IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. DAVID BRYCE JONES, Defendant/Appellant.	Case No. 20170815-CA

Reply Brief of Appellant

Appeal from convictions for abuse, neglect or exploitation of a vulnerable adult, and unlawful dealing of property by a fiduciary, both second degree felonies, in the Third Judicial District, Salt Lake County, the Honorable James T. Blanch presiding.

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Pursuant to rule 24(b), Utah Rules of Appellate Procedure, Appellant David Bryce Jones, through counsel, answers the facts and arguments raised in the Brief of Appellee as follows:

FACTS

A. The evidence related to David's mental capacity

The State's brief suggests that there was evidence David lacked mental capacity "long before" the charged conduct and that Bryce admitted that he knew this. *See, e.g.,* Br.Aple. at 31, 59. However, as stated in Bryce's opening brief, the evidence was that David had sufficient mental capacity to live independently until late September 2013, when he a dehydration incident that caused his inability to live independently. R812-813. Despite the State's characterization of the facts, *see, e.g.,* Br.Aple. at 7, 59-60, there was no testimony that David lacked capacity to execute a power of attorney when he did so in 2010. R806. Although David

started to show early signs of dementia shortly thereafter, there was no evidence of any medical diagnosis that David was unable to live independently before his September 2013 dehydration episode. Although David's brother, Ken, who visited David only "every other year" or "every third year," testified that he noticed David had memory lapses at some point earlier than 2010, he was not concerned enough about David's condition to investigate it or take any action. R600-01.

The State also asserts that David had no interest in the business and that Bryce took from him intending only to benefit himself, *see, e.g.,* Br.Aple. at 8, 59-60, but Bryce testified that his father was a founding member of the LLC, that he thought he was doing what David wanted, and that he removed David's name only to protect him from the lawsuit involving the restaurant lease. R806-08. Bryce, who is not an expert in dementia or competency, also testified that his father's dementia progressed slowly and that although David was still capable of living independently in March 2013 (when the restaurant lease was signed), David "had been a couple of years into dementia, and it's arguable that he was incompetent at that time." R808. In addition, friends and business associates testified that David would visit the restaurant, appeared interested in the project, and seemed "coherent and lucid" when they saw him at various times in 2013. *See, e.g.,* R756-57, R768-70, R774-75, R777-78, R784-85.

B. The difference between incapacity and dementia

Throughout its brief, the State conflates the concepts of capacity with dementia. For example, the State uses David's "progressive dementia" on the Highland Cove admission form as evidence that he lacked capacity at that time. Br.Aple. 32. But simply having dementia does not render one legally incompetent. Dementia includes a broad category of diseases that cause memory loss and deterioration of other brain functions. It is a progressive disease that in some individuals slowly progresses over a period of years, starting with mild cognitive impairment. *See, e.g.,* Markus MacGill, *Dementia: Symptoms, Stages, and types,* Medical News Today (Dec. 1, 2017), https://www.medicalnewstoday.com/articles/142214.php; Lauren Reed-Guy, *The Stages of Dementia*, Healthine.com (June 27, 2016), https://www.healthline.com/health/dementia/stages.

"Incapacity," on the other hand, is a legal definition that focuses on an individual's actual ability to function at a given point in time. For example, "incapacity" is defined by the Utah Uniform Probate Code as "measured by functional limitations and means a judicial determination after proof by clear and convincing evidence that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care: (a) receive and evaluate information; (b) make and communicate decisions; or (c) provide for necessities such as food, shelter,

clothing, health care, or safety." Utah Code Ann. § 75-1-201. For purposes of the Utah Uniform Power of Attorney Act, "incapacity" is defined as "the inability of an individual to manage property or business affairs because the individual: (a) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (b) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return." Utah Code Ann. § 75-9-102(5).

Because the legal definitions focus on an individual's ability, it is likely that a person with mild cognitive impairment could be deemed legally competent. Or, a person could be competent in some contexts but not others, for example a person may lack capacity to manage property as defined by law but still have capacity to live independently. And, given that capacity can change on a day-to-day basis, even a person with moderate or advanced dementia could still be deemed competent under Utah law depending on the circumstances.

ARGUMENT

I. The Improper Evidence was Prejudicial.

As stated in Bryce's opening brief, prejudice requires showing only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome … consider[ing] the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 694 (1986). Rather than focus on this standard, the State appears

to argue–without supporting authority—that because of the strong evidence that David suffered from dementia, no amount of inadmissible evidence could have created a reasonable probability of a different outcome in Bryce's trial. *See* Br.Aplt. 31-33. But this ignores that not only was suffering from dementia (or the resulting incapacity) not an element of any charged crime, it also ignores that much of the inadmissible evidence was admitted for no other purpose than to bolster the State's case against Bryce or to assert that he had a bad character. The State therefore has not shown that there is no reasonable likelihood that the outcome of the proceeding would be different absent counsel's deficient performance. *See, e.g., Strickland*, 466 U.S. at 671.

Likewise, the State's assertion that Bryce is trying "to change" the deficient performance standard lacks merit. Br.Aple. at 25 n.3. It is hard to conceive how any defendant would ever meet *Strickland's* requirement to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" without arguing that counsel's trial strategy was unreasonable. *See* S*trickland*, 466 U.S., 668, 689 (198 (quotation marks and citation omitted); *accord State v. Larrabee*, 2013 UT 70, ¶ 22, 321 P.3d 1136 (rejecting State's argument that no objecting to obviously improper, inflammatory and prejudicial statement was "sound" trial strategy).

A. Inadmissible expert testimony.

The State asserts that Bryce cannot show ineffective assistance of counsel because an objection to the improper expert testimony would have been futile,

and that he cannot show prejudice because it was merely cumulative and because at best Bryce could have obtained a continuance. Br.Aple. at 28-33. However, in arguing that it would have been futile to object to improper expert testimony, the State does not argue that the Mack and Tower testimony were reasonably based on the witnesses' perceptions, as required by Rules 602 and 701, Utah Rules of Evidence. *See* Utah R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Id.* R. 701 (lay witness opinion testimony must be "rationally based on the witness's perception"). Rather, the State's argument appears to be that because Tower and Mack observed David at some point in time, they should be able to provide lay witness testimony as to his ability to comprehend financial documents at any point in time. Br.Aple. at 25 and 28-29. There is simply no basis in the law to support this assertion.

The State first argues that even though Tower was asked to opine "based on his psychiatry degree,"[1] that testimony should not be considered expert testimony because it was also based on observations. Br.Aple. at 26 & n.4. The State also appears to argue that his testimony could have been lay testimony because "[a]n average bystander … could opine" that David "would have difficulty comprehending a complex financial document." Br.Aple. at 27.

[1] Tower's degree was actually in psychology.

However, the State's argument ignores that even if this testimony could have been within a lay person's purview, Tower was asked to use his specialized knowledge to testify as to whether David "could read this document and comprehend it." R539. "[I]f testimony, 'opinion or otherwise,' is based on 'scientific, technical, or other specialized knowledge,' it is within the scope of rule 702 of the Utah Rules of Evidence and may not be admitted as lay fact testimony." *Rothlisberger*, 2006 UT 49, ¶ 20, 147 P.3d 1176. Thus, an objection to expert testimony by a lay witness would not have been futile.

The same is true for Mack. The State concedes that Mack had no personal knowledge of David's capacity at the time either document was signed. Br.Aple. at 28 & n.5. However, the State suggests that this Court should overlook that lack of personal knowledge because "it was already clear that David lacked capacity to sign." Br.Aple. at 28 & n. 5. If that were the case, the State should have called a witness who actually observed David at the time he signed. Indeed, contrary to the State's position that David's mental capacity "would only have been worse" after Mack observed him, Br.Aple. at 28 & n.3, even an individual "in the later stages … may experience moments of lucidity (being aware of their situation) and some of their abilities return temporarily." *See The Later Stages of Dementia*, 3, Alzhemier's Society (Reviewed May 2017 by Dr. Jacqueline Crowther and Catharine Jenkins), https://www.alzheimers.org.uk/sites/default/files/pdf/factsheet_the_later_stages_of_dementia.pdf; *see also* Carol Bradley Bursack, *Surprising and Gratifying*

Moments in Caregiving: People with Dementia can have Moments of Clarity, ElderCarelink, http://www.eldercarelink.com/Alzheimers-and-Dementia/surprising-and-gratifying-moments-in-caregiving-people-with-dementia-can-have-moments-of-clarity.htm. In short the State has not shown that it was objectively reasonable to not object to the lay witness testimony that was not "rationally based on the witness's perception." Thus, failing to object to the lay witness testimony on the grounds that testimony was not "rationally based on the witness's perception" was objectively unreasonable. *See* Utah R. Evid. 701.

As for prejudice, the State argues that there was none because the best Bryce could have hoped for by objecting to Mack's and Tower's expert testimony was a continuance and that there is no reasonable likelihood that a continuance would have helped. Br.Aple. at 30. This argument is supported solely by a citation to Utah Code Ann. § 77-17-3, which allows for a continuance or exclusion of expert testimony on a showing of "bad faith." Even if the State's argument had merit, given the "'difficult burden placed on defendants to establish prejudice in cases such as these,' the burden is on the State to persuade the court there is no reasonable likelihood that, absent the error, the outcome would have been more favorable to the defendant." *State v. Peraza*, 2018 UT App 68, ¶ 44, 427 P.3d 276 (review of denial of motion for continuance). Here, had the State given proper notice that it would call three experts rather than one, counsel could have better prepared for that testimony and had time to make arguments for its exclusion.

Moreover, the State's argument presupposes that both Mack and Tower would have easily qualified as experts and that no bad faith in disclosing the witnesses only as fact witnesses would have been found. Finally, if as the State suggests, the testimony was merely cumulative of the State's expert testimony, then the trial court may well have excluded it as cumulative of the State's other expert testimony, particularly where it was used merely to improperly bolster that testimony. needlessly … cumulative*See* Utah R. Evid. 403 (allowing exclusion of "needlessly … cumulative" evidence); *State ex rel. A.M.D.*, 2006 UT App 457, ¶ 20, 153 P.3d 724 (opinion testimony properly excluded where another expert testified to the same issue).

Thus, for the above reasons and as stated in Bryce's opening brief, trial counsel was ineffective for not objecting to the improper expert testimony.

B. Inadmissible other acts evidence.

The State argues that trial counsel's failure to object to the prior loan and lease evidence did not prejudice Bryce. With regard to the prior loan evidence, the State argues that the prior loan evidence was not prejudicial because it was subject to more than one interpretation. Br.Aple. at 35. And the State argues that evidence that Bryce has a propensity to take out loans from his father and not pay them back could not prejudice him because "this case is not about unpaid loans." Br.Aple. at 35. This is a misleading statement because the conduct that Bryce was charged with was taking out (allegedly unauthorized) loans from his father and not paying him back, and the State repeatedly referred to this at trial. *See, e.g.,* R

852 (State questioning Bryce "You also discharged any and all loans that you had to your father in bankruptcy, correct?"). Indeed, "admitting evidence under rule 404(b) can often be problematic because of the 'dual inferences' that evidence of prior acts can yield." *State v. Lucero*, 2014 UT 15, ¶ 14, 328 P.3d at 850 (quoting *State v. Verde*, 2012 UT 60, ¶ 16, 296 P.3d 673), overruled on other grounds by *State v. Thornton*, 2017 UT 9, 391 P.3d 1016. "The language of the rule is inclusionary, rather than exclusionary, meaning that evidence may be admitted despite its negative propensity inference, but '[i]f such evidence is really aimed at establishing a defendant's propensity to commit crime, it should be excluded despite a proffered (but unpersuasive) legitimate purpose.'" *Lucero*, 2014 UT 60, ¶ 14 (footnote and citations omitted). "In other words, the evidence 'must have real probative value, not just possible worth.'" *Lucero*, 2014 UT 60, ¶ 14 (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985)). Thus, although the prior loan evidence may not be evidence of other acts in all cases, in the context of this case, as the State concedes, the evidence "strongly implied" that Bryce had a propensity to take out loans from his father and not repay them. *Cf. State v. Hood*, 2018 UT App 236, ¶ 22 ("[I]n the unique context of this case, evidence of excommunication strongly implied that Hood had committed an act relevant to his propensity to commit the crimes for which he was on trial.").

With regard to the lease evidence, the State asserts that the lease agreement was not 404(b) evidence at all because it was "only Jones's later, in-court representation that he knew his father was "not competent" at the time he

signed the Brewhaha lease" that constituted another act. Br. Aple. At 37. But Bryce's argument is not that his statement that it was "arguable that [David] was incompetent" constitutes an other act, it is that the State's presentation of evidence that Bryce had previously gotten his father to sign a lease while he was incompetent constituted an other act, which was highly prejudicial particularly where the State used that evidence in closing to argue that Bryce was dishonest and had a history of acting against his father's best interest. Br.Aplt at 26-28.

Finally, to the extent the State argues that no amount of other acts evidence could have prejudiced Bryce because of the overwhelming evidence against him, this argument lacks merit. It is akin to the civil "libel-proof plaintiff" doctrine,[2] which has no bearing in the criminal context because such a theory would amount to strict liability based solely on a showing of strong evidence by the State on one element of a charged crime. Indeed, the danger of being convicted based on bad character rather than an assessment of the evidence of the crime can undermine confidence in the verdict. *See Rackham*, 2016 UT App 167, ¶ 24, 381 P.3d 864. It also undermines the "time-honored tenet" of barring character evidence. Daniel Capra and Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 771 (2018). "The American adversary system was designed to

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[2] *See, e.g., Lamb v. Rizzo,* 391 F.3d 1133, 1138 (10th Cir. 2004) ("An individual who engages in certain anti-social or criminal behavior and suffers a diminished reputation may be 'libel proof' as a matter of law, as it relates to that specific behavior.").

convict defendants based upon their conduct and not based on their general character or past misdeeds. Rule 404(b) was designed to further this purpose as a rule of exclusion, prohibiting evidence of uncharged acts offered to prove a person's character (most often the criminal defendant's character) in order to demonstrate his or her conduct on the occasion in question." *Id.* .

The other acts evidence was therefore prejudicial and as explained in Bryce's opening brief, trial counsel was ineffective for not objecting to its admission—particularly given the trial court's pretrial ruling.

C. The Improper Elements Instruction.

The State does not argue that the unlawful dealing by a fiduciary charge requires only a reckless mental state for the substantial risk of loss element. Br.Aplt. 41. Instead the State asserts that counsel cannot be ineffective for not objecting to the elements instruction because there is no clear case law on point and asserts that Bryce relied only on persuasive authority. Br.Aplt.41. However, as stated in Bryce's opening brief, trial counsel was objectively unreasonable for not objecting to the instruction based on the plain language of the statute—in context with other Utah statutes–and rules of statutory construction, along with persuasive authority that supports that reading. *See, e.g., State v. Apodaca*, 2018 UT App 131, ¶ 76, 428 P.3d 99, 119, *cert. granted*, 432 P.3d 1231 (Dec. 8, 2018)(stipulating to instruction that "effectively lowered the State's burden of proof" as to mens rea "cannot be considered reasonable trial strategy").

Moreover, the State's argument that because the jury found that Jones acted knowingly or intentionally with regard to exploitation of a vulnerable adult means that he must have known that his actions involved a substantial risk of loss defies logic. Br.Aple. at 42. The State cites no authority to support this argument. Indeed it would require a substantial logical leap to presume that knowingly using resources for the benefit of someone other than the vulnerable adult is the same as knowing that such use would cause a substantial risk of loss.

Thus, as stated in Bryce's opening brief, trial counsel was ineffective for stipulating to the elements instruction.

II. Bryce has not waived any argument related to merger

The State argues that Bryce has partially waived his statutory and constitutional merger argument by arguing that Bryce's two convictions should be merged in the same way as a lesser included offense because the State asserted just one criminal act. Br.Aple. at 42-45 (citing *State v. Corona*, 2018 UT App 154). Bryce has not waived any such argument. His opening brief stated that merger should apply because Bryce was convicted of two crimes but the State asserted no evidence that could result in a conviction of one crime but not the other. *See* Br. Aplt. 48-51. (quoting *State v. Ross*, 951 P.2d 236, 245 (Utah Ct. App. 1997) (merger appropriate where the State's did not argue or prove an independent factual basis for separate crimes); and distinguishing *State v. Yanez*, 2002 UT App 50, ¶ 21, 42 P.3d 1248 (no merger where there was independent evidence to support each conviction)). In support, Bryce cited Utah Const. art. I §

12, which provides "nor shall any person be twice put in jeopardy for the same offense." He also cited Utah Code Ann. § 76-1-402 ("[W]hen the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision."). And he quoted *State v. Sanchez*, 2015 UT App 27, ¶ 8, 344 P.3d 191, which articulated that merger avoids "a circumstance where a 'criminal defendant could be punished twice for conduct that amounts to only one offense.'" *See* Br.Aplt. 48.[3]

The State does not dispute that there was no independent evidence presented to support Bryce's convictions for unlawful dealing by a fiduciary and abuse, neglect or exploitation of a vulnerable adult. Instead, the State asserts that because it is possible to commit each crime without committing the other, they are not lesser-included offenses and the merger doctrine should not apply. Br. Aple. at 45. The State's argument is not persuasive because it conflates the merger doctrine with the *Shondel* doctrine. *See State v. Shondel*, 453 P.2d 146 (Utah 1969). The *Shondel* doctrine entitles a defendant to the lesser punishment "when two statutes are 'wholly duplicative as to the elements of each crime.'" *State v. Melancon*, 2014 UT App 260, ¶ 25, 339 P.3d 151 (quoting *State v. Bryan*,

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[3] Indeed, given that Bryce's brief was filed shortly after the longstanding *Finlayson* test was overruled, there is no clear standard to brief on the issue. *See State v. Wilder*, 2018 UT 17, ¶ 37, 420 P.3d 1064 ("We recognize that our disposition of this issue, as well as today's opinion writ large, leaves several questions unanswered, including the meaning of the 'same act' language of the statutory merger test.").

709 P.2d 257, 263 (Utah 1985)). Unlike the *Shondel* doctrine, the "merger doctrine derives from the constitutional guarantee that a person may not be held accountable twice for the same criminal conduct." *State v. Williams*, 2007 UT 98, ¶ 13, 175 P.3d 1029 (quoting *State v. Ross,* 2007 UT 89, ¶ 63, 174 P.3d 628; U.S. Const. amend. V).

In other words, when as here, the State alleges and presents evidence to support a conviction for just one criminal act, punishing Bryce twice would violate Bryce's statutory and constitutional protections against multiple punishments for the same offense under either Utah Code Section 76-1-402(1) or (3). *See, e.g., State v. Hattrich,* 2013 UT App 177, ¶ 33, 317 P.3d 433 (The rule against multiplicity stems 'from the 5th Amendment [Double Jeopardy Clause], which prohibits the Government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act.'") (quoting *State v. Morrison*, 2001 UT 73, ¶ 24, 31 P.3d 547). "Utah Code section 76-1-402 codifies the 'judicially-crafted' merger doctrine that 'protects criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute.'" *State v. Perez-Avila*, 2006 UT App 71, ¶ 10, 131 P.3d 864 (quoting *State v. Smith*, 2005 UT 57, ¶ 7, 122 P.3d 615 (ineffective assistance for not seeking to merge DUI and automobile homicide charges).

In any event, the State has not shown that there is no overlap sufficient for merger as a lesser-included offense. As outlined in Bryce's opening brief, the

abuse of a vulnerable adult offense required the State to prove Bryce "unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult." Utah Code Ann. § 76-5-111(4)(a)(ii). With vulnerable adult being defined as "an elder adult," i.e. "a person 65 years of age or older" or an adult with diminished capacity. *See id.* § 76-5-111(1)(f), (s). Unlawful dealing by a fiduciary required showing that Bryce "deals with property that has been entrusted to him as a fiduciary … in a manner which the person knows is a violation of the person's duty and which involved a substantial risk of loss or detriment to the owner." *Id.* § 76-6-513(2). The State's argument that there is never sufficient overlap when a person is charged with a single act that amounts abuse, exploitation, or neglect of a vulnerable adult if that person is a fiduciary.

Thus, contrary to the State's assertion, arguing for merger under the facts of this case would not have been futile. *See, e.g., State v. Bell,* 2016 UT App 157, ¶ 23, 380 P.3d 11 (not seeking merger was ineffective assistance of counsel, regardless of theory applied, where defendant was convicted of two counts of aggravated robbery, but was convicted of two). It was objectively unreasonable and prejudicial for trial counsel to not assert a merger argument because Bryce was charged with just one criminal act yet was twice convicted and sentenced. As stated in Bryce's opening brief, this is a violation of his statutory and constitutional rights and his trial counsel was ineffective for not arguing for merger.

III. Bryce has standing to challenge the exploitation statute.

The State argues that Bryce lacks standing to challenge the exploitation of a vulnerable adult statute because according to the State, Bryce's conduct "is clearly prohibited." Br.Aple at 47. However, as stated in his opening brief, Bryce acted thinking he was following his father's wishes and had no notice as to what conduct was "unjust" or "improper." Br.Aplt. at 4-5, 44-45. In making this argument it further asserts that "unjust" and "improper" should be read to mean "without proper consent or authorization." Br.Aple. at 49-50. However, this reading of the statute ignores that the provision under which Bryce was charged includes no reference to consent (although subsections (ii) and (v) reference "lacks the capacity to consent"). If the legislature had intended to use the phrase "without the proper consent or authorization" in subsection (iii) under which Bryce was charged, it could have. But it did not and the State's suggestion that the Court should write in its proposed definition ignores the plain language and the dictionary definition of those terms. *See, e.g.*, S*ill v. Hart,* 2007 UT 45, ¶ 11, 162 P.3d 1099 (quoting *State v. Bluff*, 2002 UT 66, ¶ 34, 52 P.3d 1210) ("Looking to the plain language of the statute, 'we assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.'"). And the exploitation statute, while replete with definitions, does not define unjust or improper, which only adds to the lack of notice.

In addition, the State's attempt to read requirements into the statute that are not there make its efforts to distinguish the cases cited in Bryce's opening brief less persuasive. For example, the State argues that because Utah's statute does not have "with or without consent" language, the Mississippi statute is inopposite. Br.Aple. at 53. Yet, Utah's statute also does not require the elder adult's consent. It merely requires that the person "unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult." Utah Code Ann. § 76-5-111(4)(a)(iii).

The State also argues that "no ordinary person would think it unjust or improper … for a child to ask a vulnerable parent for help paying college tuition or buying a home." Br.Aple. at 51. But the State fails to explain how asking a vulnerable adult parent for money for buying a home or attending college is substantially different from asking for money to start a business, particularly where if successful, the business would benefit the parent. Br.Aple. at 51-52. Instead the State suggests that doing so would only be unjust if the child knew that the "vulnerable parent lacked capacity to consent." *Id.* But, as explained in Bryce's opening brief, capacity to consent is not an element under subsection (iii). The State further suggests that the vagueness is mitigated because "Jones had to at least know that his father was a vulnerable adult" and that "his actions were unjust or improper." Br.Aple. at 52. But, as stated, the exploitation statute defines anyone age 65 or older as a vulnerable adult. Utah Code Ann. § 76-5-111 (f), (s) (defining "vulnerable adult" as an "elder adult" and "elder adult as

someone 65 years old or older). Thus, anyone who knows their parent is elderly could potentially face criminal liability if a jury subjectively determines that the use of the funds is unjust or improper.[4]

Thus, as stated in Bryce's opening brief, the statute is unconstitutionally vague, as applied to him.

CONCLUSION

For the reasons stated herein and as stated in the Brief of Appellant, Bryce respectfully requests that his convictions be reversed and the charges against him dismissed with prejudice, that the Court reverse his convictions and remand for a new trial, or that the Court remand with an order to merge his convictions.

DATED this 20th day of March 2019.

/s/ Deborah L. Bulkeley
Counsel for Appellant

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[4] The State asserts that Bryce "clearly" violated other code sections, but he was not charged under those code sections and no jury found him guilty under those code sections. It is unclear whether the State is arguing that Bryce must challenge the entire statute, or whether this Court should affirm even if the provision is vague because Bryce must be guilty of something. However, neither theory is supported by any authority and the Court should disregard this argument by the State. Br.Aple. at 48 n.11.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(a)(11),Utah Rules of Appellate Procedure, this reply brief contains 4,838 words, excluding the table of contents, table of authorities and addenda, and that it complies with rule 21, Utah Rules of Appellate Procedure, governing private records. In compliance with rule 27(b), Utah Rules of Appellate Procedure, this brief has been prepared using the proportionally spaced Georgia 13-point font.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with Utah Supreme Court Standing Order 11, I certify that on March 20, 2019, I caused electronic copies of the Reply Brief of Appellant to be delivered by email to the following:

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Within seven days, printed copies will be delivered by hand or U.S. Mail to the above.

/s/ Deborah L. Bulkeley