STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2017AP798-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNALEE A. KAWALEC,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. RACE, PRESIDING

SUPPLEMENTAL BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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INTRODUCTION

Elder abuse is a serious problem. Criminals steal tens of billions of dollars each year from America's elderly population, and this problem is expected to get worse.[1]

Fortunately, people who steal from the elderly, like Johnalee Kawalec did, can be prosecuted for theft by bailee. Kawalec was a bailee with respect to her joint bank account with H.K. because she had power of attorney over that account. As H.K.'s attorney-in-fact, Kawalec had a duty to refrain from self-dealing. Kawalec violated that duty—and committed theft by bailee—when she used that bank account to benefit herself and her children. A contrary holding would allow people to abuse their positions of trust and steal from vulnerable senior citizens under their care. This Court should affirm Kawalec's conviction.

SUMMARY OF ARGUMENT

This Court ordered supplemental briefing on five issues. (R-App. 101–02.) The State responds as follows:

First issue: A co-owner of a joint bank account may be prosecuted for theft. Property in a jointly owned bank account is always "property of another" under the theft statute "unless the actor and the victim are husband and wife." Wis. Stat. § 943.20(2)(c). Wisconsin Stat. § 705.03 has no effect on this issue because that statute, at most, provides that people who share a joint bank account presumptively co-own the account. Section 705.03 says nothing about co-owners' criminal liability for theft.

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[1] Nick Leiber, *"How Criminals Steal $37 Billion a Year from America's Elderly,"* (May 3, 2018), https://www.bloomberg.com/news/features/2018-05-03/america-s-elderly-are-losing-37-billion-a-year-to-fraud

Second issue: The State does not have to disprove donative intent in an embezzlement prosecution. The lack of donative intent is not an element of embezzlement. But donative intent may be relevant to an element of embezzlement: whether the defendant acted without consent and contrary to his or her authority. Wisconsin Stat. § 705.03 has no effect on this issue because it simply provides that a joint bank account is presumptively co-owned.

Third issue: Kawalec's power of attorney over H.K.'s finances remained in effect after H.K. converted his U.S. Bank account into a joint account with Kawalec. The power of attorney, which is in the record, restricted Kawalec's use of funds in H.K.'s accounts. (R. 6; 34.) The holding of *Russ ex rel. Schwartz v. Russ*, 2007 WI 83, 302 Wis. 2d 264, 734 N.W.2d 874—that a power of attorney and joint account create conflicting presumptions of fraud and donative intent that cancel each other out—does *not* apply if the power of attorney predated the joint account. In that situation, there is only a presumption of fraud.

Fourth issue: Kawalec's power of attorney over H.K.'s finances made her a bailee, but the circuit court erred by instructing the jury to that effect. The instruction improperly relieved the State of its burden of proving that Kawalec was a bailee. But because Kawalec was a bailee, the error was harmless.

It was proper for the circuit court to remind the jury about H.K.'s testimony that he owned his U.S. Bank account. That instruction did not suggest that Kawalec was not a co-owner of the account—and even if it did, that suggestion was harmless because Kawalec's alleged co-ownership was not a legally valid defense.

Fifth issue: This Court should not reverse in the interest of justice. Kawalec's and H.K.'s own actions showed that she did not have his consent to use his U.S. Bank account for herself and her children. Kawalec may not get a second trial to pursue a new theory of defense.

ARGUMENT

I. A bailee may be guilty of stealing money that he or she co-owns.

A. Wisconsin follows the modern view that co-ownership is not a defense against a criminal theft charge.

A person can be guilty of embezzling money he owns. *See, e.g.*, *State v. Wolter*, 85 Wis. 2d 353, 362–65, 270 N.W.2d 230 (Ct. App. 1978). One element of embezzlement is that the defendant had "possession or custody of money . . . of another" by virtue of the defendant's position as a bailee. Wis. Stat. § 943.20(1)(b). "'Property of another' includes property in which the actor is a co-owner and property of a partnership of which the actor is a member, unless the actor and the victim are husband and wife." *Id.* § 943.20(2)(c). Money is property under the theft statute, section 943.20. *See State v. Ploeckelman*, 2007 WI App 31, ¶ 24, 299 Wis. 2d 251, 729 N.W.2d 784. Thus, this definition of "[p]roperty of another" applies to money under section 943.20(1)(b), so a co-owner may be guilty of theft under that provision.

"[T]hat a party to a joint or multiple-party account may commit theft from that account is not a new or novel holding." *Wagner v. State*, 128 A.3d 1, 22 (Md. 2015). At common law, a person could not be guilty of stealing property that he co-owned. *LaParle v. State*, 957 P.2d 330, 333 (Alaska Ct. App. 1998). But modern legislation has tended to move in the opposite direction. *Id.* "Model Penal Code § 223.0(7) defines 'property of another' to include

'property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property.'" *State v. Larsen*, 834 P.2d 586, 590 n.2 (Utah Ct. App. 1992). Many states have theft statutes with language virtually identical to Model Penal Code § 223.0(7). Courts in those states have held that this language allowed theft prosecutions of co-owners. *See, e.g.*, *Wagner*, 128 A.3d at 20–22 (relying on cases from other states); *State v. Gagne*, 79 A.3d 448, 454–56 (N.H. 2013) (same); *LaParle*, 957 P.2d at 333–34 (same). The Model Penal Code-based definition of "'property of another' . . . excludes criminality only when the actor–defendant is involved with property wholly his or her own." *People v. Kahanic*, 241 Cal. Rptr. 722, 725 (Cal. Ct. App. 1987). Wisconsin's definition of "[p]roperty of another" applies to co-owners even more clearly because it expressly refers to co-ownership and avoids confusing language about interests, privilege, and infringement.

Kawalec mistakenly relies on common-law cases from Alabama and Florida as well as a Montana case involving a distinguishable statute. (Kawalec's Supp. Br. 3.) Wisconsin does not follow the common-law rule that a person generally cannot be guilty of stealing property he co-owns. *See* Wis. Stat. § 943.20(2)(c). And that common-law rule does not apply if a defendant wrongfully obtained his status as joint owner of a bank account. *Gainer v. State*, 553 So. 2d 673, 681–82 (Ala. Crim. App. 1989). In Montana, co-ownership is not a defense in a theft prosecution if the other person "has an interest to which the offender is not entitled." *State v. Kane*, 992 P.2d 1283, 1285 (Mont. 1999) (citation omitted). Wisconsin Stat. § 943.20(1)(b) and (2)(c) have no similar language.

B. Wisconsin's statute on joint bank accounts does not affect criminal liability.

A Wisconsin statute creates co-ownership of joint bank accounts by stating that generally "[a] joint account belongs, during the lifetime of all parties, to the parties." Wis. Stat. § 705.03(1). It protects banks from civil liability by stating that "[n]o financial institution is liable to the spouse of a married person who is a party to a joint account for any sum withdrawn by any party to the account unless the financial institution violates a court order." *Id.* And it states that "[t]he application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person." *Id.* That language protects joint-account holders from civil liability. *See Wachniak v. Frank*, 140 Wis. 2d 429, 431–33, 410 N.W.2d 621 (Ct. App. 1987). But it does not affect criminal liability.

The Nevada Supreme Court reached the same conclusion when it addressed a similar statute, which stated that a bank's payment to a joint-account holder "is a valid and sufficient release and discharge of the depository." *Walch v. State*, 909 P.2d 1184, 1188 n.1 (Nev. 1996) (quoting NRS 100.085(1)). The court concluded that the statute protected a bank from liability but did not protect a joint tenant from criminal liability for theft. *Id.* at 1188. It thus concluded that the defendant could be convicted of theft from a joint account that she shared with the victim, over whose finances the defendant had power of attorney. *Id.* at 1187–89. It rejected the defendant's argument that "her role as owner was distinct from and trumped her role as attorney in fact in regard to the account funds." *Id.* at 1188. Otherwise the defendant would have "absolutely no legal constraint" on using the joint account for herself to the power-of-attorney principal's detriment. *Id.*

The same is true of Wis. Stat. § 705.03(1). This statute, like the similar one in Nevada, protects banks from civil liability. It apparently goes further than the Nevada statute by providing *civil*-liability protection to joint-account holders. But neither statute protects against *criminal* liability.

Under the State's interpretation of Wis. Stat. §§ 705.03 and 943.20, these statutes are compatible with each other. "Statutes must be construed together and harmonized." *State v. Ray*, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992). Section 705.03(1) creates a presumption of co-ownership, and section 943.20(2)(c) allows theft charges against a co-owner.

Kawalec argues that section 705.03 controls here because it is more specific. (Kawalec's Supp. Br. 3.) But the rule that a more specific statute controls over a more general one "only applies where the legislative intent cannot be discerned from the pertinent provisions and the two provisions irreconcilably conflict." *State v. Delaney*, 2003 WI 9, ¶ 24 n.5, 259 Wis. 2d 77, 658 N.W.2d 416. "Conflicts between statutes are not favored and will not be held to exist if the statute may be reasonably interpreted otherwise." *State v. Anthony D.B.*, 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435. Sections 705.03 and 943.20 do not conflict.

And even if they conflict, section 943.20 controls here because it is more specific. "[W]hen two statutes arguably overlap, the statute which more specifically addresses the issue at hand controls." *Purdy v. Cap Gemini Am., Inc.*, 2001 WI App 270, ¶ 17, 248 Wis. 2d 804, 637 N.W.2d 763. Although sections 705.03 and 943.20 both refer to co-ownership, only the latter statute addresses the issue at hand—criminal liability of co-owners for theft.

Of course, using jointly owned money will often not constitute embezzlement. To be guilty of embezzlement, a joint owner must have possession or custody of the property in question "[b]y virtue of his or her office, business or employment, or as trustee or bailee." Wis. Stat. § 943.20(1)(b).

In sum, jointly owned money is always "[p]roperty of another" under Wis. Stat. § 943.20(2)(c), unless the actor and the victim are husband and wife. A bailee can thus be guilty of stealing money that she co-owns.

II. The State is not required to prove lack of donative intent in an embezzlement case.

"[T]he State must prove all the elements of a crime beyond a reasonable doubt to convict a defendant." *State v. Kuntz*, 160 Wis. 2d 722, 736, 467 N.W.2d 531 (1991). A court determines the elements of a crime by looking to the statute prohibiting the conduct. *State v. Ludeking*, 195 Wis. 2d 132, 137–38, 536 N.W.2d 392 (Ct. App. 1995), *overruled on other grounds by State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). A court "should not read into [a] statute language that the legislature did not put in." *State v. Simmelink*, 2014 WI App 102, ¶ 11, 357 Wis. 2d 430, 855 N.W.2d 437 (citation omitted).

The lack of a victim's donative intent is *not* an element of embezzlement. *See* Wis. Stat. § 943.20(1)(b). The elements of theft-by-bailee embezzlement are that the defendant (1) had possession of money by virtue of her status as bailee; (2) used the money contrary to her authority and without the owner's consent; (3) knew that her use of the money was contrary to her authority and without the owner's consent; and (4) intended to convert the money to her own use. *See State v. Doss*, 2008 WI 93, ¶ 57, 312 Wis. 2d 570, 754 N.W.2d 150; *cf. State v. Seymour*, 183 Wis. 2d 683, 691 n.6, 515 N.W.2d 874 (1994) (quoting the relevant pattern jury

instruction, which includes an "intent" requirement in the second element).

Because section 943.20(1)(b) does not mention donative intent, the State need not prove that the victim lacked donative intent in a theft-by-bailee prosecution.

To be sure, donative intent or the lack thereof can be relevant to a criminal prosecution for theft from a joint account. A defendant's claim that the victim had donative intent "does no more than raise a factual question encompassed in the general issue of whether [the defendant] is guilty of theft." *State v. Conrad*, 892 N.W.2d 200, 204 (N.D. 2017) (citation omitted). An owner's intent to gift money to the defendant is relevant to whether the defendant knowingly used the money contrary to his or her authority and without the owner's consent.

Wisconsin Stat. § 705.03(1) has no effect on this issue. As explained above, this statute merely creates ownership rights and civil-liability protection, but section 943.20(2)(c) provides that co-ownership is not a defense in a criminal theft prosecution except in spousal cases. Although co-ownership is irrelevant in non-spousal theft prosecutions, donative intent can be relevant.

III. The joint account did not terminate the power of attorney, which prohibited self-dealing by Kawalec.

A. Kawalec's power of attorney terminated when H.K. revoked it, after she drained the joint bank account.

H.K. granted power of attorney over his finances to Kawalec and her then-husband in July 2005. (R. 141:6; 145:30, 35.) The power-of-attorney document was State's Exhibit One at Kawalec's trial, and it was introduced into evidence. (R. 141:12.) The provision titled "GIFTING"

prohibited Kawalec and her then-husband from "mak[ing] gifts" to themselves or their immediate family "UNLESS all persons who would inherit from [H.K.] by intestate succession (if [H.K. has] no will) or all persons and entities which are named as takers under [H.K.'s] Last Will and Testament consent in writing to such gift or gifts." (R. 6:2; 34:2.) The lawyer who drafted the power of attorney read that provision to the jury while testifying. (R. 141:13–14.) In April 2010, H.K. converted his U.S. Bank account into a joint account with Kawalec. (R. 144:55, 57.) In August or September 2011, Kawalec kicked H.K. out of her house. (R. 146:7–10.) H.K. went to the bank expecting to have "a lot of money" and learned that he "was broke." (R. 140:60–61.) On September 20, 2011, H.K. gave power of attorney to his caregiver and friend, replacing Kawalec. (R. 141:9.) Kawalec's power of attorney terminated then.

The joint account did not terminate Kawalec's power of attorney. "A power of attorney terminates" when "any" one of several enumerated scenarios happens. Wis. Stat. § 244.10(1). The creation of a joint bank account is not one of those scenarios. *See id.* Further, the power of attorney here did not state that it would terminate upon creation of a joint bank account. "A power of attorney terminates when," among other things, "[t]he power of attorney provides that it terminates." *Id.* § 244.10(1)(d). The power of attorney here stated that it "shall remain in full force and effect until [H.K.] personally revoke[s] it in a written notice delivered to [H.K.'s] Attorney-in-Fact." (R. 6:2; 34:2.) It terminated when H.K. revoked it.

H.K.'s banker's testimony at the postconviction hearing has no effect on when the power of attorney terminated. The banker testified that H.K.'s making Kawalec a "joint owner of the account" "basically would supercede anything prior to that." (R. 156:13.) The banker simply meant that the bank had originally designated

Kawalec as having power of attorney and being the payable-on-death beneficiary of H.K.'s account, and the bank later changed her designation to joint owner. (R. 156:7–13.) And even if the banker meant that the joint account ended the power of attorney, his opinion would be irrelevant. Because a court alone applies the law to the facts, an expert's opinion on the law is irrelevant. *State v. Pico*, 2018 WI 66, ¶¶ 42–43, __ Wis. 2d __, 914 N.W.2d 95. Regardless of what the banker might have thought, Kawalec's power of attorney terminated when H.K. revoked it, not when H.K. created a joint account with her.

B. Public policy supports the conclusion that the joint account did not terminate Kawalec's fiduciary duties as H.K.'s attorney-in-fact.

Besides being wrong, it would be bad public policy to hold that the joint account terminated Kawalec's fiduciary duties as H.K.'s attorney-in-fact. Because the power of attorney existed first, the joint account presumptively resulted from Kawalec's undue influence over H.K. It would not make sense to hold that a presumptively fraudulent joint tenancy trumps an attorney-in-fact's preexisting fiduciary duties.

A person who grants financial power of attorney to someone else is often elderly and vulnerable to undue influence—especially by the person entrusted with that power. A presumption of fraud and undue influence applies to a transaction involving two people in a fiduciary relationship, such as the creation of a joint bank account between two people who have a power-of-attorney relationship. *See, e.g.*, *Ayers v. Shaffer*, 748 S.E.2d 83, 91 (Va. 2013); *Kasick v. Kobelak*, 921 N.E.2d 297, 302 (Ohio Ct. App. 2009); *Matter of Estate of Dinnetz*, 532 N.W.2d 672, 675 (N.D. 1995).

That presumption applies in Wisconsin. The Wisconsin Supreme Court has "adopt[ed] the approach of the Illinois court of appeals in *Estate of Rybolt*,[2] *In re Estate of Harms*,[3] and *In re Estate of Teall*[4]." *Russ ex rel. Schwartz v. Russ*, 2007 WI 83, ¶ 36, 302 Wis. 2d 264, 734 N.W.2d 874. Under that approach, there are different presumptions depending on when the power of attorney and joint account were created.

"[A] joint checking account established under Wis. Stat. § 705.03 *prior to* the execution of a [power of attorney] creates a presumption of donative intent," but "the transfer of funds from such a joint account by an agent acting under a [power of attorney], but for the agent's own use, creates a presumption of fraud, unless the [power of attorney] explicitly authorizes self-dealing." *Id.* ¶ 40 (emphasis added). The presumption of fraud applies "regardless of whether the funds were deposited before or after the execution of the [power of attorney]." *Id.* ¶ 32. Those two conflicting presumptions "cancel each other out" "only when a joint account was created before the fiduciary relationship began." *Id.* ¶¶ 34–35 (citation omitted).

If a joint account was created *after* the power of attorney, there is a controlling presumption of fraud. "[T]he controlling presumption is the presumption of fraud" if an "attorney-in-fact actively uses his position to create the joint tenancies." *Id.* ¶ 35 (citation omitted). Stated differently, a "presumption of fraud" is "trigger[ed]" if "a power of attorney agent actively uses his or her authority to create a joint account with the principal." *Id.* ¶ 36.

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[2] *In re Estate of Rybolt*, 631 N.E.2d 792 (Ill. App. Ct. 1994).

[3] *In re Estate of Harms*, 603 N.E.2d 37 (Ill. App. Ct. 1992).

[4] *In re Estate of Teall*, 768 N.E.2d 124 (Ill. App. Ct. 2002).

Thus, "the question of when the joint tenancy was created [is] crucial." *In re Estate of Miller*, 778 N.E.2d 262, 284 (Ill. App. Ct. 2002) (citing *In re Estate of Rybolt*, 631 N.E.2d 792, 794 (Ill. App. Ct. 1994)). And for good reason. "[T]he [conflicting] presumptions should not cancel each other out whenever a joint account is created after the fiduciary relationship has been established, because this would tempt fiduciaries to fatten their pockets through creative financial arrangements." *Id.* (citing *Rybolt*, 631 N.E.2d at 795). "If the joint tenancy was formed prior to the fiduciary relationship, the opportunity for abuse is not as great and, accordingly, the presumption of fraud does not need to be as strong." *Id.*

Although the *Russ* court referred to an attorney-in-fact *actively using* his or her power of attorney to create a joint tenancy, the controlling presumption of fraud applies even if a joint tenancy was not created that way. *Id.* at 268–69. Rather, "when the joint tenancy is created after the fiduciary relationship is established, the controlling presumption is one of fraud." *Id.* at 269 (citing *In re Estate of Teall*, 768 N.E.2d 124, 130 (Ill. App. Ct. 2002)). That presumption of fraud "outweigh[s] the presumption of donative intent." *Id.* at 270 (citing *Rybolt*, 631 N.E.2d at 795). *See also, e.g.*, *Dinnetz*, 532 N.W.2d at 673, 675 (applying a presumption of undue influence because a power-of-attorney principal allowed his attorney-in-fact to be added to his bank account as a joint tenant). In short, *Russ*'s holding that conflicting presumptions cancel each other out does *not* apply when a power of attorney predates a joint account covering the same funds.

To summarize, pursuant to Wis. Stat. § 244.10, Kawalec had fiduciary duties as H.K.'s attorney-in-fact even after he converted his bank account into a joint account with her. Public policy supports this conclusion because the joint

account presumptively resulted from Kawalec's undue influence over H.K.

IV. Kawalec was a bailee because she had power of attorney.

The circuit court instructed the jury that Kawalec "had possession of money . . . belonging to another because of her status as a bailee. A person who acts as a power of attorney is a bailee." (R. 146:85.) The first part of that instruction unconstitutionally told the jury to find that the State had satisfied the "bailment" element of embezzlement. The second part of that instruction might have misstated the law because the facts of a given case will likely determine whether an attorney-in-fact was a bailee. But those errors were harmless because it is incontestable that Kawalec's power of attorney made her a bailee.

An erroneous jury instruction will not cause this Court to reverse if it was harmless, that is, if "there is no reasonable possibility that the error contributed to the conviction." *State v. Ziebart*, 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369. It is unconstitutional for a jury instruction to "have the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged." *State v. Harvey*, 2002 WI 93, ¶ 23, 254 Wis. 2d 442, 647 N.W.2d 189. "The incontestability of [an element] goes to whether the error was harmless, not whether there was constitutional instructional error in the first place." *Id.* ¶ 33. "[I]t is not harmful error, if error at all," to instruct a jury in a criminal case that a person "was a bailee" if that "ultimate conclusion" was established "beyond any room for reasonable controversy." *Burns v. State*, 145 Wis. 373, 380, 128 N.W. 987 (1910).

"It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment . . . ." *Yao v. Chapman*,

2005 WI App 200, ¶ 19, 287 Wis. 2d 445, 705 N.W.2d 272 (alteration in original) (quoting *Burns*, 145 Wis. at 380). "Possession is the act of having or taking into control." *Bushweiler v. Polk Cty. Bank*, 129 Wis. 2d 357, 359, 384 N.W.2d 717 (Ct. App. 1986). A bailor may keep "some control." *See Dahl v. St. Paul Fire & Marine Ins. Co.*, 36 Wis. 2d 420, 424, 153 N.W.2d 624 (1967).

Kawalec was a bailee regarding H.K.'s finances. Under the first element of bailment, the power of attorney gave Kawalec control over H.K.'s money. It broadly authorized her to, for example, pay his bills, "do business with banks," sign checks on his behalf, withdraw funds from his accounts, "remove articles from [H.K.]s safe deposit box," receive money due to him, and borrow money with his assets as security. (R. 6:1; 34:1.)

Under the second element of bailment, Kawalec had a duty to account for H.K.'s finances. "[A]n attorney-in-fact has a fiduciary obligation to the principal. The agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest." *Praefke v. Am. Enter. Life Ins. Co.*, 2002 WI App 235, ¶ 9, 257 Wis. 2d 637, 655 N.W.2d 456 (citation omitted). This fiduciary obligation includes "an obligation not to engage in self-dealing." *Russ*, 302 Wis. 2d 264, ¶ 32. Kawalec was a bailee over H.K.'s finances because she had both control over them and a fiduciary duty regarding them. Because this conclusion is incontestable, the circuit court's instruction on bailment was harmless error.

This Court also requested supplemental briefing on "whether it is a misstatement of the law to inform the jury . . . 'that the funds in the US Bank account were the property of [H.K.].'" (R-App. 102.) But the circuit court merely told the jury that it had "heard testimony from [H.K.] that the funds in the US Bank account were the property of [H.K.]" (R. 146:87.) Reminding the jury about H.K.'s

testimony did not misstate the law. And Kawalec seems to concede that H.K. remained a co-owner of his U.S. Bank account after he made it a joint account. (Kawalec's Supp. Br. 14.)

Further, that instruction did *not* mislead the jury by suggesting that Kawalec was not a co-owner of the joint account. A court must "review the jury instructions as a whole to determine whether the overall meaning communicated by the instructions was a correct statement of the law." *State v. Langlois*, 2018 WI 73, ¶ 38, __ Wis. 2d __, 913 N.W.2d 812 (citation omitted). Right after instructing the jury that H.K. had testified that he owned his U.S. Bank account, the court said that "the bank recognized Johnalee Kawalec as a joint owner of that account." (R. 146:88.) It told the jury "to determine what effect, if any," Kawalec's status as a joint owner had on this case. (R. 146:88.)

And any mistake in the instruction regarding the U.S. Bank account was harmless. Co-ownership is not a defense against a criminal theft charge except in cases involving husband and wife. The circuit court possibly erred by telling the jury to consider what effect Kawalec's alleged co-ownership had. It legally had no effect. But that error was harmless because it *helped* Kawalec by telling the jury to consider a legally inapplicable defense.

Kawalec seems to argue that because a transfer of title does not *create* a bailment, a bailment *ends* when a bailee receives co-ownership. (Kawalec's Supp. Br. 13–14.) She has not adequately developed that argument. She also seems to argue that the joint account's creation did not make her a bailee. (*Id.*) True. But the power of attorney made her a bailee, and the joint account's subsequent creation did not end that status.

V. Kawalec is not entitled to a new trial in the interest of justice.

This Court may reverse in the interest of justice in "exceptional cases" where the real controversy was not fully tried. *State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390 (citation omitted). This power "should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719. The real controversy was not fully tried if "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." *State v. Smalley*, 2007 WI App 219, ¶ 7, 305 Wis. 2d 709, 741 N.W.2d 286. "[A]n error in a jury instruction" might also prevent the real controversy from being fully tried. *State v. Bannister*, 2007 WI 86, ¶ 41, 302 Wis. 2d 158, 734 N.W.2d 892.

The real controversy was fully tried here. The jury instructions on bailment and ownership were harmless. And there was no need to instruct the jury on Wis. Stat. § 705.03(1). Even if that statute made Kawalec a co-owner of the U.S. Bank account, it would not trump her duties as H.K.'s attorney-in-fact. *See Walch*, 909 P.2d at 1188. At most, that statute provided Kawalec with co-ownership of the joint bank account—but co-ownership is not a legally valid defense here. *See* Wis. Stat. § 943.20(2)(c).

Further, the jury was not deprived of important testimony. Kawalec's and H.K.'s behavior showed that he did *not* intend to give her ownership of the joint account. "Evidence subsequent to the establishment of [a joint bank] account may be relevant and probative of the intent at the time the account was created." *Johnson v. Mielke*, 49 Wis. 2d 60, 77, 181 N.W.2d 503 (1970). Kawalec testified that she never used money from the joint account without getting H.K.'s permission, except for two lunches for which she paid him back. (R. 146:5, 15.) She testified at length about each

withdrawal from the joint account, and she claimed that H.K had authorized each one. (R. 145:49–94.) H.K. told a detective that Kawalec had written checks from their joint account that he had not authorized. (R. 140:64–65; 143:93.) H.K. removed Kawalec's power of attorney around that time. (R. 141:9.) Those behaviors belie any notion that H.K. intended to give Kawalec free rein over the U.S. Bank account.

H.K. was a confused, vulnerable, elderly man. He moved in with Kawalec when he left a hospital because doctors told him that he could not live alone. (R. 140:45–46, 55, 73.) Doctors even told him not to drive anymore. (R. 140:74.) After Kawalec kicked H.K. out of her house, he moved in with his friend of 23 years—but he could not remember his friend's wife's name at trial. (R. 140:54.) H.K. had trouble remembering one of his two grandchildren's names, and the prosecutor had to remind H.K. of his other grandchild's name. (R. 140:69.)

H.K.'s personal banker and investment adviser could have given trial testimony that would have highlighted H.K.'s confusion. The banker told H.K. that if he converted his account to a joint account with Kawalec, it would "basically [be] her money as well." (R. 156:8.) According to the banker, H.K. "always seemed to want the money to go to [Kawalec]; that's why she was originally [the payable-on-death beneficiary]." (R. 156:9.) The investment adviser told H.K. that "if he added [Kawalec as a joint tenant] then basically she's entitled to half that right away or joint ownership right away and if he were to pass away then it just stays in her name." (R. 156:32.) That advice incorrectly suggested that Kawalec's joint ownership would entitle her to "half" of the account "right away" and that she would get H.K.'s half when he died. When H.K. received that information, he "pretty much said [Kawalec was] going to get [his money] anyway." (R. 156:32.) That response suggests

that H.K. did not understand that joint tenancy would immediately give Kawalec ownership of the entire account. It instead suggests that H.K. simply wanted for Kawalec to have the money in his U.S. Bank account when he died, presumably soon. Indeed, H.K. had been told that he had four to six weeks to live around that time. (R. 140:55; 145:29.)

Testimony by H.K.'s banker and investment adviser would not have negated any elements of the theft charge. Again, the joint account's creation did not terminate the power of attorney and Kawalec's resulting status as a bailee. Kawalec used the joint-account money contrary to her authority under the power of attorney, which prohibited self-dealing. And there is no consent if "the victim does not understand the nature of the thing to which the victim consents." Wis. Stat. § 939.22(48)(c). Because H.K. did not understand the effects of adding Kawalec to his bank account as a joint tenant, H.K. did not thereby give consent to Kawalec to use the account for whatever she wanted.

Kawalec seems to mainly argue that she should get a second trial so she can pursue a new theory of defense: that H.K.'s alleged donative intent shows that he gifted the joint account to her. (Kawalec's Supp. Br. 15–18.) But this Court's discretionary-reversal power "was not intended to allow a party to try a case on one theory and losing on that theory to have a second trial on a different, valid theory." *State v. Sarinske*, 91 Wis. 2d 14, 60, 280 N.W.2d 725 (1979). Kawalec's main theory of defense was that joint ownership did not matter because she had H.K.'s permission for each expenditure at issue. (*See* R. 146:71–73, 76–79; 155:7–8.) Even if H.K.'s statements to his banker and investment adviser could create a viable "gift" defense for Kawalec, she may not get a second trial just so she can pursue a new theory of defense.

The real controversy—whether H.K. authorized each of Kawalec's joint-account expenses at issue—was fully tried.

CONCLUSION

This Court should affirm Kawalec's conviction.

Dated this 2nd day of August, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5495 words.

_____
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I hereby certify that:

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Dated this 2nd day of August, 2018.

_____
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