

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000635

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SC Court of Appeals

THE STATE,RESPONDENT

v.

POLLY McABEE HINDMAN.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONDENT’S STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS4

ARGUMENT:

I. The trial court properly ordered Appellant to pay \$88,000 in restitution where: (1) it appropriately based this amount on the total loss suffered by Victim due to the collective misdeeds of Appellant and her codefendant and (2) it appropriately refused to deduct amounts Appellant claimed should not be included in the total because there was a lack of credible evidence to substantiate Appellant’s claims.....17

II. The trial court properly denied Appellant’s motion for a directed verdict where the State presented sufficient evidence from which the jury could fairly and logically find Appellant guilty of committing exploitation of a vulnerable adult.....22

CONCLUSION.....30

TABLE OF AUTHORITIES

Federal Cases:

Jackson v. Virginia, 443 U.S. 307 (1979)..... 27

State Cases:

Brooks v. State, 325 S.C. 269, 481 S.E.2d 712 (1997) 21

State v. Latimore, 390 S.C. 88, 95, 700 S.E.2d 456, 460 (Ct. App. 2010) 27

State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016) 27

State v. Cantrell, 250 S.C. 376, 158 S.E.2d 189 (1967) 23

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 26

State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) 27

State v. Cox, 326 S.C. 440, 484 S.E.2d 108 (Ct. App. 1997) 21, 23, 24

State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004)..... 27

State v. Dantonio, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008)..... 26

State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976)..... 23

State v. Fussell, 299 S.C. 162, 383 S.E.2d 1 (1989)..... 22

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)..... 26

State v. Gullede, 326 S.C. 220, 487 S.E.2d 590 (1997)..... 21, 22, 23

State v. Harry, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996) 31

State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) 21

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017)..... 21

State v. Morgan, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016)..... 21

State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986) 27

State v. Pearson, 415 S.C. 463, 783 S.E.2d 802 (2016) 27

<i>State v. Phillips</i> , 416 S.C. 184, 785 S.E.2d 448 (2016)	31
<i>State v. Richburg</i> , 250 S.C. 451, 158 S.E.2d 769 (1968).....	27
<i>State v. Robinson</i> , 310 S.C. 535, 426 S.E.2d 317 (1992)	27
<i>State v. Weston</i> , 367 S.C. 279, 625 S.E.2d 641 (2006).....	26, 27
<i>State v. Wilson</i> , 274 S.C. 352, 264 S.E.2d 414 (1980)	23
<i>State v. Wilson</i> , 345 S.C. 1, 545 S.E.2d 827 (2001)	26

State Statutes:

S.C. Code Ann. § 16-3-1110(12)(a) (Supp. 2012).....	22
S.C. Code Ann. § 17-25-322(A) (Supp. 2012)	21, 22
S.C. Code Ann. § 17-25-322(B) (Supp. 2012)	22, 23
S.C. Code Ann. § 43-35-10(3) (Supp. 2012)	28
S.C. Code Ann. § 43-35-85(D) (Supp. 2012)	28

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly ordered Appellant to pay \$88,000 in restitution where:
(1) it appropriately based this amount on the total loss suffered by Victim due to the collective misdeeds of Appellant and her codefendant and (2) it appropriately refused to deduct amounts Appellant claimed should not be included in the total because there was a lack of credible evidence to substantiate Appellant's claims.

2. Whether the trial court properly denied Appellant's motion for a directed verdict where the State presented sufficient evidence from which the jury could fairly and logically find Appellant guilty of committing exploitation of a vulnerable adult.

STATEMENT OF THE CASE

Appellant Polly McAbee Hindman was indicted at the October 2016 term of the grand jury of Greenville County for one count of exploitation of a vulnerable adult. (Amended Indictment No. 2015-GS-23-001563). She was represented at trial by James P. O'Connell, Esquire, and Respondent (the State) was represented by Assistant Solicitors Sylvia P. Harrison and Julia V. Hendricks of the Thirteenth Circuit Solicitor's Office. On December 14, 2016, Appellant proceeded to a trial by jury before the Honorable Edward W. Miller pursuant to which she was found guilty as indicted. (Tr.p.1-p.5). The trial court deferred sentencing and scheduled a restitution hearing to determine the amount of restitution Appellant would be required to pay as condition of her sentence. (Tr.p.154-p.155). On February 17, 2017, the court convened a restitution hearing at which Appellant was represented by Clifford F. Gaddy, Jr., Esquire, and the State was represented by Assistant Solicitor Harrison. (R.Tr.p.1-p.4). After hearing from several witnesses, including Appellant, Judge Miller sentenced Appellant to five (5) years' imprisonment suspended upon the service of ninety (90) days imprisonment to be served in the Home Incarceration Program and five (5) years' probation. Judge Miller also ordered that Appellant pay eighty-eight thousand dollars (\$88,000) restitution to the victim's estate as a condition of her sentence. (R.Tr.p.89). Appellant timely filed and served a notice of appeal and continues to be represented by Mr. Gaddy on her direct appeal. On June 22, 2017, Appellant served and filed an Initial Brief of Appellant.

On September 19, 2017, before the State had submitted a responsive brief, Appellant filed a "Motion to Grant Leave to Appellant to Move for a New Trial" asking the Court to grant leave for her to move in the Court of General Sessions for a new trial on the grounds of newly discovered evidence pursuant to Rule 29(b), SCRCrimP. (Motion dated September 29, 2017). On September 22, 2017, the State filed a return (Return dated September 22, 2017) and on

September 27, 2017, Appellant filed a reply. (Reply dated September 27, 2017). In an Order filed October 5, 2017, this Court granted Appellant's motion and held the appeal in abeyance pending the circuit's court's resolution of the motion for a new trial. (Order dated October 5, 2017). In an order dated November 8, 2017, Judge Miller denied Appellant's motion for a new trial. (Order dated November 8, 2017). On December 4, 2017, Appellant served and filed a notice of appeal from that order.

In a letter dated December 14, 2017, this Court notified the parties it had received Appellant's correspondence which included a copy of the order denying the motion for a new trial. It also noted the original appeal was no longer held in abeyance and that the initial brief of respondent and designation of matter was due to be filed within thirty (30) days of the date of the letter. On January 3, 2018, Appellant filed a Motion Requesting Authorization to File a Supplemental Brief. In a letter dated January 9, 2018, the State advised the Court it had no objection to Appellant's motion but asked that the time frame for serving and filing the Initial Brief of Respondent be reset 30 days from service of any Supplemental Brief. In an Order filed January 29, 2018, this Court granted Appellant's motion but ordered that he file a single initial brief and designation of matter containing all issues Appellant wished to raise in this appeal. On February 13, 2018, Appellant served and filed a new Initial Brief of Appellant. This Brief of Respondent now follows.

STATEMENT OF FACTS

Appellant was charged with exploitation of a vulnerable adult for a series of incidents that took place between November of 2012 and April of 2014. Specifically, the indictment alleged:

That POLLY McABEE HINDMAN did in Greenville County, between the 29th day of November 2012, and the 8th day of April, 2014, knowingly and willfully abuse, neglect or exploit BETTE RIDDLE, a vulnerable adult, to wit: 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. This is in violation of §43-35-0085 of the South Carolina Code of Laws (1976) as amended.

(Indictment No. 2015-GS-23-001563).

Trial

Appellant proceeded to trial on December 14, 2016. As summarized by the solicitor in her opening statement, Appellant exploited and took advantage of her older half-sister Bette Riddle (Victim). Victim's husband Leonard died in 2011 and left Victim an estate worth well over a half million dollars. Approximately a year later, on November 29, 2012, Appellant prepared three powers of attorney, purportedly signed by Victim, attempting to give Appellant's other half-sister, Leisa Norris (Norris), access to Victim's bank accounts. Less than a month later, on December 19, 2012, Appellant committed Victim to Marshall Pickens.¹ This was done one day after Appellant wrote three checks to herself from one of Victim's bank accounts, purportedly for funeral expenses for Victim. Appellant and Norris then made several unsuccessful attempts to gain access to another of Victim's bank accounts which was worth \$339,000. The solicitor argued Appellant and Norris misused the powers of attorney and

¹ Marshall I. Pickens Hospital is a Psychiatric Hospital in Greenville which is managed by Department of Psychiatry and Behavioral Medicine of Greenville Health Systems.

unlawfully took advantage of a vulnerable adult. She asked the jury to find Appellant guilty of exploiting Victim. (Tr.p.23-p.26). In response, Appellant claimed this case was simply about someone trying to do a good thing. She argued that while she may have had some input in the preparation of the powers of attorney, Norris was actually the person who typed them up and then went to the bank to try and access Victim's money. Appellant claimed she did not get any money out of this case besides being paid for lawn care and being reimbursed for some store items like pens. She insisted she did not do anything wrong. (Tr.p.26-p.29).

At trial, the State first called Rachael Garner, a branch manager of Wells Fargo, to the stand. Garner identified the November 2012, December 2012, and January 2013, bank statements for Victim's bank account and those statements were admitted into evidence without objection. Garner then testified that between November and December of 2012, Norris' name was added to the Victim's account after the bank was presented with a power of attorney for Victim. On December 18, 2012, two checks bearing the numbers 3307 and 3308 were written from the account in the amounts of \$6,773.70 and \$6,059.16. They were made payable to Appellant and were both designated as being for "funeral expenses." The checks were deposited into Appellant's account. Two additional checks were written to Appellant on December 18, 2012, one check for \$1,498 with the number 3345 was written for "care" and the other check for \$20 with the number 3306 was written for "death certificates." (Tr.p.29-p.35). At the time of trial, Victim was still alive and living in an assisted living facility, after first being committed to a psychiatric hospital on December 19, 2012. (Tr.p.24, p.50). The four checks were deposited into Appellant's account for a total of \$14,350.86.

Next, Norris testified on behalf of the State. She explained she is Appellant's sister and Victim's half-sister. Norris admitted she had also been charged with exploitation of a vulnerable adult. Unlike Appellant, however, she pled guilty to the charges, was sentenced to five years of

probation, and was ordered to pay restitution to Harvard Riddle, Victim's brother-in-law, as he was the conservator of the estate. Norris testified that Appellant prepared three powers of attorney, all of which were dated November 29, 2012, and were purportedly executed by Victim. Being familiar with Victim's handwriting, Norris identified the signature on the first POA as being Victim's, but also noted that Victim spelled her own first name wrong. The signatures on the second and third POA's, however, did not appear to match that of the Victim. Norris noted Appellant witnessed and notarized the last two POAs, and that Appellant's husband was the second witness. No one else was present at the creation of these two POAs. (Tr.p.36-p.40).

Norris testified that using the first POA, she and Appellant were able to have Norris' name added to Victim's Wells Fargo account. BB&T, however, refused to accept this first POA, because Victim's name was spelled incorrectly. BB&T did not accept the second or third POAs either, and as a result, Norris and Appellant were unable to access Victim's \$339,000 at BB&T. Though all three were created on the same day, each POA was recorded at a different time. (Tr.p.40-p.41). Regarding the previously identified checks written to Appellant for "funeral expenses" and "care", Norris testified that neither Victim nor Norris signed the checks. She explained that when she did write checks she always signed her own name with "POA" along with Victim's name, and the checks in question lacked these markings. (Tr.p.41).

Norris testified Victim signed over her house to Norris in her Will, but claimed this was done before Victim got dementia and was placed in a nursing home. Norris testified she took possession of Victim's house when Victim was moved to the nursing home and sometimes paid Appellant out of Victim's bank account to cut the grass. She also paid Victim's property taxes. (Tr.p.41-p.43). Norris explained she actually got title to the house by way of a title deed that was recorded on December 12, 2012, which purportedly contained Victim's signature and which was witnessed by Appellant and Appellant's husband. The "title" indicates it was executed in June of

2005, but was signed in 2004, both of which were times when Victim's husband was still alive. Victim's husband's signature, however, was notably lacking from the deed. The document also referenced the husband's 2012 death, though it was purportedly executed in 2005. Norris testified that these documents were drafted by Appellant. (Tr.p.44-p.46). A second "title" also was executed and signed on June 16, 2004, and was again witnessed by Appellant and her husband. Again, Victim's husband did not sign the document and it referenced his 2012 death, though he was certainly still alive in 2004. (Tr.47.) This second document was also drafted by Appellant. (Tr.p46-p.47).

Next, Victim's friend and neighbor, Nancy Kay Roof was called to the stand. She testified she is familiar with Victim's handwriting and opined that neither check made out to Appellant for "funeral expenses" was signed by Victim. Roof further testified that in her opinion, Victim did not sign any of the three POA's purportedly executed on November 29th, 2012. (Tr.p.50-p.57).

The State then called Mary Ellen Cervetti, an employee of BB&T's corporate investigations, to testify at trial. She was admitted as an expert in bank fraud without objection. Cervetti was assigned to investigate this case after "two women that came in that said they were sisters of Bette Riddle" attempting to have their names added to Victim's account. The bank flagged this as being suspicious and contacted Cervetti to investigate because: (1) the name on the POA did not match the name on the account, (2) the women were so adamant that they be added to the account immediately, and (3) they stated that Appellant's brother-in-law (the conservator) was incorrectly on Victim's accounts and that this had been done in violation of BB&T policy. During her investigation, Cervetti determined everything had been done by BB&T per policy. She found that Victim's brother-in-law was changed from the beneficiary on the accounts to actually being on the accounts so that he could access them, if need be, after the

death of Victim's husband. Victim also consented to her brother-in-law's addition to the accounts. In Appellant's case, however, both she and Ms. Norris appeared at the bank with the POA and attempted to add themselves to the accounts. After not having success the first time, they returned on two further and separate occasions and attempted the same thing, but were denied access by BB&T each time. Norris continued to attempt to gain access to the accounts by writing a letter threatening legal action against the bank, but never succeeded in accessing the BB&T accounts belonging to Victim. (Tr.p.58-p.65).

Next the state called Tyler Bradley O'Shields to the stand. O'Shields was the attorney appointed by the Greenville County Probate Court in March of 2014 to serve as initial conservator and guardian ad litem for Victim's estate. He was offered as an expert in elder law but the trial court declined to admit him as such. O'Shields explained he was appointed because Victim was an allegedly incapacitated person who needed protection. He was appointed in March of 2014 and the case concluded with a hearing on December 29, 2014. O'Shields testified that to his knowledge licensed notaries who are not also licensed attorneys are not allowed to draft legal documents. He noted he is a notary himself and that a license lasts for ten years. O'Shields identified State's Exhibit #7 as a deed purportedly conveying ownership of Victim's house to Norris reserving a life estate for Victim on June 6, 2005. He noted Appellant notarized the document but also noted her notary expiration date was more than ten years after the date the document was allegedly signed, which was impossible. O'Shields then identified State's Exhibit #6 as a second deed, this one dated June 16, 2004, which was notarized by Appellant and also bore an impossible expiration date. (Tr.p.67-p.73). He explained that, on December 29, 2014, following a hearing in the probate court, Victim's brother-in-law, Harvard Riddle, and Riddle's wife Claire were made guardians and conservators over Victim after Victim was determined to be an "incapacitated person." O'Shields further explained that in 2014 the probate court had

issued a temporary order suspending the powers of attorney which had been used by Appellant and Norris. (Tr.p.73-p.78). On cross-examination O'Shields acknowledged the final order from the probate court did not mention the powers of attorney; however, he did not believe they were still valid because the guardianship/conservatorship superseded them. (Tr.p.78-p.79).

Finally the State called Investigator John T. Martin from the Greenville County Sheriff's Office to the stand. Martin explained that he got involved in the case against Appellant based on a telephone call from two probate attorneys. The attorneys met with Martin and presented him with various documents and bank records and asked that he attend the final probate hearing. Based on the evidence provided, and after witnessing the probate hearing, Martin made the decision to file criminal charges against both Appellant and Norris for exploitation of a vulnerable adult. (Tr.p.80-p.83). After the State rested, Appellant moved for a directed verdict on two grounds. She argued that the State failed to prove Victim is a vulnerable adult and that the State failed to show Appellant got any money, goods, or materials out of her interactions with Victim. (Tr.84). The trial judge disagreed, found there were sufficient questions of fact to send the case to the jury, and denied the motion. (Tr.85).

Appellant then took the stand in her own defense. She testified that for 25 years she was employed as a title abstractor and frequently was required to notarize documents. She claimed that during her career she had notarized documents with incorrect dates, but noted she was not allowed to change anything when acting as a notary because she merely was witnessing the signature. In regard to the first power of attorney which named both Appellant and Norris, Appellant testified she printed a form she found online after getting a tearful phone call from Norris claiming Riddle was taking money from Victim and that Norris needed the power of attorney so she could help Victim pay her bills. Appellant noted she did not witness the first power of attorney. Appellant then admitted the second power of attorney, which named Norris

alone, and the third and final power of attorney, which also named Norris alone, were both witnessed by Appellant and her husband. Appellant claimed Victim signed the powers of attorney when they visited her in the hospital. Although she claimed she merely printed the powers of attorney from a template, she also contended the error with the date was simply the result of a typo. According to Appellant, her purpose and Norris' purpose in getting the powers of attorney were so that they could "get [Victim] healthcare." She insisted they were not trying to defraud anybody. (Tr.p.90-p.96).

Regarding the errors in the deeds notarized by Appellant that purported to convey Victim's house to Norris, Appellant attempted to explain the errors by stating that "[t]hey're just errors, I guess, date errors..." Appellant testified that after Victim was placed in the nursing home, she visited her three or four days a week for two to three hours a day, and was the one who took Victim to all of her doctor and dentist appointments. She claimed that in helping Norris she was merely trying to keep Norris from losing her job and did not know Norris was taking Victim's money until Norris admitted to an attorney she was taking it for her own personal use. Appellant insisted she did not get any of Victim's money and maintained Victim told her she wanted Norris to have her house. (Tr.p.96-p.100).

Appellant testified she was the one who prompted Victim being admitted to Marshall Pickens. She explained she took Victim to the emergency room because she was not eating, and that following an evaluation at the hospital, Victim was admitted to Marshall Pickens. Appellant claimed she never went to Wells Fargo and only went to BB&T once with Norris when Norris was trying to get her name added to Victim's account. She repeated her claim that she did not receive any funds or other money Victim's estate and was merely repaid for things she spent in caring for Victim. Appellant said she never wrote any checks from Victim's account and that instead Norris would mail her checks to pay her back for expenses. Appellant testified Victim

wanted to make pre-burial arrangements and had even picked out a marker, so Appellant paid for these out of her own account and then put the money back in that she got from Victim. She admitted she received checks totaling over \$13,000 but said the money was for Victim and was of no benefit to her. (Tr.p.101-p.103).

On cross-examination, Appellant was asked if she knew that Victim's husband had already purchased their burial plots from Woodlawn in 1966. Appellant said she did not, but claimed she had paid for Victim's pre-burial funeral expenses, including a marker and a casket, not plots. She further claimed that she and Victim went together to plan for the pre-burial arrangements merely one day before Victim was taken to the emergency room and committed for exhibiting symptoms that raised concerns regarding her mental well-being. Appellant admitted accepting and depositing checks written by Norris from Victim's account, but again claimed this was simply to pay her back. Ultimately, Appellant agreed that she had been paid over \$16,000 from Victim's account, but contended that she was merely being repaid for things like paying for the funeral expenses and extraneous items from the store, and for completing tasks such as cutting the grass at Victim's house. (Tr.p.103-p.116).

Next, Appellant called her husband, Robert Lewis Hindman to the stand. He testified that Appellant prepared the powers of attorney in question because Norris called and asked her to do so. Hindman claimed Norris called the house crying and all upset and said Harvard Riddle was stealing money from Victim. He said the forms came off the internet and insisted Appellant did not get any extra money from Victim beyond being paid for helping out around the house and "the reimbursement for the burial stuff." (Tr.p.116-p.119). After the defense rested, the State called Victim's brother-in-law, Harvard Riddle in reply. He testified he was the executor of his brother, Leonard Riddle, estate and noted Leonard's will did not leave the Riddle's house to Norris. (Tr.p.126-p.128).

Appellant then renewed his motion for a directed verdict arguing that the State only proved the notarization of the documents was improperly completed and failed to prove that Appellant took any money from Victim. The trial court again denied the directed verdict motion on the grounds that it was a question of fact whether or not Appellant benefitted from the exploitation. The judge said it was up to the jury to decide who they believe. (Tr.p.129).

Following a brief charge conference, the parties made closing arguments and the trial court charged the jury on the law. A primary focus of the State's closing argument was to emphasize how Norris and Appellant had worked together to attack the assets of Victim, a vulnerable adult. The solicitor argued Appellant directly misappropriated assets in the amount of \$16,000, misused a power of attorney to her own profit and advantage, and misused a power of attorney to the profit and advantage of Norris, each of which constituted exploitation of a vulnerable adult. (Tr.p.129-p.146). After deliberating for approximately thirty-seven minutes, the jury found Appellant guilty of exploitation of a vulnerable adult. (Tr.p147). Appellant moved for the judge to set aside the jury's verdict on grounds that the State did not present evidence that proved that Appellant exploited a vulnerable adult through the use of a power of attorney. The judge denied the motion as well as any motions for a new trial. (Tr.148-p.149).

The solicitor asked that restitution be ordered to Victim, in addition to whatever sentence the court might hand down. She then asked the attorney who handled the probate matter, Kimberly T. Thomason, Esquire, to tell the trial court the amount of Victim's loss. Thomason explained they had done an in-depth analysis and determined the Victim had a total loss of **\$138,000**. She noted Victim had already collected \$12,500 from Norris, and that \$38,500 was still outstanding from the \$50,000 restitution Norris had been ordered to pay as part of her plea, which left a remaining loss of \$88,000. Appellant disputed the amount, arguing the State only ever alleged \$16,000 was misappropriated during trial, and that when you deduct the amounts

Appellant testified were for funeral expenses and the nursing home, restitution should only total approximately \$1,500. The trial court declined to order restitution until a full restitution hearing could be held and advised the State it would have to present some kind of proof with respect to restitution. The court deferred sentencing stating: “depending on what I hear at the restitution hearing, it’s going to determine what happens with the sentence.” (Tr.p.149-p.155).

Restitution Hearing

On February 17, 2017, the trial court reconvened to conduct a restitution hearing. At the outset, the solicitor reminded the judge that South Carolina is a joint-and-several State in regard to restitution. (R.Tr.p.4, line 1-p.5, line 14). After addressing a self-incrimination concern with Appellant’s intended efforts to counter the State’s evidence during the hearing, the solicitor explained the State would be presenting evidence of Victim’s **aggregate loss** at the hands of Appellant and Norris. The solicitor again noted that each codefendant could be held jointly and severally liable for this aggregate amount in South Carolina. (R.Tr.p.5-p.9).

The State then called financial litigation and management consultant Mark Chastain to the stand. Chastain briefly described his educational background and prior occasions where he had been qualified in courts in South Carolina and Georgia as a financial expert in marital assets, tracing monies that were misspent, and business litigation. He testified he had been asked to perform a financial or forensic accounting of Victim’s assets and the State then offered a summary of his findings which was admitted into evidence without objection as Solicitor’s Exhibit #1. Chastain testified he met with Appellant’s attorney in person and had a couple of phone conversations to go over the summary. (R.Tr.p.9-p.13). Before Chastain offered substantive testimony, Appellant objected to Chastain’s method and summary which combined money taken by her with money taken by Norris to determine Victim’s overall loss. The

objection was overruled and Chastain was admitted without objection as an expert in forensic accounting. (R.Tr.p.13-p.15).

Chastain testified the aggregate loss to Victim as a result of the actions of Appellant and Norris was **\$139,697.42**. He explained this amount included credit for the \$12,500 restitution already paid to Victim by Norris as well as \$47,923.02 returned to Victim from the bank account that had been improperly converted by Norris and Appellant. Chastain further explained this amount included credit for the average monthly bills and caregiver expense that would have been spent for Victim for the period in question. In regard to the checks at issue during trial which were written to Appellant for “funeral expenses,” Chastain acknowledged he did not include a credit but explained this was because he was never able to substantiate those expenses. He noted he paid a visit to the funeral home but was turned away and not given any documents. In regard to Victim’s Veteran’s Administration benefits which were obtained by Appellant and Norris, Chastain testified \$20,340 were accepted and only \$1,130 were paid back. He acknowledged seeing a copy of the cashier’s check Appellant claimed as evidence she repaid an addition \$12,294 to the VA, he found no evidence that the check actually cleared. Chastain explained that unless a cashier’s check clears, it can simply be returned and the money is placed by in the person’s account. (R.Tr.p.15-p.18). The trial court then asked several questions in an effort to clarify Chastain’s testimony and the fact that he did not give Appellant and Norris credit against Victim’s loss for the cashier’s check in question. Chastain further noted the check would not have covered the entire VA amount even if it had been credited. (R.Tr.p.18-20).

On cross-examination, Chastain explained his methods in greater detail and defended his calculations. He readily acknowledged that both his testimony and the written summary he prepared were based on the aggregate amount “stolen” from Victim by Appellant and Norris and did not distinguish between how much each defendant received. Chastain also acknowledged the

term “misappropriated” might have been a more appropriate term than “stolen;” however, the trial judge assured the parties he was not swayed by the use of that term. Chastain explained exactly how he arrived at the aggregate loss of \$139,697.42. Appellant continued to point out certain amounts that appeared to have been withdrawn directly by Norris, but Chastain maintained he had no way of knowing exactly who benefited from the misappropriations. He again admitted he included the funds received by Appellant from the VA and the approximately \$13,000 in “pre-burial expenses” in the total loss suffered by Victim. (R.Tr.p.20-p.39). On re-direct, Chastain noted the aggregate loss he calculated may have actually been too low. He explained it could have increased based on the additional information about the VA account given to him by Appellant’s counsel after his summary was complete. Chastain also noted the aggregate loss did not include the value of Victim’s house because it had been signed back over to Victim’s estate. He testified that in order for Norris to make the withdrawals from Victim’s Wells Fargo account, the common practice would for her to have been added to the account using the power of attorney executed by Appellant. (R.Tr.p.39-p.40).

After the State rested, Appellant called her own witnesses in regard to restitution. First, she called her husband, Robert Hindman, to the stand. He offered testimony in support of Appellant’s claim that the VA benefits she received were partially used for Victim’s benefit and that the remainder was returned to the VA. Hindman also offered testimony in support of Appellant’s claim that the checks she received for pre-burial funeral expenses were both authorized by Victim before they were made and were accepted only as reimbursement for money Appellant paid to Woodlawn Memorial Gardens on Victim’s behalf. (R.Tr.p.41-p.59). On cross-examination, Hindman suggested the lack of any record that approximately \$12,000 was returned from Appellant’s bank account to the VA was because it may have come from “cash at the house.” (R.Tr.p.59-p.66). The trial court, at the end of cross-examination, pointed

out the inconsistency of Hindman testifying they repaid the VA in installments in amounts of \$13,428, \$1,130, and \$12,294, where these installments would have totaled more than what was allegedly misappropriated. (R.Tr.p.66).

Finally, Appellant testified on her own behalf, offering testimony similar to the testimony she gave at trial. She, like Hindman, attempted to explain the contested money received from the VA and the money received for pre-burial funeral expenses. (R.Tr.p.68-p.78). Under cross-examination, Appellant attempted to explain discrepancies in the check amounts of her alleged reimbursements by claiming she was always paid for gas, her time, and the food she brought to Victim during her visits. Appellant admitted she cashed the checks from the VA, but claimed she then kept the cash in a drawer, and ultimately returned the money. In regard to the VA Appellant testified: “they have all their money.” (R.Tr.p.78-p.84).

After the defense rested, the trial court noted a slight discrepancy between the Victim’s total loss as alleged at the close of trial, and the total loss as alleged during the restitution hearing. The court noted that Kimberly T. Thomason, the attorney who handled the probate matter, determined Victim suffered a total loss of **\$138,000**, and that by subtracting the \$50,000 restitution Norris had been ordered to pay, there was a remaining loss to Victim of **\$88,000**. The court compared this information to the testimony from Chastain, the forensic accountant offered by the State at the restitution hearing, who determined the victim had a total loss of **\$139,697.42**. The trial court held it was “going to find for the benefit of the defendant,” used the lower total offered by Thomason, gave Appellant credit for the \$50,000 Norris was obligated to pay Victim, and ordered Appellant to pay only **\$88,000** in restitution rather than the entire amount of the loss. The trial court then sentenced Appellant to five (5) years’ imprisonment suspended upon the service of ninety (90) days’ imprisonment to be served in the home incarceration program and five (5) years’ probation, and ordered \$88,000 restitution to Victim. (R.Tr.p.85-p.90).

ARGUMENT

I.

The trial court properly ordered Appellant to pay \$88,000 in restitution where: (1) it appropriately based this amount on the total loss suffered by Victim due to the collective misdeeds of Appellant and her codefendant and (2) it appropriately refused to deduct amounts Appellant claimed should not be included in the total because there was a lack of credible evidence to substantiate Appellant's claims.

Appellant contends the trial judge committed an error of law “by ordering restitution in a greater amount than the loss sustained by [Victim]” for three reasons. First, she complains that the restitution ordered exceeds the amount the State alleged during trial that she wrongfully obtained from Victim and argues restitution should have been limited to the amount she personally received from the total that was misappropriated. Second, she argues the trial judge failed to account for or give her credit for monies that Appellant testified were either for reimbursement of her own expenditures on behalf of Victim or were returned to the VA. Third, in an argument similar and related to her first, she complains the trial court improperly added together all sums wrongfully received by both Appellant and codefendant Norris regardless of which of the two defendants actually received the misappropriated funds. (Brief of Appellant, p.6-p.9). Appellant’s overall argument and each of her sub-arguments lacks merit. The trial judge properly based the restitution amount on the **total loss** suffered by Victim due to the collective misdeeds of Appellant and Norris without attempting to assign an individual amount to each wrongdoer based on her personal enrichment. Also, the trial judge’s rejection of Appellant’s request to deduct from the Victim’s loss the money Appellant allegedly accepted as reimbursement for expenses and the money she allegedly repaid to the VA was not an abuse of discretion where that rejection was based upon the lack of credible evidence to substantiate Appellant’s claims. Finally, Appellant suffered no prejudice from the ordered amount of restitution where, pursuant to existing precedent, the trial judge could have ordered Appellant to

pay the Victim's entire loss jointly and severally with Norris, but instead chose to deduct Norris' \$50,000 restitution obligation from Victim's aggregate loss and only ordered Appellant to pay the \$88,000 balance.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. King*, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). A trial judge is allowed broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 271–72, 481 S.E.2d 712, 713 (1997). Thus, a sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. *State v. Jacobs*, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011); *State v. Morgan*, 417 S.C. 338, 341, 790 S.E.2d 27, 29 (Ct. App. 2016). The restitution hearing is part of the sentencing proceeding. *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590, 594–95 (1997). Therefore, a restitution order likewise will not be overturned absent an abuse of discretion amounting to an error of law. *Id.*; *See also State v. Cox*, 326 S.C. 440, 443, 484 S.E.2d 108, 110 (Ct. App. 1997) (applying an abuse of discretion standard when affirming an order of joint and several liability for restitution to assure the victim was fully compensated).

Discussion / Analysis

The South Carolina Code provides in part that:

When a defendant is convicted of a crime *which has resulted in pecuniary damages or loss to a victim*, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant's criminal acts. The restitution hearings must be held unless the defendant in open court agrees to the amount due, and in addition to any other sentence which it may impose, *the court shall order the defendant make restitution or compensate the victim for any pecuniary damages.*

S.C. Code Ann. § 17-25-322(A) (Supp. 2012) (emphasis added). The South Carolina Code further provides:

(B) In determining the manner, method, or amount of restitution to be ordered, the court *may* take into consideration the following:

(1) the financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;

(2) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(3) the anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment;

(4) any burden or hardship upon the victim as a direct or indirect result of the defendant's criminal acts;

(5) the mental, physical, and financial well-being of the victim.

S.C. Code Ann. § 17-25-322(B) (Supp. 2012) (emphasis added). Even before the enactment of section 17-25-322 of the South Carolina Code in 1993, our Supreme Court recognized that the court of general sessions *may* order reparation to a victim, but in doing so it must hold a hearing and determine the actual amount of damage or loss, and there must be a factual basis for the determination. *State v. Fussell*, 299 S.C. 162, 163, 383 S.E.2d 1, 1 (1989). The Code now *mandates* that the court hold a hearing to determine the amount of restitution due the victim or victims of a defendant's criminal acts unless the defendant agrees to the amount due, and it *mandates* that the court then order restitution to the victim for any pecuniary damages. S.C. Code Ann. § 17-25-322(A) (Supp. 2012). "'Restitution' means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct" and includes 'specific damages and economic losses.'" S.C. Code Ann. § 16-3-1110(12)(a) (Supp. 2012).

The trial judge is allowed broad discretion in conducting the restitution hearing. *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590, 594-95 (1997). However, the defendant must receive

notice of the hearing and during the hearing the defendant must be given the opportunity to be heard and to cross-examine witnesses. *Id.* Further, the evidence admitted during the restitution hearing must be reliable and trustworthy. *Id.* The trial judge is also allowed broad discretion in determining the manner, method, and amount of restitution. *Cox*, 326 S.C. at 441, 484 S.E.2d at 109; S.C. Code Ann. § 17-25-322(B) (Supp. 2012). Thus, the trial court “may conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider or the source from which the information may come, to assist it in determining the amount of restitution to be imposed”. *Gulledge*, 487 S.E.2d at 594 (citing *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976) and *State v. Cantrell*, 250 S.C. 376, 158 S.E.2d 189 (1967)). In spite of this discretion, the restitution hearing must still determine an actual amount of loss, where this determination and the exercise of judicial discretion must be established upon a firm evidentiary basis. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980).

In the instant case, the circuit court conducted a full restitution hearing that comported with the requirements of due process. It encompassed both the information presented during trial and at the separate restitution/sentencing hearing held two months later. Appellant had notice of the hearing, was represented by counsel, was given the opportunity to be heard, and was given the opportunity to cross-examine witnesses. The evidence of Victim’s actual loss was both reliable and trustworthy and was established upon a firm evidentiary basis, coming both from Thomason, the attorney who handled Victim’s probate matter, and from Chastain, the expert forensic account offered by the State at the restitution hearing. The circuit court gave Appellant the benefit of the slight discrepancy between these two amounts, choosing the lower number as a starting point. Ultimately, after hearing and evaluating all of the evidence, the circuit court ordered restitution for specific damages associated with the crime for which Appellant pled guilty, reduced by the amount her codefendant had already been ordered to pay. Any economic

damage suffered by Victim as a result of that crime meets the statutory definition for restitution, regardless of whether Appellant was personally enriched by her criminal acts.

South Carolina permits the imposition of joint-and-several liability among co-defendants in order to ensure the victim is compensated for any pecuniary damages. *Cox*, 326 S.C. at 443, 408 S.E.2d at 110. It also allows the trial court to order restitution to some codefendants who are sentenced to lighter sentences including probation, while ordering no restitution to other codefendants who are sentenced to lengthy jail terms. *Id.* *Cox* made an argument very similar to the one posited by Appellant—claiming he was less culpable than his co-defendants in the commission of their crime and, as such, he should be required to pay no more than one-third of the restitution amount ordered. *Cox*, 326 S.C. at 442, 408 S.E.2d at 109. This Court disagreed and upheld the restitution ordered. Rejecting *Cox*'s argument, it found that the trial judge did not abuse his discretion in applying joint-and-several liability where state law intended that victims of crimes be compensated and joint-and-several liability permitted this to be achieved in the most complete manner possible. *Id.*, 326 S.C. at 443, 408 S.E.2d at 110. The judge in Appellant's case applied very similar reasoning and exercised appropriate discretion in attempting to ensure Victim was fully compensated for her pecuniary losses.

Where co-defendant Leisa Norris had been ordered to pay \$50,000 in restitution, a tremendous portion of the misappropriated funds remained unreimbursed. At the close of the restitution hearing, the judge recalled that at the end of Appellant's trial there was evidence to the effect of Victim's loss totaling \$138,000, with Norris already ordered to pay \$50,000 in restitution. This, of course, left an outstanding balance of \$88,000. During the restitution/sentencing hearing, however, Chastain testified there was a total loss of \$139,697.42. Where the purpose of restitution is to make the victim of a crime whole, the ordered amount of \$88,000 was entirely fair and appropriate under the circumstances of this case, because it was

based on the Victim's actual loss. The testimony and evidence submitted by the State provided a sufficient basis to support the award of restitution. Because the evidentiary threshold was met, the circuit court did not abuse its discretion and the restitution order should be affirmed.

II.

The trial court properly denied Appellant's motion for a directed verdict where the State presented sufficient evidence from which the jury could fairly and logically find Appellant guilty of committing exploitation of a vulnerable adult.

Appellant argues the trial court erred in failing to grant a directed verdict because the State failed to present evidence sufficient to support a guilty verdict for exploitation of a vulnerable adult. Specifically, she contends the State failed to present evidence that she: (1) engaged in an improper, unlawful, or unauthorized use of Victim's funds, assets, property, or power of attorney, or (2) used Victim's funds, assets, property, or power of attorney for her personal profit or advantage. The State submits these contentions are without merit. The trial court properly denied Appellant's motion for a directed verdict because the State presented direct and substantial circumstantial evidence from which the jury could fairly and logically find Appellant guilty of each element of exploitation of a vulnerable adult.

The evidence, viewed in a light most favorable to the State, showed that Appellant, who is not an attorney, prepared three powers of attorney on the same day, each purportedly granting Norris power of attorney over Victim finances, less than a month before Appellant had Victim committed to Marshall Pickens psychiatric hospital. Appellant and her husband signed two of those powers of attorney as witnesses to Victim's alleged signature however, none of the three powers of attorney were actually signed by Victim. Appellant and Norris then used one fake power of attorney to gain access to Victim's Wells Fargo account, and tried to use all three fake powers of attorney to gain access to Victim's BB&T account, adamantly insisting that both

explained that when she did write checks she always signed her own name with “POA” along with Victim’s name, and the checks in question lacked these markings. (Tr.p.41).

Norris testified she gained title to Victim’s house by way of a title deed that was recorded on December 12, 2012, which purportedly contained Victim’s signature and which, like two of the powers of attorney, was witnessed by Appellant and Appellant’s husband. The “title” indicates it was executed in June of 2005, but was signed in 2004, both of which were times when Victim’s husband was still alive. Victim’s husband’s signature, however, was notably lacking from the deed. The document also referenced the husband’s 2012 death, though it was purportedly executed in 2005. Norris testified that *this document was drafted by Appellant*. (Tr.p.44-p.46). A second “title” also was executed and signed on June 16, 2004, and was again *witnessed by Appellant and her husband*. Again, Victim’s husband did not sign the document and it referenced his 2012 death, though he was still alive in 2004. (Tr.47.) This second document was *also drafted by Appellant*. (Tr.p.46-p.47).

Nancy Kay Roof testified she is familiar with Victim’s handwriting and opined that neither check made out to Appellant for “funeral expenses” was signed by Victim. Roof further testified that in her opinion, *Victim did not sign any of the three POA’s purportedly executed on November 29th, 2012*. (Tr.p.50-p.57).

Mary Ellen Cervetti, an employee of BB&T’s corporate investigations and an expert in bank fraud was assigned to investigate this case after “*two women* that came in that said they were sisters of Bette Riddle” *attempting to have their names added to Victim’s account*. The bank flagged this as being suspicious and contacted Cervetti to investigate in part *the women were so adamant that they be added to the account immediately*. Cervetti found *both Appellant and Norris appeared at the bank with the POA and attempted to add themselves to the accounts*.

They then returned on two further and separate occasions and attempted the same thing, but were denied access by BB&T each time. (Tr.p.58-p.65).

Tyler Bradley O'Shields, explained he was appointed initial conservator and guardian ad litem for Victim's estate because Victim was an allegedly incapacitated person who needed protection. He testified licensed notaries who are not also licensed attorneys are not allowed to draft legal documents. He noted he is a notary himself and that a license lasts for ten years. O'Shields identified State's Exhibit #7 as *a deed purportedly conveying ownership of Victim's house to Norris* reserving a life estate for Victim on June 6, 2005. He noted *Appellant notarized the document but also noted her notary expiration date was more than ten years after the date the document was allegedly signed, which was impossible*. O'Shields then identified State's Exhibit #6 as a second deed, this one dated June 16, 2004, which was *notarized by Appellant and also bore an impossible expiration date*. (Tr.p.67-p.73). Thus, the State's evidence alone was sufficient to support the denial of a directed verdict. Nevertheless, the State's case was further buttressed by Appellant's own testimony.

In reviewing the propriety of a trial court denying a motion for a directed verdict, this Court found that when the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone. *State v. Harry*, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996). Our supreme court later "expressly adopted the reasoning in *Harry* and the waiver rule propounded therein." *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). When testifying in her own defense, Appellant admitted drafting the powers of attorney in question but claimed they were simply based on forms she found on the internet. She also admitted to notarizing and dating the title deeds for Victim's house but claimed she had simply made date errors. Appellant also admitted she was the one who prompted Victim's commitment to Marshall Pickens and that she deposited the checks from

Victim's bank account into her own. (Tr.p.90-p.116). Taken together, the totality of the evidence adduced at trial sufficiently established Appellant's guilt for each element of exploitation of a vulnerable adult beyond a reasonable doubt. Viewed in a light most favorably to the State, it showed Appellant improperly, unlawfully, or without authorization, used the funds, assets, property, or power of attorney of Victim, and that she did so for the profit or advantage of Appellant or another person. The evidence created factual questions regarding Appellant's guilt that could only be properly resolved by the jury. Based on the existence of the evidence in this case along with the logical inferences of guilt to be drawn from that evidence, the trial court properly denied Appellant's motion for a directed verdict. Appellant's conviction and sentence should be affirmed.

CONCLUSION

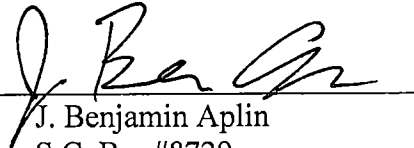
For all the foregoing reasons, it is respectfully submitted that the judgment, conviction, sentence, and restitution order of the lower court be affirmed.

Respectfully submitted,

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Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

June 14, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-000635

RECEIVED
JUN 14 2018
SC Court of Appeals

THE STATE,RESPONDENT

v.

POLLY McABEE HINDMAN.....APPELLANT.

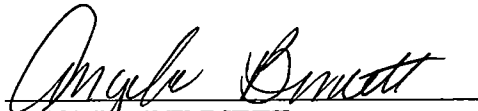
PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Clifford F. Gaddy, Jr., Esquire
121 Inglewood Way
Greenville, SC 29615

I further certify that all parties required by Rule to be served have been served.

This 14th day of June, 2018.


ANGELA BENNETT
Legal Coordinator

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ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 14 2018

SC Court of Appeals

June 14, 2018

Clifford F. Gaddy, Jr., Esquire
121 Inglewood Way
Greenville, SC 29615

RE: State v. Polly McAbee Hindman
Appellate Case No. 2017-000635

Dear Mr. Gaddy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar #8729

jba/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division