IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANN MARIE SILVIS, Appellant.	))))))))))	NO. 66961-3-I DIVISION ONE UNPUBLISHED OPINION FILED: October 31, 2011

Leach, A.C.J. — Ann Marie Silvis appeals her 15 first degree theft convictions for stealing nearly $130,000 from a vulnerable, elderly person. Silvis claims (1) the trial court erred by admitting prior act evidence as evidence of a common scheme or plan, (2) the trial court denied her right to present a defense by denying her motion to recess so she could depose a defense witness who suddenly became unavailable to testify at trial, (3) her trial counsel was deficient for failing to depose that witness before trial, (4) the evidence entitled her to a jury instruction on the good faith claim of title defense to theft, and (5) the trial court erred by ordering restitution from an account she jointly owned with her husband. Additionally, Silvis asserts three errors in a statement of additional grounds. Finding no error, we affirm.

FACTS

In December 2006, 90-year-old Mary Evelyn Finley met 42-year-old Ann Silvis through Jim Cassidy Sr., Finley's 94-year-old friend and fellow resident at an independent living community for those 55 or older. Soon after, Silvis began visiting Finley, driving Finley to her monthly high school reunions, and performing chores for her, such as cooking and cleaning.

In early 2007, Layne McCullough and Arlene Symmons, Finley's nieces, became aware that Finley had a new "friend." Finley told McCullough that her friend had cancer and needed money. Finley was secretive with the details of her friendship, telling McCullough only that the friend's name was Ann.

Several months later, Finley gave McCullough Silvis's phone number. McCullough called Silvis and introduced herself. When asked, Silvis told McCullough her last name was Barnes.[1] McCullough also asked Silvis whether Finley had paid her for her time, and Silvis replied that Finley had not.

Finley became more dependent after she injured herself in a fall. In December 2007, Finley moved to an assisted living home for seniors. McCullough told Silvis that Finley no longer required her help. Silvis, however, continued to visit Finley regularly.

Growing suspicious, Symmons called Finley's attorney, who said that

[1] McCullough later learned Silvis's last name when she asked Finley's pharmacist who had last picked up Finley's prescriptions.

Symmons could inspect Finley's bank records, using her power of attorney. Going to each of Finley's three banks, Symmons discovered several large checks written to Silvis, Silvis's husband, and Silvis's son. When Symmons and McCullough told Finley what they had learned, Finley was "shocked." Symmons and McCullough froze Finley's accounts, obtained a protection order against Silvis, and contacted the Puyallup Police Department.

The State charged Silvis with 15 counts of first degree theft and alleged one aggravating factor: that the victim was particularly vulnerable or incapable of resistance.

At trial, Officer Jason Visnaw, who investigated Finley's case, testified that the checks he examined appeared to have been written by two different people.

Brett Bishop, a documents examiner with the Washington State Patrol, testified that he conducted a handwriting analysis of the checks, using writing samples from Finley and Silvis. For eight checks, Bishop determined that Finley probably did not sign the check or write the payee information, but he could neither confirm nor exclude Silvis as the signer or the writer on those checks. For one of the eight checks, Bishop found indications that Silvis wrote the payee information. His analysis of four checks yielded inconclusive results. And his analysis of three checks indicated that Finley did not sign them. Bishop

concluded that only one check appeared to have been written by Finley. He explained that a document examiner has difficulty determining the author of a simulated signature because the author masks her own handwriting in the attempt to copy another's.

The State presented Finley's videotaped deposition. Finley testified that she gave Silvis money and "it turned out that I was giving her thousands, and I didn't realize I was giving her that much."[2] Finley said that the signature on many of the checks looked like hers, but the rest of the writing did not. She said she did not remember writing checks to Silvis's husband and that she would not have written a check to Silvis's son. Finley told the jury that the checks she gave to Silvis "were changed."

Over Silvis's objections, the trial court admitted evidence that Silvis also had received money from Cassidy as evidence of a common scheme or plan under ER 404(b). His son, Jim Cassidy Jr., testified that between 2003 and 2007, Cassidy wrote Silvis several checks, totaling $101,198. On cross-examination, Cassidy Jr. said that his father, who was very happy with Silvis's friendship, refused to testify against her.

Silvis testified that she "never touched" Finley's checkbook and "never

[2] Finley told McCullough that she wanted to give Silvis $24,000 for helping her resolve an insurance claim.

wrote a check to myself or anything like that." Silvis said that Finley presented the money to her as gifts. According to Silvis, she initially rejected Finley's offers but eventually agreed to accept the checks because of Finley's insistence.

Although Silvis had planned to call Cassidy as a defense witness, he became unavailable because of a broken hip. During trial, Silvis requested that the court recess so she could obtain Cassidy's videotaped deposition in lieu of live testimony. The trial court denied Silvis's request, noting that because Cassidy Jr. had essentially provided the same testimony during cross-examination that Cassidy would, no prejudice would result. The next day, the State produced a letter from Cassidy's doctor, stating Cassidy would not cognitively be able to testify.[3] At that point, Silvis asked to present Cassidy's testimony via live webcam. The State objected, informing the court that it had talked to Cassidy's granddaughter, who said "[she] was very concerned about her grandfather's health because every time the defense goes to contact him, he gets very upset."[4] The trial court determined that the procedure proposed by

[3] The court summarized the contents of the letter as follows, "[I]t is the doctor's opinion that Mr. Cassidy is not in a condition physically or cognitively to make statements regarding any proceeding, nor participate in out-of-facility court appointments. . . . [T]he physician would be willing to revisit his ability to participate in three to four weeks."

[4] The State explained, "And the reason why he's upset is . . . because of Ms. Silvis' [sic] predicament. He doesn't want to see her going to jail, so Angela Cassidy was not only concerned about his health outside of the case . . . she was very concerned because he does get visibly upset whenever he's having to talk about this case."

Silvis would harass or unduly embarrass Cassidy and denied her request under ER 611.

Silvis proposed an instruction on the statutory good faith claim of title defense. The trial court refused to give the instruction, ruling that the record contained no evidence entitling Silvis to it.

The jury found Silvis guilty as charged and found the existence of the aggravating factor as to each count. The trial court set restitution at $129,650 and imposed a 171-month exceptional sentence. After a restitution hearing, the trial court ordered partial payment of restitution through the transfer of funds from Silvis's joint checking account with her husband, which contained approximately $27,000.

Silvis appeals.

ANALYSIS

Admissibility of Prior Acts

Silvis claims that the trial court erred by admitting evidence that she received money from Cassidy under the common scheme or plan exception to the general rule in ER 404(b). We review a trial court's evidentiary rulings for an abuse of discretion.[5] A trial court abuses its discretion when its decision is

[5] In re Det. of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

manifestly unreasonable or is based on untenable grounds.[6]

ER 404(b) prohibits the admission of evidence to prove that a defendant has a criminal propensity. The rule authorizes the admission of evidence of other crimes, wrongs, or acts, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State has the burden of proving that the evidence it seeks to admit qualifies as one of the exceptions to this general prohibition.[7]

"[A] common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances."[8] In order to be admissible, the prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial."[9] "[T]he evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations."[10] The admission of prior acts as

[6] Duncan, 167 Wn.2d at 402.
[7] State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).
[8] State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).
[9] Lough, 125 Wn.2d at 852.

evidence of a common scheme or plan requires substantial similarity between those acts and the crime charged.[11]

Silvis argues that the evidence here was inadmissible because her acts in the two situations were not substantially similar. We disagree. In both situations, Silvis obtained over $100,000 from an elderly person who lived alone after befriending the individual by offering to help with personal affairs. These facts constitute markedly similar acts, against similar victims, under similar circumstances. Because the acts' similarities extend beyond the results, the trial court did not abuse its discretion by admitting the prior act evidence.

Silvis also contends that the evidence was inadmissible because her prior acts did not constitute criminal conduct. ER 404(b) applies to evidence of "other crimes, wrongs, or acts." The inclusion of "acts" suggests that the rule includes any prior conduct. And Silvis does not cite any authority that holds otherwise.[12] Rather, our Supreme Court seemed to reject Silvis's approach in State v. Everybodytalksabout[13] when it stated, "'[A]cts' inadmissible under ER 404(b) include any acts used to show the character of a person to prove the person

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[10] Lough, 125 Wn.2d at 860.

[11] DeVincentis, 150 Wn.2d at 21.

[12] We therefore assume she has found none. State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[13] 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

acted in conformity with it on a particular occasion. . . . Inadmissible 'acts' under ER 404(b) are not limited to acts that are unpopular or disgraceful." We therefore reject Silvis's argument that ER 404(b)'s exceptions are limited to misconduct.

Exclusion of Cassidy's Testimony

Silvis claims that the trial court abused its discretion by denying her motion to recess to conduct a videotaped deposition of Cassidy and by denying her motion to present Cassidy's testimony via live webcam. She argues that the trial court's decisions violated her right to present a defense. We disagree.

Both the state and federal constitutions guarantee an accused the right to compulsory process to compel the attendance of witnesses.[14] That guarantee includes "'the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies.'"[15] This right is not absolute and is limited to the admission of relevant, otherwise admissible evidence.[16] Again, because a trial court has broad discretion in ruling on evidentiary matters, we will overturn a decision only for a manifest abuse of that discretion.

[14] State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

[15] Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

[16] State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Silvis has not shown that the trial court's decisions were manifestly unreasonable or based on untenable grounds. First, the trial court denied her motion to recess because Cassidy's testimony would have been largely cumulative of Cassidy Jr.'s testimony. On appeal, Silvis has not attempted to refute the court's ruling, stating only, "Cassidy's testimony would have been more compelling [than Cassidy Jr.'s]." Second, the trial court denied Silvis's motion to present Cassidy's testimony via webcam under ER 611, ruling that the procedure would result in harassment and embarrassment. Silvis does not directly challenge this ruling either. Rather, she seems to assert that she was entitled to depose Cassidy because the circumstances met the requirements of CrR 4.6, the rule regarding depositions in criminal proceedings. Because CrR 4.6 did not provide the basis of the trial court's rulings, this argument is unpersuasive.

Also, any error was harmless. An error of constitutional magnitude is harmless only if we are convinced beyond a reasonable doubt that the jury would have reached the same result in the absence of the error.[17] Here, if the trial court had granted Silvis's motion to recess in order to take Cassidy's deposition, Cassidy would not have been able to make any admissible statements due to his cognitive state, as evidenced by his doctor's letter.

[17] Maupin, 128 Wn.2d at 928-29.

Because the jury would not have heard Cassidy's testimony anyway, it would have reached the same result.

Ineffective Assistance

Silvis argues that her attorney was ineffective by failing to preserve Cassidy's testimony through videotaped deposition before trial. Because counsel's performance was not deficient, we disagree.

Claims of ineffective assistance present mixed questions of fact and law that we review de novo.[18] To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under Strickland v. Washington.[19] First, a defendant must show a deficiency in counsel's representation. Counsel's representation is deficient if it falls below an objective standard of reasonableness.[20] Second, a defendant must show that the deficient performance resulted in prejudice.[21] Prejudice occurs when it is reasonably probable that but for counsel's errors, "'the result of the proceeding would have been different.'"[22] Failure to establish either prong is fatal to a claim of ineffective assistance.[23] We presume counsel was effective. The defendant has

[18] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
[19] 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[20] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).
[21] Stenson, 132 Wn.2d at 705-06.
[22] State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694).

the burden of demonstrating that there was no legitimate strategic or tactical reason for the challenged conduct.[24] This court evaluates counsel's performance in the context of the entire record.[25]

A trial court may authorize a witness's deposition only when certain conditions exist. A defendant must show that (1) the prospective witness may be unable to attend the trial or hearing or the witness refuses to discuss the case with either counsel, (2) the prospective witness's testimony is material, and (3) that it is necessary to take his deposition in order to prevent a failure of justice.[26] Here, Silvis cannot demonstrate deficient performance because it was objectively reasonable to believe before trial that a request to preserve Cassidy's testimony would not have met the required standard under CrR 4.6(a). Counsel subpoenaed Cassidy and interviewed him approximately two weeks before trial. At that time, Cassidy was cooperative and available to testify. Counsel's performance did not fall below the standard of care based on her inability to foresee Cassidy's precipitous decline.

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[23] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

[24] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[25] Strickland, 466 U.S. at 695-96 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); McFarland, 127 Wn.2d at 335 ("Competency of counsel is determined based upon the entire record below.").

[26] CrR 4.6(a).

Statutory Defense

Silvis claims that the trial court erred by refusing to instruct the jury on Silvis's good faith claim of title defense. We disagree.

Jury instructions are adequate if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.[27] A defendant is entitled to have the jury instructed on his theory of the case if sufficient evidence supports that theory.[28] A defendant must establish each element of an affirmative defense by a preponderance of the evidence.[29] Where a defendant has done so, and the trial court refused to provide the instruction, this court must reverse.[30]

It is a statutory defense to the crime of theft that the defendant appropriated the property "openly and avowedly under a claim of title made in good faith, even though the claim [may] be untenable."[31] Before a defendant is entitled to have the jury instructed on this defense, the defendant must present evidence (1) that the taking of property was open and avowed and (2) showing circumstances which arguably support an inference that the defendant has some

[27] State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).
[28] State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).
[29] State v. Riker, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994).
[30] State v. Williams, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).
[31] RCW 9A.56.020(2)(a).

legal or factual basis for a good faith belief that he or she has title to the property taken.[32] "[T]here must be evidence of good faith beyond a defendant's subjective beliefs."[33]

Here, Silvis fails on both prongs of the test. First, unchallenged handwriting analysis revealed that two different individuals completed the checks, Silvis denied to Finley's nieces that she received money from Finley, and Silvis attempted to conceal her identity by giving McCullough her maiden name. Additionally, Finley's niece testified that Finley was "shocked" when she learned of the theft. Thus, the evidence does not support an inference that the taking was open and avowed.

Second, Silvis testified that she received the money as a gift. But absent some corroborative evidence, this testimony, which establishes her subjective belief only, is insufficient to infer a legal or factual basis for a good faith belief that she had title to the money.[34] Silvis therefore fails to establish the requirements for the good faith claim of title defense. The trial court did not abuse its discretion when it refused to give the requested instruction.

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[32] State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

[33] State v. Chase, 134 Wn. App. 792, 805-06, 142 P.3d 630 (2006).

[34] Silvis argues that Finley's testimony supports her good faith belief. While Finley testified that she intended to give Silvis money, she also explicitly stated that she did not intend to give Silvis almost $130,000. Therefore, Finley's testimony does not support the necessary inference.

Restitution

Silvis claims that the trial court erred by ordering the transfer of funds from Silvis and her husband's joint checking account to be applied toward restitution. She argues, as she did during her restitution hearing, that the money in the account was community property that could not be used to compensate the victim of a crime. We disagree.

Silvis cites Bergman v. State[35] for the proposition that if a party is convicted of a crime "for which he alone could be, and was, prosecuted and convicted, the judgment, both as to the penalty and as to its incident, the costs, operated upon him and him alone," not the marital community.[36]

Here, Silvis testified that she deposited Finley's checks in her joint account. Silvis also admitted that the entire balance of approximately $30,000 in the account came from Finley. There was no evidence, therefore, that the money in the account at the time it was frozen could be attributed to a source other than Finley's checks. Because the only evidence traced the money directly to Finley, she was entitled to its return. Silvis's argument fails.

Both the State and Silvis cite several community property cases to

[35] 187 Wash. 622, 628, 60 P.2d 699 (1936).
[36] See also Dean v. Lehman, 143 Wn.2d 12, 30, 18 P.3d 523 (2001).

support their claims. But those cases involve liability for torts, not the return of stolen money to its owner, and we do not consider them helpful.

Cumulative Error

Silvis argues that cumulative error denied her a fair trial. Because she failed to establish error, we disagree.

Statement of Additional Grounds

Pro se, Silvis raises three issues. None have merit.

First, Silvis claims that Finley was not particularly vulnerable because, at the time that she knew her, Finley was "sharp" and "competent." She further argues that the trial court abused its discretion by excluding Finley's medical records, which would have shown that Finley was in good physical and mental health. Here, however, there was testimony that Finley was of sound mind during the relevant time period, so Silvis cannot show that the exclusion of the medical records prejudiced the outcome of her trial.

Second, Silvis contends that the trial court erred by refusing her request for an appeal bond at sentencing. But the record contains no indication that defense counsel moved for an appeal bond. Because Silvis did not present the issue to the court below, we decline to review it here.[37] Further, Silvis has not

shown that it would have been an abuse of discretion to deny the motion had it been made.

Third, Silvis seems to argue that at least some of the 15 counts of first degree theft constituted the same criminal conduct. Offenses amount to the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim."[38] Silvis asserts that "all the counts have two of the three." But in order to qualify as the same criminal conduct, all three of the listed elements must be present. Therefore, Silvis's argument fails.

Silvis also states, "[T]here can only be one aggravating factor found, that in fact, what the jury found was one aggravating factor . . . , not 15." It is unclear, however, what Silvis means by this statement. We will not consider an appellant's argument in a statement of additional grounds for review if it does not inform the court of both the nature and occurrence of the alleged error.[39] We find this statement insufficient to identify a ground for review.

[37] RAP 2.5(a).
[38] RCW 9.94A.589(1)(a).
[39] RAP 10.10(c).

CONCLUSION

We affirm.

Leach, A.C.J.

WE CONCUR:

Grosse, J