning Barbara, the loan, the bed-and-breakfast, and Tamara's concerns for her funds.[28] In addition, Tamara's reluctance to invest in the bed-and-breakfast was also suggested by her comments, admitted through attorney Malnati's testimony, about the multiple attempts to get Tamara to sign the papers for the $60,000 loan.[29] Thus, while the defendants argue that the challenged statements prejudiced their defense that Tamara likely approved of the further checks as necessary to protect the earlier investment in the bed-and-breakfast by the Hitsenko trust, we believe the jury would have rejected that claim regardless of

[28] Neither defense counsel objected to these statements, in which Tamara referred to Barbara as the "alleged perpetrator." The statements included that Barbara and Albert had wanted more than the $60,000 Tamara loaned them, that Barbara characterized the additional money as a loan, that Tamara was concerned about her funds, that Tamara believed the house was a poor choice for a bed-and-breakfast because it was too old and had too few bathrooms, and that her impetus for calling Jill had been something she had received from the bank.

[29] The defense also argues that the challenged hearsay was prejudicial because it accused Barbara of hiding Tamara's account records from her. We do not believe this likely had any effect on the jury, however. As trial defense counsel pointed out in closing argument, the uncontroverted evidence from the detective was that she had found financial records in Tamara's home when she served a search warrant on the premises. We also find no prejudice from the use of the bank flyer Tamara gave Jill to cross-examine the defense forensic accounting expert because that document could have been used for such a purpose regardless of independent admissibility. See ER 703.

the statements admitted as excited utterances.

In short, our review of the record satisfies us that there is no reasonable probability that the jury would have reached a different verdict if the trial court had excluded Tamara's statements to Jill from December 27, 28, and January 4.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

Dwyer, C. J.

Becker, J.