STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2024-000703

THE STATE,

Respondent,

v.

JONATHAN KEITH BASS,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Jonathan Keith Bass ("Appellant") was indicted by the York County Grand Jury for one count of exploitation of a vulnerable adult. Appellant proceeded to trial before the Honorable J. William A. McKinnon, and a jury on February 20, 2024. The jury found Appellant guilty as indicted. Appellant was sentenced to five years' incarceration.

This appeal follows.

STATEMENT OF FACTS

Elizabeth Davidson (Decedent) was sixty-six years old at the time of her death. (R. 400). When she passed, decedent owned a furnished mobile home, a Kia Soul, and some land in Florida. (R. 458-459). Decedent had amassed approximately $750,000 in an individual retirement account and an individual brokerage account managed by Edward Jones (Accounts). (R. 248). At the time of her death, Decedent's will named Hayley Perez as the sole beneficiary of the mobile home, including its contents, the Kia, and the Florida land. (R. 293). The accounts listed Jonathan Bass, Appellant, as the sole heir[1]. (R. 271).

Decedent first opened an account with Edward Jones in 2011. (R. 247). Candice Hendry became her financial advisor in May of 2014. (R. 247). Hendry testified that she would officially meet with Decedent two to three times a year regarding her accounts, but that she would often stop in and say hello or call for a phone conversation. (R. 247). Decedent had worked as a mechanic at Tyco until late 2017 when she was let go as part of a mass layoff. (R. 248). Decedent informed Hendry that she wanted to permanently retire in March of 2018. (R. 248-249). Decedent met with Hendry in April of 2018 to discuss her income stream for her in retirement. (R. 249). At the time of her retirement, her beneficiary was Sonya Collins. (R. 250). Decedent called Hendry in July of 2018 informing her she was planning to update her beneficiaries and then met with her in person in August of 2018 to change her beneficiary to Appellant with Hayley Perez listed as the contingent beneficiary. (R. 248-251). Hendry testified that she had heard Perez' name and knew that they were friends and learned that Appellant was a neighbor renting a trailer beside Decedent. (R. 251-252).

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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%. (R. 99-100).

Decedent met again with Hendry in October of 2018 to discuss her accounts. (R. 252). The conversation primarily revolved around Appellant and that Decedent intended to keep important paperwork and documents in Appellant's residence. (R. 252). Hendry testified that she expressed concerns about that, but that Decedent stated she felt like he was taking care of her. (R. 253). Due to her concern from the conversation, Hendry phoned the main office which resulted in an attempt to schedule another appointment with Decedent and Appellant so that she could meet him. (R. 253). Hendry was unsuccessful in scheduling another appointment. (R. 253-254). Hendry testified that Decedent's spending habits began to change. Hendry testified that she turned on income in early December of 2018 and then also increased her income distribution where she previously had only been receiving her social security and pension. (R. 254). She also took out a one-time withdrawal from her annuities in late December of 2018. (R. 256). Hendry testified that she expressed more concerns about her increased and unusual spending habits. (R. 255-256).

Hendry eventually met Appellant in April of 2019. Decedent came in for a regular review and Appellant waited in the lobby. (R. 256). Decedent wanted another distribution, an annual one, at an account not held at Edward Jones. (R. 257). Hendry also learned through that meeting that Decedent had loaned Appellant approximately seven to eight hundred dollars because there was a handwritten IOU paper that they showed Hendry. (R. 257). Decedent took another one-time distribution in July of 2019 and did this by phoning in rather than stopping in the office like she previously had. (R. 258). Hendry attempted to get her to come into the office to discuss that distribution, but she declined. Hendry testified that she seemed kind of distant and very different than their relationship had been before. (R. 258). Decedent also took another one-time distribution out in September of 2019. Hendry testified that it was becoming difficult to get in touch with her,

where she had previously stopped by the office frequently, when she would call her to come in she declined and rarely phoned unless she needed money. (R. 258).

Decedent then called early November of 2019 because she wanted to change her beneficiaries to 80 percent Hayley Perez and 20 percent Appellant. (R. 259). Hendry scheduled an in office meeting and Decedent came in late November to change the beneficiaries. (R. 259). During the meeting, Decedent seemed distrustful of Appellant since he had moved into her trailer. (R. 259). Hendry testified that she "shut [her] portfolio on [her] desk... and asked [Decedent] if she needed help." (R. 259). Hendry testified that she was "kind of quiet, sort of hesitant." And she did remove Appellant's power of attorney. (R. 259). Hendry testified that she was again concerned after that meeting and phoned Decedent a few days to check on her. (R. 260). During that call she stated that Decedent was kind of quiet and soft spoken. (R. 261). Hendry testified that she got the feeling that Appellant was on the line and called out to him and he did respond that he was on the line. (R. 261-262). Decedent then came in office shortly after and Hendry asked if she wanted to call the police together and asked if she was being taken advantage of. (R. 263). Hendry testified that Decedent cried and that the Appellant was supposed to move out after he paid back the money he owed her, but that she was going to ask him to move out after Christmas. (R. 263).

Hendry testified that Decedent's health rapidly declined between 2019 and 2020 specifically in November of 2019. (R. 264-265). She began having severe shoulder and hip problems and her speech became kind of slurred. (R. 264-265). She began having mobility issues and falling. (R. 266). Decedent called in early January of 2020 and stated that she had fallen in her bathroom and laid there for 45 minutes until Appellant had come home to help her up. (R. 266). Decedent called back on January 13th in a frantic manner saying it was urgent that she change her beneficiaries again and Hendry could hear Appellant in the background also expressing the

urgency. (R. 266-267). Appellant brought Decedent into the office on January 16th to make the changes to the beneficiaries. (R. 268). Hendry testified that she tried to talk to her during the meeting to determine if this was a decision that she was choosing to make on her own and that Decedent sobbed the entire time. (R. 268). She testified that she asked her numerous questions regarding her intent, if she was okay, if she needed help, but she insisted that she wanted to change beneficiaries to Appellant. (R. 269). Appellant called Hendry on February 5, 2020, to inform her that Decedent had died and that he then called frequently regarding the inheritance. (R. 272).

Sonya Collins, who at one point had been a beneficiary, also testified at trial. Collins was a friend and neighbor of Decedent. (R. 335). Collins testified that they became good friends after her divorce, that she was a very sweet woman and wasn't much of an extravagant spender. (R. 335-336). She stated that Appellant at some point was kicked out of his trailer, then got a motorhome that he attached to Decedent's trailer and then eventually moved in with Decedent. (R. 336-339). Collins stated she didn't have many encounters with Appellant, but that she would frequently see him get her mail for her and that one time he had told her "Well, I finally got her off all her medicines." (R. 339-340). Collins testified that Decedent's physical health began to get worse and she wouldn't come outside as much. (R. 340). Collins testified that after coming back from an appointment she saw Decedent fall and when she went to help her and walk her into her trailer, Decedent stated "No, please just leave before [Appellant] comes back out." (R. 341). Collins testified that shortly after that encounter she went to use her key to let Decedent's dog out and discovered that the locks had been changed. (R. 341). Decedent asked for her key back and Collins testified that after telling her she was making a mistake they had a falling out. (R. 341-342).

Alton Hyatt, the attorney who executed Decedent's will and other documents, also testified at trial. He executed a will, power of attorney, health care power of attorney, and revoked any previous power of attorney and it was filed January 6, 2020. (R. 371). All the documents listed Hayley Perez as the sole beneficiary and powers of attorney. (R. 371-374). Hyatt testified that Decedent came back to his office to meet with him regarding changing her will again on January 29th, 2020. (R. 376). Hyatt testified that he had a discussion with her about his concerns in changing the will stating the short turnaround made him concerned about either competency issues or undue influence. (R. 378). Hyatt testified Decedent's immediate response was "undue influence. It's undue influence." (R. 378). Hyatt testified he knew he wasn't going to change her will coming in, but once she stated that he confirmed to her that he would not be redoing her will and ended the discussion. (R. 378).

Sabrina Gast, the York County Coroner, testified that part of the medical procedure is investigating the medicines she was taking and going through the prescriptions she was given to determine how many pills were in the containers and how many should have been in the containers. (R. 402). Gast testified that in most of the prescriptions there was more medication than should have been indicating that she was not properly taking the medications. (R. 406). Gast testified that there were many prescriptions, but the ones that stood out to her were the ones for blood pressure, anti-depressants, cholesterol, and anti-seizure medications. (R. 406).

Hayley Perez also testified at trial. Perez testified that they had met in 2017 and had become like family creating a pseudo grandmother/granddaughter relationship. (R. 437-441). Perez testified that Decedent had called her one morning and informed her she was making her, her beneficiary, stating "I'm starting not to trust [Appellant]. Please don't tell him what I'm doing. I know he'll be upset." (R. 443-445). Perez testified that Decedent's health began declining after

Appellant moved in with her and that she became increasingly withdrawn and harder to get in touch with. (R. 445-446).

ARGUMENT

1. The trial court properly refused to quash the indictment because it provided sufficient notice of what Appellant was being called upon to defend against.

Appellant contends the trial court erred in refusing to quash the indictment. Specifically, Appellant argues the indictment failed to provide sufficient notice of what Appellant was being called upon to defend. This argument lacks merit because the indictment provided sufficient notice.

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.

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).

After selecting a jury, but prior to being sworn Appellant made a motion to quash the indictment. (R. 63). The trial judge asked the State to give a summary of the State's case. (R. 64). After the summary was provided, the trial court confirmed the State's case, stating "so the state's allegation—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." (R. 64-69).

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 defendant against. Appellant argued that the State 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. (R. 72-74). Appellant argued other than the 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. (R. 72-74). Appellant further argued by making it a run on sentence it allowed the grand jury to piece the evidence together finding that part of it may fit under the first part and part under another part to secure an indictment. (R. 72-74).

The State responded citing State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981), 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. (R. 76). The State continued by saying 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." (R. 77). The State argued 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 whether the

indictment could be made more particular was irrelevant. (R. 78). Defense counsel continued to argue that the State had to elect in the indictment one of the three methods of proving their case. (R. 78-81). The trial court found Defense Counsel's argument inconsistent with State v. Tumbleston[2] and denied the motion to quash the indictment.

In South Carolina, an indictment issued by a grand jury is generally required before an individual can be held to answer in any court for a criminal offense. See S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."); see also S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except [under certain circumstances]."). Generally speaking, an indictment is a notice document, and its "primary purpose" is "to put the defendant on notice of what he is called upon to answer, i.e., to [apprise] him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial." State v. Smalls, 364 S.C. 343, 346-347, 613 S.E.2d 754, 756 (2005) (citation and internal quotations omitted); see State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document.").

When evaluating an indictment, one shall be considered sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction." State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980); see S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient

[2] State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007).

and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Importantly, "the true test of an indictment's validity 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." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999); see Gentry, 363 S.C. at 103, 610 S.E.2d at 500 ("[W]hether the indictment could be more definite or certain *is irrelevant*." (emphasis added)).

When a timely and proper challenge to the sufficiency of an indictment has been raised, what the trial judge is called upon to determine is: (1) whether the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce upon conviction and the defendant to know what he is called upon to answer and be able to make a decision as to whether to plead guilty or stand trial; and (2) whether the defendant is apprised of the elements of the offense intended to be charged. State v. Tumbleston, 376 S.C. 90, 96-97, 654 S.E.2d 849, 852 (Ct. App. 2007). In making such a determination, the trial judge must look to the indictment with a practical eye and examine the circumstances that existed prior to trial in order to determine whether the defendant was prejudiced in the sense that defendant was taken by surprise and unable to combat the charges against him due to the indictment. State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991). If an indictment satisfies the requisite conditions and, thus, is facially valid, the trial judge should deny the defendant's motion to quash. State v. Williams, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990).

In this case, Appellant was charged with exploitation of a vulnerable adult. Pursuant to S.C. Code Ann. § 43-35-10(3) Exploitation means:

> (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.
> (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.

Viewing the exploitation of a vulnerable adult indictment in Appellant's case with practicality in mind, it both directly named Appellant's offense and identified the relevant statutory provision—43-35-0085(D)—to unmistakably delineate the exact crime being charged. Crenshaw, 274 S.C. at 477, 266 S.E.2d at 62. Likewise, it expressly used the terms contained in the applicable statute to identify the elements of the charged offense. See State v. Jacobs, 238 S.C. 234, 243, 119 S.E.2d 735, 739-740 (1961) ("An indictment is ordinarily sufficient if it is in the language of the statute."). Therefore, through its language, the indictment identified the indicted offense with sufficient certainty and particularity to alert Appellant and the trial judge of the exact offense for which Appellant was charged—exploitation of a vulnerable adult. Cf. Crenshaw, 274 S.C. at 477, 266 S.E.2d at 62 ("As the indictment bears the specific code section on its face and there was lengthy discussion concerning that code section throughout the trial, appellants obviously knew for what crime they were being prosecuted."). By doing so, the indictment was sufficient to enable the court to know what judgment to pronounce in the event of conviction and to make Appellant aware of the offense's statutory elements and terms. See State v. Solomon, 245 S.C. 550, 562, 141 S.E.2d 818, 825 (1965). ("The indictment was phrased in substantially the language of [the

pertinent statute], which created and defined the offense, and an indictment so phrased is ordinarily sufficient.").

The indictment listed the different definitions in the definition section of what exploitation could mean. Section 43-35-10(c) S.C. Code Ann. It further listed between the dates of January 6, 2020-January 31, 2020. Therefore, through its inclusion of both the terms of the statute *and* the identified time period in question, the indictment fairly alerted Appellant of exactly how he was alleged to have violated the statute, which ensured he had fair notice of what he was being called upon to answer. See Tumbleston, 376 S.C. at 98, 654 S.E.2d at 853 ("[A]n 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.").

For these reasons, the indictment—when viewed with a practical eye as required—contained sufficient detail to comply with the requirements necessary for facial sufficiency, and, thus, it carried out its purpose as a "notice document" in Appellant's case. Gentry, 363 S.C. at 102, 610 S.E.2d at 500; see S.C. Code Ann. § 17-19-20 (identifying the information that must be included before an indictment "shall be deemed and judged sufficient and good in law"); United States v. Bates, 96 F.3d 964, 970 (7th Cir. 1996) ("Facial sufficiency is not a high hurdle."); State v. Shoemaker, 276 S.C. 86, 88, 275 S.E.2d 878, 879 (1981) (concluding an indictment was sufficient where it fulfilled its purpose under the circumstances of the case). Further, State v. Lewis held that even if an indictment is questionable, further specificity is available by reviewing the discovery materials. State v. Lewis, 434 S.C. 158, 172, 863 S.E.2d 1, 9 (2021). "One is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant was prejudiced, i.e., taken by surprise and hence unable to combat the charges against him." State v. Lewis, 434 S.C. 158, 172, 863 S.E.2d 1, 9 (2021) (quoting State v. Baker, 411 S.C.

583, 589, 769 S.E.2d 860, 864 (2015)). Here, Appellant was given the indictment, discovery for the case, and a pretrial summary of the State's case. It is clear from the record that Appellant was not surprised and certainly not ambushed at trial by the allegations against him. During the pretrial summary given by the State, counsel for Appellant did not object or seemed shocked by the summary and even clarified and gave extra details during the summary. (R. 64-69). Therefore, the trial judge properly denied Appellant's motion to quash exploitation of a vulnerable adult, and there is no proper basis upon which to disturb that ruling on appeal. See Williams, 301 S.C. at 371, 392 S.E.2d at 182 (recognizing a trial judge properly denies a motion to quash an indictment when it contains "no facial defect"). Appellant's conviction should be affirmed.

2. The trial court properly refused to grant a directed verdict because there was evidence in the record that Decedent was a vulnerable adult.

Appellant argues that the trial court erred in failing to direct a verdict for Appellant based upon the fact that the State failed to present any direct or substantial circumstantial evidence that the decedent was a vulnerable adult. This argument lacks merit because there is evidence in the record to show that decedent was a vulnerable adult and properly was sent to the jury.

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In an appeal of a ruling involving a challenge to the sufficiency of the evidence in a criminal case, the appellate court must necessarily apply the same standard that should have been applied by the trial judge and view the evidence and all reasonable inferences in the light most favorable to the State. State v. Gracely, 399 S.C. 363, 371-372, 731 S.E.2d 880, 884 (2012). "In reviewing a refusal to grant a directed verdict, we must view the evidence in the light most favorable to the State and determine whether there is any direct or substantial circumstantial evidence that reasonably tends to prove the defendant's guilt or from which his guilt may be logically deduced." State v. Pinckney, 339 S.C. 346, 348, 529 S.E.2d 526,

527 (2000). On a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Condrey, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002). If the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to a jury. Id. The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling or if the ruling is based on an error of law. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002); State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008).

Hendry testified that Decedent's health rapidly declined between 2019 and 2020 specifically in November of 2019. (R. 264-265). She began having severe shoulder and hip problems and her speech became kind of slurred. (R. 264-265). She began having mobility issues and falling. (R. 266). Decedent called in early January of 2020 and stated that she had fallen in her bathroom and laid there for 45 minutes until Appellant had come home to help her up. (R. 266). Decedent called back on January 13th in a frantic manner saying it was urgent that she change her beneficiaries again and Hendry could hear Appellant in the background also expressing the urgency. (R. 266-267). Appellant brought Decedent into the office on January 16th to make the changes to the beneficiaries. (R. 268). Hendry testified that she tried to talk to her during the meeting to determine if this was a decision that she was choosing to make on her own and that Decedent sobbed the entire time. (R. 268). She testified that she asked her numerous questions regarding her intent, if she was okay, if she needed help, but she insisted that she wanted to change beneficiaries to Appellant. (R. 269).

Sonya Collins stated she didn't have many encounters with Appellant, but that she would frequently see him get her mail for her and that one time he had told her "Well, I finally got her off all her medicines." (R. 339-340). Collins testified that Decedent's physical health began to get worse and she wouldn't come outside as much. (R. 340). Collins testified that after coming back from an appointment she saw Decedent fall and when she went to help her and walk her into her trailer, Decedent stated "No, please just leave before he comes back out." (R. 341). Collins testified that shortly after that encounter she used her key to let Decedent's dog out to find that the locks had been changed. (R. 341). Decedent asked for her key back and Collins testified that after telling her she was making a mistake they had a falling out. (R. 341-342).

Sabrina Gast, the York County Coroner, testified that part of the medical procedure is investigating the medicines she was taking and going through the prescriptions she was given to determine how many pills were in the containers and how many should have been in the containers. (R. 402). Gast testified that in most of the prescriptions there was more medication than should have been indicating that she was not properly taking the medications. (R. 406). Gast testified that there were many prescriptions, but the ones that stood out to her were the ones for blood pressure, anti-depressants, cholesterol, and anti-seizure medications. (R. 406).

Hayley Perez also testified that Decedent's health began declining after Appellant moved in with her and that she became increasingly withdrawn and harder to get in touch with. (R. 445-446). The State also introduced two photographs of writing to prove the vulnerability of Decedent. One showed a note dated January 26, 2020, wherein 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 described 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).

After the State rested, Defense Counsel made a motion for a directed verdict arguing that the State had not produced any direct evidence of vulnerability. (R. 499-520). The State argued that there was evidence that she could not physically care for herself. She had fallen and laid on the ground for 45 minutes before Appellant was able to help her, and there was evidence of mental and emotional issues and was not taking her prescriptions for those. (R. 519-520). In its ruling the court stated:

> I am going to deny the motion though I think it is a very close call. That the 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 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.

(R. 521-522). Appellant cites Doe v. South Carolina Department of Social Services[3] in its brief. 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

[3] Doe v. South Carolina Department of Social Services, 407 S.C. 623, 757 S.E2d 712 (2014).

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 looking 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 persona 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 from caring for himself or living independently").

Id. at 636, 757 S.E.2d at 719. 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.

In this case, there was evidence that Decedent had emotional issues such as depression and a prescription for her depression that she was not taking. Further, there was evidence of malnutrition from her own note stating that she was having issues with eating. There were also two separate instances where Decedent fell and needed help getting up because she could not do it on her own. While she wasn't living in filth or diminished living quarters, unlike Doe she did have evidence of

physical and mental issues that limited her ability to perform daily activities. Therefore, there is evidence in the record that supports the trial judge's decision to deny the directed verdict.

3. **The trial court properly admitted Decedent's statements despite her dying prior to trial because they were not testimonial and therefore did not violate Appellant's right to confrontation.**

Appellant argues 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. Specifically, that the statements entered were largely testimonial. This argument lacks merit because the statements entered were not testimonial in nature.[4]

"In general, the admission or exclusion of evidence is a matter left to the sound discretion of the trial court, whose ruling will not be reversed on appeal absent an abuse of that discretion." Matter of Campbell, 427 S.C. 183, 190, 830 S.E.2d 14, 18 (2019). "An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "To warrant the reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Commander, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011).

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 trial on both hearsay and confrontation clause grounds. Defense counsel's biggest concerns were the testimony of Candice Hendry, the

[4] Appellant is only arguing confrontation clause and no hearsay issues, although any of the statements would fall under the hearsay exception of Rule 803(3), SCRE.

financial advisor to the decedent, and Alton Hyatt, the estate planning lawyer of decedent. (R. 20-21). The trial judge asked what the law on the confrontation clause of a deceased witness was stating that he had not come across that issue before. (R. 88). The State cited Crawford v. Washington[5] arguing that it was the seminal case that reset the confrontation clause and that whether hearsay violated the right to confrontation will not depend upon whether there's a hearsay exception in place but rather if the statements were testimonial. (R. 88).

The State argued that there is no argument that the statements could be testimonial. The statements that were going to be introduced were not statements made by Appellant or Decedent to law enforcement, but that the statements were something she had told her financial advisor or friends. (R. 89-90). Towards the end of pretrial the State again stated that in preparing for trial, the State told Ms. Hendry that she could only testify to the statements made to her about decedents then existing state of mind. (R. 130-131). The State further argued that "as to the acts that occurred during that, I think that's all part of the res gestae. It goes to tell the story of who is this Jonathan Bass character when he moved into her life all of a sudden where she starts to start pulling more and more money out." (R. 131). The trial judge decided to hold off on ruling and proffer both Hendry and Hyatt. (R. 133-137).

Candice Hendry was proffered and when the State asked Hendry what the primary topic of one her meetings with Decedent was, Defense Counsel objected arguing hearsay and confrontation clause. The trial judge overruled the hearsay objection and asked the argument on the confrontation clause because it didn't seem testimonial under the Supreme Court precedent. (R. 202). Defense 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

[5] Crawford v. Washington, 541 U.S. 36.

designed to be used in court to ensure a decedent's final wishes are met. (R. 202-204). Defense counsel further argued that the statements were made under circumstances which would lead an objective witness to reasonably believe that the statements would be used at trial. (R. 205-207). The trial court disagreed stating "no but extrajudicial statements in formalized testimonial materials—and the idea—I mean, the whole idea is something you [expect] the witness is doing it—expecting it will be used later in Court, like signing an affidavit—this is what happened. A will has legal effect on its own. I mean, it doesn't mean that the person thinks the will is going to be used in Court later." (R. 205-206). The trial court further stated that:

> No, no, no, formal testimony means like in Court under oath. I mean—mean—again, the purpose of the rule is—not that it's relevant to a criminal prosecution—the purpose is that it is something that when the witness is saying it, they believe it's going to be used later in Court. Like a police officer coming to a witness and saying, 'give me your statement, tell me what—' that is something where the witness understands if a police officer comes to them and says, 'tell me what happened and I'm going to write it down,' that's testimonial." (R. 206-205).

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002). The Sixth Amendment is applicable to the states through the Fourteenth Amendment. Id. The confrontation clause provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . ." U.S. Const. Amend. XIV; State v. Gracely, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012). The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. State v. Williams, 432 S.C. 515, 854 S.E.2d 166 (Ct. App. 2021). 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. State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022) (quoting Crawford v. Washington, 541 U.S. 36 (2004)).

"The Crawford Court declined to comprehensively define 'testimonial,' it did however state that 'the core class of testimonial statements' includes:

- *Ex parte* in court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
- Extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions;
- Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial and;
- Statements taken by police officers in the course of interrogations."

State v. Ladner, 373 S.C. 103, 112, 644 S.E.2d 684,688-689 (2007). In addition, the United States Supreme Court stated that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006), also held the generally statements made outside of an official investigatory or judicial context are non testimonial.

Here, Decedents statements were made to Hendry and Hyatt while changing her beneficiaries to her accounts and to her estate planning documents. A reasonable person would not expect to make those statements with the anticipation of it being later used in court. While it is true that she had to sign forms to change those beneficiaries those forms do not rise to the level of an affidavit for the purposes to be later used in a prosecutorial manner. Therefore, the trial judge properly allowed the statements made by Decedent in despite her dying prior to trial because they were non testimonial and did not violate Appellant's right to confrontation.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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