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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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|----------------------|---|----------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| |) | Plaintiff, |
| |) | No. 12-C-04115-2 SEA |
| |) | |
| vs. |) | |
| |) | STATE'S TRIAL BRIEF |
| MICHAEL J. EVANS, |) | |
| |) | |
| |) | Defendant. |
| |) | |
| |) | |
| |) | |

I. CHARGES

This case was filed on July 2, 2012. The defendant, Michael Evans, was charged by original information with one count of Theft of a Motor Vehicle, and one count of Trafficking in Stolen Property in the First Degree. The Theft of a Motor Vehicle charge also alleges a vulnerable victim aggravator under RCW 9.94A.535 (3)(b) – specifically, that the victim of these crimes, Leon Lucas, was “particularly vulnerable or incapable of resistance, and the victim’s vulnerability was a substantial factor in the commission of the offense, under the authority of RCW 9.94A.535(3)(b).” The co-defendant, Yana Ristick, was charged with five counts of Theft in the First Degree and three counts of Theft in the Second Degree. The defendants were arraigned on July 12, 2012. The co-defendant is set to plead guilty on October 29, 2012, to four counts of Theft in the

1 First Degree and two counts of Theft in the Second Degree. The defendant, who is in custody, is
2 represented by Seth Conant. The State is represented by Senior Deputy Prosecuting Attorney Page
3 Ulrey.

4 **II. TIME ESTIMATES**

5 This trial including pre-trial motions, should last approximately six days.

6 **III. POTENTIAL WITNESSES**

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

- 10 • Leon Lucas
- 11 • Jeffery Lucas
- 12 • William O'Brien
- 13 • Jennifer Martinez
- 14 • Jeremy Mistretta
- 15 • Seattle Police Detective Pamela St. John
- 16 • Seattle Police Officer Ryan Beck
- 17 • Jerry Gunville (Adult Protective Services)
- 18 • Karen Taifour (Geriatric Regional Assessment Team)
- 19 • Dan Forgey (records custodian for GBC International Bank)
- 20 • Nikki Mize (records custodian for Whidbey Island Bank)

21 **IV. FACTS**

22 At the time of this incident, victim Leon Lucas was 79 years old and had just lost his wife
23 of fifty years. Although he suffers from some cognitive impairment due to dementia, he lives
24

1 alone in a condominium north of Seattle. His son, Jeffery Lucas, is a psychologist and lives in
2 Puyallup. Leon's wife died of lung cancer on September 23, 2011. According to Jeffery, Leon
3 became distant from his wife and the rest of his family as his wife was dying. During the two
4 months after her death, Leon stopped calling Jeffery altogether. Before this episode, they used to
5 talk frequently. On the rare occasions when Jeffery was able to talk to his father during the
6 months after his mother's death, he grew increasingly frustrated by the fact that his father
7 wouldn't answer his most basic questions. Finally, Leon disclosed to him that he had given
8 \$125,000 to someone he had recently met, and that he was planning on investing another
9 \$25,000 with her. Leon told his son that the person he had given the money to was a woman
10 named Annie, who was 38 years old. He said Annie had a daughter of 7 or 8, and a brother
11 named Michael. Jeffery found his father's actions particularly concerning because Leon had
12 always been very reluctant to give any of his money away, and because his father typically
13 consulted with him before making any significant financial decisions. When Jeffery confronted
14 him about his poor decision-making, Leon was unconcerned about what he had done.

15 As this situation continued, it became clear to Jeffery that his father was being scammed.
16 On January 1, 2012, his wife, Heidi, called Seattle Police and made a report. Officer Ryan Beck
17 responded to the call and went to see Leon Lucas. Leon reported that he willingly gave a woman
18 named "Ann Miller" \$150,000 in cash to start a catering business. Lucas was very unhappy that
19 the police had been called. He appeared confused during the conversation and did not provide
20 details of what bank he had withdrawn the money from. He did not have an address or date of
21 birth for "Miller." The officer attempted to contact "Miller" by phone, but was unsuccessful. He
22 advised Heidi Lucas to obtain a power of attorney for her father-in-law.

1 In early January, 2012, Jeffery Lucas contacted the Geriatric Regional Assessment Team,
2 an agency that conducts capacity and other mental health evaluations of seniors living in the
3 community. Karen Taifour, one of their evaluators, was assigned to conduct the evaluation of
4 Leon Lucas. On January 10 and 17, 2012, she conducted her evaluation. She concluded that
5 Lucas suffers from impaired short-term memory. She further found that his insight and
6 judgment were severely impaired, as was his ability to conduct mathematical calculations. She
7 also noted one of his symptoms as “isolation.” She said his scores indicate that he suffers from
8 dementia, though she noted that he still manages to conduct his activities of daily living well.

9 On January 6, 2012, Heidi Lucas reported the situation to Adult Protective Services
10 (APS). APS investigator Jerry Gunville was assigned to the case. On January 23, Gunville
11 visited Lucas. Lucas admitted to him that he had given \$150,000 to a lady, but said it was a gift,
12 not a loan. He said he didn’t formally make it a loan as he didn’t want the IRS to be involved.
13 He said the lady was going to pay him back. Lucas also described having sold the car to a man,
14 but said the man is still making payments on the car. Lucas did not feel concerned about having
15 given his money or the vehicle to these two. When asked for more details about the \$150,000.
16 Lucas said that “Annie” had bought the catering business. He was unable to provide details of
17 what exactly the money was for. He said that she lives nearby with her five year-old daughter
18 Gracie. He said her husband had died. On January 23 and 24, 2012, Gunville conducted a
19 business license search for the name of the catering business Lucas had given him; he was unable
20 to find a match. Gunville also checked the phone number for “Annie” that Lucas had provided
21 him; it came back to someone named Jerome Nielsen on Camano Island. Gunville called that
22 number and a woman answered. He asked for Annie Miller, and the woman asked him to hold.
23 Eventually the woman told him he had the right number but that he should leave a message.
24

1 Gunville did so, but never got a call back. Gunville made additional attempts to contact Miller
2 but was unsuccessful.

3 On March 8, Gunville again visited Leon Lucas. Gunville expressed concern about the
4 money Lucas had given away. He also said that the results of the GRAT evaluation caused him
5 to have concern about Leon's judgment. Leon said he had received Taifour's report and that it
6 contained wrong information. He said that Annie needed the money to buy out a catering
7 business. He said that her cousin Mike is still sending him money. He does not have a number
8 or address for Mike. He said Mike will give "Annie" money to give to him. He said he sold the
9 Cadillac to Mike on October 30, 2011 for \$3600 and received \$100. Two more payments were
10 made for \$50 and \$60, then for \$75 and \$75. He said the car engine blew and that it was at a
11 shop to be sold on consignment. On April 10, Gunville discussed the case with his supervisor.
12 While cognitive issues were noted, he said, it appeared that Lucas did not meet APS' definition
13 of "vulnerable adult" under RCW 74.34. On that same day, Jeffery Lucas informed Gunville
14 that two weeks earlier, his father had withdrawn another \$10,000 from his bank. Lucas said as
15 his father's power of attorney, he would be taking action to protect his father's finances. APS
16 then closed its investigation as inconclusive.

17 On January 10, 2012, SPD Detective Pamela St. John was assigned to the case. St. John
18 specializes in the investigation of elder financial exploitation cases. She first spoke with Lucas
19 on January 12, 2012. Lucas told her he was trying to help a lady so he gave her \$15,000. He
20 said that the woman was a cook at a catering business by the name of "JoAnn's Catering and
21 Decorating" and that he had bought out the business. He told St. John he paid \$15,000 up front
22 and that the remaining \$150,000 would be paid out over time. He told her that he was very
23 excited about this, as this was something he had always wanted to do. He was upset that Jeffery
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1 had called all these people about what he was doing. Lucas said that the woman was from
2 Romania, and that he had met her when he was selling his wife's car. He said that someone
3 named "Michael" had purchased the car from him. Michael had initially paid \$150 and was
4 supposed to make payments every month. When St. John asked him if Michael had made any
5 more payments, Lucas wasn't sure.

6 Over the next several months, the exploitation continued. On April 10, 2012, St. John got
7 a call from Whidbey Island Bank where Lucas had some of his accounts. They were concerned
8 because Lucas was at the bank asking for money, and they felt he was being taken advantage of.
9 St. John spoke with Heidi, who stated that she thought Leon was realizing that he was the victim
10 of a scam and might be willing to accept help. The following day, St. John went to see Lucas
11 and again spoke with him about what had been occurring. This time, Lucas told her that he
12 hadn't seen as much of "Annie" lately because she had been so busy with her catering business.
13 When asked what kind of car she drives, Lucas told her that she drives different cars. One car he
14 remembered was a white van with a lift in the back.

15 On April 25, St. John ran a records check to see if the title of Lucas' vehicle had been
16 changed. She discovered that it was now registered to William O'Brien in Mountlake Terrace.
17 O'Brien told St. John that in late December, he had seen an ad on Craigslist for a 1999 Cadillac.
18 He went to a home on 91st Ave NE in Seattle to look at the car. He was met by a woman of
19 approximately 35 years, who introduced herself as Michael's cousin. O'Brien test drove the car
20 and informed the woman he wanted to buy it. He later went back to the home and met up with
21 Michael and a man who he described as big and round with dark whiskers. Michael told him he
22 owned a salvage business in Lynnwood. He said he was selling the car for his father. O'Brien
23 said a young girl was in the home who appeared to be about ten years old. He said that while he
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1 was there, the woman asked him if he wanted to go out on a date, which he refused. O'Brien
2 went to the bank with Michael and the other male, gave Michael \$4200 in cash, and received the
3 title and vehicle in return. The title was in the names of Leon and Alice Lucas.

4 On May 5, 2012, Heidi Lucas informed St. John that they had reviewed Leon's bank
5 statements and saw large withdrawals starting at the end of November and continuing. She said
6 that they continued to get calls from Leon's bank saying that he was there and withdrawing more
7 money.

8 On May 9, Leon left a message with St. John saying that Annie had called him saying she
9 couldn't pay for her employees and didn't know what to do. He said she cried for over 20
10 minutes. She also told him that she and Michael had had to replace the engine in the Cadillac.
11 She said they found a friend who did the work and who now has the car on consignment. She
12 told him that they would give him the money for the car when it sold.

13 As she was trying to determine the identity of the perpetrators, St. John was reminded of
14 a case she had investigated several years prior. In that case, co-defendants Yana Ristick, aka
15 Shinman, and Michael Evans, between December 2007 and July 2008, serially exploited three
16 different elderly men. In each case, they had approached an elderly white male on a ruse,
17 quickly befriended him, and then proceeded to financially exploit him. Ristick was the primary
18 contact with the victim, while Evans acted as her driver. In one case, in which Ristick actually
19 married the victim, Evans, who referred to himself as Ristick's brother-in-law, took \$30,000
20 from the victim under the guise of offering him a partnership in a car business. See,
21 Certifications for Determination of Probable Cause on Cause Numbers 08-C-05658-5 SEA and
22 08-C-05659-3 SEA (attached). On March 3, 2010, Evans pled guilty to three counts of
23 Attempted Theft 1 and two counts of Theft 1. He was sentenced by Judge Ramsdell to 43
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1 months in prison on March 19, 2010. St. John prepared a photo montage of Ristick and of Evans
2 to show Lucas. On May 9th, 2012, she showed the montages to Lucas. Lucas positively
3 identified Yana Ristick as being the woman he knows as “Annie.” On Evans’ montage he chose
4 two photographs he said looked like Michael, one of which was Evans’. On that same day, St.
5 John showed the montages to O’Brien. O’Brien positively identified Ristick, Evans, and a man
6 named Archie Marks who was the other man who had accompanied them to the bank. That same
7 day, St. John received another call from Leon saying that he had just spoken to “Annie. She told
8 him how much she loves him, and kept telling him she wanted to marry him. She said she
9 needed money “really bad.” Lucas told St. John that he wants to help get her arrested.

10 On May 23, 2012, Lucas left a message with St. John saying he’d been getting two calls
11 per day from Ristick. She said “they” had taken away her business and now they were going to
12 take away her child. That same day, Leon again called St. John and told her he was getting up to
13 five calls per day from “Annie.” She told him she had to go to the dentist to get a tooth fixed,
14 and that she now owes \$2,000. She said she wants him to pay for it for her. He replied that he
15 couldn’t get any money out of the bank. She then suggested that he withdraw all the money
16 from his bank and move it to another bank so he could get money for her. He said that she keeps
17 telling him she loves him and wants to be with him. She is upset that people are coming over to
18 visit him. She advised him that Det. St. John is trouble and that she should not be allowed in his
19 house any more.

20 Over the next month, St. John continued her efforts to locate Ristick and Evans.
21 Eventually, she found them. On June 29th, 2012, both suspects were arrested in a house they
22 were renting in the Woodside neighborhood in Renton. Countless expensive items were found at
23 the home, including shoes, suits, coats, jewelry, and vehicles.

1 Jennifer Martinez lives next door to the home in which Ristick and Evans were arrested.
2 She said that the people who were renting the home had moved in in the middle of the night on
3 April 12, 2012. She said that it appeared that a middle-aged man and woman were living there,
4 along with another middle-aged man who was severely overweight, as well as a younger man
5 and woman, and two small girls. Almost immediately after moving in, they started power
6 washing car engines and detailing cars behind the house. One man she spoke with said he didn't
7 live there, that he only worked there. He was also employed at the AM/PM. The day after the
8 cars were detailed at the home, they would show up at the local AM/PM for sale. Martinez was
9 able to document and photograph a number of vehicles at the residence, one of which was a
10 white van. Another neighbor, Jeremy Mistretta, reports that approximately seven people were
11 living in the home, and that it appeared that they were running a used car business there. He also
12 took photographs of the many vehicles at the home, one of which was a white van.

13 **V. PRETRIAL RULINGS**

14 There have been no pre-trial rulings to date.

15 **VI. EVIDENTIARY ISSUES**

16 **1. Exclusion of Witnesses**

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

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

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

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

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

8 **4. Discovery Demand**

9 The State moves for the discovery of:

- 10 (a) All defense witnesses not already provided to the State,
11 including any alibi witnesses. Specifically their names,
12 addresses, sex, date of birth and a written summary of testimony
13 or substance of all oral statements;
- 14 (b) All potential exhibits, allow inspection of physical or
15 documentary evidence in defendant's possession which may be
16 offered by defendant at any stage of the hearings for trial of this
17 case, including cross-examination of State's witnesses, in
18 defendant's case, or in rebuttal.

19 A defendant's discovery obligations are outlined in CrR 4.7(b) and in the common law.
20 In brief, every defendant is required to provide the State with discovery of all material and
21 information within the defendant's control, as outlined above. This discovery should include
22 endorsement of all witnesses a defendant intends to call as a witness, even if the same witness
23 has been endorsed by the State. To date, the defendant has disclosed no witnesses and has
24 indicated that it will offer no documentary evidence at trial.

1 **5. Disclosure of Defense**

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

6 **6. Motions Regarding Impeachment of Defendant (ER 609)**

7 ER 609(a) and (b) permit impeachment of a witness with prior crimes of dishonesty that
8 occurred within the last ten years, as calculated by date of conviction or date of release from
9 confinement (whichever date is later). Crimes of dishonesty that occurred beyond the ten-year
10 time limit may still be admissible if the court determines, in the interests of justice, that the
11 probative value of the conviction supported by specific facts and circumstances substantially
12 outweighs its prejudicial effect. ER 609(b). Convictions more than ten years old are not
13 admissible unless the other party has been given notice of intent to offer the evidence in a timely
14 fashion. ER 609(b).

15 The defendant has the following convictions of which the State has knowledge:

- 16 1. Cause #08-C-05659-3 SEA (Attempted Theft 1 (x3); Theft 1 (x2); pled guilty on
17 3/3/10)
- 18 2. Cause #03-C-09910-1 SEA (Theft 1 (x2); pled guilty on 2/18/04)
- 19 3. Cause # 97-1-00367-5 SEA (Forgery (x2); pled guilty on 10/15/99)

20 The State will be seeking to admit the convictions from the first two cause numbers under ER
21 609, should the defendant choose to testify. The crimes of Theft, Attempted Theft, and Forgery
22 all fall squarely under category of crimes of dishonesty.

23 None of the State’s witnesses has any prior convictions.
24

1 **7. Motion to Admit Evidence Current Thefts by Co-Defendant Ristick and to Admit**
2 **Evidence of Prior Thefts Committed by Ristick and Evans under ER 404(b)**

3 The State will be seeking to admit the actions of Ristick in defrauding Leon Lucas in the
4 current case under the theory of *res gestae* and ER 402, as they are an inseparable part of the
5 crime charged and relevant to the charges against the defendant. As part of this evidence, the
6 State will seek to admit statements by Ristick made to Lucas during her perpetration of this
7 crime (hearsay issues to be addressed below). In addition, the State will seek to elicit testimony
8 from Det. St. John on her investigation of the prior thefts committed by Ristick and Evans that
9 resulted in their conviction in 2010.

10 ER 404(b) governs the admission of other crimes, wrongs, and acts:

11 Evidence of other crimes, wrongs, or acts is not admissible to prove the character
12 of a person in order to show action or conformity therewith. It may, however, be
13 admissible for other purposes, such as proof of motive, opportunity, intent,
preparation, plan, knowledge, identity, or absence of mistake or accident.

14 Before admitting evidence under ER 404(b), the trial court must, on the record: “(1) find by a
15 preponderance of the evidence that the uncharged acts probably occurred before admitting the
16 evidence, (2) identify the purpose for which the evidence will be admitted, (3) find the evidence
17 materially relevant to that purpose, and (4) balance the probative value of the evidence against
18 any unfair prejudicial effect the evidence may have upon the fact-finder.” State v. Kilgore, 147
19 Wn.2d 288, 292, 53 P.3d 974 (2002).

20 (a) Evidence of Ristick’s actions in this case

21
22 With regard to Ristick’s actions in the current case, because they are of Ristick and not of
23 the defendant, it is arguable that they do not even fall under ER 404(b), but rather simply under
24 ER 402. Both rules, however, allow for the admission of this evidence.

1 “Where another offense constitutes a link in the chain of an unbroken sequence of events
2 surrounding the charged offense, evidence of that offense is admissible in order that a complete
3 picture be depicted for the jury.” State v. Hughes, 118 Wash. App. 713, 77 P.3d 681 (Div. 2
4 2003). See also, State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981).

5
6 A defendant cannot insulate himself by committing a string of connected offenses
7 and then argue that the evidence of the other uncharged crimes is inadmissible
8 because it shows the defendant's bad character, thus forcing the State to present a
9 fragmented version of the events. Under the res gestae or “same transaction”
10 exception to ER 404(b), evidence of other crimes or bad acts is admissible to
11 complete the story of a crime or to provide the immediate context for events close
12 in both time and place to the charged crime.

13 State v. Lillard, 122 Wash. App. 422, 431-32, 93 P.3d 969, 974 (2004) (citations omitted).

14 Equally important to recognize is that nearly all evidence will prejudice one side or the other in a
15 lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial.

16 Carson v. Fine, 123 Wash. 2d 206, 224, 867 P.2d 610, 621 (1994).

17 In the case at issue, co-defendant Ristick was inextricably involved with the thefts
18 committed by Evans. Leon Lucas will testify that the defendant knocked on his door in response
19 to the “For Sale” sign he had placed in the window of his wife’s Cadillac that was parked in front
20 of his house. He will say that shortly after the defendant entered his home, “Annie Miller,” aka
21 Yana Ristick, drove up and came inside. Ristick very quickly cultivated Lucas’ trust and
22 affection, and began to obtain large sums of money from him for her fictitious catering business.

23 Ristick introduced herself as the defendant’s cousin. On several occasions, she provided small
24 sums of money to Lucas that she said were payments on behalf of Evans for Lucas’ Cadillac.

Long after the car had been sold to O’Brien, Ristick informed Lucas that the car was for sale on a
consignment basis. O’Brien, the buyer of Lucas’ car, had dealings with both Ristick and Evans
in his purchase of the car. Ristick and Evans were arrested together in their Renton home by

1 Detective St. John. The car theft and exploitation of Lucas were investigated as one case by the
2 Seattle Police Department. Because the defendant and Ristick were clearly acting in tandem and
3 their actions are closely connected, evidence of the exploitation by Ristick should be admitted as
4 an inseparable part of the crime charged.

5 (b) Evidence of Defendant's and Ristick's actions in 2010 case

6 Testimony by Det. St. John regarding the 2010 case where the defendants targeted three
7 older men and financially exploited them is admissible under ER 404(b) to show intent, and
8 common scheme or plan. Here, it is possible that Evans will claim that he intended to pay Lucas
9 for the balance of the cost of the car that he owed him. The State is seeking to admit his prior
10 crimes in order to show that his intent was never to pay Lucas for the car.

11 In State v. Medrano, 80 Wash. App. 108, 906 P.2d 982 (Div. 3 1995), the Court of
12 Appeals ruled that evidence of the defendant's prior convictions for burglary and theft were
13 properly admitted to show intent and rebut his claim of diminished capacity. "[A]s a matter of
14 logical probability, convictions (or pleas) of guilty to other crimes requiring intent make it less
15 likely that Medrano could not form the requisite intent for the current burglary." State v.
16 Medrano, 80 Wash. App. 108, 113, 906 P.2d 982, 984 (1995).

17 Similarly here, Evans' prior crimes of targeting elderly men, using Ristick to gain their
18 trust and inject a romantic element into the interaction in order to financially exploit them is
19 evidence that he intended to do the same here. Here, too, he targeted an elderly man, quickly
20 brought Ristick and her little girl onto the scene to gain Lucas' trust, and did this with the intent
21 to exploit him. Evans' prior, similar crimes make it much less likely that his actual intent was to
22 never pay Lucas the money he owed him on the car.
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1 Evans' prior crimes should also be admitted under ER 404(b) to show that they were part
2 of a common scheme or plan. The Washington Supreme Court in State v. Lough, 125 Wn.2d
3 847, 889 P.2d 487 (1995), set forth a four-step analysis to determine whether evidence is
4 admissible to show a common scheme or plan under ER 404(b):

5
6 Proof of such a plan is admissible if the prior acts are (1) proved by a
7 preponderance of the evidence, (2) admitted for the purpose of proving a common
8 plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a
9 defense, and (4) more probative than prejudicial.

8 Lough, 125 Wn.2d at 852, 889 P.2d 487. Regarding the passage of time that may have occurred
9 between the prior acts and the present one, the Court of Appeals writes:

10 ...[A] lapse of time is not alone determinative. *State v. Baker*, 89 Wash.App. at
11 734, 950 P.2d 486 (prior misconduct 11 to 15 years earlier); *Wermerskirchen*, 497
12 N.W.2d at 242, n. 3 (prior misconduct was at least 7 years earlier). Here, as in
13 *Baker* and *Wermerskirchen*, other factors strongly favored admission. There were
14 marked similarities in the methodology of the crime and the age and
15 circumstances of the victims. "Further, prior bad act evidence is particularly
16 relevant when the circumstances of the alleged crime create difficulty in assessing
17 the credibility and memory of the complaining witness." *Baker*, 89 Wash.App. at
18 734, 950 P.2d 486. See also *State v. Griswold*, 98 Wash.App. 817, 826, 991 P.2d
19 657 (2000) (prior incidents 11 to 13 years earlier); *Krause*, 82 Wash.App. at 691-
20 92, 919 P.2d 123 (prior incidents 14 or more years earlier).

16 State v. DeVincentis, 112 Wash. App. 152, 161-62, 47 P.3d 606, 610-11 (2002) aff'd, 150 Wash.
17 2d 11, 74 P.3d 119 (2003).

18 In applying the four-step analysis set out in Lough to this case, it is clear that evidence of
19 Evans's prior crimes should be admitted. First, the State will be able to prove them by a
20 preponderance of the evidence through the testimony of the detective who investigated the case,
21 as well as the court documents from that case. Second, the testimony will be admitted for
22 purposes of showing that defendant Evans and Ristick's actions were part of a common scheme
23 to exploit elderly men. In each case, the two selected elderly men who appeared to be alone as
24 their victims. In each, they acted in concert, with Ristick as the primary contact with the victim.

1 And in each, they used a ruse to contact the victim, gained his trust, and proceeded to exploit
2 him out of thousands of dollars by telling him lies. Regarding the third step of the analysis, this
3 evidence is important to establishing the elements in the Theft of a Motor Vehicle charge that the
4 defendant wrongfully obtained Lucas' property, and that he did so using deception. In the
5 Trafficking charge, the evidence is essential to establishing that the vehicle was actually stolen.
6 Heard in a vacuum, without the entire picture of the defendant and Ristick's history of exploiting
7 older victims, the jury could naively think that Evans actually was telling the truth, and did
8 intend to pay Lucas for the car. But seen in the context of the prior case, it becomes clear that
9 this incident is one in a series of similar incidents, interrupted only by the defendant's and
10 Risticks' imprisonment in 2010 and 2011.

11 **8. Motion to Admit Fact of Co-Defendant Yana Ristick's Plea of Guilty on Current**
12 **Case**

13 Co-Defendant Ristick is scheduled to plead guilty on this case on October 29, 2012. She
14 will be pleading guilty to four counts of Theft 1 and three counts of Theft 2. The State will be
15 seeking to admit the fact of her guilty plea to these charges at trial, in order to explain her
16 absence to the jury, as well as to establish the fact of her involvement in the financial
17 exploitation of Lucas. Because she won't have been sentenced by the time of trial and therefore
18 the State cannot offer a Judgment and Sentence into evidence, the State will ask that the Court
19 simply read to the jury a stipulation that the defendant has entered a plea of guilty to four counts
20 of Theft 1 and two counts of Theft 2 on October 29, 2012. Had Ristick already been sentenced
21 on this case, the State would be offering the Judgment and Sentence into evidence. The State
22 asks the Court to read into the record the above statement to avoid any possible confrontation
23 clause issues that could come with admission of the Statement of Defendant on Plea of Guilty
24 into evidence.

1 “The records and proceedings of any court of the United States, or any state or territory,
2 shall be admissible in evidence in all cases in this state when duly certified by the attestation of
3 the clerk, prothonotary or other officer having charge of the records of such court, with the seal
4 of such court annexed.” RCW 5.44.010. “[T]he judgment and sentence is not testimonial. It is
5 not a statement made for the purpose of establishing some fact and it does not constitute a
6 statement the declarant would reasonably believe would be used by the prosecutor in a later trial.
7 The prior judgment and sentence was properly admitted as a hearsay exception under RCW
8 5.44.040. State v. Benefiel, 131 Wash. App. 651, 656, 128 P.3d 1251, 1253 (2006) (citations
9 omitted).

10 **9. Motions Regarding Out-of-Court Statements of Leon Lucas and William O’Brien**

11 The State will be seeking to admit a number of out-of-court statements made by Leon
12 Lucas to various other State’s witnesses, as well as statements of O’Brien to Detective St. John.
13 ER 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying
14 at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(a),
15 in turn, defines a “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a
16 person, if intended by the person as an assertion.” ER 803(a) contains various specific
17 exceptions to the general rule that hearsay is not admissible in which the availability of the
18 declarant is immaterial.

19 Each of the statements being offered by the State in its case in chief is addressed
20 individually below:

- 21 (a) Out-of-Court Statements of the Victim and O’Brien Identifying the Defendant and
22 Ristick

1 The State will be seeking to introduce out-of-court statements made by victim Leon
2 Lucas and William O'Brien to Det. St. John identifying Ristick and Evans in photo montages. In
3 addition, it will offer statements by Leon Lucas and William O'Brien to the detective providing
4 physical descriptions of the pair, as well as statements by Lucas regarding the car that Ristick
5 was driving.

6 ER 801(d)(1)(iii) provides that a prior statement is not hearsay where the declarant
7 testifies at trial and is subject to cross-examination concerning the statement, and the statement is
8 one of "of identification of a person made after perceiving the person." Such an identification
9 remains admissible even if the witness subsequently denies or forgets having made the
10 identification. State v. Grover, 55 Wash. App. 252, 777 P.2d 22 (Div. 1 1989). Identification of
11 a vehicle being driven by the suspect is also admissible under this rule. See, State v. Jenkins, 53
12 Wash. App. 228, 231-32, 766 P.2d 499, 501-02 (1989).

13 Because these statements squarely fall under ER 801(d)(1)(iii) and because the declarants
14 will be testifying at trial, these statements should be admitted.

15
16 b) Statements made by Ristick to Lucas during the course of her exploitation of him

17 Leon Lucas will testify to numerous statements made to him by Ristick in the course of her
18 exploitation of him. These statements include, among other things, claims that she was opening
19 a catering business, that her husband was dead, that the defendant Michael Evans was her cousin,
20 and that she was running out of money to pay her employees. Statements of this nature will be
21 offered by the State through victim Lucas, and may also be offered in part by Detective St. John.

22 Such statements are admissible because they are not offered to prove the truth of the matter
23 asserted. Thus, they are not hearsay under ER 801(a). Further, because they are not hearsay,
24 their admission does not violate the confrontation clause: "There is no doubt that Washington

1 decisions following *Crawford* recognize that “[w]hen out-of-court assertions are not introduced
2 to prove the truth of the matter asserted, they are not hearsay and no confrontation clause
3 concerns arise.” In re Theders, 130 Wash. App. 422, 433, 123 P.3d 489, 495 (2005) (citations
4 omitted).

5 The State will be offering these statements for the purpose of showing the jury that
6 Ristick was telling Lucas lies, not in order to establish any facts contained in any of the
7 statements. Because these statements are not hearsay, they should be admitted.

8 (c) Statements made by Lucas to mental health evaluator Karin

9 Taifour

10 The State will be seeking to admit the statements made by Leon Lucas to Karin Taifour,
11 who conducted a capacity evaluation of Lucas at the request of Lucas’ son. Lucas’ son
12 requested the evaluation when it was becoming apparent to him that his father was being
13 scammed, in an attempt to determine what he could legally do to attempt to protect his
14 father’s assets. In conducting her evaluation, Taifour met with Lucas on two occasions,
15 and administered tests to him. When she was done, she wrote a report in which she
16 rendered a diagnosis and set out a treatment plan. This evaluation was conducted on
17 January 10 and 17, 2012, when the criminal investigation was in its infancy.

18 ER 803(a)(4) states that “[s]tatements made for purposes of medical diagnosis or
19 treatment and describing medical history, or past or present symptoms, pain, or
20 sensations, or the inception or general character of the cause or external source thereof
21 insofar as reasonably pertinent to diagnosis or treatment. Forensic evaluations are
22 included in the intent of this rule. See, In re Dependency of Penelope B., 104 Wn.2d 643,
23
24

1 709 P.2d 1185 (1985). Further, statements made for psychological diagnosis are
2 admissible. See, State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001).

3 Because these statements were clearly made for purposes of rendering a diagnosis
4 and treatment, they should be admitted at trial.

5 (d) Statements made by Lucas to Det. St. John after just having spoken
6 to Ristick

7 Det. St. John will testify that on at least one occasion, Lucas called her after just
8 having gotten off the phone with Ristick. In the conversation, Ristick was telling him that she
9 loved him, that she was unable to pay her employees, and other falsehoods, all in an attempt to
10 get more money from him. Those statements describing the phone call by Lucas that were made
11 immediately after hanging up the phone with Ristick are admissible as present sense impressions.
12 It is possible that Jeffery Lucas will offer similar testimony.

13 ER 803(a)(1) defines a present sense impression as a statement describing or explaining
14 an event or condition made while the declarant was perceiving the event or condition, or
15 immediately thereafter. “Present sense impression statements must grow out of the event
16 reported and in some way characterize that event.” Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d
17 1113, 127 A.L.R. 1022 (1939). “The statement must be a “spontaneous or instinctive utterance
18 of thought,” evoked by the occurrence itself, unembellished by premeditation, reflection, or
19 design. It is not a statement of memory or belief.” Id. “An answer to a question is not a present
20 sense impression.” State v. Hieb, 39 Wash. App. at 278, 693 P.2d 145 (1986). “When out-of-
21 court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay
22 and no confrontation clause concerns arise.” In re Theders, 130 Wash. App. 422, 433, 123 P.3d
23 489, 495 (2005) (citations omitted).

1 (e) Statements made by Lucas to witnesses regarding then-existing
2 Mental or Emotional Condition

3 Det. St. John, Jerry Gunville, and Jeffery Lucas each had conversations with Leon Lucas
4 during the time that the incidents were taking place. Select portions of these conversations may
5 be admissible as then-existing mental or emotional condition. The State asks the Court to
6 consider the admissibility of these statements in the context of the testimony of these witnesses.

7 ER 803(a)(3) states that the following are not excluded by the hearsay rule, even when
8 the declarant is available as a witness:

9 A statement of the declarant’s then existing state of mind, emotion, sensation, or
10 physical condition (such as intent, plan, motive, design, mental feeling, pain, and
11 bodily health), but not including a statement of memory or belief to prove the fact
12 remembered or believed...

12 (f) Crawford v. Washington Issues

13 Because the victim is available to testify, the issue of the admissibility of his statements
14 under the United States Supreme Court’s decision in Crawford v. Washington, 541 U.S. 36, 53-
15 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and subsequent opinions expanding upon the
16 holding in Crawford, does not apply. In Crawford, the Supreme Court held that the admissibility
17 of out-of-court statements of a declarant required both the unavailability of the declarant and an
18 opportunity to cross-examine that declarant if the statements sought to be admitted were
19 “testimonial.”

20 **10. Motion to Admit Facts of 2010 Case under ER 404(b).**

21 **Motion to Exclude Evidence of Defendant’s Good Character (ER 404(a))**

22 The State moves for an order preventing the defense from offering non-pertinent
23 character evidence of the defendant. ER 404(a) prohibits either party from offering evidence of
24

1 the defendant's character for the purpose of proving action in conformity therewith. The
2 defendant may, however, offer evidence of the defendant's character to rebut the nature of the
3 charge. ER 404(a)(1). Thus, in this case, the defendant's reputation for truthfulness and honesty
4 is not relevant and should be excluded. The State asks that the defense advise the court of what,
5 if any, character evidence of the defendant it will offer so that the matter may be addressed pre-
6 trial.

7 **11. Motion to Exclude Any Allusion to Punishment**

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

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

18 **Motion to Exclude Any Mention of APS' Statement that Lucas was not a Vulnerable**
19 **Adult Under RCW 74.34.**

20 **Motion to Exclude APS' Finding of "Inconclusive" After Their Investigation**

21 **Motion to Allow Defendant's Neighbors to Testify to Observations of Defendant's**
22 **Residence**

1 **12. Motion To Allow Sidebars During Jury Selection To Address Potential Batson**
2 **Challenges.**

3 Under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), a party has
4 a right to object when it believes the other party's exercise of a peremptory challenge against a
5 potential juror constitutes discrimination. In Washington, this rule was recently supplemented by
6 State v. Rhone, No. 80037-5, slip op. (filed 4/1/10) (2010 WL 1240983). Rhone appears to require
7 that the State must provide a race-neutral reason for exercising a peremptory challenge whenever it
8 strikes a juror of the same minority group as the defendant. The prejudice to the State of having one
9 of its peremptory challenges -- made in open court -- disallowed by the court based on Batson
10 and/or Rhone is obvious. The State, therefore, will request a sidebar prior to exercising a
11 peremptory challenge against any potential juror that is subjectively perceived to be part of a
12 qualifying minority group. The State would request that the defense articulate at that sidebar
13 whether a Batson/Rhone objection will be made to the exercise of the peremptory challenge. If such
14 an objection will be made, the State requests that the court address the matter outside of the
15 presence of the jury.

16 **13. Motion To Compel Submission Of Jury Instructions.**

17 Trial counsels have an obligation to assist the court in drafting accurate jury instructions
18 so that the parties' rights to a fair trial are addressed. The time to ensure accuracy of jury
19 instructions is before such instructions are submitted. To that end, CrR 6.15 dictates in relevant
20 part that:

21 Proposed jury instructions *shall* be served and filed when a case is called for trial
22 by serving one copy upon counsel for *each* party, by filing one copy with the
23 clerk, and by delivering the original and one additional copy for *each* party to the
24 trial judge.

1 CrR 6.15(a) (emphasis added). As is clear from the rule's plain language, it applies equally to
2 defense counsel, and its use of the word “shall” means that compliance is mandatory. The clear
3 purpose is to provide the defendant and the State an opportunity to advise the court of their
4 respective views on the best way to protect a defendant’s rights at a time when the court can
5 actually do that -- before the jury is instructed.

6 Despite this, many defense counsel in King County frequently submit an incomplete
7 packet of proposed instructions or no proposed instructions at all. This practice is apparently
8 deliberate; counsel hopes that by withholding jury instructions his or her client might be able to
9 argue on appeal that the giving of an instruction constituted reversible error and that the doctrine
10 of invited error will not preclude the tardy argument.¹

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

17
18
19 ¹ Many instructional errors are presumed prejudicial unless it affirmatively appears that the error
20 was harmless, and error of a constitutional magnitude can be raised for the first time on appeal
21 unless the invited error doctrine applies. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184
22 (2004); State v. Henderson, 114 Wn.2d 867, 870 792 P.2d 514 (1990). The invited error doctrine
23 precludes review of instructions proposed by the defendant, but only when the defense actually
24 *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).

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

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

11 **20. Jury Instructions on "Vulnerable Victim" CHECK**

12 Counts I and II of the Amended Information allege that the charges of murder in the
13 second degree and manslaughter in the first degree were aggravated by the fact that the
14 defendant knew or should have known that the victim of the current offense was particularly
15 vulnerable or incapable of resistance as provided in RCW 9.94A.535 (3)(b) (effective April 15,
16 2005). The language alleging the "vulnerable victim" aggravator was added to provide notice to
17 the defendant that, if a jury convicts him of either of these crimes, the State would ask the
18 sentencing court to impose a sentence greater than that called for in his standard sentencing
19 range.

20 The State added this language alleging this aggravator in response to, and in compliance
21 with, the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124
22 S.Ct. 2531, 159 L.Ed.2d 403 (2004), filed on June 24, 2004. In Blakely, the United States
23 Supreme Court held that the Sixth Amendment entitles a defendant in Washington to have a jury
24

1 determine the existence of aggravating factors, other than recidivist facts, that support the
2 imposition of an exceptional sentence above the standard range. On April 15, 2005, Governor
3 Gregoire signed into law SB 5477, the “Blakely-fix” bill designed to make Washington’s
4 procedure for exceptional sentences upward comply with the dictates of Blakely v. Washington.
5 SB 5477 amended RCW 9.94A.530 and 9.94A.535, and created a new section, subsequently
6 recodified as RCW 9.94A.537.

7 The State submits that the provisions of SB 5477 apply to the case at bar. It further
8 submits that should the defendant be convicted of Counts I or II, the jury should be instructed
9 appropriately, and be asked to determine whether Leon Lucas was a “vulnerable victim,”
10 pursuant to the factors set out in the aggravator in the Amended Information and the language set
11 out in what is now RCW 9.94A.535(3)(b). The State will be submitting appropriate special jury
12 verdict form on the aggravator for the Court to consider using with the jury should the jury
13 convict the defendant of either crime.

14 **V. CONCLUSION**

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

17 Dated this 29th day of October, 2012.

18 For DAN SATTERBERG, King County Prosecuting Attorney

19
20
21 By: _____
22 PAGE ULREY, WSBA No. 23585
23 Senior Deputy Prosecuting Attorney
24