

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | | |
|----------------------|---|-----------------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| |) | No. 10-1-00675-0 KNT |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | STATE'S RESPONSE TO DEFENSE |
| LISA M. O'NEILL, |) | BRIEF OBJECTING TO JURY |
| |) | INSTRUCTIONS ON FIDUCIARY |
| |) | DUTY AND JOINT BANK |
| Defendant. |) | ACCOUNTS |
| |) | |
| |) | |

I. INTRODUCTION

The defendant objects to the four jury instructions proposed by the State that pertain to the duty of a fiduciary. The defendant further objects to the State's proposed instruction setting out the Washington statute that governs the ownership of funds in joint bank accounts. The State is withdrawing its instructions pertaining to fiduciary duty, but reserving the right to re-offer them depending on the evidence put on by the defense at trial. The State is offering a modified version of its instruction pertaining to ownership of funds in joint bank accounts. Such an instruction is necessary and justified for the reasons set out below.

1 **II. ARGUMENT**

2 **a. Because It is Unclear What Evidence the Defense Will Seek to Offer**
3 **on the Subject, the State Hereby Withdraws Its Instructions on**
4 **Fiduciary Duty, but Requests the Right to Re-Offer Them Depending**
5 **on the Evidence Introduced at Trial.**

6 The State has offered four jury instructions that would be important and relevant to the
7 jury's ability to understand the fiduciary duty of the defendant to the victim, should the defense
8 argue that the defendant was the Power of Attorney for the victim. These instructions define a
9 fiduciary, explain the duties of a fiduciary, and state that a fiduciary may not exert undue
10 influence over the person to whom they have a fiduciary duty in order to obtain a gift from that
11 person. In her Trial Memorandum, the defendant states that in July, 2007, the victim, Leonard
12 Swenson, contacted a friend of the defendant's who was a notary, Ms. McCormick, and asked her
13 to notarize a Power of Attorney. Defendant's Trial Memorandum, at 9. This document named
14 the defendant as Swenson's attorney-in-fact. Id. The defendant claims that Swenson executed
15 this document because he was concerned that his children would take his money. Id. The victim
16 does not remember signing such a document. The alleged document is not in the State's
17 possession nor, apparently, is it in the defendant's. Because it is unclear at this time just what, if
18 any, evidence the defense will offer that the defendant was attorney-in-fact for the victim, the
19 State at this time moves to withdraw the instructions that are at issue. Should sufficient evidence
20 be offered at trial that the defendant indeed was attorney-in-fact for the victim, the State asks that
21 it be allowed to re-offer the instructions and that argument be made as to whether they should be
22 given to the jury at that time.

1 **b. The State's Proposed Instruction Regarding Joint Bank Accounts as**
2 **Modified is Proper, Does Not Shift the Burden from the State, and**
3 **Does Not Constitute a Comment on the Evidence.**

4 The State originally offered a jury instruction on the subject of ownership of the
5 funds in a joint bank account. Specifically, that instruction read:

6 Funds on deposit in a joint belong to the depositors in proportion to the net
7 funds owned by each depositor on deposit in the account, unless the
8 contract of deposit provides otherwise or there is clear and convincing
9 evidence of a contrary intent at the time the account was created.

10 That jury instruction that was taken directly from RCW 30.22.090, the Washington
11 statute that governs ownership of funds in bank accounts. The statute from which the instruction
12 was taken reads as follows:

13 Subject to community property rights, during the lifetime of a depositor, or the
14 joint lifetimes of depositors:

15 (2) Funds on deposit in a joint account without right of survivorship and in a joint
16 account with right of survivorship belong to the depositors in proportion to the net
17 funds owned by each depositor on deposit in the account, unless the contract of
18 deposit provides otherwise or there is clear and convincing evidence of a contrary
19 intent at the time the account was created.

20 RCW 30.22.090.

21 In response to the defense argument that the original proposed instruction shifted
22 the State's burden of proof to the defendant, the State has modified that instruction to
23 remove the "clear and convincing" clause. The proposed instruction now reads as
24 follows:

 Funds on deposit in a joint belong to the depositors in proportion to the net
 funds owned by each depositor on deposit in the account, unless the
 contract of deposit provides otherwise or there is a contrary intent at the
 time the account was created.

 See Attachment A.

STATE'S REPLY TO DEFENSE BRIEF OBJECTING
TO STATE'S PROPOSED JURY INSTRUCTIONS ON
FIDUCIARY DUTY AND JOINT BANK ACCOUNTS

1 The defense further argues that the State's proposed instruction is a comment on the
2 evidence. Because the instruction simply summarizes the law and does not comment on or
3 create any inferences as to matters of fact, it does not constitute a comment on the evidence and
4 therefore is permissible.

5
6 “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but
7 shall declare the law.” WA. CONST. art. IV, section 16. State v. Becker, 132 Wn.2d 54, 64,
8 935 P.2d 1321 (1997). “[A]n instruction that states the law correctly and is pertinent to the
9 issues raised in the case does not constitute a comment on the evidence.” State v. Winings, 126
10 Wn. App. 75, 90, 107 P.3d 141 (2005) (citing State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d
11 413 (1981)).

12 The State will offer evidence at trial that the defendant opened joint bank accounts in her
13 name and that of the victim, and that virtually all of the assets deposited into those accounts
14 belonged to the victim. Further, evidence offered by the State will show that the defendant made
15 numerous withdrawals for large amounts from those accounts for her own benefit. The proposed
16 instruction correctly states Washington law as to the ownership of funds in joint accounts, and is
17 pertinent to issues that will be raised in this trial. It is necessary to prevent the misperception
18 that joint account holders mutually own the funds contained in a joint bank account.

19 The defense further argues that the instruction "assumes that ownership of the funds is
20 dispositive of theft." The defense goes on to argue that the instruction comments on the evidence
21 because it fails to mention that "intent is critical and that a joint signatory can withdraw and
22 deposit funds."

1 In the State's proposed "to convict" instruction for Theft, one element that the State must
2 prove is that the defendant "... obtained control over property of another..." In addition, the
3 instruction requires that the State prove that the defendant "intended to deprive the other person
4 of that property."

5 Regarding the defendant's argument as to ownership, in order to prove that the defendant
6 wrongfully obtained the property of another, the State must elicit evidence and establish who
7 owns the property that was taken. The proposed instruction merely clarifies the law in
8 Washington as to who owns the property in a joint account, and prevents any possible
9 misperception by the jury that having one's name on a joint bank account automatically means
10 that one owns those funds. The State's instruction regarding ownership of funds in a joint bank
11 account does not alter what the State must prove in order to convict the defendant of theft.

12 Regarding the defense argument that the instruction fails to mention intent, the "to
13 convict" instruction on the theft charges is the standard WPIC instruction, and remains
14 unchanged. The State must prove that the defendant acted intentionally.

15 Finally, the defense claims that the instruction is erroneous because it fails to mention
16 that "a joint signatory can withdraw and deposit funds." The powers of joint signatories are a
17 factual matter, and depend on individual bank policy. These policies do not dictate ownership of
18 the funds, as such ownership is governed by state law. Because these powers are questions of
19 fact and vary from bank to bank, they are not the proper subject of a jury instruction.

20 **III. CONCLUSION**

21 For all of the reasons set out above, this Court should allow the State to withdraw its
22 fiduciary duty instructions with leave for it to re-argue the issue depending on the testimony at
23

1 trial. Further, it should give the State's proposed instruction as to joint bank accounts as
2 modified.

3 DATED this 20th day of December, 2011.

4 For DAN SATTERBERG, King County Prosecuting Attorney

5
6 By: _____
7 KATHY VAN OLST, WSBA No. 21186
8 Senior Deputy Prosecuting Attorney

9 By: _____
10 PAGE ULREY, WSBA No. 23585
11 Senior Deputy Prosecuting Attorney