SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 10-1-00675-0 KNT
	)	
vs.	)	
	)	STATE'S TRIAL BRIEF
LISA O'NEILL,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

I. CHARGES

This case was filed on January 22, 2010. The defendant, Lisa O'Neill, was charged by original information with one count of theft in the first degree - domestic violence and one count of assault in the fourth degree - domestic violence. Count 1, the theft charge, also alleged a vulnerable victim aggravator under RCW 9.94A.535(3)(b). The defendant entered a plea of not guilty to each count.

The State amended the charges on March 25, 2011, charging 14 counts of theft in the first degree - domestic violence and 1 count of assault in the fourth degree - domestic violence. Counts 1 through 14 also allege a vulnerable victim aggravator under RCW 9.94A.535(3)(b) – specifically,

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that the victim of these crimes, Leonard Swenson, was "particularly vulnerable or incapable of resistance." The defendant entered a plea of not guilty to each count.

The State gave notice on September 14, 2011 that it would make a final motion to amend the charges in 4 of the 14 counts to clarify the dates of the transactions, clarify the continuing course of conduct alleged in court 14, and to clarify the language of the vulnerable victim aggravator prior to beginning trial. The defense has been sent a copy of the proposed amendments to the Information. All of these amendments are to correct scrivener's errors, they are not substantive amendments.

The defendant, who is out of custody, is represented by Edwin Aralica. The State is represented by Senior Deputy Prosecuting Attorneys Page Ulrey and Kathy Van Olst.

II. TIME ESTIMATES

This trial including pre-trial motions, should last approximately two weeks.

III. POTENTIAL WITNESSES

The following is a list of potential witnesses that the State may call to testify in its case-in-chief. The State offers this list to assist the court in determining whether any of the jurors are acquainted with the people involved in this case.

- Leonard Swenson
- Beverly Swenson
- Tony Swenson
- Eric Swenson
- Virginia Banker
- Renton Police Detective Pete Montemayor
- Renton Police Officer Rice

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- Renton Police Advocate Harris
- Gail Gibson
- Matt Iwama
- Marlene Schreiber
- Kathy Young
- Angela Heald, M.D.
- Becki Tyrell

IV. FACTS

Leonard W. Swenson is a sixty-nine year old man. He is small in stature, about 5'3", weighs about 125 pounds, and is missing the forefinger on each of his hands. He suffers from some cognitive deficits, mild dementia, and a speech impairment as a result of a stroke he suffered in early 2007. He repeated the 3rd grade twice, and dropped out of school in the 7th grade.

Leonard worked for 27 years in the body shop of Banker's Towing in Renton. Former co-worker and his employer, Virginia Banker, described Leonard as being very timid and non-confrontational. She has never seen him angry. She further described Leonard as the type of person who would "give me his last dime."

Banker said Leonard's wife of 34 years was the 'rock' and together they had a wonderful life. "He depended on his wife for everything." During their years together, Leonard and his wife raised a family. They raised a daughter, Beverly Swenson, and two sons, Eric Swenson and Tony Swenson. Leonard's cognitive limitations, combined with his stable work and family relationships throughout most of his adulthood, contributed to making him more trusting of others. However, Leonard's life changed abruptly on July 9, 2005 when his wife was hit and

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killed in a traffic collision. Banker said that this “threw him for a loop and he was like a fish out of water.”

After his wife's death, Leonard began to go to Classics Sports Bar in Renton a couple of times a week after work. Leonard would have beer and play pull tabs. Leonard would talk with the employees and patrons of the bar about his life and about the settlement he was to receive for his wife’s death. Toward late spring or early summer 2006, Leonard met the defendant at the bar. The first time he met her, he followed her home at her invitation. About a week later, she asked him to spend the night at her house. Leonard slept in a room in her basement. By the end of 2006, Leonard had moved out of his home and into the basement of the defendant’s home. Leonard understood that he would live in the defendant's home for $500/month rent. Leonard stated that the defendant told him that he should make this move because her residence was closer to his workplace. Although they did not have a romantic relationship at the time, Leonard hoped that they would someday. Leonard understood when he moved into O'Neill’s home that she was single. Leonard talked about his romantic interest in O'Neill to the defendant, her family, his family, and to neighbors. In fact, Leonard told his daughter, Beverly, that "Lisa might be your next stepmother." Neither the defendant, nor her family, did anything to discourage Leonard's impression that they would marry someday.

Prior to meeting the defendant, Leonard had sufficient financial resources to cover his expenses. Leonard had bank accounts at Banner Bank, $90,000 in CDs, a home with a mortgage, a Ford Ranger Truck with a loan, two life insurance policies through American National Insurance Company, and income from a steady job. The defendant, however, was not financially secure. She had bank account balances of less than $500 and debt totaling $ 49,337

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from a truck loan, an auto loan, and a personal loan. In addition, the defendant had no steady employment.

Leonard's daughter Beverly was a joint account holder on her father's Banner Bank accounts. In the fall of 2006, she began to be concerned about her father's finances, due to the fact that he was writing a number of large checks to the defendant, a woman he barely knew.

1. The Defendant's Financial Exploitation of Leonard

A. Major Financial Transactions by the Defendant in 2006

On September 30, 2006, Leonard wrote a check to O'Neill in the amount of $1,500. On October 5, 2006, $10,000 was withdrawn from one of Leonard's CDs and transferred to a cashier's check payable to Lisa Marie O'Neill. On October 11, 2006, Leonard wrote a check to the defendant in the amount of $7,000. And on October 17, 2006, more money was withdrawn from Leonard's CDs and a cashier's check in the amount of $23,910.04 written to pay off the loan on the defendant's 2001 Ford F350 pickup truck. The defendant told Leonard that this was a loan, as she would rather pay him $500 a month than to pay interest to a bank. On October 12, 2006, a purchase was made with Leonard's funds for a new computer and accessories at Fry's Electronics for $4,759.83. Beverly Swenson knew that her father had never been to Fry's Electronics prior to meeting the defendant. When asked about the purchase, Leonard recalled that he went with the defendant to Fry's because she was getting a computer. Leonard said that the defendant told him she was going to pay him back. Leonard paid $1,759.83 by check and had to open a credit account for the remaining $3,000. On the same date, Leonard made a purchase at "Auto Glass" for $212.14. The check indicated it was for "Lisa Glass." When asked about this check, Leonard stated that it was for the windshield of the defendant's truck. When asked if the defendant told him why she didn't have any money, Leonard responded that he had

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hoped they might have a relationship one day. He said, “She said someday we might get married, that age, don’t make a difference.”

a. Leonard’s Children's Attempt to Intervene

After seeing all of these checks written to the defendant on their father’s account, Beverly and Tony went to speak with Leonard in early November. When Leonard would not speak with them about the checks, they followed him to the defendant's house. Upon arriving there, Beverly and Tony confronted the defendant about what she was doing with their father's money. The defendant became extremely angry, and refused to speak with them about it. When it became clear to them that they were not going to accomplish anything by talking to the defendant, Beverly and Tony left. Shortly thereafter, as Beverly and Tony were getting food in downtown Renton, they saw the defendant and Leonard driving near Leonard’s bank. Fearing the worst, Beverly and Tony followed the defendant and Leonard, pulling into the bank parking lot, and parking right next to them. While sitting in their car, Beverly and Tony overheard the defendant instructing Leonard to withdraw his money from his account. At this point, knowing that her father's money was at risk, Beverly went into the bank and transferred $13,906.04 from his account into hers, leaving a balance of $1. Leonard, convinced by the defendant that his children were trying to take his money from him, protested Beverly's taking over his funds. Eventually Beverly gave the money back to her father a little at a time before finally returning all of it.

b. The Defendant’s Transfer of Leonard’s Accounts to Her Bank

Within a few days of this incident, on approximately November 3, 2006, the defendant took Leonard to her bank, Boeing Employee’s Credit Union (B.E.C.U.), and opened savings and checking accounts in his name as well as a $10,000 line of credit. On November 27, 2006, the accounts that Leonard and his wife had held for years at Banner Bank were closed.

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On December 6, 2006, a deposit of $10,012.50 was made into Leonard's savings account at BECU. According to Leonard, this money came from one of his CDs that was cashed out. Two days later, a $3,000 withdrawal was made from Leonard's savings account with a transaction description of "Descriptive Withdrawal to Lisa Marie O'Neill." According to BECU, a descriptive withdrawal is a transfer of funds that is done by an account holder.

On December 21, 2006 a $9,000 advance was taken on Leonard's line of credit that had recently been obtained at BECU and was deposited into his BECU checking account. Leonard's bank records show that on that same day, a $5,000 "Descriptive Withdrawal" was made to Lisa Marie O'Neill. O'Neill's personal BECU account shows a corresponding $5,000 deposit on that same date.

When Leonard was interviewed by Renton Police Detective Montemayor about the opening of the new accounts and the line of credit at BECU, he stated that he opened the accounts at O'Neill's suggestion. He said that the defendant told him that BECU was a better banking facility and she had her accounts there. On the day the new accounts were opened, Leonard remembered the defendant talking to the BECU employees at the bank, but he does not know what they were discussing. Leonard said that he did not participate in the conversation; he just signed some papers and was directed to a couch by the defendant so she could finish up business. Leonard knew he had opened new accounts at BECU but it was unclear to Detective Montemayor whether Leonard understood the difference in the accounts.

After signing the documents at BECU, Leonard recalls being issued an A.T.M. card on his account. He said that the defendant "got hold of it and never gave it back." He had given her the PIN number for the A.T.M. card. After defendant obtained his A.T.M. card, Leonard stated that he had no control over his finances. He recalled that the defendant would use the card to

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make withdrawals and then would play pull tabs with the cash. Also, during this time period, Leonard received weekly payroll checks that he would endorse to the defendant because she said she would deposit them in his account. These checks were generally in the $400-$700 range. Leonard does not recall ever seeing his money, or his bank statements, nor does he remember getting information from the defendant about his money in the accounts. Leonard told the Detective, "I don't know where she deposited it."

In addition to these large transactions, the defendant also used Leonard's ATM and credit cards to pay for other household and entertainment expenses. It is clear from the bank records that the majority of the funds that paid the household bills were Leonard's, not the defendant's. During the last 6 months of 2006, the defendant earned approximately $11,663 in wages. Leonard, on the other hand, still had a portion of his savings, some money in CDs, his life insurance, his home, his truck, and steady income from a job.

B. Major Financial Transactions by the Defendant in 2007

In early January 2007, at the direction of the defendant, Leonard cashed out his life insurance policies with American National Insurance Company. On January 10, 2007, American National Insurance Company issued him one check for $3,226.28 and one for $4,324.95 – a total of $7,551.23.

Toward the end of January or early February of 2007, Leonard suffered a stroke. Beverly took him to Valley Medical Center. One of his children then picked him up on the following Sunday. Leonard went to work on Monday. Beverly claims that the stroke made her father's cognitive condition worse. After he had his stroke, the defendant told Leonard she would take care of him and his bills. Consequently, Leonard moved back in with the defendant and Leonard's children saw very little of him over the next year.

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The police investigation revealed that during 2007, the defendant isolated Leonard even further from his family. When Leonard moved in with the defendant, he brought his Ford Ranger truck. Bank records indicate that the last payment on the truck was made in May 2007. As a result of the defendant's failure to make payments on the loan, Leonard's truck was repossessed, leaving him without an independent means of transportation. According to Leonard, the defendant also took away his cell phone so that she wouldn't have to pay his bill.

On September 6, 2007, Leonard retired from Banker's Towing. According to Virginia Banker, he was no longer able to do his job effectively as a result of his stroke. Leonard was also drinking a lot at this time. After retiring, Leonard told police he stayed mainly in the defendant's basement and did chores around the house and yard. Leonard said that did not feel that he was free to leave O'Neill's residence.

Between September 7 and early October 2007, Leonard began to receive weekly unemployment checks in the amount of $411.00. While Leonard received four (4) of these checks totaling $1,644 during this time, he endorsed all of them to O'Neill for deposit. Rather than deposit these checks into Leonard's BECU account, Lisa deposited them each into her own personal BECU account.

On October 11, 2007, the defendant persuaded Leonard to open an account at Bank of America. Leonard does not know why this occurred. He also was not aware that it was a joint account until O'Neill made a comment about it a few months later. Leonard stated that O'Neill never showed him a bank statement for the accounts nor did she give him an ATM card for the accounts.

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C. Major Financial Transactions by the Defendant in 2008

From September 2007 through June 2008, a total of $13,098 in Leonard's Social Security checks and $9101 in unemployment checks were deposited into the joint account he held with the defendant. Upon the deposit of all of the Social Security checks each month, the defendant immediately transferred the money on-line to her own personal account where Leonard could not have access to it. With regard to the unemployment checks, O'Neill deposited all 22 checks into the joint account and then immediately transferred the money from 12 of the checks to her personal account withdrawing the remaining money over time from the joint account.

Also around this time, creditors were foreclosing against Leonard due to the defendant's failure to pay the mortgage on his home. When Leonard was able to sell his home in January 2008 for a slight profit of $8,274 prior to the completion of the foreclosure, that payment was split so that $4,137 went to Leonard's son, Tony, and the remaining $4,137 was wire transferred into Leonard's joint account. Immediately after those funds were deposited, the defendant transferred them on-line into her personal account.

In March and June of 2008, Leonard received additional deposits into the joint accounts for his benefit totaling $14,353.96. Again, immediately after these deposits, the defendant made an on-line transfer of approximately $14,320 into her personal account. Throughout this time, significant cash withdrawals were also made from the joint accounts by use of the ATM card. Leonard did not make any of the transfers because he does not use a computer and he did not make any of the withdrawals because he did possess an ATM card.

2. The Defendant's Exploitation of Leonard was not Limited to his Finances

In addition to using deception and secrecy to obtain and keep control over Leonard's assets, the defendant used physical and psychological abuse to coerce him into continuing to

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allow her to control his assets. Leonard recalls that after he had lived with the defendant for a while, she was less accepting of him and would often become angry with him. The defendant would scold him for not doing things to her standard. She would often push him and knock his hat from his head. In April 2008, the defendant pushed Leonard down a flight of stairs. Leonard's back hurt for a long period of time afterward, and he suspected that he had a cracked rib. Leonard told police that he did not go the hospital but wanted to. He said he did not feel he had the means to get to a hospital without the defendant's assistance. When the police questioned Leonard further about why he did not ask to be taken to the hospital at the time, Leonard stated, "I was kind of scared." Leonard described O'Neill's general disposition as being "mean" and that he was intimidated by her.

Leonard also told police that the defendant had hit him with a phone and, on another occasion, with a rusty saw. Leonard said the defendant would call him names and belittle him. After Leonard's stroke, from which he suffered a speech impairment, the defendant would allow Leonard to go with her to meet friends in a bar. However, before going out the victim said that O'Neill would tell him "not to say nothing to nobody else. Don't talk. Don't talk at all…. I couldn't talk good anyways, so she told me to be quiet." Even within the defendant's home, Leonard could not walk upstairs without calling out for permission. Leonard said he did not have access to a phone in the defendant's house because she had no land line and he had no cell phone.

Finally, one night during the week of July 7, 2008, Leonard woke at about 5:30 a.m. He knew that O'Neill had stayed up until about 3:00 a.m. watching television. He turned the porch light off and walked out of the house. He told police that he was afraid that if the defendant saw him leaving, she would have pulled him back into the house. Leonard walked to Banker's

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Towing, approximately 5.4 miles from the defendant's house. He knocked on the door of Virginia Banker's apartment. Banker recalled Leonard saying that he had left O'Neill and had nowhere to go. Banker allowed Leonard to stay with her until he was able to contact his family.

Approximately one week later, on July 18, 2008, Leonard was interviewed by Adult Protective Services worker Kathleen Young. He reported that the defendant physically and verbally used him. He said that the verbal abuse occurred several times daily, and included her calling him a "faggot," a "moron," an "idiot," and a "leprechaun." He added, "I don't seem to be doing things the way she wants it done." He said that O'Neill would "bop" him, push him, and hit him with the cell phone "if I didn't say things right." He said this had occurred a couple of times a week for the past year. He said that he began to give her money because she told him she was a victim of identity theft and needed money to pay her bills. When Young asked him where his credit cards currently were, Leonard answered, "She's got the cards." He also said that the defendant told him not to talk. He added, "She did things so fast I got confused… I couldn't think straight. Do this now. Do that now." He ended his interview by saying, "Within the past year, I felt like I was a slave. I had to stay in my room. I could never stay in the living room and watch TV." He said he felt trapped in O'Neill's home with no transportation, money or telephone.

On March 12th of 2009, Leonard was evaluated at the request of Detective Montemayor by Angela Heald, M.D., a geriatric psychiatrist. In the interview, Leonard told Dr. Heald that he had stopped paying the mortgage on his home after moving in with the defendant because she told him to. He could not explain to the psychiatrist why it was a good idea to leave his home in the first place, or how he had thought that not paying his mortgage was a good idea. He reported

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that the defendant had told him that paying her rent left him open to the option of eventually buying into her split-level home.

Regarding his bank accounts, Leonard told Dr. Heald that he would sign his checks for her to deposit into what he believed was his account. He was unable to explain why he thought this was a good idea. He stated that the defendant had created a joint account for them both at Bank of America from which she withdrew his money. He reported that at no time did he suspect that the defendant was using his funds without his permission. He said that he later discovered credit cards in his name that he was not using but for which he was being billed and that much of his money was gone.

After an in-depth interview and testing of Leonard, Heald concluded that he "appears to have a dementia of a vascular type given his history of stroke. . . he had significant deficits in his frontal assessment battery, which reveals deficits in executive functioning and decision-making capacity." Additionally, Leonard's testing indicated a lapse in attention and concentration and he exhibited significant problems completing one of the more sensitive tests for cognitive impairment. Leonard also demonstrated some difficulty in learning new information and processing appropriately, which, Heald concluded, "combined with his disturbances in executive functioning, and impairment in his regular functioning by way of losing his job of 27 years, and losing a large amount of his finances in very poor decision-making, he meets the criteria for a dementia."

When Leonard left the defendant's home under cover of darkness, he did so with a small plastic bag of his few belongings. As a result of the time he had spent with the defendant, Leonard had lost all of his assets, could not afford to pay his bills, and his credit was ruined. The defendant, on the other hand, now owned her expensive truck free and clear, purchased the home

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she'd been renting, and had numerous other new possessions. The Bank of America records for the joint accounts indicate that as of the date of their opening until they were closed, Leonard deposited a total of $40,956 into them. During the same period of time, the defendant deposited a total of $94 into the accounts. Of the $40,956 that Leonard put into the joint accounts, the defendant transferred $37,365 from the accounts into her own personal account for her own use.

The following table is a summary of the major thefts charged in this case. The table sets out each charged count, the date of the offense, and the corresponding assets that were taken. It was created from the summary of the bank records belonging to the defendant and Leonard:

COUNT	DATE	ORIG. SOURCE	Amount of Theft	Use of Theft Proceeds
Count 1	10/17/06	Swenson Banner Bank CD	$23,910.04	Converted CD to cashier's check to pay off Lisa O'Neill's truck
Count 2	11/21/07	Swenson Social Security check	$ 1,700.00	Online transfer to O'Neill separate Bank of America account
Count 3	12/19/07	Swenson Social Security check	$ 1,625.00	Online transfer to O'Neill separate Bank of America account
Count 4	1/11/08	Proceeds from sale of Leonard's House	$ 4,100.00	Online transfer to O'Neill separate Bank of America account
Count 5	1/17/08	Swenson Social Security check	$ 1,600.00	Online transfer to O'Neill separate Bank of America account
Count 6	2/21/08	Swenson Social Security check	$ 1,644.00	Online transfer to O'Neill separate Bank of America account
Count 7	3/19/08	Swenson Social Security check	$ 1,644.06	Online transfer to O'Neill separate Bank of America account
Count 8	4/2/08	Platinum Escrow check to Swenson	$ 4,900.00	Online transfer to O'Neill separate Bank of America account
Count 9	4/9/08	Platinum Escrow check to Swenson	$ 2,620.00	Online transfer to O'Neill separate Bank of America account
Count 10	4/17/08	Swenson Social Security check	$ 1,644.00	Online transfer to O'Neill separate Bank of America account
Count 11	5/21/08	Swenson Social Security check	$ 1,640.00	Online transfer to O'Neill separate Bank of America account
Count 12	6/18/08	Swenson Social Security check	$ 1,600.00	Online transfer to O'Neill separate Bank of America account
Count 13	6/30/08	Swenson check from Law Offices of David Richardson	$ 6,800.00	Online transfer to O'Neill separate Bank of America account

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Count 14	9/30/06-6/30/08	**All of the above plus items below:**	**$ 55,427.10**	
	9/230/06	Swenson Banner Bank CKG	$ 1,500.00	Check from Swenson to O'Neill
	10/5/06	Swenson Banner Bank CD	$ 10,000.00	Converted CD to cashier's check written to O'Neill
	10/11/06	Swenson Banner Bank CKG	$ 7,000.00	Check from Swenson to O'Neill
	11/28/06	Swenson BECU Withdrawal	$ 2,000.00	Withdrawal from Swenson to O'Neill separate BECU account
	12/8/06	Swenson BECU Withdrawal	$ 3,000.00	Withdrawal from Swenson to O'Neill separate BECU account
	12/21/06	Swenson BECU withdrawal	$ 5,000.00	Withdrawal from Swenson to O'Neill separate BECU account
		Count 14 TOTAL	**$ 83,927.10**	

V. PRETRIAL RULINGS

There have been two defense pre-trial motions filed to date in this case. The defense filed a Motion for a Bill of Particulars which the State provided in a responsive brief so the Motion was stricken without any ruling by the court. The defense also filed a Knapstad motion to dismiss Counts I through XIV of the Amended Information. The Knapstad motion was denied by the court.

VI. EVIDENTIARY ISSUES

1. Exclusion of Witnesses

The State requests that the court exclude witnesses from the courtroom. ER 615 generally authorizes the court to exclude witnesses upon the motion of any party, or upon its own motion. The rule specifically does not authorize exclusion of an officer designated by the State. ER 615. In this case, if an officer does sit with the State during trial, it would be Detective Pete Montemayor of the Renton Police Department.

2. Defendant's Statements – *CrR 3.5 Hearing Not Necessary*

In this case, the defendant gave no statements to law enforcement. Thus, a hearing pursuant to CrR 3.5 is not necessary.

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3. Defendant's Motion to Suppress Evidence – *CrR 3.6 Hearing Not Necessary*

The only items of the defendant's that have been seized in this matter are her bank and financial records. The defense will not be challenging the admissibility of these documents under CrR 3.6.

4. Discovery Demand

The State moves for the discovery of:

(a) All defense witnesses not already provided to the State, including any alibi witnesses. Specifically their names, addresses, sex, date of birth and a written summary of testimony or substance of all oral statements;

(b) All potential exhibits, allow inspection of physical or documentary evidence in defendant's possession which may be offered by defendant at any stage of the hearings for trial of this case, including cross-examination of State's witnesses, in defendant's case, or in rebuttal.

A defendant's discovery obligations are outlined in CrR 4.7(b) and in the common law. In brief, every defendant is required to provide the State with discovery of all material and information within the defendant's control, as outlined above. This discovery should include endorsement of all witnesses a defendant intends to call as a witness, even if the same witness has been endorsed by the State. To date, the defendant has subpoenaed the following witnesses:

- Renton Police Officers Rice and Tierney
- Loraine Hayden
- Stuart Wallace
- David Frey
- Heather Carlson
- Collin O'Neill
- Susan O'Neill
- Mike O'Neill
- Debra McCormick
- Kathy Young

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5. Motion to Compel Defense Investigator Notes Should She Be Called as a Witness

Should the defendant decide to call the defense investigator as a witness, the State moves for an order compelling the defendant to provide to the State -- prior to the investigator's testimony -- copies of the defense investigator's notes concerning any interview about which the investigator is being called to testify. State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988).

6. Disclosure of Defense

The nature of the defense has been disclosed as general denial. Pursuant to CrR 4.7, the State demands further disclosure of the general nature of the defense if it is other than "general denial." The State moves to preclude the defendant from offering evidence of or arguing any other defense not previously disclosed to the State.

7. Use of Photographs during Opening and Closing

The State anticipates that it will use photographs during opening statement and closing argument. The State will provide notice of precisely which such items it is planning on using to the defense and the court prior to using them. The State requests that any objections to the use of such items be addressed prior to the beginning of the State's presentation.

8. Motions Regarding Impeachment of Witnesses and Defendant (ER 609)

ER 609(a) and (b) permit impeachment of a witness with prior crimes of dishonesty that occurred within the last ten years, as calculated by date of conviction or date of release from confinement (whichever date is later). Crimes of dishonesty that occurred beyond the ten-year time limit may still be admissible if the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. ER 609(b). Convictions more than ten years old are not

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admissible unless the other party has been given notice of intent to offer the evidence in a timely fashion. ER 609(b).

The State has provided the criminal history of all State's witnesses to the defendant. The only State's witness who has prior convictions that the State believes may be admissible under ER 609 is Eric Swenson, the victim's son. His convictions which may be admissible are as follows: TMV 2 (2008); PSP 2 (2006); Theft 3 (2002); PSP 2 (2001).

Regarding the defense witnesses, the only conviction which the State believes is admissible under ER 609 is a Hit and Run Attended, of which the defendant was convicted on March 10, 2011. The State will seek to impeach the defendant with this conviction should she testify. The defendant, as well as a number of other defense witnesses, have other criminal history that the State believes is not admissible under ER 609. The State will only seek to admit these convictions if the witnesses open the door to their admission during their testimony.

9. Motion to Limit Admissibility of Reputation and "Prior Bad Acts" of State's Witnesses (ER 608 and ER 404).

The State seeks clarification regarding any prior bad acts or reputation evidence the defendant seeks to introduce at trial regarding any of the State's witnesses. The State moves for disclosure of any specific instances of misconduct that the defense intends to use for the purpose of attacking any witness's credibility, pursuant to ER 608. In order for the court to be able to exercise its discretion, as required by ER 608, the court must have advance notice of any such evidence. This is true of both ER 404(b) and ER 608. The Court is tasked with exercising its discretion in ruling on these matters, and in order to allow the parties to argue any proposed evidence, these matters should be decided pretrial. The State requests that the Court require offers of proof related to any such evidence.

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Further, the defendant is not entitled to "prove up" specific instances of misconduct with extrinsic evidence in order to attack mere credibility. The defendant is asked to disclose any such evidence.

10. Motion to Admit Summaries of Bank Records

The State will offer the testimony of Rebecca Tyrrell, financial investigator for the King County Prosecuting Attorney's Office, as a summary witness. Ms. Tyrrell will summarize her review of the checking and savings accounts held by the victim and defendant before, during, and after the defendant became involved with the victim. She will then testify to various facts she observed in her review of these records.

The bank records that Ms. Tyrrell will be summarizing are typical bank records: monthly statements, checks, deposit items, etc., generated by checking and savings accounts. These records are of the ordinary type maintained by those institutions in the normal course of business, and will therefore be admissible into evidence as business records, pursuant to RCW 5.45.020.

ER 1006 reads:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Summaries are admissible under ER 1006 when they promote the jury's convenience, and the proponent of the summary establishes that the original records are too voluminous for easy use in court and makes the records available for examination by the opposing party. State v. Barnes, 85 Wn. App. 638, 662-63, 932 P.2d 669 (1997); State v. Marshall, 25 Wn. App. 240, 243, 606 P.2d 278 (1980), *review denied*, 95 Wn.2d 1005 (1981); State v. Kane, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979). In addition, Karl Tegland points out, ER 1006 is identical to Fed. R. Evid.

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1006, and federal case law should therefore be helpful in interpreting ER 1006. 5C K. Tegland, Wash. Prac., Evidence §1006.1, at 270 (4th ed. 1999). The federal courts have held that Fed. R. Evid. 1006 should not be read restrictively as to the requirement that the underlying documents be "voluminous." United States v. Winn, 948 F.2d 145, 158 (5th Cir. 1991), *cert. denied*, 503 U.S. 976, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992). The federal courts have also held that Fed. R. Evid. 1006 does not require that it be literally impossible to examine the underlying documents in court before a chart or summary may be used at trial. Instead, the rule requires only that the underlying documents be voluminous and that in-court examination not be convenient. United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988); United States v. Scales, 594 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979).

Here, the State can establish through the testimony of Ms. Tyrrell that the documents underlying her summary exhibits – the records of Banner Bank, Boeing Credit Union, and Bank of America – together take up well over 1000 pages, and are too voluminous for easy use in court. Under these circumstances, Ms. Tyrrell's summaries can only be of assistance to the jury, while preserving the defendant's right to cross-examine Ms. Tyrrell about her preparation of the summaries. The State can also establish that the defense has had access to both the summaries and the underlying records for many months, and was provided physical copies of all of the records reviewed by Ms. Tyrrell in the preparation of her summaries. The proponent of a summary must also establish that the documents underlying the summary are admissible into evidence. State v. Barnes, 85 Wn. App. at 662-63; State v. Marshall, 25 Wn. App. at 243; State v. Kane, 23 Wn. App. at 110-11. The defense has agreed to stipulate to the foundation for the admissibility of these records, although she is not agreeing to their relevance.

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One final issue is whether the physical summaries to be introduced as part of the testimony of Rebecca Tyrrell constitute substantive evidence that should go to the jury room. In State v. Lord, 117 Wn.2d 829, 856 n. 5, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992), the Washington Supreme Court held that summaries prepared pursuant to ER 1006 (as opposed to illustrative charts) are in fact substantive evidence, and do go to the jury room. The State respectfully submits that the demonstrative exhibits illustrating various points of Rebecca Tyrrell's summary of records should therefore be admissible as substantive evidence since they summarize numerous pages of separate records that will not, for the most part, be offered into evidence, and cannot be conveniently examined by the jury. The alternative – to have Ms. Tyrrell plod her way through a ream of bank records and point out one by one each record's significance in the case – would be time-consuming and frustrating for the jury, the Court, and the parties alike. The defendant will still preserve her full right to cross-examine the witness concerning these summaries. For that reason, the State respectfully urges that the Court exercise its discretion to admit into evidence the summaries of these documents as substantive evidence in their own right.

11. Motions Regarding Out-of-Court Statements

(a) Out-of-Court Statements of the Victim Offered by Both Parties

The State and the defense may be seeking to introduce out-of-court statements made by victim Leonard Swenson as evidence of his state of mind under ER 803(a)(3), and as present sense impressions under ER 803(a)(1). The State asks that the court rule on the admissibility of these statements during testimony rather than pre-trial. The following case law is set out for the court's reference

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Although an exception is frequently made to the rule excluding hearsay when the state of mind or intention of a person is in question, the court still must analyze the statement to determine if it passes a two-part test: (1) that there is some degree of necessity to use out-of-court, uncross-examined declarations, and (2) that there is circumstantial probability of the trustworthiness of the out-of court, uncross-examined declarations. State v. Parr, 95 Wn.2d 95, 98-99, 606 P.2d 263 (1980), citing Raborn v. Hayton, 34 Wn.2d 105, 208 P.2d 133 (1949). As the Parr Court explains:

> If the circumstances do not impart trustworthiness, such evidence may be inadmissible unless there is some other corroborating evidence. This court has been mindful that evidence of this type may be misused by the jury and is easily fabricated.

Parr, 95 Wn.2d at 99.

In Crowder, 103 Wn. App. 20 (2000), the trial court admitted out-of-court, uncross-examined statements of the elderly victim regarding his intent to have the defendant handle his affairs and finances. These statements were made to a variety of disinterested third parties, including a social worker, an attorney, a legal assistant, and a neighbor – that is, people who had no imaginable motive, pecuniary or otherwise, to fabricate such statements. Because they were made to disinterested third parties, they were deemed to be substantially reliable.

> *(i) Should the Court Permit either Party to Present the Victim's Hearsay Statements, then the Victim's Statements Inconsistent with that Testimony Should Be Admissible Under ER 806.*

Should the court determine that statements and assertions of Leonard Swenson offered by either party are, in fact, admissible, then any statements to the contrary may be admitted as inconsistent statements for purposes of impeachment of the declarant under ER 806:

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a

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> witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain….

The principle behind this rule is that when a hearsay statement is admitted into evidence, the out-of-court declarant (in this case, Leonard Swenson) is treated as a witness, and his credibility is subject to impeachment and support, just as if he had testified.

(b) Out-of-Court Statements of the Victim Made to Dr. Angela Heald

In addition, the State will seek to offer statements made by Leonard Swenson to Dr. Angela Heald, a psychiatrist who evaluated him for purposes of assessing his cognitive impairment for purposes of this case. ER 803(a)(4) allows the admission of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. State v. Ashcraft, 71 Wn. App. 444, 456, 859 P.2d 60 (1993); State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995). Such statements are admissible on the theory that people seeking medical help are unlikely to lie. State v. Florczak, 76 Wn. App. 55, 69, 882 P.2d 199 (1994). This self-interest motive underlies the reason courts have found ER 803(a)(4) is a "firmly rooted" exception having "particularized guarantees of trustworthiness." Ring v. Erickson, 983 F.2d 818, 820 (8th Cir.1992) (quoting Idaho v. Wright, 497 U.S. 805, 815, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638 (1990)). The primary limitation in the rule is that the statement must be reasonably pertinent to medical diagnosis or treatment. ER 803(a)(4).

(c) Out-of-Court Statements of the Defendant Offered by the Defendant (Self-Serving Hearsay)

It is not clear whether the defense will be offering into evidence at trial out-of-court statements by the defendant either by defense witnesses in its case-in-chief or through cross-

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examination of State witnesses. The State will nevertheless offer this brief review of the law concerning the admissibility of such statements.

ER 801(d)(2) is entitled *Admissions by a Party Opponent* and excludes from the hearsay rule various categories of out-of-court statements. ER 801(d)(2) defines the term *Admission by a Party-Opponent* and it reads:

> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Out-of-court statements that a defendant seeks to introduce on his own behalf (as opposed to statements "offered against a party") are not admissions at all, but in fact self-serving hearsay. As such, they are inadmissible under the Washington Rules of Evidence. State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); State v. Haga, 8 Wn. App. 481, 495, 507 P.2d 159 (1973). As our Supreme Court has noted:

> The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. State v. Bennett, 20 Wn. App. 783, 787, 582 P.2d 569 (1978). This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence. Id.

State v. Finch, 137 Wn.2d at 825. The State will therefore be objecting to the statements of any defense witness or cross-examination of any State witnesses concerning out-of-court statements of the defendant where such statements are clearly self-serving statements and not admissions. Such statements are hearsay, and should not be admitted into evidence.

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(d) Out-of-Court Statements of the Defendant Offered by the State

As noted above, ER 801(d)(2) excludes from the hearsay rule out-of-court statements of a party that are offered against a party. The State anticipates offering numerous out-of-court statements made by the defendant made to the State's witnesses. Since these statements will be offered by the State against the defendant, they are nonhearsay and admissible under ER 801(d)(2), assuming they are relevant and material.

(e) *Crawford v. Washington* Issues

Because the victim is available to testify, the issue of the admissibility of his statements under the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and subsequent opinions expanding upon the holding in Crawford, does not apply. In Crawford, the Supreme Court held that the admissibility of out-of-court statements of a declarant required both the unavailability of the declarant and an opportunity to cross-examine that declarant if the statements sought to be admitted were "testimonial."

12. Motion to Exclude Evidence of Defendant's Good Character (ER 404(a))

The State moves for an order preventing the defense from offering non-pertinent character evidence of the defendant. ER 404(a) prohibits either party from offering evidence of the defendant's character for the purpose of proving action in conformity therewith. The defendant may, however, offer evidence of the defendant's character to rebut the nature of the charge. ER 404(a)(1). The State asks that the defense advise the court of what, if any, character evidence of the defendant it will offer so that the matter may be addressed pre-trial.

13. ER 404(b)

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The State is not seeking to admit any evidence that it considers to fall within the scope of ER 404(b). However, counsel for the State has been surprised in the past as to the things that others consider to be covered by the rule. The State requests that the defense disclose whether it believes that ER 404(b) prohibits introduction of any evidence listed in the discovery that the State might reasonably seek to admit. If such a matter arises once trial has begun, the State asks to address any such issue outside the presence of the jury if the issue unexpectedly arises.

14. Motion to Exclude Any Allusion to Punishment

The State moves in limine for an order prohibiting the defense – at any point in this trial, including voir dire – from arguing, eliciting testimony, offering evidence, suggesting, or alluding in any way to the possibility of punishment or effect of punishment in this case. This should include the defendant's attorney, defense witnesses, and any person connected with the defense from making references either express or implied that might be heard or seen by the fact-finders concerning the penalty that might flow from the conviction.

The sentence is irrelevant to the issues before the jury. The facts of consequence in the prosecution of the underlying crime are those related to the elements. The sentence that follows the verdict in either instance has no bearing on those facts of consequence, and, therefore, the sentence is irrelevant. ER 402.

15. Motion to Exclude Mention of APS Worker's Conclusion that Victim was not a "Vulnerable Adult" Under ER 403.

After these crimes occurred, the victim was interviewed by Adult Protective Services (APS) worker Kathy Young. Ms. Young concluded that Leonard Swenson was not a "Vulnerable Adult" under the definition set out in RCW 74.34.020 (16), which governs when a

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person qualifies for services from APS. The State moves to exclude Ms. Young's on the grounds that it would unfairly prejudice and confuse the jury.

ER 403 states that: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." RCW 74.34, the statute that governs Adult Protective Services investigations, defines "Vulnerable Adult" as including a person:

> (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
>
> (b) Found incapacitated under chapter 11.88 RCW; or
>
> (c) Who has a developmental disability as defined under RCW 71A.10.020; or
>
> (d) Admitted to any facility; or
>
> (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
>
> (f) Receiving services from an individual provider; or
>
> (g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

The fourteen felony counts with which the defendant is charged in this case each allege a vulnerable victim aggravator under an entirely different statute--RCW 9.94A.535(3)(b). Specifically, each of those counts states that "the defendant LISA O'NEILL knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to advanced age, disability or ill health and this vulnerability was a substantial factor in the offense, under the authority of RCW 9.94A.535(3)(b)."

"The Sentencing Reform Act of 1981 (SRA) explicitly provides that the trial court may consider that '[t]he defendant knew or should have known that the victim of the current offense

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was particularly vulnerable or incapable of resistance due to ... advanced age.' RCW 9.94A.390(2)(b)." State v. George, 67 Wn. App. 217, 222 (1992). The Court of Appeals in George further noted that the fact that the victim is particularly vulnerable due to advanced age may alone, as a matter of law, be used to justify the imposition of an exceptional sentence. Id., *citing* *State v. Clinton*, 48 Wash.App. 671, 676, 741 P.2d 52 (1987), cited in *State v. Vandervlugt*, 56 Wash.App. 517, 523, 784 P.2d 546 (1990).

The definition for who is a "Vulnerable Adult" under RCW 74.34 is entirely different from that set out in RCW 9.94A.535(3)(b), the statute that sets out bases for exceptional sentences above the standard range. Were the jury to hear testimony that Ms. Young found that Leonard Swenson wasn't vulnerable under RCW 74.34., they could easily be led to believe that this fact should dictate their finding as to whether he is particularly vulnerable as a basis for an exceptional sentence. In fact, these two definitions are completely different and have no relationship to each other whatsoever. Admission of this testimony would be of little probative value, and would have a great likelihood of confusing the jury. For these reasons, the State moves to exclude Kathy Young's conclusion under ER 403.

16. Motion To Allow Sidebars During Jury Selection To Address Potential Batson Challenges.

Under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), a party has a right to object when it believes the other party's exercise of a peremptory challenge against a potential juror constitutes discrimination. In Washington, this rule was recently supplemented by State v. Rhone, 168 Wn.2d 245 (2010). Rhone could be read to require the State to provide a race-neutral reason for exercising a peremptory challenge whenever it strikes a juror of the same minority group as the defendant, if that circumstance is applicable. The prejudice to the State of

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having one of its peremptory challenges -- made in open court -- disallowed by the court based on Batson and/or Rhone is obvious. The State, therefore, will request a sidebar prior to exercising a peremptory challenge against any potential juror that is subjectively perceived to be part of a qualifying minority group. The State would request that the defense articulate at that sidebar whether a Batson/Rhone objection will be made to the exercise of the peremptory challenge. If such an objection will be made, the State requests that the court address the matter outside of the presence of the jury.

17. Scheduling and Witness Issues

A few of the State's witnesses may have issues that may make them unavailable to testify on a given day or days of trial. In addition, counsels for the State may have issues arise that may cause them to ask for a late start or an early recess on occasion. The State has, and will continue to, exert every effort to schedule its case in a manner that allows for the most efficient use of the court's time possible. However, certain delays may be inevitable. The State asks for the court's indulgence should such a situation arise.

18. Motion To Compel Submission Of Jury Instructions.

Trial counsels have an obligation to assist the court in drafting accurate jury instructions so that the parties' rights to a fair trial are addressed. The time to ensure accuracy of jury instructions is before such instructions are submitted. CrR 6.15(a). As is clear from the rule's plain language, it applies equally to defense counsel, and its use of the word "shall" means that compliance is mandatory. The clear purpose is to provide the defendant and the State an opportunity to advise the court of their respective views on the best way to protect a defendant's rights at a time when the court can actually do that -- before the jury is instructed.

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Despite this rule, on occasion, defense counsel will submit an incomplete packet of proposed instructions or no proposed instructions at all. This practice is allows counsel for the defense to argue on appeal that the giving of an instruction constituted reversible error and the doctrine of invited error will not preclude the tardy argument.[1]

The State respectfully submits that trial courts should not acquiesce to such a strategy, particularly in light of the mandatory language of CrR 6.15. Failure to comply with CrR 6.15 prevents the court from addressing avoidable errors at the trial stage, leaving such errors to be addressed for the first time on appeal -- after countless taxpayer dollars have been spent on appointed counsel in the trial and appellate courts, on court staff, on judicial time, and on prosecutorial resources.

If the defendant were to comply with the rules and submit a *complete* set of proposed jury instructions, the court would have the opportunity to rule on the propriety of those instructions, rather than wait for a claim of instructional error on appeal. Such an approach serves the dual purposes of giving defense counsel an opportunity to protect their clients' rights at this stage of the proceedings rather than waiting until an appeal, and allowing the court to address any instructional problems before they prejudice the defendant.

[1] Many instructional errors are presumed prejudicial unless it affirmatively appears that the error was harmless, and error of a constitutional magnitude can be raised for the first time on appeal unless the invited error doctrine applies. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2004); State v. Henderson, 114 Wn.2d 867, 870 792 P.2d 514 (1990). The invited error doctrine precludes review of instructions proposed by the defendant, but only when the defense actually *proposes* the instruction at issue. State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979); see also State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). And, unfortunately, the appellate courts have held that, "failing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

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For these reasons, the State respectfully asks this court to require the defendant to comply with CrR 6.15 and submit a complete set of proposed instructions. However, if defense counsel fully agrees with the State's proposed instructions, counsel can certainly affirmatively adopt the State's proposed instructions.

V. CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial.

Dated this 22nd day of November, 2011.

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