

2013 WL 6704558 (Mont.) (Appellate Brief)
Supreme Court of Montana.

STATE OF MONTANA, Plaintiff and Appellee,
v.
Paulette HOMER, Defendant and Appellant.

No. DA 12-0640.
December 4, 2013.

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Karen S. Townsend, Presiding

Brief of Appellee

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***1 STATEMENT OF THE ISSUE**

Did the district court err in refusing to admit prior testimony given at a competency hearing from an **elderly** victim who was unavailable for trial?

STATEMENT OF THE CASE

Appellant Paulette Homer (Homer) was charged with **exploitation** of an older person, in violation of [Mont. Code Ann. § 52-3-825\(3\)\(a\)](#). (D.C. Doc. 3)¹ The offense was based on about \$41,000 that Homer obtained from her mother, Ethel Yvonne Powell (Powell), in April 2008 while Powell was suffering from ***2** dementia. Homer obtained the money by arranging with Powell for Powell to take a reverse mortgage on her home to obtain money to give Homer.

The district court found Homer guilty of the offense following a bench trial. (Tr. at 724; Appellant's App. 1.) The court imposed a 10-year suspended sentence and ordered Homer to pay \$100,000 in restitution. (Appellant's App. A.)

STATEMENT OF THE FACTS**I. FACTS UNDERLYING THE OFFENSE****A. Background on the Victim**

Powell had five children, but she was particularly close to her daughter, Homer. (Tr. at 91, 94-95.) Powell and her husband raised the children in their Missoula home. (Tr. at 92.) Powell continued to live in the home after her husband died in 1999. (Tr. at 584-85.) She later moved in with Homer Skip Stratton (Stratton) around 2006, but she continued to own her home. (Tr. at 92, 331.)

B. Powell's Memory Loss

By the end of 2007, some friends and family noticed that Powell was more confused than normal and frequently repeated herself. (Tr. at 93-94, 274.) In October 2007, Powell consulted with a doctor about her memory loss. (Tr. at 247.) She was accompanied at that visit by one of her daughters, presumably Homer. *3 (Id.) That doctor thought that her memory loss might be caused by anxiety, rather than [dementia](#). (Tr. at 253.)

But in March 2008, Dr. Eric Kress concluded that Powell suffered from moderate dementia. (Tr. at 404-07, 412-14.) Dr. Kress observed that Powell did not know the date or year and could not identify the president or governor of Montana. (Tr. at 409-11.) Homer accompanied Powell to the visit with Dr. Kress, and Dr. Kress spoke to her about the diagnosis and Powell's medical care. (Tr. at 414-16, 420.) Dr. Kress later testified that he would not expect somebody who suffered from moderate dementia to be able to understand complicated [financial](#) transactions, make decisions about the person's [financial](#) future, or provide for the person's own best interest. (Tr. at 418.)

In fall 2009, a neuropsychologist, Dr. William David Patenaude, performed additional testing and concluded that Powell was severely impaired. (Tr. at 460, 475.) Dr. Patenaude opined that Powell would not have been capable of understanding complicated [financial](#) transactions in April 2008. (Id.) He had concern about the possibility of her being [exploited](#). (Tr. at 476.) Dr. Patenaude later testified that

her ability to appreciate the implications of making [financial](#) decisions, I thought placed her at risk. [She also] carried a good deal of anxiety. And I think one way she dealt with the anxiety is to avoid confrontation. And so I thought those things, in combination, really placed her at a position where it would be, I think, very hard for her to assert for her own needs. And part of it is she didn't get it. She *4 didn't realize... how impaired she was. And that's not unusual for someone with an Alzheimer's process.

(Tr. at 476.)

Although Powell's boyfriend, Stratton, was not able to place dates on the progression of Powell's [dementia](#), he testified about the mental decline she suffered in the years while he lived with her. Stratton explained that Powell eventually had so many problems with her memory that she sat in a chair and beat herself on the head while saying so dumb, I can't remember." (Tr. at 331.) She forgot how to use the microwave and stopped doing her laundry prior to April 2008. (Tr. at 331-32, 352.) To ensure that she took her medication, Homer set up Powell's medication and Stratton made sure that she took it. (Tr. at 332.) Stratton testified that, based on his suggestion, Homer took Powell to a doctor to address Powell's memory problems prior to April 2008. (Tr. at 344.)

C. Background on Homer and Her [Financial](#) Troubles

Homer's husband suffered from dementia for many years, and eventually died in April 2008. (Tr. at 96-97.) Her husband's health problems created a [financial](#) hardship for Homer. (Tr. at 96, 309, 591.) Homer had her Florence home on the market a long time before it sold in the spring of 2008. (Tr. at 96, 668.) Before the home sold, Homer believed that she needed to move out of the home. (Tr. at 309.) Powell asked her children if they would be opposed to her allowing Homer to move into her home, and the children did not object. (Tr. at *5 96.) Yet Homer decided not to move into the home. (Tr. at 96-97, 345-46.) Instead, she began renting a condominium in Missoula with a contract to allow her to purchase the condominium in 2008. (Tr. at 97-98, 346.)

In February 2008, Homer needed money to enable her to purchase the condominium. (Tr. at 293, 309.) When she was unable to sell her house before she needed the money, another relative purchased the condominium. (Tr. at 308-11.) She purchased the condominium from that relative later that year, using either the money she received from Powell or the proceeds from the sale of Homer's Florence home. (Tr. at 294.)

D. The Reverse Mortgage

In 2008, Homer arranged with Powell for Powell to take out a reverse mortgage on her home and for Powell to then give or loan the money to Homer. The reverse mortgage was completed in April 2008. (Tr. at 98.) Powell received over \$141,000 from the reverse mortgage. Homer, who was able to write checks from Powell's account, used nearly the entire amount to pay her debts. (Tr. at 109-25, 370, 667.)

Before the mortgage was completed, Stratton advised Powell that it was unwise and could cause her to lose her home. (Tr. at 334-35, 337.) But Powell told him that she would give her children anything they wanted. (Tr. at 335, 337, 345.) Stratton did not know whether Powell understood the reverse mortgage in *6 detail. (Tr. at 335, 363.) He testified: "I don't think she understood. I think all she knows is if this is what [Homer] wants, that's fine. Where do I sign?" (Tr. at 363.) Powell had never been interested in her **finances**. (Tr. at 336.) Stratton believed that the idea of Powell taking out a reverse mortgage originated with Homer or Homer's daughter, Lesa, not with Powell. (Tr. at 345.) Stratton did not know whether Powell gave Homer the money as a gift or a loan. (Tr. at 346-47.)

E. Powell's Need for Additional Health Care

Eventually, it became impossible for Stratton to continue to care for Powell. Early one morning, Powell left while Stratton was sleeping and injured herself when she fell on a sidewalk. (Tr. at 333.) Stratton initially tried to get help from Homer, because she was the child who was closest to Powell, but Homer avoided Stratton. (Tr. at 99.) In early 2009, Stratton contacted two of Powell's other children and let them know that because he and Powell both had significant health problems, he could no longer safely care for her. (Tr. at 98-100, 332-33.)

Powell's other daughter, Deborah Richardson, asked Homer if she would be willing to care for Powell in Homer's home, but Homer was unwilling to do so. (Tr. at 100, 104, 150-51.) Richardson and her brother moved Powell back into her own home and made arrangements for Powell's son, who was trained as a nursing assistant, to provide her 24-hour care in exchange for a salary. (Tr. at 101, 145.) When Richardson and her brothers moved Powell back into Powell's home in *7 2009, they learned about the reverse mortgage for the first time. (Tr. at 98, 101-02.) Richardson tried to get Homer to either take care of Powell or to return the money, but Homer would not do so. (Tr. at 105.)

The reverse mortgage caused severe difficulties when Powell later had to be moved into a nursing home because Powell no longer had any savings but had difficulty qualifying for Medicaid when she owned a home. (Tr. at 107, 135-38.) Homer's siblings eventually pursued legal actions to try to recover the money from Homer because they needed money to pay for Powell's care. (Tr. at 126-27.)

II. POWELL'S COMPETENCY HEARING TESTIMONY

One week before the trial was scheduled to begin, the district court held a hearing to determine whether Powell was competent to testify at trial. (Tr. at 33.) Richardson had been legally declared Powell's guardian before that hearing, but the parties agreed that a witness could be competent to testify even though a court found that the person needed a guardian. (Tr. at 34-35.) Powell was examined under oath to determine whether she was competent to testify. (Tr. at 38-45.) Powell was able to answer many of the questions she was asked, but was also unable to remember some significant facts. For example, she did not remember the name of the nursing home she lived in, she left off one daughter's name when she listed her children, and she did not remember

having lived with Stratton, with *8 whom she had lived for years. (Tr. at 39-45.) Homer asked Powell basic questions about her family and a few questions about the reverse mortgage. Powell and Homer's counsel had the following exchange:

Q. And at some point in those 50 years did you get some money out of your house?

A. Yes, I did.

Q. Do you remember what that's called, by any chance, what the name of the-- name of the fancy title of getting all the money?

A. I don't know that--the name of that.

Q. Okay. And when you got a bunch of money out of your home, who did you give the money to?

A. Good Lord, I don't know. It was for the kids to use because I didn't think I needed it. And any of them--that it was always a practice that any of them needed help and I could do it, I did.

Q. Do you remember giving all the money to [Homer]?

A. I gave her some money, I don't remember--I don't know that it was all of it.

Q. And do you remember if--did you give money to any of your other kids?

A. Not at that time. The boys were all working and one of the girls, and they didn't need it. And so I did not--I--had they asked for it, they would have gotten it, just like Pauli did.

(Tr. at 41-42.)

The State asked Powell whether she knew what a reverse mortgage was. (Tr. at 42.) Powell responded, "I don't know the terminology of it but you *9 get-- they have the price of your house set up and they--I think they take the value of it and use it for anything you need in that same line." (Id.) The State asked Powell questions about whether she understood why she was there and whether she was worried about testifying in a manner that might be harmful to Homer. The State also asked Powell about two people who had been close to Powell. (Tr. at 43-45.)

By the time the trial began, Powell's health had worsened, so she was unable to testify at the trial. (Tr. at 607.) During the trial, the court and counsel had an off-the-record discussion about whether Powell's testimony from the competency hearing could be admitted. (Tr. at 605-06.) The next day, the court provided Homer with an opportunity to make a record of the discussion. (Tr. at 605-08.) Homer asked the court to "take judicial notice and consider Ms. Powell, Yvonne Powell's testimony, of January 3rd where we had a competency hearing before this Court on whether or not she was competent to testify. And the results of this court's conclusions, of course it was my--my purpose for having the competency hearing was to establish competency." (Tr. at 606.) Homer explained:

And since that testimony was taken and this Court determined she was competent, she has since fallen sort of ill, and I would make a motion that she's now unavailable as a witness, and although both sides did not have an opportunity to fully explore the issues for purposes of trial, I do think that the limited testimony she gave regarding some of the questions surrounding reverse mortgage is relevant for the trial. *10 So I would move the Court to accept the transcript of her competency hearing testimony in light of the fact that she is basically unavailable because she's very ill.

(Tr. at 607 (emphasis added).)

The State opposed the motion on the ground that “[t]here are issues that were not addressed during the competency hearing since that was a hearing based solely on her competence to testify, and there were issues that the State would want to delve into further with her for trial testimony and trial purposes.” (Tr. at 608.) The court concluded,

[s]o it appears to the Court that the kind of testimony that we had in connection with the competency does not really go sufficiently to the issues that are before this Court, and whether or not the Court could determine her mental capacity to understand and be influenced at the time that her decision was made.

(*Id.*) Based on that conclusion, the court denied Homer's motion to have Powells testimony admitted at trial. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it excluded the testimony Powell gave at the competency hearing because the prior testimony was inadmissible hearsay. The only ground for admitting the evidence that Homer appeared to be relying on is the prior testimony exception. But the competency hearing testimony was not admissible under the prior testimony exception because *11 the State's motive for cross-examining Powell at the competency hearing was very different than the motive the State would have at trial.

Homer argues for the first time on appeal that the competency hearing testimony should have been admitted as a statement against interest. That argument should not be considered because Homer did not make that argument in the district court. Further, that argument fails on the merits because Powell's statement that she gave Homer money is not a statement against her interest.

Homer also argues for the first time on appeal that her right to present a defense was infringed by the exclusion of the hearsay testimony. This argument should not be reviewed because Homer did not preserve that claim, and she has not made any claim that it should be reviewed under the plain error doctrine. Further, the exclusion of the evidence did not violate her right to present a defense because the evidentiary rule excluding the evidence is not arbitrary or disproportionate to the purpose it is designed to serve.

Finally, even if the district court abused its discretion in excluding the evidence, that alleged error is harmless. The competency hearing testimony was not exculpatory to Homer. While Powell testified that she gave money to Homer, her testimony also indicated that she did not understand her own **finances** or the amount of money she gave to Homer, and it is consistent with the argument that she was unduly influenced. Further, Stratton provided testimony that contained the *12 same information as Powell's testimony. Therefore, there is no reasonable possibility that the exclusion of the evidence contributed to the guilty verdict.

ARGUMENT

I. STANDARD OF REVIEW

A district court has broad discretion when determining the relevance and admissibility of evidence. Accordingly, this Court generally reviews evidentiary rulings for abuse of discretion. *State v. Lotter*, 2013 MT 336, ¶ 13, ___ Mont., ___ P.3d *State v. Berosik*, 2009 MT 260, 352 Mont. 16, 214 P.3d 776 (“Rulings regarding the admissibility of evidence are left to the sound discretion of the trial court, and will not be overturned absent a showing of an abuse of discretion.”). This Court reviews a trial court's interpretation of a rule of evidence or a statute, however, de novo. *Lotter*, ¶ 13.

***13 II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED POWELL'S TESTIMONY FROM THE COMPETENCY HEARING BECAUSE IT WAS NOT ADMISSIBLE UNDER ANY HEARSAY EXCEPTIONS.**

A. The Competency Hearing Testimony Was Not Admissible as Prior Testimony Because the State's Motive for Cross-Examining Powell at That Hearing Was Not Similar to the State's Motive to Cross-Examine Powell at the Trial.

Although Homer did not cite to any rule of evidence when she moved to admit Powell's testimony, it appears that she was requesting to have the testimony admitted on the ground that it was prior testimony by a witness who was unavailable.

As Homer acknowledges, Powell's testimony from the competency hearing is hearsay. [Mont. R. Evid. 801\(c\)](#). Hearsay is inadmissible unless an exception making it admissible applies. [Mont. R. Ev. 802](#). Rule 804 creates exceptions that apply when the declarant is unavailable. Under [Mont. R. Evid. 804\(b\)\(1\)](#), former testimony is admissible if it was “given as a witness at another hearing or the same or different proceeding... in criminal actions and proceedings, *if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony* by direct, cross, and redirect examination.” (Emphasis added.)

In addressing the analogous federal rule, the Second Circuit has explained that “[t]he ‘similar motive’ requirement of [[Fed. R. Evid.\] 804\(b\)\(1\)](#) protects the *14 party to whom the witness is ‘unavailable’ in order to accord that party some degree of adversarial fairness, thereby assuring that the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by that party.” [United States v. Salerno](#), 937 F.2d 797, 806 (2nd Cir. 1991). The rule “ensures that the party against whom the testimony is offered has been afforded a fair chance to seek the truth, and is not blindsided at trial by the hearsay testimony.” *Id.*

The district court correctly excluded Powell's testimony from the competency hearing because the State's motive for cross-examining Powell at the competency hearing was not similar to the State's motive for cross-examining Powell during the trial. During the competency hearing, the State's motive was only to determine whether Powell had the ability to competently testify. A witness is deemed competent to testify unless the witness “is incapable of expression concerning the matter” or does not understand the duty to tell the truth. [Mont. R. Evid. 601](#). Therefore, the State was motivated during the competency hearing only to determine whether Powell was capable “of expression concerning the matter” and would tell the truth. The State did not have any motivation to examine Powell about her understanding of the reverse mortgage and the money that she gave to Homer at the time she gave away the money. The only substantive questions the *15 State asked are “What is a reverse mortgage?” and “Do you have to pay it back?” (Tr. at 42-43.) The State did not ask follow-up questions when Powell provided vague answers that did not demonstrate that she understood the reverse mortgage. (Tr. at 43.) And the questions the State asked appear to have been asked to demonstrate whether Powell had the ability to answer questions about the reverse mortgage at trial, not to prove the charge against Homer.

The district court aptly noted: “the kind of testimony that we had in the competency [hearing] does not really go sufficiently to the issues that are before this Court, and whether or not the Court could determine her mental capacity to understand and be influenced at the time that this decision was made.” (Tr. at 608.) Thus, the court did not abuse its discretion when it excluded Powell's testimony from the competency hearing because the State did not examine Powell with the motive of demonstrating that Powell had a diminished mental capacity at the time of the reverse mortgage.

B. Homer Did Not Preserve Her Argument That Powell's Competency Hearing Testimony Constitutes a Statement Against Interest; Further, Powell's Testimony Is Not a Statement Against Interest.

Homer failed to preserve her argument that Powell's competency hearing testimony is admissible as a statement against interest. This Court generally “will not consider new legal theories raised for the first time on appeal because ‘it is *16 unfair to fault the trial court on an issue it was never given an opportunity to consider.’” [Lotter](#), ¶30.

Homer did not clearly argue any specific ground to have Powell's testimony admitted. It appears from the discussion, however, that the parties and the court were discussing whether Powell's competency hearing testimony was admissible under the prior

testimony exception. (Trial Tr. at 606-08.) Indeed, when the State argued that the testimony should not be considered because the State did not have an opportunity to examine Powell on issues that are important to the trial, Homer noted that “the State did ask her if she knew what a reverse mortgage was. And she did explain what her understanding was.” (Tr. at 608.) Homer's response is consistent only with the argument that Powell's testimony should be admitted under the prior testimony exception. Homer did not make any argument that Powell's testimony was against her interest. Because Homer failed to preserve that issue, it should not be reviewed on appeal.

Even if this Court reviews the claim, it should be rejected because Powell's competency hearing testimony does not qualify as a statement against interest. Under [Mont. R. Evid. 804\(b\)\(3\)](#), a statement against interest is admissible if the declarant is unavailable. A statement against interest is defined as

[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another or to make the declarant an *17 object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.

[Mont. R. Evid. 804\(b\)\(3\)](#).

Homer argues that Powell's statement that she gave money to Homer is a statement against interest. But a statement fits the exception only if the speaker knows that the statement is against her interest. Christopher B. Mueller et al., *Evidence Practice Under the Rules* § 8.72, at 1055 (3d ed. 2009). And the statement must be looked at in context to determine whether the speaker is using the statement in a manner that is against the speaker's interest. *Id.* § 8.72, at 1056-57. Powell's statement would be against interest only if it could subject her to civil liability or render invalid a claim against Homer. Powell's statement that she gave money away would not subject her to civil liability. Further, Powell has never made any claim to the money that she gave to Homer. Accordingly, Powell did not make any statement that she would understand to be against her interest.

Finally, even if this Court determines that Powell's statement that she gave money to Homer is a statement against interest, only those portions of her testimony that are against her interest would be admissible. [Williamson v. United States](#), 512 U.S. 594, 605 (1994). Thus, only her testimony that she gave money to Homer would be admissible, not the entire competency hearing, which Homer sought to have admitted.

***18 III. HOMER DID NOT PRESERVE HER CLAIM THAT HER RIGHT TO PRESENT A DEFENSE WAS INFRINGED; FURTHER, THAT CLAIM FAILS ON THE MERITS.**

As discussed above, this Court generally does not review errors raised for the first time on appeal. *Lotter*, ¶30. Homer did not preserve an argument in the district court that exclusion of the competency hearing testimony violated her right to present a defense. Indeed, Homer did not refer to the Constitution or make any claim that her right to present a defense was being infringed. (Tr. at 606-08.) Although this court may review unpreserved claims if a defendant demonstrates that the claim should be reviewed under the plain error doctrine, [State v. Taylor](#), 2010 MT 94, ¶ 14, 356 Mont. 167, 231 P.3d 79, Homer has not made any argument that the plain error doctrine should be applied in this case. Accordingly, Homer's unpreserved claim should not be reviewed.

Even if this Court reviews Homer's unpreserved claim, the district court's exclusion of Powell's competency hearing testimony did not infringe Homer's constitutional right to present a defense. The United States Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” [Holmes v. South Carolina](#), 547 U.S. 319, 324 (2006). But that right “is subject to reasonable restrictions.” [United States v. Scheffer](#), 523 U.S. 303, 308 (1998). Thus, “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge *19 an accused's right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Id.* Courts have held that the exclusion of evidence under some state evidence rules violated a defendant's

right to present a defense where the evidentiary rules required trial courts to exclude evidence based on dubious, irrational reasoning. *State v. Jay*, 2013 MT 79, 369 Mont. 332, 298 P.3d 396 (citing *Holmes*, 547 U.S. at 328-31 (evidentiary rule prevented defendant from presenting evidence that a third party had committed crime if the judge determined the prosecutor's case was strong); *Rock v. Arkansas*, 483 U.S. 44 (1987) (evidentiary rule prohibited witness from testifying about memories recalled after hypnosis); *Washington v. Texas*, 388 U.S. 14 (1967) (evidentiary rule prohibited alleged accomplice from testifying on the defendant's behalf but he could testify for the government)). But well-established rules of evidence that are not arbitrary do not impermissibly infringe on a defendant's right to present a defense. See *Jay*, ¶ 33.

Application of the general rule against hearsay was not arbitrary or disproportionate in this case. The rule admitting hearsay from prior testimony only where the party against whom the evidence is offered had a similar motive to develop the testimony is a reasonable rule designed to ensure fairness to that party. See *Salerno*, 937 F.2d at 806 (explaining that the rule accords the party against whom the evidence is offered “some degree of adversarial fairness”). It would *20 have been unfair to allow Homer to admit Powell's statements from the competency hearing because the State did not cross-examine Powell with the motive of demonstrating that Homer exerted undue influence over Powell during the reverse mortgage process. The State engaged in a short cross-examination intended only to determine whether Powell was competent. That testimony could not fairly be admitted at trial for the purpose of proving or disproving the elements of the offense. Therefore, the exclusion of the testimony did not violate Homer's right to present a defense. See *Jay*, ¶¶ 33-34 (concluding that exclusion of expert testimony did not infringe the defendant's right to present a defense because the exclusion was rationally related to the important goal of admitting only expert testimony that has a logical connection to the central issues of the case); *United States v. Amato*, 306 Fed. Appx. 630, 632 (2d Cir. 2009) (unpublished) (concluding that the defendant's right to present a defense was not infringed by the exclusion of prior testimony).

Homer argues that the district court failed to articulate a justification for excluding Powell's prior testimony. (Appellant's Br. at 13.) But Homer acknowledges that the prior testimony was hearsay. The district court's explanation that the prior testimony did not go “sufficiently” to the issues before the court during the trial demonstrates that it the court was excluding the prior testimony because the State's motive for examining Powell at the competency *21 hearing was not similar to the State's motive at trial. Based on that conclusion, the evidence was not admissible under *Mont. R. Evid. 804(b)(1)*. The decision to exclude the prior testimony was not arbitrary or disproportionate, and did not violate Homer's right to present a defense.

IV. EVEN IF THIS COURT DETERMINES THAT THE DISTRICT COURT ERRED IN EXCLUDING POWELL'S COMPETENCY HEARING TESTIMONY, THAT ALLEGED ERROR IS HARMLESS.

Even if the district court erred in excluding Powell's competency hearing testimony, that error was harmless. An error in the admission or exclusion of evidence is a trial error. *State v. Van Kirk*, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735. Trial error is not reversible unless the admission or exclusion was prejudicial to the defendant. *Mont. Code Ann. § 46-20-701(1)*; *Van Kirk*, ¶40. To prove that a trial error was harmless, the State must demonstrate that there is no reasonable possibility that the error might have contributed to the conviction. *Van Kirk* ¶ 47.

There is no reasonable possibility that the outcome of Homer's trial would have been different if Powell's testimony had been admitted. Indeed, Powell's testimony may have inculpated Homer. While Powell testified that the money she took from the reverse mortgage was for her children, she also testified that she had given Homer “some money,” but that she did not “know that it was all of it.” (Tr. *22 at 41.) This demonstrates that Powell did not understand the significant quantity of money she gave Homer. And Powell's testimony that she did not think she needed her money also demonstrates that she did not have an understanding of her **finance's**. (*Id.*) Further, the information that Homer sought to admit testimony that she gave money to Homer because it was Powell's practice to help her children admitted at trial through Stratton. (Tr. at 335, 337, 345.) Finally, Homer was convicted by the same court that conducted the competency hearing. The court's conclusion that the competency hearing testimony “does not really go sufficiently to the issues that are before this Court” at the trial demonstrates that admitting the competency hearing testimony would not have changed the outcome of the trial. Thus, the alleged error would be harmless.

***23 CONCLUSION**

Because the district court did not abuse its discretion when it excluded Powell's competency hearing testimony, Homer's conviction for **exploitation** of an older person should be affirmed.

Footnotes

- 1 For purposes of the offense, **exploitation** is defined, in part, as “an act taken by a person who has the trust and confidence of an older person. to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person... of the ownership, use, benefit, or possession of or interest in the person' money, assets, or property.” [Mont. Code Ann. § 52-3-803\(3\)\(b\)](#). Undue influence consists of:
- (1) the use by one in whom a confidence is reposed by another person or who holds a real or apparent authority over the other person of the confidence or authority for the purpose of obtaining an unfair advantage over the other person;
 - (2) taking an unfair advantage of another person's weakness of mind; or
 - (3) taking a grossly oppressive and unfair advantage of another person's necessities or distress.
- [Mont. Code Ann. § 28-2-407](#)