IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KIMBERLY ANN PHILLIPS, Appellant.	No. 38646-1-II Consolidated with 39253-4-II PART PUBLISHED OPINION

Worswick, A.C.J. — Kimberly Phillips was convicted of eight counts of first degree theft. Phillips appeals, arguing (1) the trial court's ruling on her prior convictions was an abuse of discretion and denied her the right to present a defense, (2) a photograph of one of the elderly victims was irrelevant and prejudicial, (3) one of the witnesses who testified against her was incompetent, (4) insufficient evidence supports her convictions and exceptional sentences, (5) the trial court erred by not giving her proposed instructions, and (6) the trial court erred in arriving at the restitution amount. In a statement of additional grounds (SAG),[1] she raises six additional

[1] RAP 10.10(a)

issues. Finding no error, we affirm.

FACTS

A jury convicted Phillips of eight counts of first degree theft against five elderly victims, all occurring between March and September 2007. These victims were between 79 and 93 years old at the time of the trial.

I. Marie Adams

The first victim, Marie Adams, was 84 years old at the time of trial in October 2008. For more than 20 years, she had been unable to walk and had been on oxygen. Adams, who lived alone, put an ad in the paper seeking a part-time caretaker. Phillips responded to the ad. When Phillips met Adams to discuss the caretaker position, Phillips told Adams that Phillips needed money before an escrow company would release a $67,000 check being held for her. She promised Adams a bonus if Adams lent her the money she needed. Adams agreed to go with Phillips to an escrow office, but she wanted to verify the escrow before lending Phillips the money.

Phillips drove Adams's car because Adams no longer had a driver's license and Adams's car could accommodate her mobility scooter. Phillips took Adams to a Washington Mutual Bank to withdraw $5,000, but Adams insisted on holding the money until she could verify the escrow. Phillips then drove Adams to a building that supposedly housed the escrow company, but she told Adams that she could not come inside because it was not wheelchair accessible. Adams refused to hand over the money and asked Phillips to take her home; she could not leave by herself

because she could not reach her mobility scooter. Phillips insisted that Adams hand over the money and Adams refused for several hours, until Phillips finally struggled with Adams and took the money. Phillips then drove Adams home, promising to repay the money, but she never did so.

II. Audrey Seitz

The second victim, Audrey Seitz, was 79 years old at the time of trial. Seitz had Alzheimer's and dementia and had no memory of the five years prior to trial. Seitz required 24-hour care, and her niece, Luanne Larson, hired Phillips as one of Seitz's caretakers. Larson left town for the Fourth of July weekend, leaving Seitz with Phillips. Larson returned to find that Phillips had left her caretaker position. Larson also discovered the bank had "flagged" Seitz's checking account based on withdrawal activity. Larson learned that over the Fourth of July weekend there had been a bank withdrawal for $2,500 and a check for $4,783.20 cashed at a Money Tree check cashing location. Larson identified Phillips in a bank surveillance photograph that showed Phillips and Seitz at the bank on the day that the $2,500 was withdrawn. Evidence at trial also established that Phillips had escorted Seitz to the Money Tree and had persuaded her to cash the check.

III. Corinne Gunderson

The third victim, Corinne Gunderson, was 88 years old at the time of trial. Gunderson lived alone, but her son helped her around the house and monitored her finances. When Gunderson was walking home from the grocery store, Phillips approached and offered Gunderson a ride home. Phillips told Gunderson that employees at Gunderson's bank branch were stealing

and that Phillips needed $7,500 to catch them. Gunderson agreed to give Phillips the money, and the two drove to a different branch where Gunderson withdrew $7,500, which Phillips pocketed. Phillips took Gunderson home and said that she would catch the thieving employees and then return the money. Phillips never repaid the money.

IV. Joy Ostrander

The fourth victim, Joy Ostrander, was nearly 93 years old at the time of trial. Ostrander's neighbors saw Phillips and her vehicle at Ostrander's house several times. One neighbor saw Phillips take Ostrander to Phillips's car and also saw Phillips arrive at Ostrander's house with two young girls. The neighbors also saw Phillips put on nurse's scrubs before entering Ostrander's house. Nobody had hired a nurse to care for Ostrander. Phillips's theft came to light when Ostrander called his 72-year-old girlfriend, Anne Lizotte, telling her that something bad had happened. When Lizotte arrived, Ostrander had $100 and said that a woman got a bunch of money and left him with just the $100. Ostrander told Lizotte that the woman had driven him to the bank and withdrawn money. Ostrander could not describe the woman specifically and did not know her name. Ostrander could not remember who took his money, or when she took it, or how much she took.

Ostrander's daughter, Karen Anderson, testified that Ostrander "usually" kept between $2,000 and $4,000 in a black case hidden in the basement of his house. 4 Verbatim Report of Proceedings (VRP) at 521. Anderson would count the money for Ostrander at least every other month. After Lizotte reported the incident to Anderson, Anderson found that Ostrander's black

case had been rifled through and only $300 remained. Anderson did not report the theft immediately because Ostrander had misplaced his money in the past. But several weeks

after finding that money was apparently missing from the case, Anderson discovered that $5,500 had been withdrawn from Ostrander's bank account, and she notified the police. A bank surveillance photograph showed Ostrander at the bank with a woman on the date of the withdrawal, and the combined testimony at trial demonstrated that this woman was Phillips.

V. Robert Hokenson

The fifth victim, Robert Hokenson, was 86 years old at the time of trial. He had a valid driver's license and was able to drive, although he suffered from memory problems due to a stroke. Hokenson's family helped with his finances, and would call almost daily and visit about once a week to ensure his well-being. When Hokenson was working outside, Phillips approached and asked him for $400, explaining that she needed to get her car out of impound and that her purse was locked inside. Hokenson agreed to help and Phillips followed Hokenson inside his house, taking an envelope with $1,200 in it from Hokenson's top dresser drawer. Hokenson's wife Virginia had found the envelope earlier that day and counted it, placing it in the dresser.[2]

After Phillips left, Virginia found that an envelope with $700 inside was also missing from his desk. Hokenson testified that were also five to six other envelopes in his dresser, each containing $300 to $400, and Virginia testified that none of them were in the dresser after Phillips left. After leaving his home, Hokenson drove to the bank with Phillips, with Hokenson driving part of the way. Hokenson withdrew $3,800 at the bank and Phillips took the money.[3] Phillips

[2] As Robert and Virginia Hokenson share the same last name, we refer to Virginia by her first name for clarity. We intend no disrespect.
[3] Virginia testified that the amount withdrawn was $3,800. The information, however, charged Phillips with stealing $3,080 from Hokenson. The bank documents showing the transaction are

never returned Hokenson's money.

VI. Charges, Motions and Trial

On October 17, 2007, the State charged Phillips with eight counts of theft in the first degree—one count for stealing $5,000 from Adams (count I), two counts for stealing $4,783 and $2,500 from Seitz (counts II and III), one count for stealing $7,500 from Gunderson (Count IV), two counts for stealing approximately $2,000 from Ostrander's home and $5,500 from his bank account (counts V and VI), and two counts for stealing $3,300 from Hokenson's home and $3,080 from his bank account (counts VII and VIII). For each count, the State charged the aggravating factor that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. The State also charged the aggravating factor of abuse of a position of trust for the thefts from Seitz (counts II and III).

Before trial, the State filed an ER 404(b) motion to admit evidence of Phillips's past forgery and theft crimes against elderly and vulnerable victims in the 1980s. The State sought to admit evidence of Phillips's past convictions and a summary of the facts underlying each one. The trial court found the prior convictions admissible to show a common scheme or plan. During motions in limine, the trial court amended this ruling, ruling that the convictions would not be admissible unless Phillips testified that the victims consented to lend her money. The trial court ruled that if Phillips testified, the convictions would be admissible to impeach her, but if she did not testify, the convictions would be excluded.

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not in the record before this court.

At trial, in response to defense counsel's request for clarification, the trial court amended its order again, ruling that the prior convictions would be admissible not to impeach Phillips, but to rebut any material assertion by Phillips that the victims consented to lend her money. The trial court found that the prior convictions would be highly prejudicial and irrelevant unless Phillips first testified and made such a material assertion. The trial court ruled that the evidence would come in under ER 404(b), even though it was "sort of a hybrid" between ER 404(b) and ER 609. 5 RP at 670. The trial court ruled that the facts underlying the convictions that Phillips had pleaded guilty to (including the ages of the victims for those crimes) would be admissible along with the fact that Phillips agreed to pay restitution for other, uncharged crimes.

Before trial, the court held a competency hearing for Ostrander and Hokenson. Hokenson testified at the hearing, confidently recalling many details from the incident with Phillips, and the trial court found him competent.

Ostrander, however, could not remember his age, date of birth, address, or the color of his house. He remembered that his wife was dead, but he could not remember her name. He remembered the name of his daughter Karen, but he identified her as a friend. He did remember that his daughter helped him around the house. Ostrander said he was in court because "man—no, it was the wife, got my money and just took it." 1 RP at 125. Ostrander recalled that a woman came to his house with some children and took whatever they wanted, but he could not remember the woman's name or what the woman looked like. Ostrander reported that the woman would take him places on a horse. He could not remember how long ago this was.

Ostrander remembered that he kept money hidden in his home, though he could not remember how much the woman took. The trial court found that Ostrander was able to relate basic facts about the incident and was therefore competent, but ruled that there would be another competency evaluation before Ostrander testified.

At trial, Ostrander's second competency hearing showed him to have approximately the same ability to relate basic facts. Ostrander repeated his statements that a woman came to his house and took things and that there were children with her. He also repeated his claim that he sometimes rode a horse to go places with the woman. The trial court again found that Ostrander could relate basic facts and that he understood his obligation to tell the truth, making him competent to testify. The trial court found that Ostrander's memory problems were a credibility issue for the jury.

Also at trial, Phillips objected to the State's plan to offer a photograph of Seitz, who did not testify.[4] Phillips argued that the photograph was not relevant and that it would prejudice her by invoking the jury's sympathy. The photograph in question shows Seitz in normal clothing in a home setting, smiling at the camera and not looking exceptionally frail or infirm. The trial court noted that there was nothing unduly prejudicial or sympathetic about the photograph. The trial court ruled that the photograph was admissible, finding that it was no more prejudicial than a victim-in-life photograph in a homicide case and that it would help identify Seitz in the bank photograph the State sought to admit.

[4] The State conceded that Seitz was incompetent and did not call her.

Phillips did not testify or present any evidence at trial. Defense counsel stated that Phillips declined to testify because the trial court had ruled that her prior convictions would become admissible if she did. Defense counsel had advised Phillips that she needed to testify to preserve the issue of the admissibility of her convictions on appeal, but Phillips did not do so.

Before the close of trial, Phillips offered proposed jury instructions. Included in these instructions was proposed instruction six, which stated that, "A person is incompetent if he or she cannot understand the nature and consequences of their interaction with others." Clerk's Papers (CP) at 208. Also included was proposed instruction seven, which read, "Advancing age does not bestow upon an elderly person's family members some type of natural guardianship, as neither age nor eccentricity alone is enough to find incapacity." CP at 209. The trial court rejected proposed instruction six because it would confuse the jury, and because "incompetent" was not an issue included in the particular vulnerability instructions. The trial court rejected proposed instruction seven because it was confusing and unnecessary.

The jury found Phillips guilty of all eight counts of first degree theft. The jury also found the aggravating factor of particular vulnerability on all counts. The jury further found the aggravating factor of abuse of trust for counts II and III against Seitz.

At sentencing, defense counsel stated that if Phillips had testified, she would have said that she was in an abusive relationship at the time of the crimes and that she had taken the money in loans and had intended to repay them. The trial court found that this argument carried little weight because the evidence showed that Phillips did not appear to be in distress or under duress

during the crimes. The trial court stated that the case "scream[ed] out" for an exceptional sentence because of the "extreme vulnerability and position of caretaker." 6 RP at 903. The trial court sentenced Phillips to the maximum 43 months on every count, and ran the sentences consecutively for a total of 344 months. Phillips appeals.

ANALYSIS

I. Prior Convictions—Preservation on Appeal

Phillips asserts that the trial court erred by ruling that her prior convictions would be admissible if she testified. Phillips argues that the trial court erred by admitting the convictions to show propensity in violation of ER 404(b). Phillips has not preserved this issue for review.

Under ER 404(b), evidence of past crimes may be admitted for purposes other than to show propensity, such as to rebut a material assertion. *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999) (quoting 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 114, at 391, § 117 at 411 (3d ed. 1989)). Evidence admitted under ER 404(b) is substantive evidence that can usually be admitted in the offering party's case in chief and is not normally contingent on the defendant testifying.

Here, the State filed an ER 404(b) motion to admit evidence of Phillips's past forgery and theft crimes against elderly and vulnerable victims in the 1980s. The trial court ruled that although Phillips's past convictions would not be admissible for impeachment, they were admissible to rebut the material assertion that the victims consented to give her the money. The trial court ruled that this evidence was admissible under ER 404(b). The State argues that Phillips

did not preserve her objection to the admissibility of this evidence because she did not testify.

The question presented is whether a defendant must testify to preserve an objection to ER 404(b) evidence when the admissibility of said evidence is contingent on the defendant testifying. Division I of this court addressed a similar question in *State v. Mezquia*, 129 Wn. App. 118, 127-32, 118 P.3d 378 (2005). There, the trial court ruled that evidence of the defendant's prior acts would be admissible under ER 404(b), but only if the defendant raised the issue of identity. *Mezquia*, 129 Wn. App. at 126-27. The defendant decided not to call the witness who would raise the issue, and the ER 404(b) evidence was never admitted. *Mezquia*, 129 Wn. App. at 127. The *Mezquia* court held that because the defendant failed to put on the witness and the ER 404(b) evidence was not admitted, the defendant had not preserved the issue for appeal. *Mezquia*, 129 Wn. App. at 131-32.

The *Mezquia* court analogized the situation to *Luce v. United States*, 469 U.S. 38, 43, 105 S.Ct. 460, 83 L.Ed. 2d 443 (1984). *Mezquia*, 129 Wn. App. at 127-32. In *Luce*, the Court decided that a defendant must testify to preserve an objection to the admissibility of evidence under Fed. R. Evid. 609(a).[5] 469 U.S. at 42. The Court held that a defendant's testimony was necessary to create a sufficient record on appeal, reasoning that without the defendant's testimony, a reviewing court cannot say whether the State would have actually offered the offending evidence and cannot decide how prejudicial that evidence would have been. *Luce*, 469 U.S. at 41-42. The Court held that this rule would discourage defendants from attempting to

[5] Our Supreme Court adopted *Luce* as to ER 609(a) in *State v. Brown*, 113 Wn.2d 520, 540, 782 P.2d 1013 (1989).

"plant" reversible error in the proceedings. *Luce*, 469 U.S. at 42.

Here, as in *Mezquia*, the trial court ruled that ER 404(b) evidence was admissible only if the defendant put on a particular defense. 129 Wn. App. at 126-27. Because Phillips did not testify, we cannot predict exactly what would have been admitted at trial. Additionally, whether the convictions would have been used for an invalid ER 404(b) purpose is speculative. And allowing Phillips to challenge the admissibility of her convictions under ER 404(b) without testifying would arguably allow her to plant an error in her trial as the Supreme Court warned against in *Luce*. 469 U.S. at 42. We adopt *Mezquia* and hold that because Phillips has not preserved this issue for appeal, we will not consider it.

II. Prior Convictions—Right to Present a Defense

Phillips further argues that the trial court's decision to admit her past convictions denied her the right to present a defense. We hold it did not.

Appellate courts review a claim of denial of constitutional rights de novo. *State v. Drum*, 168 Wn.2d 23, 31, 225 P.3d 237 (2010). We will consider manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). The state and federal constitutions guarantee a defendant's right to present a defense. *See State v. Tracy*, 128 Wn. App. 388, 397-98, 115 P.3d 381 (2005). Phillips argues that her right to present a defense was denied because had she testified, the State would have admitted her past convictions. We hold that the State's threat to rebut her testimony did not infringe on her right to present a defense. The right to present a defense guarantees that the defendant may present relevant, admissible evidence in her

own defense, not that this evidence will stand unrebutted. *See Tracy*, 128 Wn. App. at 398.

Furthermore, Phillips voluntarily decided not to testify, even after defense counsel advised her that she needed to testify in order to preserve the issue for appeal. Phillips's failure to present a defense was the result of her own informed decision, not any action by the State or the trial court, so her argument on this point fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.[6]

III. Victim Photograph

Phillips next argues that the trial court erred by admitting a photograph of Seitz, the only victim who did not testify. She argues that the photograph was more prejudicial than probative. We disagree.

Relevant evidence is presumed admissible. ER 402. But evidence is inadmissible if unfair prejudice substantially outweighs its probative value. ER 403. We review a trial court's ER 403 rulings with great deference under a manifest abuse of discretion standard. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001) (quoting *State v LuVene*, 127 Wn 2d 690, 706-07, 903 P.2d 960 (1995)). Phillips argues that the photograph was not relevant to any issue before the jury and that its only purpose was to appeal to the jury's sympathy. But the trial court

[6] In the unpublished portion of this opinion, we reject Phillips's contentions that (1) admission of certain evidence and testimony was an error; (2) there was insufficient evidence to support her convictions; (3) there was insufficient evidence to support her exceptional sentence; (4) the trial court improperly instructed the jury; and (5) the trial court erred in arriving at the restitution amount. In addition, we reject all arguments raised in her statement of additional grounds.

found that the photograph would help the jury identify Seitz in the bank surveillance photograph that would also be admitted. The trial court also noted that the photograph did not show Seitz in a hospital bed or hooked up to life support, and it was no more prejudicial than a victim-in-life photograph, which would normally be admissible in a homicide case. Admitting the photograph was not an abuse of discretion and Phillips's argument on this point fails.

IV. Competency

Phillips further argues that the trial court erred by finding Ostrander competent to testify. She argues that Ostrander was incapable of truly relating the facts on which he was examined. We disagree.

We review a trial court's competency rulings for manifest abuse of discretion. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982). "In Washington, adult witnesses are presumed competent to testify." *State v. Johnston*, 143 Wn. App. 1, 13, 177 P.3d 1127 (2007) (citing *Smith*, 97 Wn.2d at 802-03; RCW 5.60.020; CrR 6.12). A witness is not competent to testify if he is of "unsound mind" or appears incapable of receiving facts or relating them truly. RCW 5.60.050. A person is of "unsound mind" if he displays a "total lack of comprehension or the inability to distinguish between right and wrong." *Smith*, 97 Wn.2d at 803. "Witness competency determinations rest primarily with the trial judge, who 'sees the witness, notices his manner, and considers his capacity and intelligence.'" *State v. Cross*, 156 Wn. App. 568, 579, 234 P.3d 288 (2010) (quoting *State v. Swan,* 114 Wn.2d 613, 645, 790 P.2d 610 (1990)). The party opposing a witness bears the burden of showing the witness incompetent. *Johnston*, 143 Wn. App. at 14.

Phillips points to a wide array of memory problems that Ostrander had during his competency hearings. Ostrander could not remember basic facts about his own life, such as his age, date of birth, or address. Ostrander claimed to remember an incident where a woman with children stole his money, but he could recall no real details about the incident. And Ostrander repeated both at the pretrial competency hearing and at the pre-testimony hearing that he rode a horse to go places with the woman. The trial court, which was in the best position to observe Ostrander's demeanor, found that Ostrander was competent because he understood his obligation to tell the truth and was able to relate basic facts.

Ostrander was not incompetent because he did not demonstrate himself to be of unsound mind and because he showed comprehension of basic facts and understood his obligation to tell the truth. Ostrander consistently gave the same account of a woman with children taking his money. Although Ostrander recalled few details from the incident, we do not substitute our judgment for that of the trial judge when reviewing witness competency. *Cross*, 156 Wn. App. at 579. The trial court's decision that Ostrander was competent was not an abuse of discretion.

Even if we were to hold that the admission of Ostrander's testimony was erroneous, any error was harmless. Evidentiary error is harmless if, within reasonable probability, it did not materially affect the verdict. *State v. Scott*, 151 Wn. App. 520, 529, 213 P.3d 71 (2009) *review denied,* 168 Wn.2d 1004, 226 P.3d 780 (2010) (citing *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)). Ostrander's testimony was not necessary for the State to prove its case. The testimony of Ostrander's neighbors showed that Phillips came to Ostrander's house on multiple

occasions, posing as a nurse at least some of the time. Lizotte's testimony showed that Ostrander reported a theft by a woman he could not identify. Anderson's testimony showed that Ostrander's black case where he kept his money had been rifled through, with only $300 left in it. And evidence from the bank showed Ostrander at the bank on the date of the $5,500 withdrawal with a woman Anderson was not familiar with. Ostrander's vague and often confused testimony added very little to the State's case. As such, even if the trial court abused its discretion by finding Ostrander competent, Ostrander's testimony did not, within a reasonable probability, materially affect the verdict. Because the trial court did not abuse its discretion in finding Ostrander competent and because the admission of Ostrander's testimony, if error, was harmless, Phillips's claim on this point fails.

V. Sufficiency of Evidence—Convictions

Phillips next argues that the State failed to meet its burden of proof to show how much money she stole from Ostrander's and Hokenson's homes. Phillips argues that the State failed to prove that Phillips stole at least $1,500 from each victim's home, the amount required for first degree theft under former RCW 9A.56.030(1)(a) (2007). We disagree.

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Drum*, 168 Wn.2d at 34. "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all

inferences reasonably drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

For count V, the State charged Phillips with stealing approximately $2,000 from Ostrander's home. Ostrander had no memory of how much Phillips stole. Ostrander's daughter, Anderson, reported that Ostrander usually kept between $2,000 and $4,000 in a black case hidden in his basement, and there was only $300 left in the case after it had been rifled through. Anderson counted the money at least every other month, and Phillips did not report finding less than $2,000 on any occasion.

Taking all facts and reasonable inferences in the light most favorable to the State, a reasonable jury could conclude that Ostrander had at least $2,000 in the case before it was rifled through. Because there was only $300 left when Anderson found the case, a rational fact finder could have found beyond a reasonable doubt that Phillips stole at least $1,700 from the case. Phillips's claim on this point fails.

For count VII, the State charged Phillips with stealing $3,300 from Hokenson's home. At trial, Hokenson's wife Virginia testified that she found an envelope holding $1,200 on the dining room table, which she put in Hokenson's dresser drawer where he kept his cash. Virginia also testified that Hokenson had withdrawn $700 that week, which he would have kept in his desk, and which was missing after Phillips left. Hokenson did not state that Phillips took any money

from his house except for the $1,200 envelope. Taken in the light most favorable to the State, a reasonable juror could have concluded that Phillips stole the $1,200 envelope, as well as the $700 envelope. Hokenson saw Phillips take the $1,200 envelope, and there is strong circumstantial evidence that Phillips stole the $700 envelope because it was discovered missing after Phillips stole the $1,200 envelope.

Phillips argues that the State failed to prove that the $1,200 envelope and the $700 envelope were two separate amounts of money—the $700 envelope could have been combined with $500 from another source to make the $1,200 envelope. But the State presented evidence that the $1,200 envelope was found on the dining room table and then placed in Hokenson's dresser and that Hokenson would have kept the $700 in his desk. This evidence was not rebutted or impeached. This was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the amounts were separate, and that Phillips stole both of them.

Furthermore, as the State argues, the jury could have found that Phillips took more than just the $1,200 and $700 envelopes. Hokenson testified that there were five to six envelopes in his dresser, each with $300 to $400 in them, which would total between $1,500 and $2,400. Hokenson did not testify that Phillips took these envelopes, nor did he claim that any of them were missing after Phillips left his home. But Virginia testified that there was no money left in the dresser after Phillips left the Hokensons's home. Based on this testimony, a reasonable jury could have concluded that Phillips stole the five to six envelopes with $300 to $400 in each of them. As such, a rational trier of fact could have concluded that Phillips stole both the $1,200 envelope and

the $1,500 to $2,400 also in the dresser, totaling well over the required $1,500. Because the jury had ample evidence to conclude beyond a reasonable doubt that Phillips stole at least $1,500 from Hokenson's home, the evidence was sufficient and Phillips's argument fails.

VI. Sufficiency of Evidence—Particular Vulnerability

Phillips further argues that her exceptional sentence was in error because the State did not present sufficient evidence that each victim was particularly vulnerable. Phillips argues that the State failed to prove particular vulnerability as to Adams, Gunderson, and Hokenson. We disagree.

The aggravating factor of particular vulnerability is set forth in RCW 9.94A.535(3)(b), which allows a court to sentence outside of the standard sentence range if "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." "In order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). "To be a substantial factor, the victim's disability must have rendered the victim 'more vulnerable to the particular offense than a nondisabled victim would have been.'" *State v. Mitchell*, 149 Wn. App. 716, 724, 205 P.3d 920 (2009) (quoting *State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989)). Phillips attacks the evidence at trial based on the third factor of the test outlined in *Suleiman*, arguing that the victims, in spite of their advanced age, were not more vulnerable than younger victims would have been.

A victim's particular vulnerability need not be extreme or unusual, as exemplified by *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). There, our Supreme Court upheld a finding of

particular vulnerability to an assault where the victim was a 52-year-old woman who was five feet two inches tall, and not otherwise disabled. *Sweet*, 138 Wn.2d at 482-83. Washington courts have further recognized that advanced age alone can support a finding of particular vulnerability. *See, e.g., State v. Jones*, 130 Wn.2d 302, 312, 922 P.2d 806 (1996); *State v. Butler*, 75 Wn. App. 47, 53, 876 P.2d 481 (1994); *State v. Clinton*, 48 Wn. App. 671, 676, 741 P.2d 52 (1987). As Phillips points out, however, the published cases finding advanced age as the sole basis for particular vulnerability deal with violent crimes where a victim's age clearly makes her particularly vulnerable. *See, e.g., Jones*, 130 Wn.2d at 312; *Butler*, 75 Wn. App. at 53; *Clinton*, 48 Wn. App. at 676. Phillips argues that in a nonviolent crime like theft by deception, an elderly person might not be any more vulnerable than any other person. While this may be true, if a person is suffering from the physical and mental weaknesses that are sometimes caused by advanced age, that person may be particularly vulnerable to theft by deception.

At the time of the incident, Adams was unable to walk or drive, was on oxygen, and had congestive heart failure. Phillips drove Adams to a building far from her house, where Adams's lack of mobility rendered her all but helpless. Taking the facts in the light most favorable to the State, a reasonable trier of fact could have found that since Adams was unable to walk or drive away, she was particularly vulnerable to the crime.

At the time of the incident, Gunderson lived on her own, but her son helped her around the house and monitored her finances to enable her to live independently. The fact that Gunderson's son needed to monitor her finances indicates that Gunderson's advanced age was

accompanied by mental frailties that made her particularly vulnerable to theft by deception. The jury was entitled to find Gunderson particularly vulnerable on this basis.

At the time of the incident, Hokenson's family was assisting with his finances and was calling and visiting him regularly to ensure his well-being. Like Gunderson, the fact that Hokenson needed family assistance with finances shows that his advanced age was accompanied by reduced mental acuity, which made him particularly vulnerable to theft by deception. The jury was entitled to find Hokenson particularly vulnerable on this basis.

Because there was sufficient evidence for a rational fact-finder to find particular vulnerability as to each victim, Phillips's claim on this point fails.

VII. Jury Instructions

Phillips next argues that the trial court erred by refusing to give her proposed jury instructions six and seven. We disagree.

We review a trial court's refusal to give jury instructions for abuse of discretion. *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009). Jury instructions must accurately state the law and must be supported by the evidence. *State v. Berube*, 150 Wn.2d 498, 510, 79 P.3d 1144 (2003). Jury instructions are improper if they do not permit the defendant to argue her theories of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. *State v. Vander Houwen*, 163 Wn.2d 25, 29, 177 P.3d 93 (2008).

At trial, Phillips offered proposed instruction number six, which stated the definition of incompetence.[7] She also offered proposed instruction number seven, which discussed natural

guardianship and incapacity due to age.[8] The trial court refused both jury instructions because they would confuse the jury.

In arguing that instructions six and seven were necessary, Phillips cites *State v. Simms*, 95 Wn. App. 910, 913-17, 977 P2.d 647 (1999), where we held that advanced age and physical impairment alone do not make a person incompetent or incapable or confer an automatic guardianship on relatives. *Simms* is not on point. Under RCW 9.94A.535(3)(b), it is an aggravating factor that the defendant "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." From the plain language of RCW 9.94A.535(3)(b), it is unnecessary to make a legal determination of incompetence, incapacity, or guardianship to find particular vulnerability. Because both proposed instructions addressed irrelevant issues, the trial court correctly found that they would have confused the jury. This was a proper basis for excluding the instructions and the trial court did not abuse its discretion. Phillips's argument on this point fails.

VIII. Cumulative Error

Phillips further argues that cumulative error deprived her of the right to a fair trial. The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. *State v.*

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[7] Defendant's proposed instruction number six stated: "A person is incompetent if he or she cannot understand the nature and consequences of their interaction with others." CP at 208.

[8] Defendant's proposed instruction number seven stated: "Advancing age does not bestow upon an elderly person's family members some type of natural guardianship, as neither age nor eccentricity alone is enough to find incapacity." CP at 209.

Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The defendant bears the burden of proving an accumulation of error of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). As we hold above, Phillips has not shown any error at trial and her cumulative error claim fails.

IX. Restitution

Phillips next argues that the trial court erred by ordering her to pay $1,500 in restitution for stealing from Ostrander's home (count V). We review a restitution order for abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution is governed by RCW 9.94A.753, which provides that restitution must be based on "easily ascertainable damages for injury to or loss of property . . . ." RCW 9.94A.753(3). "If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." *Griffith*, 164 Wn.2d at 965 (internal citation omitted). Here, as we hold above, the State proved beyond a reasonable doubt that Phillips stole at least $1,500 from Ostrander's house. Because the State met its burden of proof as to the amount Phillips stole, Phillips's claim fails.

Statement of Additional Grounds

I.Burden of Proof

In her statement of additional grounds (SAG), Phillips contends that the aggravating factor of particular vulnerability violates due process by shifting the burden of proof at trial. Phillips argues that the aggravating factor of particular vulnerability places the defendant in a catch-22: in order to exclude a witness's testimony, the defendant must present evidence that the

witness is incompetent, but in doing so, the defendant proves that the witness is particularly vulnerable. Phillips argues that this dilemma violates the due process clause by forcing the defendant to make the State's case on particular vulnerability if she wants to prove incompetence. This issue was not raised at the trial court, but shifting the burden of proof to the defendant is manifest error affecting a constitutional right, reviewable for the first time on appeal. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009); RAP 2.5 (a). We review a claim of denial of constitutional rights de novo. *Drum*, 168 Wn.2d at 31.

The party opposing a witness bears the burden of showing the witness incompetent. *Johnston*, 143 Wn. App. at 14. But competency hearings are not heard before the jury, so they are not evidence at trial. Here, the trial court held two competency hearings for Ostrander and one for Hokenson, all outside the presence of the jury. Nothing from these hearings was admitted as evidence, and the State did not mention these hearings at closing argument. Because the competency hearings were not evidence at trial, Phillips's argument that the particular vulnerability factor unconstitutionally shifted the burden of proof in this case fails.

II. Sufficiency of Evidence—Aggravating Factors

Phillips next argues in her SAG that the State failed to prove the charged aggravating factors beyond a reasonable doubt. Phillips claims that, to prove particular vulnerability, the State was required to prove, under RCW 11.88.010, that the victims were "at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs." SAG at 12. She is incorrect. Chapter 11.88 RCW governs guardianships and RCW

11.88.010 provides the standard for appointing a guardian over an incapacitated person. The aggravating factor of particular vulnerability, however, is provided in RCW 9.94A.535(3)(b). RCW 9.94A.535 does not reference RCW 11.88.010, and does not require any finding of incapacity or guardianship. As we hold above, the State met its burden of proof to show that the victims were particularly vulnerable. Phillips's argument on this point fails.

Phillips also argues that the State failed to prove that she abused a position of trust as to counts II and III against Seitz. Phillips cites former RCW 74.34.020(13) (2006) (*recodified* as RCW 74.34.020(16)), the definition of "vulnerable adult," to support this argument. She claims that, because RCW 74.34.020(16) defines "vulnerable adult" as someone receiving professional care, she cannot be found to have abused a position of trust because she was not a professional, licensed caregiver We first note that under RCW 74.34.020(16), "vulnerable adult" includes not only adults receiving professional licensed care, but also includes adults over 60 who lack the functional, mental, or physical ability to care for themselves. Moreover, chapter 74.34 RCW covers abuse of vulnerable adults and does not deal with sentencing factors. RCW 9.94A.535(3)(n) provides the aggravating factor of abuse of a position of trust, and does not reference the "vulnerable adult" standard from RCW 74.34.020(16). Abuse of a position of trust does not require a finding that the victim was a "vulnerable adult" or that the defendant was a professional caregiver. Phillips's argument on this point fails.

III. Included Offense

Phillips further argues that abuse of a position of trust is an "included offense" in

particular vulnerability. "An element of the charged offense may not be used to justify an exceptional sentence." *State v. Ferguson*, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). But abuse of trust and particular vulnerability are sentencing factors; one cannot be an included offense in the other because neither one is an offense. And Phillips was charged with theft by deception, which does not include abuse of trust or particular vulnerability as an element. Because her argument is without merit, Phillips's claim on this point fails.

IV. Vagueness

Phillips next argues that the aggravating factor of particular vulnerability is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment. We disagree.

A due process violation is manifest error affecting a constitutional right, reviewable for the first time on appeal. RAP 2.5(a); *See State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). In order to survive a vagueness challenge, a statute must be clear enough to give fair warning of what conduct is proscribed, and it must have ascertainable standards of guilt to prevent arbitrary enforcement. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). But as our Supreme Court held in *Baldwin*, sentencing directives do not proscribe conduct, so the due process vagueness test does not apply. 150 Wn.2d at 458. A sentencing directive cannot warn citizens of what is forbidden because it forbids nothing, and it cannot have standards of guilt because one cannot be found guilty of violating it, precluding application of due process vagueness doctrine. *See Baldwin*, 150 Wn.2d at 459. As such, Phillips's argument on this point

fails.

V. Offender Score

Phillips further argues that the trial court miscalculated her offender score by treating all of her convictions in the present case as separate crimes. Phillips argues that counts II and III, counts V and VI, and counts VII and VIII were the same criminal conduct because they were against the same victims on the same days. Under RCW 9.94A.589, current offenses are not added together to calculate an offender score if they were the same criminal conduct. "Same criminal conduct . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). "'A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion . . . .'" *State v. Tili,* 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (quoting *State v. Walden,* 69 Wn. App. 183, 188, 847 P.2d 956 (1993)).

The convictions that Phillips names were not the same criminal conduct because each occurred at a different time and place. Count II charged Phillips with stealing $2,500 from Seitz by withdrawing money from a bank, while count III charged Phillips with stealing $4,783 from Seitz by cashing a check at a Money Tree check cashing location. Because count II occurred at a bank and count III occurred at a Money Tree, the acts occurred at different times and places. Count V charged Phillips with stealing $2,000 from Ostrander's home, while count VI charged her with stealing $5,500 by withdrawing money from Ostrander's bank account. Because count

V occurred in Ostrander's home and count VI occurred at a bank, the acts occurred at different times and places. Likewise, count VII charged Phillips with stealing $3,300 from Hokenson's home, and count VIII charged her with stealing $3,080 by withdrawing money from Hokenson's bank account. Count VII occurred in Hokenson's home and count VIII occurred at a bank, so the acts occurred at different times and places. Because these crimes all occurred at different times and places, they were not the same criminal conduct, and Phillips's argument on this point fails.

VI. Exceptional Sentence

Phillips finally argues that the trial court erred by imposing an exceptional sentence. We hold that the trial court did not err.

The trial court imposed eight consecutive sentences of 43 months, for a total of 344 months. Under RCW 9.94A.589(1)(a), consecutive sentences may be imposed only under the exceptional sentence provisions of RCW 9.94A.535. Under RCW 9.94A.535, a court may impose an exceptional sentence when there are "substantial and compelling reasons" justifying such a sentence. To reverse an exceptional sentence, we must find: "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive . . . ." RCW 9.94A.585(4). We review whether the exceptional sentence was clearly excessive for abuse of discretion. *State v. Smith*, 124 Wn. App. 417, 435 n.15, 102 P.3d 158 (2004), *aff'd,* 159 Wn.2d 778, 154 P.3d 873 (2007).

Phillips first argues that the trial court's reasons were not supported by the record. The trial court's exceptional sentence was based on the jury's verdict that all of the victims were particularly vulnerable and that Phillips abused her position of trust with Seitz. As we hold above, the evidence was sufficient for the jury to make these findings and Phillips's argument on this point fails.

Phillips next argues that the trial court's reasons did not justify the exceptional sentence as a matter of law. To make this argument, Phillips again asserts that there was insufficient evidence to support the aggravating factors. Because we hold that the evidence was sufficient as to all of the aggravating factors, Phillips's argument on this point fails.

Phillips finally argues that her sentence was clearly excessive. To argue that her sentence was disproportionately harsh, Phillips references a news article attached to her SAG that outlines a large theft of credit card information. Because this article is not properly part of the record, we do not consider it. Phillips's sentence was eight times the high end of the standard range. But a sentence many times greater than the standard range is not presumptively excessive—Washington courts have upheld numerous exceptional sentences that more than doubled the standard range, some by as much as fifteen or sixteen times. *See State v. Halsey*, 140 Wn. App. 313, 325-26, 165 P.3d 409 (2007). We conclude that the trial court did not abuse its discretion and did not impose a clearly excessive sentence.

Because the exceptional sentence was based on reasons supported by the record, because these reasons justified the exceptional sentence, and because the exceptional sentence was not

clearly excessive, Phillips's argument that her sentence was excessive fails.

Affirmed.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Williams, J.P.T.