

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

COURT OF GENERAL SESSIONS

2015-GS-23-1563

Edward W. Miller, Circuit Court Judge

Appellate Case No: 2017-000635

The State.....Respondent/Appellant

Polly McAbee Hindman.....Appellant/Respondent

INITIAL BRIEF OF THE APPELLANT

Clifford F. Gaddy, Jr., Esquire
S. C. Bar License # 2275
408 N. Church St., Ste. B
Greenville, South Carolina 29601
(864) 250-5155
James P. O'Connell
S. C. Bar License # 4259
139 Grace Drive
Easley, South Carolina 29640
(864) 220-0005
Attorneys for Appellant/Respondent

RECEIVED
FEB 15 2018
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....1

Facts.....3

Arguments

1. BY NOT GIVING CREDIT FOR FUNDS PAID ON BEHALF OF THE
VULNERABLE ADULT OR FUNDS RETURNED TO THE VETERANS
ADMINISTRATION, THE JUDGE COMMITTED AN ERROR OF
LAW BY ORDERING RESTITUTION IN A GREATER AMOUNT
THAN THE LOSS SUSTAINED BY THE VULNERABLE ADULT.....6

2. THE STATE DID NOT PRESENT EVIDENCE TO SUPPORT A
VERDICT OF GUILTY OF EXPLOITATION OF A
VULNERABLE ADULT.....17

Conclusion.....27

TABLE OF AUTHORITES

CASES

State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (S.C. 2013).....16

State v. Morgan, 338 S.C. 338, 341, 790 S.E.2d 27 (S.C. App., 2016).....16

State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (S.C. 1989).....17

State v. Brown, 360 S.C. 581, 585, 602 S.E.2d 392, 396 (S.C. 2004).....26

STATUTES

S.C. Code Ann. § 16-3-116(2) (1976).....16

S.C. Code Ann. § 43-35-101(3).....17

STATEMENT OF ISSUES ON APPEAL

1. DID THE JUDGE COMMIT AN ERROR OF LAW IN DETERMINING THE AMOUNT OF RESTITUTION? 6
2. DID THE STATE PRESENT EVIDENCE TO SUPPORT A VERDICT OF GUILTY OF EXPLOITATION OF A VULNERABLE ADULT? 17

STATEMENT OF THE CASE

This case began with an Indictment, dated May 19, 2015 stating that the Defendant, Polly Hindman, violated the South Carolina Code of Laws 1976, Section 43-35-0085 (Exploitation of a Vulnerable Adult). This indictment was followed by an Amended Indictment, dated October 18, 2016 stating that the Defendant, Polly Hindman, violated the South Carolina Code of Laws 1976, Section 43-35-0085 (Exploitation of a Vulnerable Adult).

The Amended Indictment, dated October 18, 2016, differed from the original Indictment in that the later Indictment provided the Defendant

"did take an improper, unlawful or unauthorized use of the funds, assets, property or power of attorney of the vulnerable adult, Bette Riddle, for the profit or advantage of that person or another person."

The earlier Indictment dated May 19, 2015 alleged

"the defendant did take and use monies belonging to Bette Riddle for her own personal use without authorization to do so."

Defendant Polly Hindman pled not guilty. The case came to trial before a jury and Circuit Judge Edward W. Miller on December 14, 2016.

The jury returned a verdict of guilty.

Circuit Judge Edward W. Miller presided over a Restitution Hearing on February 17, 2017. Judge Miller directed that Defendant Polly M. Hindman pay restitution in the amount of \$88,000.00.

On March 13, 2017 Polly Hindman served a Notice of Appeal on the State of South Carolina.

Polly M. Hindman ("Polly") appeals from the jury verdict finding her guilty of Exploitation of a Vulnerable Adult. She also appeals from the sentence imposed upon her by Circuit Judge Edward W. Miller.

STATEMENT OF FACTS

Polly M. Hindman ("Polly") has appealed from a verdict finding her guilty of Exploitation of a Vulnerable Adult. She also has appealed from the sentence imposed upon her by Circuit Judge Edward W. Miller.

Background Polly M. Hindman and Leisa M. Norris were half-sisters of Bette Riddle. Polly and Leisa were over 20 years younger than Bette. Following the death of Bette's husband, Leonard, in 2011, Bette began developing dementia.

Polly and Leisa began administering to the needs of Bette, visiting her frequently, taking her to appointments and shopping.

Bette would reimburse her sisters for their expenses in her behalf. To make reimbursement easier, Bette, at the urging of Leisa, prepared powers of attorney which Bette signed giving Polly and Leisa authority over her affairs.

Polly did not use her power of attorney to obtain funds. She used it to facilitate the admission of Bette to Marshall I. Pickens following an incident in which Bette threatened Leisa with a knife.

Until Polly heard Leisa relate stories in a conference held by Leisa's

attorney in which Leisa recounted her theft of stealing thousands of dollars from Bette, Polly thought that the only money Leisa obtained from Bette's funds was to reimburse expenses incurred by Polly and Leisa when they spent their personal funds in behalf of Bette.

Harvard Riddle, the brother-in-law of the deceased Leonard Riddle and later appointed Conservator of Bette Riddle, pushed the Sheriff's office to investigate. Following investigation of the removal of funds from the bank accounts of Bette Riddle, Detective Timothy Martin of the Sheriff's office issued warrants for the arrest of Polly Hindman and Leisa Norris. An indictment alleged they committed the offense of Exploitation of a Vulnerable Adult. (TT p25, Line 23-TT p 26, L7) South Carolina Code of Laws 1976, Section 43-35-0085

Leisa pled guilty and agreed to pay \$50,000.00 in restitution.

Polly denied wrongfully taking Bette Riddle's money. Polly refused to plead guilty. Her case came on for trial before Circuit Judge Edward W. Miller and a jury. A guilty verdict was returned on December 14, 2016.

Alleged Violations of Statute The State presented evidence involving the Defendant in three situations which the State contends made Polly guilty of Exploitation of a Vulnerable Adult. These alleged wrongful acts were: (1) preparing and using powers of attorney from a vulnerable adult for profit and

advantage; (2) wrongfully obtaining \$16,000 from the bank account of a vulnerable adult; and (3) wrongfully obtaining \$12,832.86 from the bank account of a vulnerable adult.

Violations Denied Hindman agrees that she prepared and obtained a power of attorney from her sister, Bette Riddle, but denies that it was used for any profit or advantage. (TT p 100, Lines 9-25) Hindman agrees that she prepared a power of attorney given by Bette Riddle to Leisa Norris, but denies that she had any knowledge that Leisa Norris would use the power of attorney to steal thousands of dollars from Bette Riddle. (TT p 98, Lines 1-22; TT p106, Lines 24-25; TT p107, Lines 1-22)

With respect to the \$16,000 Hindman asserts that these funds repaid her for previously paying many expenses of Bette Riddle.

With respect to the \$12,832.86 Hindman asserts that these funds repaid her for previously paying pre-burial expenses of Bette Riddle. (TT p 32, Line 20-p 35, Line 13; TT p 101, Line 6-TT p 105, Line 6)

Restitution Judge Edward W. Miller directed that Defendant Hindman pay \$88,000.00 in restitution to the Conservatorship of Bette Riddle. But the State did not claim that Defendant Hindman took \$88,000.00 during the trial. The State claimed that Defendant Hindman took \$28,832.86 from Bette Riddle's bank

account at BB&T. Therefore, for the State to contend during a restitution hearing that Defendant Hindman should repay \$88,000.00 is highly unfair. Furthermore, the evidence presented through a witness named Mark Chastain is unreliable. (RT p 15, Lines 16-22) Judge Miller is requiring Defendant Hindman to make restitution for missing funds that she did not take. Furthermore, the computation of the loss sustained by Bette Riddle is based upon (1) conjecture and (2) requiring Hindman to pay for funds taken by Leisa Norris. (RT p 22, Lines 2-25; Rest.Exhibit 1; RT p 32, Line 6; RT p 36, Line 2)

Defendant Hindman appeals from the denial of her Motion for a Directed Verdict, the denial of her Motion for a New Trial and the denial of her Motion for a Continuance.

ARGUMENTS

- I. **BY NOT GIVING CREDIT FOR FUNDS PAID ON BEHALF OF THE VULNERABLE ADULT OR FUNDS RETURNED TO THE VETERANS ADMINISTRATION, THE JUDGE COMMITTED AN ERROR OF LAW BY ORDERING RESTITUTION IN A GREATER AMOUNT THAN THE LOSS SUSTAINED BY THE VULNERABLE ADULT.**

After the jury returned its verdict, Judge Edward W. Miller set a Restitution Hearing for February 17, 2017.

Judge Miller directed that Defendant Polly Hindman be required to pay \$88,000.00 in restitution. To arrive at this figure Judge Miller accepted as reliable the determination by prosecution witness Mark Chastain that Bette Riddle's assets sustained a loss of \$139,697.00. (RT p 13, Line 20 thru RT p 14, Line 6 thru 11) Assistant Solicitor Sylvia Harrison informed Judge Miller that Leisa Norris agreed to pay \$50,000.00 in restitution. Judge Miller deducted the \$50,000 from \$139,697.00 and also deducted \$1,697.00 from the \$139,697.00 leaving \$88,000.00. Judge Miller then orders that Polly Hindman pay \$88,000.00 in restitution. (RT p 5, Line 12 thru p 86, Line 12) Defendant Polly Hindman appeals from this order that she pay \$88,000.00 in restitution because it is based upon erroneous calculations.

The error comes from the conclusion of prosecution witness, Mark Chastain who testified that after reviewing all checks and bank statements of Bette Riddle beginning in 2012, he found that Leisa Norris and Polly Hindman wrongfully obtained \$139,697.00.

In response to questions from Assistant Solicitor Harrison Mark Chastain testified that he "was asked to look at accounts that I brought with me today." (RT p11, Line 21 thru RT p12, Line 8)

Here is the answer of Mark Chastain in response to a question from Assistant Solicitor Harrison:

"Q. Okay. Did you prepare a summary for the Court?" Chastain replied that he brought multiple copies of his summary. [The summary was introduced into evidence as Exhibit 1.] (RT p15, Line 15 thru p16, Line 7)

Assistant Solicitor Harrison asked,

"Q. Based on your calculation, Mr. Chastain, what is the aggregated loss to Ms. Riddle by the co-defendants Ms. Hindman and Ms. Norris?" (Emphasis added)

"A. The net amount which you'll find on the second page of the Wells Fargo accounts that I looked at, the VA benefits, and the real estate taxes. The net amount outstanding is \$139,697.42" (RT p15, Line 15 thru p 16, Line 7)

Defendant Polly Hindman asserts that the amount of \$139,697.42 is incorrectly computed. Therefore, it should not be the basis for determining restitution.

The calculations made by witness Mark Chastain are erroneous for three reasons.

Defendant's attorney Clifford Gaddy objected to Mark Chastain testifying to his conclusions concerning the amount of loss sustained by Bette Riddle's funds. (RT p 13, Line 10 thru p 14, Line 1)

The first reason the testimony of Mark Chastain should be set aside is that he concluded Defendant Polly Hindman should be held responsible for a loss of \$139,697.42 sustained by Bette Riddle when the State claimed during the trial Polly Hindman wrongfully took \$12,832.86 and \$16,000.00 for a total of \$28,832.86. Assistant Solicitor Harrison refers to the figures as "13 Grand and 16 Grand." (TT p138, Line 24, 25; TT p135, Line 18,19) This conflict in the evidence at trial and at the Restitution Hearing will be described later in the Brief.

The second reason that the amount of \$139,697.42 was wrong is that Mark Chastain refused to deduct from his conclusion (1) amounts which documentation showed were reimbursement for expenses of Bette Riddle and (2) the amounts which documentation showed Polly Hindman returned to the Veterans Administration. These offsets will be described later in the Brief.

The third reason that the amount of \$139,697.42 was wrong is that after combining funds received by both Polly Hindman and Leisa Norris, Mark Chastain says that Polly Hindman should be required to pay all losses sustained by Bette Riddle. This third reason will be described in further detail further below.

Turning to the first reason that restitution was based upon improper evidence, during the trial the State presented evidence that Polly Hindman wrongfully received \$12,832.86 which is the total of a check for \$6,059.16, dated

December 18, 2012 and a check for \$6,773.70, dated December 18, 2012 payable to Polly Hindman. The checks were described during the testimony of Rachel Garner, an employee of Wells Fargo. The checks were not identified as Exhibits. (TT p 30, Line 16 continuing to TT p 35, Line 13) Defendant Polly Hindman denies that she obtained these checks wrongfully.

With respect to proof that Polly Hindman wrongfully received \$16,000 from Bette Riddle assets, there were no documentation introduced into evidence that is identifiable as establishing this amount of loss.

However, Assistant Solicitor Harrison told the jury more than once that Defendant Polly Hindman obtained funds amounting to \$16,000.00.

The Trial Transcript shows Assistant Solicitor Harrison saying,

"And Ms. Hindman walked away with over 16 Grand." (TT p 138, Line 24, 25) At another point in her argument to the jury Assistant Solicitor Harrison stated that she (referring to Polly) obtained "13 Grand" (TT p 135, Line 18, 19) and "misappropriated assets in the amount of \$16,000.00." (Transcript p 139, Line 10,11)

Defendant Polly Hindman wants to make clear that regardless of whether the State offered evidence proving that she wrongfully took \$12,832.86 and also offered evidence proving that she wrongfully took another \$16,000.00, at no

point during the trial concerning the guilt or innocence of the Defendant, Polly Hindman, did the State never claim Polly Hindman took \$139,697.42.

To claim during a Restitution Hearing that Polly Hindman is responsible for Bette Riddle losing \$139,697.00 when the State claimed during the trial on the guilt or innocence of the Defendant that the Defendant wrongfully obtained \$28,832.86 is asking the Court to direct that the Defendant pay in restitution about five times more than the Assistant Solicitor told the jury was wrongfully obtained by Defendant.

Defendant Polly Hindman contends that it is an error of law for a Trial Judge to direct restitution based upon evidence conflicting with evidence presented during the trial on the guilt or innocence of the accused.

Turning to the second reason Mark Chastain incorrectly computed the loss sustained by Bette Riddle, he has ignored documentation that the checks described above and described during the testimony of Rachel Garner (cited above) were reimbursement for funds advanced to the Woodlawn Mortuary.

Mark Chastain also ignores the documentation furnished to him that Polly Hindman spend VA benefit checks on nursing home expenses and returned to the VA money that was not spent on nursing home expenses.

The amount Polly Hindman received from the VA totaled \$20,340.00 (RT p 17, Line 16 thru p 19, Line 19). Her documentation showing that she used the VA funds to pay nursing home charges and returned unspent VA funds to the VA is found in RT p 44, Line 1-24 thru p 46, Line 25, Exhibits 2, 4 and 5. Even though a copy of a cashier's check payable to the Veterans Administration in the amount of \$12,294.00 was offered into evidence as Court Exhibit 1. (RT p 65, Lines 15 thru p 66, Line 14) Chastain refused to give Polly Hindman credit because evidence that the check cleared the bank was not presented to him. Yes, it is theoretically possible to give a bank funds to pay for a cashier's check, then instead of giving the check to the payee, return the check to the bank and receive the proceeds. But why would anyone go to this trouble when the payor could make no payment instead of purchasing a cashier's check without delivering the check to the payee?

Mark Chastain was so biased against Defendant Polly Hindman in his testimony and calculations that his testimony should be viewed with the suspicion. Is he denying that Pendleton Place and Emeritus Assisted Living did not get paid by Polly Hindman when she testifies that she used funds from the Veterans Administration to pay the charges of these nursing homes? A copy of a cashier's check in the amount of \$12,294.00 (Court Exhibit 1) payable to the Veterans Administration was not sufficient proof to him that Defendant Polly

Hindman had accounted for all VA funds received by her. Therefore, he refused to recognize as an offset either funds paid to a nursing home or returned to the VA for unspent funds. (RT p 17, Line 3 thru p 20, Line 17)

In his analysis Chastain stated in his schedule (State Exhibit 1) that the \$12,832.86 received by Polly Hindman in two checks from Bette Riddle's bank account were a wrongful taking of assets, then disregards the documentation from the Woodlawn Funeral Home showing that Polly Hindman gave two checks in payment of pre-burial expenses of Bette Riddle. (RT p 35, Line 15-25) Contained in Restitution Hearing Defendant's Exhibit 6 are copies of Woodlawn Funeral Home records showing the receipt of the \$12,832.86 initially paid by Polly Hindman to Woodlawn Funeral Home. (RT p 50, Line 6 thru p 54, Line 10)

Defendant Polly Hindman contends that to order restitution in a greater amount than the loss sustained by the vulnerable adult is an error of law.

Turning to the third reason that the conclusions of Mark Chastain are erroneous, we find that Mark Chastain added together all sums received by Polly Hindman and Leisa Norris regardless of which of them actually received funds. To add together the sums received by Hindman and Norris together does not show the amount each received, but rather the sum both received together. (RT p 14, Line 6-11) Chastain testified that since he could not determine whether Leisa or

Polly received check and debit card proceeds that Polly should be responsible for the entire loss. (RT p 26, Line 17-32 and p30, Line 8-16) Using similar reasoning it would be logical to conclude that since Chastain could not determine the amount Polly received separately from the amount Leisa received, then Leisa Norris should be responsible for the entire funds obtained from the Bette Riddle assets.

Defendant Polly Hindman anticipates that the State will contend that Polly Hindman and Leisa Norris engaged in a common plan and scheme to wrongfully obtain funds from Bette Riddle's bank accounts.

Defendant Polly Hindman completed her power of attorney forms and obtained the signature of Bette Riddle on her power of attorney to use her power of attorney to deal with health care personnel. (TT p 95, Lines 16-25) Polly Hindman's power of attorney was never used to obtain funds from the bank accounts of her sister Bette Riddle.

Moreover, Defendant Polly Hindman understood that Leisa Norris would use her power of attorney to obtain funds needed to reimburse Polly and Leisa for funds advanced by them to pay for items purchased for their sister Bette. Polly did not know Leisa was stealing thousands of dollars of Bette's money until she heard Leisa recount her theft to a lawyer. (TT p 97, Lines 20 thru p 98, Line 22)

Polly Hindman denies that she and Leisa acted together at any time to wrongfully take money from their sister, Bette Riddle.

While \$139,697.00 is the amount which the State contends is the amount Polly Hindman should pay back, Judge Edward W. Miller saw immediately that this claim did not give Polly Hindman credit for the amount of \$50,000.00 that Leisa Norris had agreed to pay.

Upon Assistant Solicitor Sylvia Harrison confirming to Judge Miller that Leisa Norris pled guilty and agreed to pay \$50,000.00 pursuant to a negotiated plea. Judge Miller subtracted the \$50,000.00 from \$139,697.00 determined by Mark Chastain as the loss, resulting in \$89,697.00. Judge Miller subtracted \$1,697.00 from the \$89,697.00 leaving \$88,000.00.

Judge Miller directed Polly Hindman to pay \$88,000.00 in restitution.

Testimony and exhibits are not clear concerning the total amount of funds paid by Polly Hindman to nursing homes. Disregarding funds given to nursing homes, it is clear from documentation that Polly Hindman should be given credit for checks given to Woodlawn and a return of funds to the Veterans Administration.

When the checks payable to Woodlawn Funeral Home amounting to \$12,832.86 and the cashier's check in the amount of \$12,294.00 are deducted, the loss sustained by the Bette Riddle Estate decreases to \$62,873.14.

The loss sustained by Bette Riddle is far less than the \$88,000.00 loss determined by the Trial Judge after deducting the restitution amount agreed upon by Leisa Norris.

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (S.C. 2013)

Defendant Polly Hindman contends that the Trial Judge committed an error of law when the Court relied upon the erroneous findings of the witness Mark Chastain. Defendant recognizes that the Trial Judge is vested with wide discretion in determining the appropriate sentence for a convicted defendant. The discretion of the Court does not include reliance on highly biased, unreliable conclusions. State v. Morgan, 338 S.C. 338, 341, 790 S.E.2d 27 (S.C. App., 2016)

South Carolina Code of Laws 1976 Section 16-3-116(2) defines "Restitution" to mean payment for all injuries, specific losses and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes but is not limited to: (ii) specific damages and economic losses.

Chastain has grossly exaggerated the loss sustained by the assets of Bette Riddle as explained in Appellant's Brief.

Defendant Polly Hindman requests that the restitution portion of the sentence be set aside and that the case be remanded for a proper determination of the amount lost by Bette Riddle and/or her Conservatorship.

State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (S.C. 1989) holds that when a judge's reasons for ordering restitution are improper the restitution portion of the sentence should be reversed and the case remanded.

II. THE STATE DID NOT PRESENT EVIDENCE TO SUPPORT A VERDICT OF GUILTY OF EXPLOITATION OF A VULNERABLE ADULT.

The 1976 South Carolina Code of Laws §43-35-010(3) provides as follows:

"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."

The statute requires 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. (Emphasis added)

In this Brief Defendant Polly Hindman will review each element of the statute to determine if the evidence proves the elements required by the statute.

The first element requires an improper, unlawful or unauthorized use of the funds, assets property of a vulnerable adult.

Assistant Solicitor allocated the State's evidence into two parts. Checks payable to Defendant Polly Hindman having a total of \$16,000.00 and checks payable to Defendant Polly Hindman having a total of \$12,832.86.

Did Defendant Polly Hindman engage in an improper, unlawful or unauthorized use of funds having a total of \$16,000.00? Many checks were introduced into evidence to represent funds wrongfully obtained by Defendant Polly Hindman; however, the checks were not identified as having a total of \$16,000.00. However, Assistant Solicitor Harrison considered these checks to total \$16,000.00 because in her argument to the jury she asserted on two occasions that Defendant Polly Hindman wrongfully obtained \$16,000.00.

To simply present checks withdrawing funds from the bank account of a vulnerable adult is not proof in and of itself that exploitation has occurred. There needs to be proof that the funds were used for the profit or advantage of the person taking them. The State has not proved this element of the statute.

On page 138 at lines 24 and 25 Assistant Solicitor Harrison says to the jury, "And Ms. Hindman walked away with over 16 Grand. On page 139 at lines 10 and 11, Assistant Solicitor Harrison says to the jury, (referring to Polly Hindman) she "misappropriated assets in the amount of \$16,000.00."

Defendant Polly Hindman agrees that she received funds covered by checks payable to Polly Hindman, but she denies that she wrongfully obtained the funds. To violate the statute, quoted above, the funds of the vulnerable adult must be wrongfully taken. All funds received by Defendant Polly Hindman were reimbursement to her for expenditures she made in behalf of Bette Riddle, the vulnerable adult.

On page 101 of the Transcript at Line 24 and going through page 102 Line 13, there are these questions to Polly Hindman by Attorney Jim O'Connell on direct examination and the answers of Polly Hindman:

Q Did you get any other funds or any other money from this estate?

A No, sir. I didn't get any funds from this estate. I was repaid for diapers, Depends, clothes, quilts for her--so we could decorate her room at the nursing home, and underclothes. And the only thing I got--I got repaid back because Leisa worked. And I couldn't drive all the way to where she worked to get a check. She would mail me a check. And I would pay out of my own account and deposit that check to pay me back. [and so on]

Assistant Solicitor Harrison on cross examination of Polly Hindman asks about several checks made payable to Polly Hindman. The answers of Polly Hindman explain the purpose of the checks presented to her in response to the questions of Assistant Solicitor Harrison. One check for \$1500.00 represented reimbursement to Polly Hindman for \$1000.00 paid by Polly Hindman to Emeritus and the remaining \$500.00 spent for items to make the room of Bette Riddle look nice before she got to the room. In the Record page 111, Line 15 through Line 11 on the TT page 112 Polly Hindman explained the expenses of other checks written to her for reimbursement. (TT p 112, Lines 5 thru 15)

In the Record at page 113 beginning at Line 2 through Line 17 Polly Hindman explains that check # 3347 was reimbursement to her for a prior payment by her to Emeritus Assisted Living.

By way of summary - checks payable to Defendant Polly Hindman from the bank account of Bette Riddle were reimbursement for items purchased or

reimbursement for expenses of Bette Riddle. For the assets of a vulnerable adult to be used to reimburse a person who spend money in behalf of the vulnerable adult is not an improper, illegal or unauthorized use of the assets of the vulnerable adult.

Assistant Solicitor Harrison has focused on \$12,286.37 which on the surface would appear to be funds wrongfully obtained by Polly Hindman. Testimony concerning these funds appear in the Record beginning on page 33, Line 5 and continuing through page 35, Line 33.

Witness Rachel Garner, an employee of Wells Fargo, identified check number 3308 in the amount of \$6,059.16 payable to Polly Hindman, check number 3307 in the amount of \$6,773.70, check number 3345 for \$1,498.00 and check number 3306 for \$20.00.

During the cross examination of Polly Hindman by Assistant Solicitor Sylvia Harrison Polly Hindman explains that the checks were for the pre-burial expenses of Bette Riddle. (TT p 102, Line 14 thru 21) Documents substantiating that Polly Hindman used her checking account to pay Woodlawn Funeral Home are introduced into evidence as will appear by reference to Defendant' Exhibit 6 in the Record on page 51, Line 7 through p 54, Line 25.

Power of attorney evidence The statute prohibiting

Exploitation of a Vulnerable Adult is violated by a person using a power of attorney in an improper or wrongful way. Has Polly Hindman used a power of attorney wrongfully?

Polly Hindman asserts that she did not use the power of attorney given to her by her sister, Bette Riddle, in any improper way. Nor did she use her power of attorney for her profit or advantage.

How did Polly Hindman use her power of attorney? She used her power of attorney to deal with medical personnel at the Marshall I. Pickens Hospital when admitting Bette Riddle to this hospital. (TT p 95, Line 16 thru Line 25)

Polly Hindman agrees that she completed a power of attorney form and participated in Bette Riddle signing the power of attorney, but creating a power of attorney is not unlawful, it is the use of the power of attorney that is a violation of the Exploitation of a Vulnerable Adult Statute.

Polly Hindman further agrees that she completed a power of attorney by which Bette Riddle gave Leisa Norris a power of attorney. Completing the power of attorney given to Leisa Norris was not improper unless she was aware that Leisa would be using it to steal money from Bette Riddle.

Polly Hindman did not know Leisa would steal money from her sister. (TT p 98, Lines 10 thru 22) Polly Hindman understood that Leisa would be withdrawing funds from the BB&T bank account of Bette for the purpose of reimbursing Polly and Leisa when they spent money in behalf of Bette. As far as Polly knew, Leisa withdrew money from Bette's bank account to reimburse for expenses incurred in behalf of Bette. (TT p 101, Lines 24 and 25)

Not until Polly Hindman and Leisa Norris were both present in a conference taking place in the office of Leisa Norris' attorney in 2014 did Polly know that Leisa had actually stolen thousands of dollars by using her power of attorney. (TT p 98, Lines 10 thru 22) Polly had nothing further to do with Leisa after that date.

Unless the Court is finding that the creation of a power of attorney is improper and unlawful in itself, the evidence dealing with powers of attorney does not show a violation of the Exploitation of a Vulnerable Adult statute. Polly Hindman did not use a power of attorney from her sister in any improper or unlawful way.

To find someone guilty of Exploitation of a Vulnerable Adult requires that a person must use the wrongfully taken assets or power of attorney for the profit or advantage of that person or another person.

The State may contend that Defendant Polly Hindman joined her sister Leisa Norris in a plan or scheme to obtain funds from Bette Riddle's bank account. It is true that Defendant Polly Hindman completed the power of attorney forms and participated in arranging for Bette Riddle to sign the powers of attorney appointing Leisa Norris attorney in fact and appointing Polly Hindman attorney in fact.

It is also true that the checks Polly Hindman received were written by Leisa Norris.

When we look further into the circumstances leading to the signing of the powers of attorney we find that the powers of attorney were designed to assist Polly Hindman administering to Bette Riddle.

On page 95 of the Record beginning at Lines 16 through 25 during the direct examination of Polly Hindman by attorney James O'Connell we find the following:

Q What were you trying to do with all those powers of attorney?

A Well, to get Bette health care. The doctors wouldn't speak to us -- or wouldn't speak to me about her health care -- she -- her medications refilled.

Q Okay.

A I was only to do her health care. That's my only -- was my only purpose of being brought in. Because I had worked in health care. Leisa was already paying her bills way before I got involved.

On page 97 of the Record beginning at Line 20 through page 98 Line 22 we

find the following:

Q And how many times did you go to a nursing home and see her?

A I went three to four days a week.

Q And how long were you with her every day?

A Two to three hours a day.

Q Well, tell the Court - - tell the jury - -

A I went to see her every day. I drove from Easley to Greenville. And I was the one that took her to all her doctors appointments, not Leisa. I took her to all her dental appointments. I met her at the emergency room every time she had to go.

THE COURT: All right. Just calm down, ma'am.

THE WITNESS: I was the one.

THE COURT: Hold on. Take a minute.

MR. O'CONNELL: Can we get her some napkins - -

THE WITNESS: I - - Leisa wanted me to help her because she worked and all, I didn't. And I was trying to keep Leisa from losing her job. I was only trying to keep her from getting off of work all the time. And I didn't know she was taking Bette's money. I didn't know it until she went to see an attorney. And she told the attorney in front of me she was taking Bette's money for her own personal use.

BY MR. O'CONNELL:

Q So those powers of attorney weren't to defraud anybody?

A No. I was only wanting to get her health care. I didn't do - - I didn't get any money.

When we look further into the circumstances behind Leisa Norris writing checks payable to Polly Hindman using a power of attorney, we find that Leisa Norris wrote checks payable to Polly Hindman to reimburse her for purchases made by Polly Hindman for the benefit of Bette Riddle. (TT p 102, Line 1 thru p 103, Line 11; TT p 106, Line 24 and 25; p 107, Line 13)

Defendant Polly Hindman contends that the testimony shows that she did not have a plan to wrongfully obtain money from Bette Riddle but to obtain funds to reimburse her when she spent her personal money in behalf of Bette Riddle.

(Record p 111, Line 15 thru p 113, Line 22)

Is there competent evidence to establish each element of the crime of Exploitation of a Vulnerable Adult?

If the State fails to present sufficient proof of all of the elements, a conviction must be reversed and a judgment for the defendant must be rendered.

See State v. Brown, 360 S.C. 581, 585, 602 S.E.2d 392, 396 (S.C. 2004)

Defendant Polly Hindman contends that the State has offered no evidence tending to prove that she wrongfully obtained funds that she used for profit or advantage. She obtained funds by way of reimbursement only.

It is well established that the defendant is entitled to a directed verdict when the evidence merely raises a suspicion of guilt. State v. Brown, supra

CONCLUSION

The sentence imposed upon Defendant Polly Hindman requiring her to pay restitution of \$88,000.00 should be set aside. The restitution amount is based upon the testimony of Mark Chastain. His conclusion that Defendant Polly Hindman has wrongfully obtained \$139,697.00 from Bette Riddle is erroneous for three reasons: (1) the amount of \$139,697.00 is five times the amount of \$28,286.37 the State claimed was wrongfully taken during the trial, (2) the amount of \$139,697.00 is a total of funds attributed to a wrongful taking by Polly Hindman and Leisa Norris together, and (3) fails to give credit to Polly Hindman for funds returned to the Veterans Administration and funds received by Polly Hindman to reimburse her for expenses of Bette Riddle paid personally by Polly Hindman.

The evidence shows that Polly Hindman spent her personal funds for obligations and expenses of Bette Riddle. Therefore, for Polly Hindman to receive funds from the assets of Bette Riddle is not an improper, unlawful or unauthorized use of the funds of a vulnerable adult.

For the reasons expressed above Defendant Polly Hindman should be granted a New Trial.

In the event that a New Trial is not granted, restitution by the Defendant Polly Hindman should be set aside on the grounds that the restitution amount is an error of law.

Respectfully Submitted,


Clifford F. GADDY, JR.

Clifford F. Gaddy, Jr. (2275)

408 N. Church St., Ste B

Greenville, SC 29601

Ph.: (864) 250-5155

Fax: (864) 233-3750

Attorney for Appellate/Respondent

James P. O'Connell (4259)

139 Grace Drive

Easley, SC 29640

Phone/Fax: (864) 220-0005

Attorney for Appellate/Respondent