

2011 WL 7766627 (Ill.App. 1 Dist.) (Appellate Brief)
Appellate Court of Illinois, First District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,

v.

Karen BAILEY, Defendant-Appellant.

No. 1-09-1020.

January 10, 2011.

Appeal from the Circuit Court of Cook County, Illinois

07 CR 13619

Honorable Angela Munari Petrone Judge Presiding.

Reply Brief and Argument for Defendant-Appellant

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***1 I. The trial court erroneously sustained hearsay objections to nonhearsay testimony that Wilson made statements that authorized certain expenditures when the statements explained why Bailey acted as she did and had independent legal significance regardless of their truth. The effect of the rulings was to deny Bailey her constitutional right to present evidence in her defense.**

The State responds that Wilson's statements authorizing expenditures did not fall under the category of nonhearsay statements offered to prove the effect on the listener's mind. (State's Br. at 18-19) It reasons that David Service did not indicate that Bailey was present during his conversation with Wilson and that Service's state of mind was not relevant. (State's Br. at 18-19) But the State ignores that Bailey and Service were married. (R.II. Q68-69, Q106; R.III. S98) A reasonable inference is that Bailey obtained cashier's checks from Wilson's checking *2 account to pay for these expenditures because either she was either present or Service told her about Wilson's authorizations to use her money to pay for Service's truck, their tax bill, and an addition to their house.

The State also argues that because there was no evidence that Bailey was present, Wilson's statements also could not fall under the nonhearsay category of statements that have independent legal significance. (State's Br. at 18-19) But Bailey needed not be present to hear Wilson authorizing the expenditures; Wilson's statements to Bailey's husband authorizing the expenditure had legal significance whether or not Bailey herself was present. The State cites the holding of [Kukla Press v. Famliy Media, Inc.](#), 133 Ill. App. 3d 939, 943 (1st Dist. 1985), that a person cannot relate what someone else told him that a third party said - but that is not what happened here. (State's Br. at 19) Service did not testify that someone else told him what Wilson said.

The State also argues that Wilson's statements on their face did not authorize Service or Bailey to spend her money. (State's Br. at 19) But, as to the statements about purchasing the truck, Service was asked if he knew "how money was transacted for you to pay for the car?" (R.III. S111)

Therefore, Service's testimony about Wilson's statements indicated that Wilson was giving him the money for the purchase. As to the taxes, Service testified that he was behind in paying them and would pay them later but that Wilson told him he should

not wait; the inference from Service's testimony was that Wilson meant he should use her money to pay the taxes since he could not have paid them. (R.III. S116) As to the cost of the room *3 addition to provide housing for Wilson and Clifford Service, it is a reasonable inference that Wilson agreed to pay as it was for her benefit.

The State further argues that the statements did not constitute a contract, but the State confuses legal enforceability with legal significance.

The issue is not whether a contract was formed, e.g., whether Wilson could have changed her mind about paying for a gift. Rather, the issue is whether her statements were, on their face, legally significant, i.e., did they authorize expenditures. See Corkery, Illinois Civil and Criminal Evidence §801.104 at 446 (2001) (a statement has legal significance if it produces a legal effect just by being said regardless of any secret unexpressed intent of a declarant).

Bailey argued that the judge's errors denied her constitutional right to present a defense and that the errors were not harmless beyond a reasonable doubt. (Def. Br. at 23-24) The State, in response, calls the excluded evidence cumulative of other evidence, i.e., Service's testimony that Wilson gave him the money for a truck, the taxes, and an addition. (State's Br. at 19-20) But Wilson's excluded statements explained why she would authorize those expenditures, which could have bolstered Service's conclusory testimony that Wilson paid for these expenditures. Therefore, Wilson's barred statements were not cumulative.

The State ignores Bailey's argument that these errors can be considered although not raised in the motion for new trial because they raise a constitutional issue. (Def. Br. at 24-25)

As to her alternative plain-error argument, the State disagrees that the evidence about Wilson's abilities was closely balanced. (State's Br. at 20)

*4 But its two-sentence argument cites to no evidence in the record and consists only of the conclusion that Wilson did not authorize Bailey to spend her money. (State's Br. at 20) The State ignores that the defense offered evidence, through Service's testimony, that Wilson was able to communicate. (R.II. S109, S110, S166, S170-71) (Def. Br. at 25) As to the second prong of plain error, the State argues the trial court's errors did not tip the balance against Bailey because she was able to present her theory of defense that Wilson authorized her expenditures. (State's Br. at 20) But, as argued above, the excluded evidence was not merely cumulative, and therefore the court's misapprehension of hearsay law denied Bailey her right to a fair trial at which she could present crucial defense evidence.

To summarize, the State has incorrectly placed Wilson's statements at issue outside the two different categories of nonhearsay. The exclusion of the testimony was not harmless beyond a reasonable doubt where it was important to the defense theory. The State does not contest that the constitutional issue was not forfeited. Alternatively, both plain-error prongs apply. This Court should reverse and remand for a new trial.

***5 II. The trial judge denied Bailey a fair trial because it mischaracterized significant portions of the trial evidence in finding that Wilson was not able to consent and in rejecting David Service as a credible defense witness.**

In attempting to defend the trial court's finding that Bailey had severe dementia in 2004, the State relies on Dr. Evans's hearsay testimony that a "note [by an unidentified author] suggest[ed] [Wilson] was completely demented and was unable to give any meaningful information." (St. Br. at 23) (R.IV. S209) Not only did the doctor refer to someone else's note instead of testifying to facts within his personal knowledge, he did not disclose the complete content of the note, and he testified that it only suggested that Wilson was "completely demented." Furthermore, he did not explain what the phrase meant.

Dr. Evans could not even recall what Wilson said. (R.IV. S09) His testimony revealed that he had little independent recollection of Wilson: he first testified, "I don't think she was demented; then he testified, "The nurse notes said that she was demented so-; and then he testified that Wilson "appeared" to be demented. (R.III. S204-05) The State further notes Dr Evans's testimony that

Wilson would not be competent to make financial decisions for herself, but that opinion was not supported by facts and also was not the equivalent of testimony that her dementia was severe. (State's Br. at 23) Considered as a whole, Dr. Evans's testimony did not support the trial court's finding that the State proved beyond a reasonable doubt that Wilson's dementia was severe in 2004.

Nor did the mere testimony of Dr. Gaziano, who treated Wilson in 2006. As the State notes, Dr. Gaziano said that Wilson's 2004 [CT scan](#) *6 showed [dementia](#). (R.I. P36-37) (St. Br. at 23-24) But Dr. Gaziano did not testify that Wilson's [dementia](#) was severe in 2004. (R.I. P37-40, P69-70)

The State ignores Bailey's argument that the trial court mischaracterized the evidence about dementia by ruling that anyone with dementia would have difficulty communicating. (Def. Br. at 28)

Bailey also argued that the trial court erroneously ruled that Service testified that he could not remember if she saw Wilson sign a power of attorney. (Def.'s Br. at 29) The State's response misstates his cross-examination testimony. (State's Br. at 24) Service did not testify that he could not remember if he was present on any other days for other powers of attorneys, as the State claims; rather, he said he was present for other powers of attorneys but could not be sure of the date. (R.III. S134) He reiterated on cross-examination that he was present when Wilson signed the January 16, 2004, power of attorney. (R.III. S132-33)

Bailey also argued that the trial court erroneously ruled that Service's testimony that Wilson could speak and walk in 2004 was contradicted by medical testimony. R.IV. S274, S276) (Def. Br. at 29-3) The State does not refute that no doctor testified that Wilson lacked these abilities.

Bailey next argued that the trial court erroneously ruled that Service had been impeached on his testimony that his parents bought him the truck because Wilson was not his mother. (Def's Br. at 30) The State does not address Bailey's main point: Service considered Wilson his mother. (State's Br. at 24) Neither does the State address the judge's confusion about the relationship of the parties in rejecting Service's testimony that Wilson *7 bought him the truck. (Def's Br. at 31) The trial court stated that David Service had not married "into the family," but Bailey was not related to Wilson or Clifford Service; rather, David Service was the son of Clifford Service. (R.III. S100; R.IV. S276)

As to the court's erroneous statement that Service did not show any receipts for remodeling Wilson's home, the State does not contest the error. (R.IV. S275) (Def.'s Br. at 32; St. Br. at 25) Neither does the State address directly the trial court's erroneous recollection of Service's testimony about purchases at "Home Depot"; the trial court incorrectly stated that Service testified that the [Menards] purchases were for remodeling at his home. (R.III. S124-26) That Service had his memory refreshed as to a contractor invoice for work at Wilson's home is irrelevant to whether the trial court misrecalled the evidence concerning Service's purchases. (R.III. S188-92) (State's Br. at 25)

As Bailey next argued, the trial court ruled that Wilson "couldn't write" the marriage application because it was not signed. (R.IV. S276) Bailey called this finding incorrect because there was no evidence that Wilson could not sign her name. (Def.'s Br. at 32) The State responds that Service testified that Wilson used a signature stamp for the marriage application. (State's Br. at 25) The State's argument misses the point: the trial court made a finding that Wilson could not sign her name. (State's Br. at 25)

The State further defends the judge's finding that Wilson could not write by noting medical testimony that Wilson had tremors and used feeding *8 utensils. (State's Br. at 25) Specifically, Dr. Evans testified that in May 2004 the occupational therapist made Wilson "some gadgets to hold in her hands so she could handle food," that he assumed that "the nurses probably noticed that she was incapable of feeding herself," and there was "some mention of tremors." (R.III. S206) But there was no medical testimony that tremors rendered Wilson incapable of ever signing her name. Furthermore, Dr. Evans only assumed that nurses had noticed that Wilson could not feed herself- if that was correct, eating is a different physical ability from signing one's name. Service described how Wilson signed her name in a "scribble fashion" - evidence that, while some physical condition affected the quality of her signature, she could at least at times sign her name without a signature stamp. (R.III. S182)

In the alternative, the State argues that even if the trial court did err in making factual findings, the trial court sufficiently recalled the crux of Bailey's defense theory. (State's Br. at 25-27) This position is unsupported by case law. The State cites some cases holding only that a judgment should be reversed if the trial judge both failed to recall important facts and did not consider the crux of the defense; in its remaining cases, either the trial court did recall the evidence, or the court's inability to recall a fact was very insignificant to the conviction. (State's Br. at 26) It cites no case holding that a new trial is not warranted if the court mischaracterized significant portions of the trial evidence. The State's position does not make sense because a defendant cannot have received a fair trial if the trial court misrecalled significant defense evidence pertinent to the defense theory *9 just because it recalled the general thrust of the defense theory.

Furthermore, the State ignores that some of the trial court's misrecollections affected its negative credibility assessment of the defense witness. (Def.'s Br. at 28-32)

The State points to other testimony of Service that the trial court found incredible. (State's Br. at 27) That some credibility rulings did not mischaracterize the evidence does not negate the court's other errors.

Furthermore, the trial court's errors in recollecting the defense evidence could have poisoned its assessment of the credibility of other testimony.

Significantly, Bailey argued that the trial court mischaracterized important State's evidence as well. (Def.'s Br. at 27-28) The State does not argue that, if the trial court did mischaracterize evidence concerning the severity of Wilson's dementia, Bailey was not thereby denied due process.

On the standard of review, the State correctly notes that a reviewing court is not to reassess witness credibility de novo. (State's Br. at 22-23, 25) But Bailey is not asking this Court to do so; rather, she is arguing that the trial judge's mischaracterizations of David Service's testimony affected its assessment of his credibility. For this reason, the State's argument that de novo review does not apply is incorrect. (State's Br. at 22-23)

The State argues that the issue was forfeited and that the plain-error doctrine does not apply. (State's Br. at 21-22) But the trial court's failure to recall crucial evidence is a constitutional error that may be later raised in a post-conviction hearing, and therefore the issue is not forfeited for not being raised in the post-trial motion. See *10 *People v. Mitchell*, 152 Ill. 2d 274, 325 (1992).

As to plain error, the State adopts its argument from issue I. (State's Br. at 21, fn. 2) Bailey has already rebutted this argument in the reply. (Reply at 3-4)

The State has not attempted to argue how the second prong of the plain-error doctrine would not apply to the errors of a trial judge in mischaracterizing significant portions of trial evidence, rising to the level of a denial of due process. See *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1st Dist. 1976) (due process is denied where court considers matters outside the record). If the right to due process is denied at trial, then by definition the error was so serious that it affected the fairness of the trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 555 (2007) (explaining the plain-error doctrine); *People v. McDonald*, 321 Ill. App. 3d 470, 473-74 (1st Dist. 2001) (where the trial court convicted defendant of uncharged offenses and thereby violated due process, the trial court committed plain error).

To summarize, the State has either ignored, or defends without record support, the trial judge's significant mischaracterizations of the evidence. Bailey was entitled to a fair assessment of the State's evidence and the credibility of her sole defense witness. This Court should reverse and remand for a new trial.

***11 III. In its prosecution for financial exploitation of an elderly person and theft, the State did not prove beyond a reasonable doubt that Wilson's dementia rendered her incompetent to authorize Bailey's financial transactions. In**

addition, the State did not prove beyond a reasonable doubt that Bailey had notice that her authority as agent under the nondurable power of attorney had terminated.

In arguing that the State did not prove beyond a reasonable doubt that Wilson's dementia rendered her incompetent to authorize Bailey's financial transactions, Bailey argued that the State proved only that Wilson had nonsevere dementia beginning in May 2004. (Def.'s Br. at 35-36) In response, the State again cites to the testimony of Dr. Evans who testified about Wilson's condition in May 2004. (State's Br. at 32) Bailey incorporates her arguments from Issue II concerning Dr. Evans's testimony. (Reply at 5) It is worth noting again that the State's claim is misleading: Dr. Evans never testified that Wilson was completely demented but actually only referred to a note written by an unidentified person. (R.IV. S209)

The State claims that Dr. Evans testified that Wilson was "unable to communicate effectively." (State's Br. at 32) Actually, he testified that Wilson was "unable to give any meaningful history." (R.III. S203) And, on cross-examination, he qualified his answer by testifying that he did not remember exactly whether Wilson was able to furnish a medical history but just that a note suggested that she was unable to give any meaningful information. (R.IV. S209)

The State accuses Bailey of improperly citing to evidence chronicled in other cases. (State's Br. at 33-34) It is proper, however, to cite case law for an applicable legal proposition, *e.g.*, persons of mature age are presumed to *12 be mentally competent. (Def.'s Br. at 36) As to the case law that the current view of dementia is that the condition may be remitting, the proposition was properly supported by citation to a standard scientific work. *See Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000) at 157, *cited in In the Matter of Conservatorship of Groves*, 109 S.W.2d 317, 338 (Tenn. 2003); *People v. Lee*, 265 Ill. App. 3d 856, 863 (1st Dist. 1993) (judicial notice may be taken of authoritative treatises that are generally known and accepted); *United States v. Johnson*, 979 F.2d 396, 401 (6th Cir. 1992) (taking judicial notice of an earlier edition of the DSM). Furthermore, the proposition is consistent with the testimony at Bailey's trial that a person with dementia has good and bad days and can sometimes have coherent conversations. (R.I. P47, P48)

The State argues that the trial court found that Bailey engaged in deception and that the powers of attorney were fraudulently obtained. (State's Br. at 30-31) That just begs the question. If the State did not prove that dementia rendered Wilson unable to consent, then the trial court's finding of deception based on Bailey merely having checks payable to Wilson sent to Bailey's home was error. (R.II. R15-18; R.IV. 278) Also, without evidence proving beyond a reasonable doubt that Wilson was incapable of authorizing Bailey to be her agent, the trial court lacked a basis to reject the validity of the initial general power of attorney signed on January 15, 2004. (R.IV. S278) That power of attorney contained Wilson's handwritten and stamped signatures, which were notarized. (People's Ex. No. 6)

In the alternative, the State argues that, even if Wilson had been able *13 to consent, the clear inference from the evidence is that she actually did not. (State's Br. at 32) This argument appears to be based solely on the unwarranted speculation that Wilson could not have allowed Bailey to spend all her money. *See People v. Davis*, 278 Ill. App. 3d 532, 540 (1st Dist. 1996) (if an alleged inference does not have a chain of factual evidentiary antecedents, then it is not a reasonable inference but is instead mere speculation). The trial court was in no position to rule that Wilson, a person who did not testify, could not have possibly given her consent, especially in light of the likely reason why she would have: preferring that Bailey and Service to spend the money than lose it to a public nursing home. Indeed, David Service had indicated that there was a concern that relatives would put Wilson into a nursing home and that her bank accounts would have been depleted. (R.III. S179-81).

In light of the testimony that dementia does not preclude coherent communications at all times, the State did not prove beyond a reasonable doubt that Wilson could not have consented to Bailey's financial transactions and therefore did not prove Bailey's guilt. Thus, contrary to the State's argument, Bailey does invoke the applicable standard of review. (State's Br. at 34)

Bailey argued that even if the State met its burden of proof on the issue of Wilson's incompetence, it did not prove that Bailey had notice that her authority as agent had terminated due to a permanent loss of capacity. (Def.'s Br. at 39-42) The State's response that even if the trial court were to accept the general power of attorney, it was superseded by the subsequent *14 durable power of attorney for finance, misses the point because the trial court found the latter power of attorney invalid. (R.IV.

S278) (State's Br. at 32-33) Moreover, even if the durable power of attorney for finance was valid, Bailey still was not proven to have known that Wilson had permanently lost her capacity to consent.

On the merits of the argument that the State did not prove notice, the State wrongly contends that the agency law cited by Bailey is irrelevant to whether Bailey committed the offense of financial exploitation of an **elderly** person. (Def.'s Br. at 40-41) (State's Br. at 32-33) That offense can be committed by "illegally us[ing] the assets or resources" of an **elderly** person. [720 ILCS 5/16-1.3\(a\)](#) (West 2006). "Illegal use" is defined to include "use of the assets or resources contrary to law." [720 ILCS 5/16-1.3\(a\)](#) (West 2006).

If an agent's authority has not terminated due to lack of notice and lack of a judicial determination, then the agent could not constitute illegally use the principal's property absent the presence of other triggering conduct under the statute (*e.g.*, deception).

The State has not disputed the principles of agency law or their application. Nor has the State disputed that it did not prove beyond a reasonable doubt that Bailey, a layperson, would not have been on notice that her authority as agent terminated due to Wilson's permanent loss of capacity.

To summarize, the record does not support the State's arguments that it proved beyond a reasonable doubt that Wilson's dementia rendered her incompetent to consent or otherwise was sufficiently incompetent to put ***15** Bailey on notice that her agency terminated. This Court should reverse the convictions.

***16 IV. In sentencing Bailey, the trial court relied in aggravation on improper assumptions that Bailey retained a large amount of cash taken from Wilson and that Bailey had not acted in Wilson's best medical interests on two occasions.**

Bailey argued that the trial court improperly concluded that there were large amounts of money awaiting Bailey, there being no evidence that any money was left in Bailey's possession. (R.V. T98) (Def.'s Br. at 42-44) The State incorrectly responds that Bailey has misstated the evidence on the basis that there were unaccounted-for cash withdrawals. (State's Br. at 36-37) That there was no accounting of how some cash was spent was not evidence that money is left. Also, the State has not responded how the trial court's improper assumption was insignificant given the trial court's twice-repeated statements of this concern and that it was particularly troubling. (R.V. T98, T102)

As for Bailey's decision not to have the paramedics take Wilson to the hospital because Williams reporting seeing "bits in her mouth," the State offers no explanation for its conclusory statement that the record supported the conclusion that Bailey had not acted in Wilson's best medical interest. (Def.'s Br. at 44-45) (State's Br. at 37) And none is available because there was no evidence that Wilson needed emergency care.

And, as to the trial court's conclusion that Bailey had decided that Wilson was to receive only Tylenol, the State asserts that Bailey had control over the choice of medications because she possessed a health power of attorney. (State's Br. at 37) But mere possession of a power of attorney does not mean that the power was exercised. Also, the State ignores that Williams had indicated only that "the family" had made that decision. ***17** (R.IV. T33) That testimony is consistent with relatives, and not Bailey, making the decision. In addition, the State has not responded to the argument that there was no testimony that the decision was not in Wilson's medical interests. (Def.'s Br. at 45)

As to the judge's finding that Bailey did not act in Wilson's medical interests, the State does not acknowledge the inherent seriousness of such a conclusion and resulting importance to the sentencing decision. (Def.'s Br. at 44-45) (R.V. T106-07) Instead, the State relies on a vague comment by the trial court about adding icing to the cake. (State's Br. at 38-39) But it is not clear that this comment addressed Bailey's medical decisions: "I do consider the fact also, just to add a little bit of icing to the cake, if you will, that the Defendant was not acting in the best interest of Mary Ann Wilson when she made all of these purchases for her own personal use, and the use of her husband, and the use of her child. That was shown in the sentencing hearing

***.” (R.V. T106-07) (The trial court next discussed the incidents with the paramedics and the Tylenol. (R.V. T107)) The comment does not show that the judge's finding - that Bailey did not act in Wilson's best medical interests - was insignificant. *See People v. Heider*, 231 Ill. 2d 1, 21-22 (20038) (a sentence based on an improper factor can only be affirmed if the reviewing court *can determine* that the weight placed on the factor was insignificant).

To summarize, the State has not countered Bailey's argument that improper assumptions about Bailey's behavior towards Wilson and about her retaining large amounts of money were significant to the trial court's *18 imposition of high-end 11-year sentences. This Court should vacate the sentences and remand for resentencing or reduce the sentences.

***19 V. Bailey's high-range 11-year sentences were excessive because there were significant mitigating factors and because she had a strong potential for rehabilitation. In addition, lower sentences should have been imposed because the State did not prove that Bailey had necessarily acted without regard to Wilson's interests.**

Either the State mistakenly believes that Bailey received an extended-term sentence or it is taking the untenable position that Bailey's non-extended sentences years were not excessive because 11 years was less than the 30-year maximum extended-term sentence. (State's Br. at 39-40)

The trial court ruled that an extended-term sentence was “not appropriate.” (R.V. T109) The analysis of whether Bailey's high-range sentences were excessive must of course be confined to the context of the applicable sentencing range of 4 to 15 years. 730 ILCS 5/5-8-1(a)(4) (West 2006).

Bailey argued that the State did not prove the reason for her conduct and that the uncertainty about her motivation was an additional reason militating toward sentence reduction. (Def.'s Br. at 48-49) The State's . response is only conclusory: “the clear inference” is that Bailey was motivated by greed. (State's Br. at 41) The State notes the large amount of money taken, but the amount involved does not preclude the possibility that Bailey had spent the money so that it would not make Wilson ineligible for nursing-home care at public expense. (State's Br. at 41) Indeed, David Service indicated that there was a concern that relatives would attempt to put Wilson into a nursing home, which would deplete her bank accounts. (R.III. S179-81)

This Court should reject the State's position that the sentences are appropriate as it does not address the significant mitigating factors and *20 speculates as to the motivation for the offenses.

***21 VI. Five of Bailey's six convictions should be vacated pursuant to the one-act, one-crime doctrine because the State's charges treated Bailey's conduct as one act.**

The State agrees that all the theft convictions should merge into the convictions for financial exploitation of an elderly person. (State's Br. at 43) As to the latter counts (counts one through four), while Bailey contended that a conviction should stand for only one count, the State contends that two convictions should stand - for count one (based on obtaining control of over \$100,000 by deception) and for count two (based on illegally using over \$100,000). (State's Br. at 44) The State reasons that these two counts were based on two different acts: the act of obtaining control of the money by the use of the powers of attorney and the act of illegally using Wilson's assets. (State's Br. at 44) But the indictment did not treat these acts as separate. Rather, the charges for financial exploitation treated Bailey's conduct as one act but charged different theories of culpability. Bailey was not put on notice that she could be convicted of multiple counts of financial exploitation for using the assets after obtaining control over them, and so only one conviction should stand. *See People v. Crespo*, 203 Ill. 2d 335, 340-43 (2001).

This Court should vacate all but one of the convictions for financial exploitation of an elderly person.

***22 CONCLUSION**

For the foregoing reasons, Karen Bailey, Defendant-Appellant, respectfully requests that this Court reverse her convictions, pursuant to issue three, or, pursuant to issues one or two, reverse her convictions and remand for a new trial. In the alternative, she seeks either a new sentencing hearing or a reduced sentence on a single conviction, pursuant to issues four, five, or six.

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