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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 10-1-00675-0 KNT
vs.	)	
	)	
LISA O'NEILL,	)	STATE'S RESPONSE TO DEFENSE
	)	MOTION FOR BIFURCATION OF
	)	JURY INSTRUCTIONS AND
Defendant.	)	LIMITING INSTRUCTION
	)	
	)	
	)	

**I. INTRODUCTION**

The defendant asks this court to bifurcate the jury instructions in this case. Specifically, she requests that the Court first instruct the jury on the charged crimes. Then, if the jury convicts, the defense asks that additional instructions be provided to the defense on the vulnerable victim aggravator that is filed on each felony count. In addition, the defendant requests that the court give the jury a limiting instruction that it cannot consider the facts that support the vulnerable victim aggravator in its deliberation on the theft charges.

The State asks the court to deny both the defendant's requests. First, the request for bifurcation of jury instructions should be denied because the Washington Sentencing Reform Act ("SRA") provides no legal authority for such bifurcation of the jury instructions alone or for

1 bifurcation of the proceedings where the charged aggravator is that the victim was particularly  
2 vulnerable. Second, the defense request for the limiting instruction should be denied because  
3 evidence of Leonard Swenson's vulnerability is relevant and admissible to the jury's  
4 determination of the charged crimes.

5 **II. FACTS RELEVANT FOR THE COURT'S CONSIDERATION**

6 The defendant has been charged with fourteen counts of Theft in the First Degree, each of  
7 which alleges that the defendant knew or should have known that the victim was particularly  
8 vulnerable or incapable of resistance and that vulnerability was a substantial factor in the  
9 commission of the offense, under RCW 9.94A.535(3)(b). The facts of the case are set out in the  
10 Certification for Determination of Probable Cause (Attached hereto as "Appendix A") and in the  
11 Trial Memorandum previously filed by the State.

12 **III. ARGUMENT**

13 A. The Sentencing Reform Act does not authorize the bifurcation of jury  
14 instructions.

15 RCW 9.94A.537 of the Washington Sentencing Reform Act governs the prosecution of  
16 aggravating circumstances. Section (4) of that statute explicitly sets out how evidence of such  
17 aggravating circumstances is to be presented, and how jury deliberations are to be conducted:

18 **Evidence regarding any facts supporting aggravating circumstances under**  
19 **RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the**  
20 **trial of the alleged crime**, unless the jury has been impaneled solely for  
21 resentencing, or unless the state alleges the aggravating circumstances listed in  
22 RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating  
23 circumstances is alleged, the trial court may conduct a separate proceeding if the  
evidence supporting the aggravating fact is not part of the res geste of the charged  
crime, if the evidence is not otherwise admissible in trial of the charged crime,  
and if the court finds that the probative value of the evidence to the aggravated  
fact is substantially outweighed by its prejudicial effect on the jury's ability to  
determine guilt or innocence for the underlying crime.

1 RCW 9.94A.537(4) (emphasis added).

2 As is clearly set out in the language of the statute set out above, the facts supporting a  
3 vulnerable victim aggravator are to be presented to the jury during the trial. There is simply no  
4 authority for the bifurcation of proceedings where the aggravating circumstance is that the victim  
5 was particularly vulnerable under RCW 9.94A.535(3)(b).

6 As for the bifurcation of jury instructions in the manner proposed by the defense, the  
7 State will be proposing the standard procedure for instructing the jury on the aggravating  
8 circumstance. Specifically, that circumstance will be provided to the jury in a special verdict  
9 form, and will not be incorporated in the "to convict" instruction. The jury will only address that  
10 special verdict form upon its rendering a verdict of guilty on the theft charge/s.

11 The only apparent authority for the defense position are cases in which a single element  
12 from the "to convict" instruction was bifurcated to a special verdict form where that element  
13 elevated the base crime from a misdemeanor to a felony. See, State v. Oster, 147 Wash.2d 141,  
14 147-48, 52 P.3d 26 (2002); State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005). There is no  
15 discussion in those cases regarding any special procedure where the jury was first instructed on  
16 the "to convict," and then, after a finding of guilty, on the special verdict form. Indeed, the  
17 procedure that the State asks the court to follow is consistent with those cases in that the  
18 aggravating factor is rendered to the jury by means of a special verdict form.

19 Even if the court were to consider following the defense recommendation as to how these  
20 instructions are to be given the jury, it would be virtually impossible to separate evidence of the  
21 thefts from that of the victim's particular vulnerability. The elements of theft by deception and  
22 embezzlement include consideration of the victim's ability to understand the circumstances of the  
23

1 transactions at issue. This is particularly true where, as here, the defense claims that the victim  
2 consented to these transactions.

3 Here, Mr. Swenson's loneliness and grief over the death of his wife, his dementia,  
4 developmental delay and other cognitive impairments are completely relevant as to why he  
5 believed the defendant's deceptive statements that she would take care of his assets, protect him,  
6 and even marry him. The testimony of lay witnesses who knew Swenson and had the  
7 opportunity to observe him and interact with him during the relevant time period will provide  
8 important evidence of Swenson's mental state and vulnerability that will assist the jury in  
9 determining whether he truly consented to the financial transactions that are at issue in this case.  
10 In addition, expert testimony regarding Mr. Swenson's mental capacity and cognitive  
11 impairment is further relevant to helping the jury understand and assess whether Swenson's  
12 deficits impacted his understanding of the financial transactions conducted during this time  
13 period and the impact they had on his financial situation, as well as his vulnerability to the  
14 defendant's deception. All of evidence is an integral part of the res geste of the charged crimes  
15 and is essential to the State's theory of the case, and is therefore not appropriate for bifurcation.

16 B. The Limiting Instruction Proposed by the Defense Are Not Authorized by the  
17 SRA or the Rules of Evidence.

18 The defense argues that the court should issue a limiting instruction prohibiting the jury from  
19 considering evidence of Swenson's vulnerability for any purpose other than determining the  
20 applicability of the aggravating circumstance. Because evidence of Swenson's cognitive and  
21 emotional vulnerability is relevant and material to the jury's decision as to whether the defendant  
22 committed the crimes of theft, the court should deny the defense request for a limiting instruction.

23 ER 105 states:

1           When evidence which is admissible as to one party or for one purpose but  
2           not admissible as to another party or for another purpose is admitted, the court,  
3           upon request, shall restrict the evidence to its proper scope and instruct the jury  
4           accordingly

5           Here, the Court, in its pre-trial rulings, has not ruled that evidence of the victim's cognitive and  
6           emotional impairment is admissible only for the purpose of determining whether the aggravating  
7           circumstance applies. Because the court has not indicated that it will be limiting the  
8           admissibility of that evidence solely for purposes of the aggravator, such a limiting instruction is  
9           inappropriate. Further, were the Court to impose such a limitation, the State would be deprived  
10          of its theory of the case, and prevented from rebutting the defense that has been asserted.

11          Evidence of Leonard Swenson's vulnerability is clearly admissible to establish whether he truly  
12          consented to the financial takings that are charged, and to rebut the defense claim that he did  
13          consent to those the takings. See, State v. Thompson, 153 Wash.App. 325, 223 P.3d 1165  
14          (2009). Further, if the Court were to provide such an instruction, the trial would become  
15          extremely confusing to the jury. As the defense states, "Testimony about the alleged thefts and  
16          the alleged vulnerability are not easily separated." Evidence of the victim's vulnerability will be  
17          part of the testimony of all of the witnesses who were acquainted with him. For the jury to  
18          attempt to separate out that testimony each time they hear it would be virtually impossible, and  
19          would inevitably confuse them far more than it would assist them in determining the truth and  
20          rendering a fair and just verdict.

1 **IV. CONCLUSION**

2 For all of the reasons set out above, this Court should deny the Defendant's Motion to  
3 Bifurcate the Jury Instructions and its Motion for a Limiting Instruction.

4 DATED this 14th day of December, 2011.

5 For DAN SATTERBERG, King County Prosecuting Attorney

6  
7 By: \_\_\_\_\_  
8 KATHY VAN OLST, WSBA No. 21186  
9 Senior Deputy Prosecuting Attorney

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