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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JONATHAN KEITH BASS,

APPELLANT.

APPELLATE CASE NO. 2024-000703

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# INITIAL BRIEF OF APPELLANT

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JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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**I.**

Whether the trial court erred in refusing to quash the indictment where the overbroad indictment failed to provide Appellant with sufficient notice what was being called upon to defend against?

**II.**

Whether the trial court erred in refusing to direct a verdict of acquittal were the state failed to present any direct or substantial circumstantial evidence that the decedent was a vulnerable adult?

**III.**

Whether the trial court erred in allowing the state to enter statements of the alleged victim who died prior to trial in violation of Appellant's right to confrontation?

## STATEMENT OF THE CASE

Appellant was indicted during the January 2024 term of the York County grand jury for one count of exploitation of a vulnerable adult. R. (Indictment). The state, represented by T. Matthew Hogge and Peri E. Imler, called the case to trial on February 20, 2024, before the Honorable William A. McKinnon and a jury. Appellant was represented by Zachary M. Merritt and Joshua R. Brown. Tr. 1. After a four-day trial, Appellant was found guilty. Tr. 599, ll. 22-25. Judge McKinnon sentence Appellant to five years' incarceration. S. Tr. 3, ll. 12-14.

## STATEMENT OF THE FACTS

Elizabeth Davidson (Decedent) was sixty-six (66) years old at the time of her death. Tr. 327, ll. 1-3. By all accounts, decedent lived a very modest life. Tr. 94, ll. 14-19; Tr. 366, ll. 14-18. When she passed, decedent owned a furnished mobile home, a Kia Soul, and some land in Florida. Tr. 385, l. 18-386, l. 5. Decedent had also amassed approximately $750,000 in an individual retirement account and an individual brokerage account managed by Edward Jones (Accounts). Tr. 94, l. 20-95, l. 13. Her will named Hayley Perez as the sole beneficiary of the mobile home, including its contents, the Kia, and the Florida land. Tr. 239, l. 5-240, l. 5. The accounts listed Jonathan Bass, Appellant, as the sole heir.[1] Tr. 117, ll. 1-6.

Decedent had worked as a mechanic at Tyco until late 2017 when she was let go as part of a mass layoff. By March of 2018, the decedent had decided to permanently retire. Tr. 94, ll. 3-95, l. 2. She met with her Edward Jones financial advisor, Candice Hendry, between 2014-2020 to change the beneficiaries to her accounts. In 2014, the first person to be named beneficiary of the accounts was Lisa Gardner. In mid-2016, the beneficiary was changed from Lisa Gardner to Sonya Collins. In August of 2018, decedent again changed her beneficiary, this time to Appellant with Hayley Perez listed as the contingent beneficiary. Tr. 94, l. 3-97, ll. 23. In November of 2019, decedent changed the beneficiary with eighty (80) percent going to Perez and twenty percent going to Appellant. Tr. 105, ll. 2-4. Finally, in mid-January 2020, decedent again changed her beneficiary making Appellant the sole beneficiary of the Edward Jones accounts. At that point in time, the accounts were worth approximately $800,000. Tr. 117, ll. 1-6.

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[1] The parties contested the beneficiary of the accounts in civil court. They entered into a settlement agreement wherein Perez would inherit 70% of the EJ accounts and Appellant would inherit 30%. PT Tr. 98, l. 11-99, l. 11.

Decedent also met with her estate planning attorney, Alton Hyatt, between 2004-2020 to make changes to the beneficiaries of her will. Attorney Alton Hyatt testified that his representation of decedent began in 2004 when he drafted probate documents including a power of attorney. At that time the power of attorney was listed as Roger Dale Davidson. He next changed decedent's will and other probate documents in 2012, making the beneficiary and power of attorney Lisa Gardner with Charles Gardner as the alternate. Then in 2015, decedent changed her probate documents to Sonya Collins with the alternate being Ann Long Jablonske. In February of 2018, decedent updated her will to change the alternates but left the primary beneficiary as Sonya Collins. In September of 201,8 decedent changed her probate documents to Appellant as the beneficiary and power of attorney. Finally, on January 6, 2020, decedent changed her probate documents to leave everything to Hayley Perez. Decedent attempted to change her will again on January 29, 2020, but Attorney Hyatt had determined he would not change her will again in such a short period of time. He expressed that when someone wants to change their will that quickly he has myriad concerns including competency and potential undue influence. Tr. 242, l. 1-Tr. 248, l. 17.

At issue during trial were the changes in beneficiaries decedent made (and attempted to make) in the last month of her life. Regarding exploitation, the state presented testimony that decedent was upset and crying throughout the last meeting with Hendry when she changed the beneficiary to solely Appellant. While Hendry testified that the decedent was emotional (and this caused her concern), she also testified that decedent was sure of her intent and intentions in making the change to the beneficiary. Tr. 112, l. 21-115, l. 15. Hendry had, at a prior meeting in November of 2019, questioned decedent directly to see if she was being taken advantage of

and offered to call the police with decedent. However, while emotional, decedent declined. Tr. 108, l. 18-109, l. 11.

Regarding vulnerability, the state alleged that, despite a meticulously well-kept home and a lifetime of independence, decedent was a vulnerable adult because she had various common prescriptions and age-related health issues. The state presented testimony that decedent had unspecified hip and shoulder problems and that she was prescribed various medications for blood pressure, cholesterol, antidepressants, and a seizure medicine that likely treated tremors. Tr. 110, l. 18-111, l. 23; Tr. 337, l. 14-Tr. 339, l. 19. The state entered evidence of two handwritten notes found in decedent's mobile home that indicated she had a lack of appetite and pain from her shoulders. State's Exhibits 17; State's Exhibit 18. The state did not present evidence of any identifiable health conditions, diagnoses, or medical records of decedent. None of decedent's treating doctors were subpoenaed by the state to offer expert testimony on the issue of vulnerability.

## ARGUMENTS

### I.

The trial court erred in refusing to quash the indictment where the indictment failed to provide sufficient notice of what Appellant was being called upon to defend against.

**Standard of Review**

The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. Id. Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law. Id.

**Relevant Facts**

Appellant was indicted for exploitation of a vulnerable adult.

The body of the indictment charged,

> The defendant, Jonathan Keith Bass, did between on or about January 6 to January 31, 2020, in York County, did knowingly and willfully exploit a vulnerable adult, Elizabeth Long Davidson, by causing or requiring the victim to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult; did make an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of the victim and such act was performed for the profit or advantage of someone other than the victim; or did cause the victim to purchase goods or services for the profit or advantage of the seller or another person through undue influence, harassment, duress, force, coercion, or swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that did delude the victim and cause the victim to lose money or other property, all in violation of 43-35-0085(D), Code of Laws of South Carolina (1976, as amended).

R. (Indictment). According to the state, "the entire case is about [Appellant] pressuring this vulnerable adult to change her will and her beneficiaries." P. Tr. 15, ll. 4-5.

After selecting a jury, but prior to the jury being sworn, defense counsel moved to quash the indictment. R. (Motion to Quash). Prior to defense counsel arguing the motion, the trial court requested the state summarize its opinion of the facts of the case. P. Tr. 64, l. 4-68, l. 18. The court then confirmed "the exploitation the state is alleging is getting her to change those accounts and then getting her to change – attempting to get the will changed." P. Tr. 69, ll. 21-24.

Defense counsel argued that under State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), that the indictment as a notice document should sufficiently and plainly tell a defendant what he is called to defend against. However, in Appellant's case the state had merely copied and pasted the three separate ways that exploitation could occur under the statute into a single cause of action in a run on sentence in the body of the indictment. Other than a date range, the indictment neither indicated which specific cause of exploitation Appellant was charged with nor offered any indication of what acts Appellant had engaged in that were contrary to the law. By presenting exploitation as a single run-on sentence in the indictment instead of as three distinct causes of action, the grand jury would have been able to piecemeal the evidence together finding "part of it might fit under the first part and then part of it might fit under the second part and then part of it might fit under the third part" of the exploitation causes of action to secure an indictment. Defense counsel further argued the standard was "that a reasonable person would have to be able to review the indictment and know what the defendant is called on to answer." Defense counsel maintained no one could read the indictment and know what Appellant was called on to answer because the state did not specify a cause of action or expound upon any actions alleged to have been taken by Appellant. Finally, defense counsel noted that the evidence in the case was almost entirely hearsay. If the state was allowed to proceed on the

indictment as it stood, defense counsel would be unable to properly challenge whether the hearsay evidence was being offered for the proof of the matter asserted because the indictment did not specify what matter the state sought to prove. P. Tr. 70, l. 5-75, l. 6.

The state responded that an indictment met legal muster when it charged the crime, substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. P. Tr. 75, ll. 21-24. The state continued that this case was "not easily pigeon-holed into one of the categories" of exploitation and that Appellant's conduct "could fall under some of these or all of these." P. Tr. 77, ll. 19-22. The state posited that if the court quashed the indictment, the state would seek an indictment with three separate counts for each separate cause of action under exploitation. The state maintained the indictment was sufficient because it cited the statute and "[w]hether or not the indictment could be made more particular is irrelevant." P. Tr. 78, ll. 1-10.

Defense counsel argued that determining whether an indictment was sufficient depended upon the statutory offense alleged and that while the state was not required to allege every single act in the indictment, the state did have to indicate what cause of exploitation it was prosecuting Appellant under and what supported that cause of action. Defense counsel maintained that a reasonable person could not look at the indictment and know what he was called upon to defend against. The trial court stated that defense counsel was arguing that having the entire statutory language in the indictment was not sufficient for notice and that the state had "to carve out what particular language in the statute they're accusing your client of violating." The trial court disagreed with defense counsel. While finding the argument logical, it ruled the indictment was sufficient under the case law. P. Tr. 78, l. 17-82, l. 11.

**Discussion**

As our Supreme Court recently reiterated, indictments matter. See State v. Dent, Op. No. 28289 (S.C. Sup. Ct. filed July 16, 2025). While the law does not require exhaustive specificity in an indictment, it does require more than a copy and paste of statutory law that the state believes might apply. To wit: information specific enough that a reasonable person would know what they were being called upon to defend against. That did not occur in this case. The trial court erred in failing to quash the overbroad indictment.

"Definitively, an indictment is a 'notice document.'" State v. Tumbleston, 376 S.C. 90, 95, 654 S.E.2d 849, 852 (Ct. App. 2007) (cleaned up). After Gentry, an indictment challenged as insufficient no longer raised a question of subject matter jurisdiction; rather, it raised a question of whether a defendant properly received notice he would be tried for a particular crime. Id., at 96, 654 S.E.2d at 852 (cleaned up). A challenge to the sufficiency of an indictment must be made before the jury is sworn. Id. citing S.C. Code Ann. § 17–19–90 (2003). If the objection is timely made, the circuit court should evaluate the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense intended to be charged. Id. at 96-97, 654 S.E.2d at 853-53 (cleaned up).

In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances. Id. at 97, 654 S.E.2d at 853. (cleaned up). Accordingly, the sufficiency of an indictment is examined

objectively, from the viewpoint of a reasonable person, and not from the subjective viewpoint of a particular defendant. Id. Further, whether the indictment could be more definite or certain is irrelevant. Id. As repeatedly noted by our appellate courts:

> An indictment is sufficient if the offense is stated with [enough] certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

Id. at 97-98, 654 S.E.2d at 853 (cleaned up). Therefore, an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. Id. at 98, 654 S.E.2d at 853 (cleaned up). An indictment is a critical document that must state the charged offense with particularly, apprising a defendant of the elements of that offense. Dent, *supra*.

Pursuant to S.C. Code Ann. § 43-35-10(c), exploitation of a vulnerable adult can occur in three distinct ways:

> (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient;
>
> (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; **or**
>
> (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) undue influence, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property.

These are three distinct and separate causes of action that have different elements and require different proof. However, the state copied the definitional language of the code section into a single-count, run-on sentence indictment, creating a single cause of action where three existed. This overbroad indictment was problematic for several reasons.

First, the state secured the indictment by presenting its evidence to the grand jury, and subsequently the trial jury, as general proof of exploitation. Instead of having to show that each element of each cause of action was present, the state was able to show that some of Appellant's conduct "could fall under some of these or all of these," and thus secure an indictment. For example, the state presented testimony that decedent said "undue influence" when discussing her will with Attorney Hyatt. However, the state never presented evidence that decedent had been caused to purchase goods or services for the profit or advantage of himself or another. Thus, proof of the "undue influence" element in section (c) was presented to the grand jury, and an indictment returned, even though no evidence of the other elements of section (c) was presented. As defense counsel argued, the state was piecemealing together conduct under each separate cause of action to prove a general form of exploitation.

Second, other than the definitional language of the statute and a date range, the indictment offered no notice as to what Appellant was expected to defend against. The indictment merely alleged the three ways that exploitation could occur, without specificizing any actions or conduct by Appellant that were contrary to the law. The state, because the case could not be "pigeon-holed" into one section, felt it did not need to offer any further specifics. However, a reasonable person could not look at the indictment and know what they were being called upon to defend against. Looking at the face of the indictment Appellant and defense counsel would have ascertained that they were defending against actions that occurred between

January 6-31, 2020. However, they were left to puzzle out what "activity or labor" Appellant had caused decedent to engage in against her wishes, or what "improper, unlawful, or unauthorized uses" of "funds, assets, property, power of attorney, guardianship or conservatorship" Appellant had undertaken, or what "goods and services" were procured through "undue influence, harassment, duress, force, coercion, or swindling by overreaching, cheating or defrauding" by Appellant. Not separating the indictment properly into separate counts, and not indicating what portions of each code section that Appellant was alleged to have violated, created an extremely vague and overbroad indictment that did not provide notice to Appellant of what he was defending against.

Third, most evidence in this case came in through hearsay. As defense counsel noted, the broadness and vagueness of the indictment presented special challenges in Appellant's case. Without further specific or information, defense counsel's ability to properly challenge whether the hearsay evidence was being offered for the proof of the matter asserted was significantly impaired because the indictment did not specify what matter the state sought to prove.

It should also be noted that at the direct verdict stage the court informed the state it did not see evidence of sections (b) and (c) and would therefore not charge the jury on those sections. While the jury was not charged with the inapplicable law, it was presented with evidence, such as the "undue influence" that was not relevant to what the state actually ended up prosecuting appellant for: purportedly causing decedent to engage in the activity or labor of changing her beneficiary against her rationale wishes. Again, much like the grand jury, the trial jury was presented with evidence that went to elements ultimately not before them but used by the state to prove generalized exploitation.

Looking at the indictment with a practical eye in view of all the surrounding circumstances, and from the viewpoint of an objectively reasonable person, the indictment in this case failed to prove Appellant with adequate notice of what he was called upon to defend against. The state did not charge the offense properly, as three separate counts with different elements and proof, but as a single charge with no particularity. Appellant had no notice of which portions of the three sections of exploitation the state sought to convict him of and instead prepared a shotgun defense for a shotgun prosecution. The indictment in this matter did not sufficiently apprises the defendant of what he must be prepared to meet and the trial court should have quashed the indictment.

## II.

The trial court erred in refusing to direct a verdict of acquittal were the state failed to present any direct or substantial circumstantial evidence that the decedent was a vulnerable adult.

**Standard of Review**

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Passio, 433 S.C. 666, 673, 861 S.E.2d 785, 789 (Ct. App. 2021) *quoting* State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged." Id. "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Passio, 433 S.C. 666, 673, 861 S.E.2d 785, 789 (Ct. App. 2021) *quoting* State v. Frazier, 386 S.C. 526, 531, 689 S.E.2d 610, 613 (2010). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." Id.

**Relevant Facts**

Upon retiring in 2018, decedent had planned to take a cruise but had to cancel the trip due to unspecified health concerns. Tr. 100, ll. 8-12. Candice Hendry, the financial advisor to decedent, described decedent as active when they first met. Starting in late 2019 into 2020, she saw a decline in the health of decedent, noting decedent suffered from unspecified shoulder problems from her work as a mechanic and "just based on age." Decedent was also purportedly having unspecified hip issues and trouble with slurring her words. Tr. 110, l. 18-111, l. 23. It was during that time decedent allegedly scheduled an appointment with a neurologist. Tr. 111, ll. 18-23. Hendry reported that decedent had told her she had fallen one time and could not get

off the floor for forty-five minutes until Appellant arrived to help her up. Tr. 112, ll. 5-10. Hendry also described decedent as a hard-working, smart, organized, and warm-hearted woman with a formidable mind. Tr. 169, ll. 13-23. While recounting the final meetings with decedent, Hendry testified that although decedent was emotional, she was aware of her intent and intentions when she made the last two changes to her beneficiaries. Tr. 190, l. 21-15; Tr. 194, ll. 4-24.

Sonya Collins, a friend and neighbor of decedent, testified that she once helped decedent up after she fell getting out of the car. She also testified that at one point Appellant confronted her and said "Well, I finally got her off all her medicines." Tr. 206, l. 3-207, l. 6. Sabrina Gast, the coroner, testified that the coroner's office had been provided with the decedent's medications after her death. The medicines were a mix of prescription and over the counter medications. Among the medicines were different blood pressure medicines, cholesterol medication, an anti-seizure medication likely to treat tremors, and an anti-depressant. Gast noted that several prescriptions did not appear to have been taken as prescribed because there was more medication left in the bottle then there should have been at the time of decedent's death. Tr. 333, ll. 4-21. Gast specifically noted that there was a discrepancy in the amount of anti-depressant medication and blood pressure medication. She indicated there were several medications "like that" in evidence. She also stated that some of the prescriptions were very old, dated between 2010 to 2014. She testified it was not unusual for prescriptions to be taken incorrectly and that, given decedent's age, her prescriptions for blood pressure, cholesterol, and antidepressant medications were normal. Tr. 337, l. 14-Tr. 339, l. 19.

Hayley Perez, the ultimate sole beneficiary of the will and majority beneficiary of the accounts, testified that decedent seemed more depressed and frazzled at the end of her life, with

more doctor's appointments. Tr. 372, l. 22-Tr. 373, l. 22. She agreed that decedent was an independent, strong woman who could manage things on her own. Tr. 394, ll. 9-12. She concluded her testimony by stating the decedent "wasn't too horribly old in her, you know, late sixties. But yes, she was aging like the rest of us." Tr. 414, ll. 4-7.

The state also entered two photographs of writings purporting to prove the vulnerability of the decedent. One showed a note dated January 26, 2020, wherein the decedent describes her lack of appetite and loss of senses of smell and taste. The note ends by stating her meal the night before was the first time she had eaten supper in months. State's Exhibit 17. The other was a note titled "Betty's Pain Days" dated January 24 through January 26, 2020, wherein she describes the pain in her shoulders as unbearable, better today, and not too bad over the course of a three-day period. State's Exhibit 18. The state also entered close to three hundred photographs of the decedent's house on the day of her death which showed an organized and pristinely cleaned home, except for Appellant's room which was extremely messy. State's Exhibit 11.[2]

After the state rested,[3] defense counsel moved for a directed verdict arguing the state had not provided substantial circumstantial evidence of vulnerability. The trial court noted the state had an "uphill battle" to show evidence of vulnerability. Tr. 426, l. 1-Tr. 428, l. 20. Defense counsel argued that the state had not presented any direct evidence of vulnerability. He argued there was no evidence decedent was living in squalor or filth and if fact the evidence showed she had meticulously maintained her home up until her death. The testimony indicated that the decedent "lived a normal day-to-day life, went to necessary doctor's appointments, was trying to

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2 A copy of State's Exhibits 11, 17, and 18 are on file with this Court.

3 Curiously, prior to resting the state requested the judge essentially pre-rule on the directed verdict motion so that the state could determine whether it should rest its case or attempt to call another witness. Tr. 414, l. 23-417, l. 9.

get stuff figured out." He argued that having medical problems and other people's feelings of unease did not rise to substantial circumstantial evidence of vulnerability. Tr. 434, l. 19-435, l. 21. Defense counsel further noted that the doctor's decedent was seeing leading up to her death had a duty under the law to report vulnerability and that did not occur. Tr. 438, l. 19-439, l. 2. Nor had the state sought to call any of decedent's doctors to testify about any actual diagnoses or health limitations. He also reiterated that Perez, arguably the person closest to decedent, had testified decedent could take care of herself. Tr. 447, ll. 4-448, l. 19.

Ultimately the court denied the motion for direct verdict on the issue of vulnerability calling it "a very close call." In denying the motion the court rule,

> [T]he basis for my ruling is I do think the Defense is right, the depression issue is circumstantial. There is evidence in the record that she was prescribed Lexapro, an antidepressant, but that -- that's circumstantial, that she had depression.
>
> And then there was evidence that the defendant stopped her from taking it, but in it -- so that's some evidence --circumstantial. In addition to that, there's direct evidence that she had a fall and could not get up. And then the most significant evidence in the Court's view is the notes in her own handwriting that she was having -- really struggled with nutrition and was hardly eating.
>
> So -- because it's -- it's diminished ability to adequately provide for self-care. I think the notes about not eating, I think that that satisfies -- that, at least, there is a piece -- some direct evidence which is enough to get to the jury.

Tr. 448, l. 20-449, l. 13. Defense counsel argued that the handwritten note was not direct evidence of vulnerability and that there had been no physical or mental condition established by evidence as necessary to show the decedent was vulnerable. The court responded that the note showed malnutrition and while the directed verdict motion was a close call, he felt there was enough to send the case to the jury. Tr. 449, l. 14-450, l. 32.

**Discussion**

To convict someone of exploitation of a vulnerable adult the state must prove that exploitation occurred in one of three ways, and that the adult at issue was vulnerable under the law. Here, the state failed to submit direct evidence or substantial circumstantial evidence that decedent was a vulnerable adult. The court should have granted the motion for a direct verdict.

"The circuit court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Suspicion implies a belief or opinion as to guilt based upon facts or circumstance which do not amount to proof." State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). "A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id.

"Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. If the State failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

Our Supreme Court "has repeatedly affirmed the principle that when the State fails to produce *substantial* circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011)

(emphasis added). In Odems, this Court cited State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001), as "jurisprudence . . . instructive in explaining the proof required in cases built wholly on circumstantial evidence." Id. Specifically, the trial court "should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty." Odems, 395 S.C. at 586, 720 S.E.2d at 50 (citation omitted). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." See State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (internal quotation omitted).

Pursuant to S.C. Code Ann. §43-35-10(11) a vulnerable adult is

> a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

In Doe v. South Carolina Department of Social Services, 407 S.C. 623, 757 S.E.2d 712, Jane Doe appealed the determination that she was a vulnerable adult. Doe, who was then eighty-six, lived in a hoarded house that was in "an unsanitary and deplorable condition" with a hole in the roof, a hose running from the neighbor's house providing water, and mold on various surfaces. The home's windows and doors had been barricaded for security purposes. A licensed psychologist evaluated Doe and found she possessed a sound mental status with a cognitive ability within the low to average range. She possessed the minimum levels of competency to function independently and there was no evidence of dementia, severe emotional issues, or obvious physical limitations. Doe also had a minor heart condition and hypertension, but there

was nothing to indicate that her chronic medical needs were not being addressed. Id. at 627-630, 757 S.E. 2d at 714-715.

To analyze whether Doe was a vulnerable adult our Supreme Court looked in part to how various courts, including criminal courts, have defined the term.

> In cases where the government has pursued a charge of abuse or exploitation of a vulnerable adult, courts have *required the prosecution to present evidence that the victim was unable to perform daily activities related to self-care or protection as a result of a physical or mental infirmity*, including advanced age. Doe v. S.C. Dep't of Soc. Servs., 407 S.C. 623, 636–37, 757 S.E.2d 712, 719 (2014) (emphasis added) See People v. Cline, 276 Mich.App. 634, 741 N.W.2d 563 (2007) (finding evidence was sufficient to support conviction for first-degree vulnerable adult abuse where victim qualified as a vulnerable adult because she required some level of personal care as a result of blindness and diabetes and, thus, could not live independently); Decker v. State, 66 So.3d 654, 658 (Miss.2011) (recognizing that, in a case involving the prosecution for a violation of the Vulnerable Adults Act, the broad definition of "vulnerable adult" included "a person with completely normal mental capacity, but *whose ability to perform the normal activities of daily living is impaired because of a physical limitation,* such as blindness or the inability to walk" (emphasis added)); State v. Stubbs, 5 Neb.App. 38, 555 N.W.2d 55, 62 (1996) (vacating conviction for exploitation of a vulnerable adult where evidence that victim was physically and mentally aging did not establish that the victim had "substantial functional impairment which left him incapable of caring for himself or living independently"), *aff'd,* 252 Neb. 420, 562 N.W.2d 547 (1997). See generally James L. Buchwalter, Annotation, *Validity, Construction, and Application of State Civil and Criminal Elder Abuse Laws,* 113 A.L.R. 5th 431 (2003 & Supp.2014) (analyzing state and federal cases involving civil suits and criminal prosecution for elder abuse); William D. Bremer, Annotation, *Vulnerability of Victim as Aggravating Factor under State Sentencing Guidelines,* 73 A.L.R. 5th 383 (1999 & Supp.2014) (analyzing state cases as to various aspects of vulnerability, such as age, that have been asserted in applying a state sentencing provision based on victim's vulnerability).

Ultimately our Supreme Court ruled that the state had failed to show that Doe was a vulnerable adult as there was no evidence that her ability to adequately provide for her own care and protection had been impaired. Id. at 639, 757 S.E.2d at 720.

During Appellant's trial the state did not present direct or substantial circumstantial evidence that decent was unable to perform daily activities related to self-care or protection as a

result of a physical or mental infirmity. The evidence offered at trial showed decedent took care of herself and her home up until the day of her death. While decedent was on prescription medications, there was no evidence introduced to show *why* she was prescribed those medications. The state repeatedly argued that her anti-depressant prescription showed she was depressed. However, as one solicitor pointed out, she too was on the same anti-depressant medication, and it also treated anxiety. Tr. 440, l. 9-441, l. 19. Further, the mere existence of a prescription does not indicate a diagnosis or the reason it was prescribed.

There was circumstantial evidence that decedent had fallen once and been stuck on the floor for forty-five minutes and that she had issues with her hips and shoulders related to aging. There was also evidence that decedent slurred her words but there was no diagnosis, condition, or ailment identified as a cause. Further, while it was testified that decedent slurred her words, no one testified that she was incompetent, confused, or unable to provide for herself. Based on the testimony, it appeared decedent was a functionally independent woman up until her death who had common health issues related to aging. None of the evidence presented by the state showed that decedent was unable to engage in the daily activities related to self-care or protection.

The trial court stated the handwritten note discussing decedent's lack of appetite was direct evidence of vulnerability because it showed malnutrition. While the note was direct evidence of a lack of an appetite and altered eating habits, it did not directly show vulnerability or malnutrition. Lacking an appetite or suffering from daily pain does not render an individual vulnerable under the law. The law requires proof that the adult cannot perform daily activities related to self-care and protection to be deemed vulnerable. The adult's ability to care for themselves must be *substantially* impaired by a physical or mental condition which prevents a

person from *adequately* providing for their own care. While decedent was aging and unquestionably had some health concerns, the record is evident that she was taking care of herself and her home on a daily basis, scheduling and keeping appointments with various professionals, and living her life unassisted.

Critically, the state did not offer any testimony from decedent's doctors, nor did it offer medical records detailing physical or mental diagnoses. The evidence provided at trial was wholly circumstantial as it related to vulnerability and amounted to little more than an older woman, aging normally with normal health concerns. The evidence did not show that decedent was unable to perform the daily activities related to self-care or protection and only created an inference that she had some vulnerability. The trial court should not have denied the directed verdict motion.

## III.

The trial court erred in allowing the state to enter statements of the alleged victim who died prior to trial in violation of Appellant's right to confrontation.

**Standard of Review**

In criminal cases, appellate courts sit to review errors of law only. *State v. English*, 443 S.C. 49, 55, 902 S.E.2d 385, 338 (2024) *citing State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Appellate courts typically review a trial court's ruling on the admissibility of evidence pursuant to an abuse of discretion standard and give great deference to the trial court. *Id. citing State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *Id.* Whether a statement is testimonial and therefore subject to the confrontation clause is a question of law reviewed de novo. *State v. Brewer*, 438 S.C. 37, 44, 882 S.E.2d 156, 160 (2022).

**Relevant Facts**

Prior to the start of trial defense counsel informed the trial court that "every witness that's being called and every piece of evidence that's being submitted is through the deceased victim" and therefore the defense would be objecting throughout the trial on both hearsay and confrontation clause grounds. Defense counsel's biggest concerns were the testimony of Candice Hendry, the financial advisor to the decedent, and Alton Hyatt, the estate planning lawyer of decedent. P. Tr. 20, l. 24-22, l. 1.

At the request of defense counsel the court took a proffer of the testimony of Candice Hendry. Defense counsel objected when the state asked a question that would implicate the

Confrontation Clause arguing the testimony the state was attempting to elicit was testimonial in nature. Specifically, counsel argued that the conversations between the decedent and her financial advisor and her estate planning lawyer were testimonial in nature because they were made while preparing documents designed to be used in court to ensure a decedent's final wishes are met. Counsel argued the statements were made under circumstances which would lead an objective witness to reasonable believe that the statements would be used at trial. Considering how often estate documents were contested, and the fact that the parties in this case had in fact contested the accounts beneficiary in this case, defense counsel argued any statements by decedent in those conversations should be excluded from evidence in violation of Appellant's right to confrontation. Tr. 20, l. 6-25, l. 13. The court disagreed, finding the statements were not testimonial, and overruled the objection on confrontation grounds. Tr. 25, ll. 14-24. Throughout the testimony Candice Hendry and Alton Hyatt, defense counsel repeatedly objected on grounds of confrontation and hearsay.

**Discussion**

"The Sixth Amendment to the United States Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" State v. Brewer, 438 S.C. 37, 48, 882 S.E.2d 156, 162 (2022) citing State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013) (quoting U.S. Const. amend. VI). Whether the Confrontation Clause applies turns on whether the challenged out-of-court statement is testimonial and applies to witnesses against the accused - in other words, those who bear testimony. Id. (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).

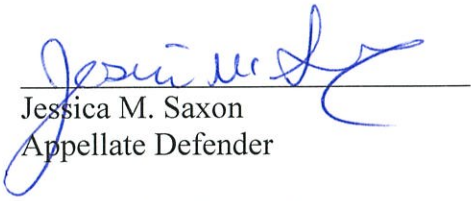
An out-of-court statement, including a written report, is considered testimonial when its primary purpose is to serve as evidence or an out-of-court substitute for trial testimony. State v.

English, 443 S.C. 49, 58, 902 S.E.2d 385, 390 (2024) (cleaned up). In determining the primary purpose of the out-of-court statement, courts "look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." Id. "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Id.

The testimony of Candice Hendry and Alton Hyatt, professionals who work preparing legal documents that are used after an individual's death, was largely testimonial when considered with the other circumstances in the case, and thus should have been excluded under the Confrontation Clause. The numerous changes to beneficiaries, the indication that Hendry believed decedent was being taken advantage of and she wanted to call the police, and that decedent told Hyatt she was being unduly influence, indicate that a reasonable person would have ascertained that the purpose of those conversations would ultimately be to bear testimony against the Appellant after the decedent's death. Considering the regularity with which estate documents are contested, it strains incredulity to find that the conversations surrounding the creation of the documents and the beneficiaries would not be testimonial under the Confrontation clause. Here, the decedent's purported intents and wishes as to her estate were repeatedly testified to by individuals that prepared the valid legal documentation to execute those wishes. This was testimonial in nature and should have been excluded.

## CONCLUSION

Based on the forgoing arguments, Appellant respectfully requests that this Court reverse and remand his conviction and sentence for a new trial.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of August, 2025.