

No. COA 09-1591

20-A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,)

Plaintiff,)

v.)

KENNETH THOMAS FORTE,)

Defendant.)

From: Richmond County
No. 09 CRS 518-20

DEFENDANT-APPELLANT'S BRIEF

CLERK COURT OF APPEALS
OF NORTH CAROLINA

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STATEMENT OF QUESTIONS PRESENTED

- I. **DID THE TRIAL COURT ERR BY FAILING TO DISMISS AT THE CLOSE OF THE STATE’S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE ALL THREE CHARGES OF EXPLOITATION OF AN ELDER ADULT IN THAT, IN THE LIGHT MOST FAVORABLE TO THE STATE, THE STATE DID NOT PRODUCE SUBSTANTIAL EVIDENCE THAT ERNEST LINDSEY WAS AN “ELDER ADULT” AS THAT TERM IS DEFINED BY STATUTE?**

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III. DID THE TRIAL COURT ERR BY ALLOWING ERNEST LINDSEY TO TESTIFY ON BEHALF OF THE STATE, IN THAT MR. LINDSEY WAS NOT A COMPETENT WITNESS PURSUANT TO N.C.G.S. § 8C-1, RULE 601(b), IN THAT, BASED ON MR. LINDSEY'S VOIR DIRE TESTIMONY, MR. LINDSEY WAS INCAPABLE OF EXPRESSING HIMSELF CONCERNING THE MATTER AS TO BE UNDERSTOOD, AND HIS PRESENCE BEFORE THE JURY WAS SO PREJUDICIAL AS TO DENY DEFENDANT A FAIR TRIAL?

STATEMENT OF PROCEDURAL HISTORY

Defendant Kenneth Thomas Forte ("Mr. Forte" or "defendant") was indicted on February 2, 2009, for three counts of exploitation of elder adult. (Record on Appeal at 3-5) ("R. at ___") Two of the indictments, 09 CR 518 and 09 CR 520, were brought as Class H felonies under N.C.G.S. § 14-32.3(c). One indictment, 09 CR 519, was brought as a Class H felony under N.C.G.S. § 14-112.2(b).¹ (*Id.*) Defendant was arraigned at the March 30, 2009, term of Richmond County Superior Court, pleading not guilty. (R. at 6)

¹ As explained in the Statement of Facts, *infra*, effective December 1, 1995, the General Assembly approved a bill imposing criminal penalties for, among other things, exploitation of an elder adult. *See* N.C.G.S. § 14-32.3(c). Effective December 1, 2005, however, N.C.G.S. § 14-32.3(c) was repealed with the passage of N.C.G.S. § 14-112.2, entitled "Exploitation of an elder adult or disabled adult." The former N.C.G.S. § 14-32.3(c) is similar to, although not identical with, N.C.G.S. § 14-112.2(b).

Defendant's case came on for trial at the June 8, 2009, Criminal Session of Richmond County Superior Court, the Honorable Joseph Crosswhite presiding. Defendant was found guilty on all three counts on June 16, 2009. (R. at 9-11)

Defendant was sentenced the same day. Judge Crosswhite consolidated the three convictions, and after finding that defendant had 0 criminal history points, sentenced defendant to a term of 6-8 months. Judge Crosswhite suspended that sentence subject to 60 months supervised probation. Defendant also was ordered to pay restitution in the amount of \$35,000. (R. at 12-16)

Ronald Barbee, trial counsel for defendant, gave oral notice of appeal to the North Carolina Court of Appeals at the conclusion of the trial on June 16, 2009. (R. at 17)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This is an appeal from a Judgment Suspending Sentence - Felony. (T. at 12-16) Defendant appeals this final judgment as of right pursuant to N.C.G.S. § 7A-27(b).

STATEMENT OF THE FACTS

A. Overview.

Defendant was indicted on three counts of exploitation of an elder adult under two statutes. The first statute was N.C.G.S. § 14-32.3², effective December 1, 1995.

² A copy of this statute is attached as Appendix-1.

That statute states in pertinent part:

(c) Exploitation. - - A person is guilty of exploitation if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting, and knowingly, willfully, and with the intent to permanently deprive the owner of property or money: (i) makes a false representation, (ii) abuses a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or elder adult gives or loses possession and control of property or money.

If the loss of property or money is of a value of more than one thousand dollars (\$1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of less than one thousand dollars (\$1,000) the caretaker is guilty of a Class 1 misdemeanor.

(d) Definitions. - - The following definitions apply in this section:
(1) Caretaker. - - A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.

* * *

(4) Elder Adult. - - A person sixty (60) years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

N.C.G.S. § 14-32.3(c), (d).

Effective December 1, 2005, N.C.G.S. § 14-32.3(c) was repealed. In its place came a new statute, N.C.G.S. § 14-112.2, "Exploitation of an elder adult or disabled adult." Following is the pertinent sections of that statute:

(a) The following definitions apply in this section:

* * *

(2) Elder adult. - - A person sixty (60) years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

(b) It is unlawful for a person: (i) Who stands in a position of trust and confidence with an elder adult or a disabled adult, or (ii) who has a business relationship with an elder adult or disabled adult to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an elder adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elder adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elder adult or disabled adult.

* * *

(d) A violation of subsection (b) of this section is punishable as follows:

* * *

(3) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at less than twenty thousand dollars (\$20,000), then the offense is a Class H felony.

N.C.G.S. § 14-112.2(a)(2), (b), (d)(3).

Because some of defendant's alleged activities took place prior to December 1, 2005, and some after December 1, 2005, he was indicted under both statutes. More specifically, defendant was indicted under N.C.G.S. § 14-32.3(c), in indictment 09

CR 518, for the time period December 30, 2003 through December 31, 2004. Defendant was then indicted under the same statute, N.C.G.S. § 14-32.3(c), in indictment 09 CR 520 for the time period January 1, 2005 through November 30, 2005. Finally, defendant was indicted under N.C.G.S. § 14-112.2(b), in indictment 09 CR 519, for activities which allegedly took place between December 1, 2005, and June 1, 2006. (R. at 3-5) Accordingly, the time frame for all defendant's alleged activities includes the years 2004, 2005 and one-half of 2006.

The State's case included four witnesses and various exhibits. Put simply, the theory of the State's case was that defendant Kenneth Forte, an accomplished hardwood artist who had never before been accused of or convicted of any crime, took advantage of an elderly man, Ernest Lindsey. More specifically, the State alleged that Mr. Forte tricked Mr. Lindsey into writing scores of checks made out to himself (Mr. Forte).

The State introduced into evidence as Exhibits 5-13 a series of checks written by Mr. Forte and signed by Mr. Lindsey for the period dating from December 18, 2003 through June 1, 2006. These checks include eight which paid Mr. Lindsey's taxes, 10 to pay his insurance, 28 to the Town of Ellerbe, 32 to Progress Energy, five for the Postmaster and Farm Supply, 27 to Ellerbe Telephone, four to Rachel Cromer,

12 to Delores Bordeaux, and 92 to Kenneth Forte.³ (Transcript at 324-343) (T. at ___)⁴

Evidence from Mr. Forte did not dispute that Mr. Lindsey signed the checks that had been introduced into evidence by the State. Instead, evidence from Mr. Forte was that Mr. Forte had done various jobs around Mr. Lindsey's home, such as repairing and remodeling, and that some of the checks were for payment to Mr. Forte for labor and supplies. Other checks were to reimburse Mr. Forte for items he purchased for Mr. Lindsey. Finally, other checks made out to Mr. Forte were for the purpose of securing cash for Mr. Lindsey, since Mr. Lindsey did not have a local checking account. At the close of the trial, after the jury had rendered its verdict, the State conceded that Mr. Forte had in fact done certain work for Mr. Lindsey, and the State agreed that this should be taken into account when determining restitution. Therefore, instead of demanding the full amount of the 91 checks written to Mr. Forte totaling \$45,000, the State agreed to allow restitution in the amount of \$35,000, thus crediting \$10,000 for work performed for Mr. Lindsey by Mr. Forte. (T. at 9, 32-33)

³ Although the State's Exhibit 13 indicates there are 92 checks, there are actually 91 checks written to Mr. Forte by Mr. Lindsey.

⁴ The State also introduced 105 checks made out to Kenneth Forte for the period dating April 1, 2002 through December 23, 2003. These checks were introduced pursuant to Rule 404(b) of the North Carolina Rules of Civil Procedure, not as substantive evidence.

B. State Witnesses.

DELORES BORDEAUX

Delores Bordeaux is the daughter of Ernest Lindsey. Mr. Lindsey resides in Ellerbe, North Carolina. Ms. Bordeaux resides in St. Louis, Missouri. Ms. Bordeaux testified that her father is either 99 or 109-years-old; however, his Army records state that he was born in 1910, and was 99-years-old as of the date she testified, June 9, 2009. (T. at 24-25) (Mr. Lindsey testified during voir dire that he was born September 2, 1910, meaning that he was 99.⁵) Mr. Lindsey had been retired from the Government Printing Office in Washington, D.C. for more than 30 years. He received a retirement check, as well as Social Security. (T. at 24-27) Mr. Lindsey now has a caregiver who lives with him. Her name is Doris Lindsey, Mr. Lindsey's niece. Mr. Lindsey did not need a caregiver until "after this whole thing happened with Kenneth Forte." (T. at 31-32)

Mr. Forte first began coming around Mr. Lindsey's home when Mr. Lindsey needed help with an insurance claim. Mr. Forte did some work around the house for

⁵ The time frame at issue in this case is 2004, 2005, and the first part of 2006. The trial took place five years after these events allegedly first began.

Mr. Lindsey, such as work in the bathroom, some work on the hot water heater, and the counter tops in the kitchen, as well as some work in the shop.⁶ (T. at 33-35)

Ms. Bordeaux had a joint checking account with her father. Around 2004, she started noticing that checks were being written to Mr. Forte. Ms. Bordeaux talked to Mr. Forte concerning the checks, and at one time asked him by telephone if he would not write any checks over \$500 for cash. (T. at 36-42)

In April 2006, Ms. Bordeaux wrote a certified letter to Mr. Forte and to her father, asking that Mr. Forte no longer have anything to do with Mr. Lindsey's finances. Shortly after that, Ms. Bordeaux made a complaint to the police. (T. at 42-44)

On cross examination, Ms. Bordeaux testified that her father had a right to do with his money anything he chose to do with it. Ms. Bordeaux had never been present when Mr. Lindsey signed a check to Mr. Forte. Ms. Bordeaux recognized her father's signature, and the signature on the checks written to Mr. Forte were signed by Mr. Lindsey. (T. at 55; 59)

Mr. Lindsey's mental condition did not start to deteriorate until after the incident with Mr. Forte. After Mr. Forte was charged, Mr. Lindsey's memory became more impaired, and he was confused. (T. at 69-72)

⁶ There was a beauty shop on Mr. Lindsey's property. (T. at 35)

Mr. Forte was charged with exploitation of an elder adult on June 16, 2006.
(T. at 274) Prior to Mr. Forte being charged, Mr. Lindsey was able to manage his own affairs.

Q: [Defense attorney Barbee] Where he couldn't manage his affairs in 2003.

A: [Delores Bordeaux] No, I never said I felt that in 2003.

Q: 2004 - How was he in 2004? Could he manage his affairs?

A: He seemed able to manage his affairs.

Q: 2005 ?

A: I think so.

Q: 2006?

A: I don't know. As I said it was a gradual thing.

* * *

A: After the incident with Mr. Forte, he became fairly incoherent. I was really very fearful of his mental state at that point.

* * *

A: His physical condition was worse after the incident with Mr. Forte being charged. He gradually settled back down.

(T. at 68, lines 7-15; 69, lines 21-22; 71-72, lines 25-2)

More specifically, Ms. Bordeaux testified that, prior to June 2006, Mr. Lindsey, if he wanted to, could go to a social event; he could pay someone to take him.⁷ With regard to his health, Mr. Lindsey was covered by both Medicare and the VA. Mr. Lindsey did not have medical bills. "He's been in remarkably good health." Mr. Lindsey did not have psychiatric or psychological problems. If Mr. Lindsey needed the services of an attorney, he had money to pay an attorney. (T. at 59-60)

Mr. Lindsey had money, (Tr. at 59), and was capable of managing his affairs prior to Mr. Forte being charged in June 2006. (T. at 68)

Prior to June 2006, Ms. Bordeaux would visit her father on average twice a year. If she had felt that her father needed someone at his home to take care of him, she would have made arrangements for that care. (T. at 61-62) In fact, Doris Lindsey, Mr. Lindsey's caregiver, did not begin living with Mr. Lindsey until 2007, (T. at 73), more than six months after Mr. Forte was charged.

During the times Ms. Bordeaux visited her father prior to June 2006, Mr. Lindsey could bathe himself. (T. at 63-64)

At the time of the trial, Ms. Bordeaux said her father was "getting older. He is - - it's increasingly difficult for him to be mobile. I think there is some early signs of age-related dementia. His memory is not as good as it used to be." (T. at 67)

⁷ Mr. Lindsey had not driven a vehicle since 2000. (T. at 50)

JOHN BORDEAUX

John Bordeaux is Delores Bordeaux's husband and Mr. Lindsey's son-in-law. (T. at 113) Mr. Bordeaux first looked at Mr. Lindsey's checking account in June 2006, and noticed several checks which he found to be suspicious, including a check paid to Mr. Forte for \$400 to cut Mr. Lindsey's toe nails. (T. at 144-145) Mr. Bordeaux saw other checks, such as a power washer and labor to clean Mr. Lindsey's house for \$600, and checks for \$1,900 and \$1,300. (T. at 146-147)

Mr. Lindsey lived alone from 2002 through 2006. (T. at 152) Mr. Bordeaux accompanied his wife to visit Mr. Lindsey every time from 2002 until 2006, except for the year 2005. (T. at 143)

WENDELL SESSOMS

Wendell Sessoms is a detective with the Richmond County Sheriff's office. In June 2006, he spoke with John and Delores Bordeaux about checks being written to Kenneth Forte on Ernest Lindsey's checking account. The Bordeauxs gave Det. Sessoms copies of checks from January 2004 through June 2006. (T. at 216-218)

Mr. Forte agreed to talk with Det. Sessoms. Det. Sessoms asked Mr. Forte about a \$500 check for a pedicure. Mr. Forte stated that he had clipped Mr. Lindsey's nails, that he had massaged his feet and taken care of his feet. (T. at 222)

Mr. Forte explained that he would help Mr. Lindsey pay his bills, that Mr. Lindsey was 96-years-old and it was an effort for him to write out checks. Mr. Forte stated that Mr. Lindsey was aware of the checks that were being cashed. Mr. Forte also explained that he would give Mr. Lindsey cash back after he, Mr. Forte, had cashed a check.

LAURA RACHEL CROMER

Laura Cromer is Ernest Lindsey's sister and lives next door to him. She was 80-years-old at the time of trial. (T. at 295-96)

Before Mr. Forte began visiting Mr. Lindsey, Ms. Cromer and Mr. Lindsey had a good relationship. That relationship deteriorated when Mr. Forte dug up a tree on Ms. Cromer's property. (T. at 216-219)

ERNEST J. LINDSEY - VOIR DIRE⁸

The voir dire of Ernest J. Lindsey begins on page 355 and ends on page 400. Mr. Lindsey is in a wheelchair. (T. at 359)

Mr. Lindsey was born on September 2, 1910, but does not know how old he is. (T. at 356) Following are key colloquies from Mr. Lindsey's voir dire.

Q: [District attorney Layton] That man right there (indicating) - do you know him as Kenny Forte?

⁸ Prior to Mr. Lindsey's testimony, a voir dire was held outside the presence of the jury.

A. Wait a minute. Looked like to me that old rascal - looked like to me I know him from somewhere. (Mr. Forte removed his glasses)
No, that don't help me a bit. Let's see. That old rascal - - I shouldn't call him a rascal, because I don't know him that well, do I?

(T. at 357)

* * *

Q. [Defense attorney Saunders] Do you know this man seated beside me (indicating)?

A: Huh?

Q: Do you know this man?

A: A while ago I said I knew him. But, I mean, the same thing now. I knew him then, I know him now. That's all I can - -

Q: Do you know his name?

A: Mr. Forte.

Q: How long have you known Mr. Forte?

A: I couldn't tell you. I couldn't tell you. But its been quite a while that I known Mr. Forte. I knew him well, because he got stuff that I wished I had - beautiful moustache.

(T. at 363)

* * *

Q: [Defense attorney Saunders] Let me ask you this, Mr. Lindsey. Do you have a checking account?

A: Huh?

Q: Do you have a checking account?

A: Not that I know of. If I did - if I had one, I'd know it. But I don't know that I've got a checking account.

Q: Do you remember ever having a checking account?

A: No. I mean, yeah, I think I told them a while ago I had a checking account somewhere. But I don't remember where it was.

(T. at 364)

* * *

Q: [Defense attorney Saunders] Do you understand that a trial is going on here, and Mr. Forte is being tried?

A: Yeah, I understand that part, I'm dumb, but I'm not quite that dumb. Yeah.

Q: Do you have any information - - do you think you got information that would be helpful to this Court about that - about Mr. Forte's trial?

A: I mean, I can't - - I mean, I just don't get - don't quite understand the question. I understand what you're saying, but what it means, or is emanating from, I just can't say.

(T. at 365)

* * *

Q: [Defense attorney Saunders] Did Mr. Forte help you get a truck at one time?

A: I couldn't say that. I really don't remember. Now if he did - if he helped me, he did. If he didn't help me, I can't say he didn't. I mean, I don't - I just don't have that kind of memory you know.

(T. at 367)

* * *

Q: [Defense attorney Saunders] Do you remember Mr. Forte now?

A: Now, see, there's somebody asked me that just a while ago. Sure I remember Mr. Forte. That beautiful moustache.

Q: What do you remember about Mr. Forte?

A: The main thing I remember - he was gentleman to start with. Next thing I remember is the beautiful moustache he got there. The first time I - I -
- look at him smiling now. He's still got that moustache.

(T. at 369)

* * *

Q: [Defense attorney Saunders] Do you recall having some dealings with him [Mr. Forte]?

A: Say what?

Q: Do you remember having some dealings with Mr. - -

A: Just like I said a while ago. You asked me a question there. I had some deals, but it wasn't no business. No kind of deal that you couldn't speak with - I mean, couldn't talk to people.

That's the kind of man I tell you, if you understand what I'm trying to say. And I swear up and down - - I don't want to be telling no lie, if I can help it. On account of I don't believe in that.

(T. at 375)

* * *

Q: [Defense attorney Saunders] And have your dealings with him, as far as you know, always been on the square?

A: On the level, far as I know. That's all I can say.

He's sitting over there smiling now, looking like a - - I can't say what I want to say, but - - he looked like a gentleman. That's good enough.

Q: Do you remember Mr. Forte visiting with you in your home?

A: I just told you - - excuse me. I just told you a few minutes ago I do - I do remember him visiting me in the home. But how long ago - I don't know exactly how long it has been. And I don't know for what reason he be coming at that time.

I told you that just a few minutes ago, and I still say the same thing. I still say the same thing right now. I say the same thing right now that I said then.

My dad was an old-time preacher, and he didn't believe in telling lies. He didn't believe in telling people lies, and he didn't believe in telling people to tell lies for him. That's just as far as I could go.

Somebody say, "well, you're a preacher?" No, hell, no, I ain't no preacher. I'm not a preacher.

(T. at 376-77)

* * *

Q: [Defense attorney Saunders] Well, let me ask you this. Do you have anything bad to say about Mr. Forte?

A: Oh, no. Hell, no. No, indeed. All I can say is he is a gentleman.

Q: You're speaking of Mr. Forte here?

A: Huh?

Q: Talking about Mr. Forte?

A: Sure. That gentleman there with the pretty moustache. Wish I could get the moustache he got.

What you laughing about? You know I - you know I - -

Oh, boy. Please ask me some more questions that I can answer.

(T. at 378-79)

* * *

Q: [District attorney Layton] Do you remember any time that he would cut your toe nails?

A: Say what?

Q: Cut your toe nails.

A: Say what now?

Q: Do you remember Mr. Forte cutting your toe nails on your feet?

A: Somebody asked me that just some time ago, just recently.

Q: Yes, sir, I asked you that. We talked about that a while ago.

A: We did, yeah. That's all I can say, Miss. I don't - - I hope I don't try to be the smart ass or nothin, but that's all I can say.

Q: Do you remember him cutting your toe nails?

A: I just said just a few minutes ago I remember it. But I don't remember the date or nothing like that.

Q: Do you remember him cutting your toe nails?

A: Yeah, I told somebody that I remember somebody cutting my toe nails.

Now, does that answer your question? I hope so.

(T. at 390-91)

ERNEST LINDSEY TRIAL TESTIMONY

Mr. Lindsey's trial testimony begins on page 416 and ends on page 496. Mr. Lindsey testified from a wheelchair. Most of Mr. Lindsey's testimony was disjointed and incoherent. (*See, e.g.*, one of Mr. Lindsey's ramblings, beginning on line 10 of page 483 and ending on line 5 of page 486.) Given space limitations, following are a sampling of colloquies from Mr. Lindsey's testimony.⁹

Q: [Defense attorney Bowden] And I'm going to ask you some questions. When I ask you these questions, I have no intentions to be disrespectful to you. Do you understand that?

A: What's that term you used in there?

Q: Disrespectful to you. I have no intentions of being disrespectful to you by the questions that I ask you. Do you understand that?

A: I mean I just - - no, I don't. But it's just something that I just don't understand right there. I just don't understand it right there. That's all I can say.

Q: How many children do you have?

A: How many children do I have?

⁹ To really comprehend Mr. Lindsey's testimony, both voir dire and trial testimony, it is necessary to read each in its entirety.

Q: Yes, sir.

A: How man children do I have? Do I have any children? I mean, I just - - I can't answer that right now, because I don't understand it. Break it down.

Q: Okay. Now you said your daughter is Mrs. Delores Lindsey Bordeaux; is that correct?

A: Yes. Sitting right behind you (indicating).

Q: Right. Who is her mother.¹⁰

A: Huh?

Q: Who is your daughter's mother? What's her name?

A: My daughter's mother? Is that right?

Q: Yes, sir.

A: My daughter's mother - what's her name? I can't remember right now. I mean, she got a name, but I can't - - I've heard it, but I don't remember. I don't remember.

(T. at 440-442)

* * *

Q: [District attorney Layton] Do you remember Mr. Forte doing stuff for your feet? Cutting your toe nails?

A: Mr. Forte doing something for my feet? I don't remember that good. I'm not saying it wasn't done, but I just don't - - I don't remember that.

(T. at 420)

¹⁰ Ms. Bordeaux's mother would be Mr. Lindsey's late wife.

* * *

Q: [District attorney Layton] When Mr. Forte put that handrail in your house, did you pay him for that?

A: Did I pay him for that?

Q: Yes, sir.

A: He put a handrail in the house? Let me see - did he - - you asked me did I pay him for that?

Q: Yes. For putting the handrail there for you.

A: It's there now?

Q: Yes.

A: I'm muddled up here right now. I don't - I just don't - - somebody got a beautiful - two different handwritings here. Look at this handwriting up here at the top. Look at that.

(T. at 433)

* * *

Q: [Defense attorney Bowden] She's not here now. Your daughter lives in Missouri, doesn't she?

A: Live where?

Q: You say your daughter. Doesn't she live in Missouri?

A: You say did she live in Missouri? Delores, my daughter, sitting right there (indicating). Didn't she used to live at Missouri somewhere?

Q: Doesn't she live there now? She's been living there for a number of years?

A: Living here - right here. Right here in Rockingham. In Rockingham.

(T. at 474-475)¹¹

* * *

Q: [Defense attorney Bowden] Do you know Kenneth Forte?

A: You say do I knew him?

Q: Yes. The gentleman seated over here (indicating).

A: I've been asked that question today, I think, two or three times. You say do I know him?

Q: Yes.

A: Yes, I know him. He's a very fine gentleman. That's all I know.

Now what else do I need to tell you about - -

Q: And how long would you say you have known Mr. Forte?

A: Well, I can't say. I don't know just how long I've known him. It's been quite a while, quite a while.

Q: Did you know his father?

A: No, no.¹²

¹¹ Mr. Lindsey's daughter, Delores Bordeaux, lives in St. Louis, Missouri, and has lived there since 1972. (T. at 24-25)

¹² Mr. Lindsey knew Mr. Forte's father. (T. at 598-600)

Q: Now did Mr. Forte ever visit your home?

A: Mr. Forte ever visit my home? Not that I - - I mean, I just don't remember. Did Mr. Forte ever visit my home right where I live in Ellerbe; is that right? Is that what you mean to say?

Q: Yes, sir.

A: I don't know. I just don't know.

(T. at 486-487)

C. Defense Witnesses.

ROBERT ARMSTRONG

Robert Armstrong has known Mr. Forte since 1965. He met Mr. Lindsey in the late 1990's or 2000. Mr. Lindsey's mind was sharp. (T. at 530-531)

Mr. Forte's general reputation in the community is that he is fair and honest. He has an extremely good reputation in the community. (T. at 532)

Mr. Armstrong witnessed Mr. Forte cashing checks and giving the money to Mr. Lindsey. He saw this several times. (T. at 534)

Mr. Armstrong saw females in Mr. Lindsey's house. They were cleaning up. Mr. Lindsey would touch the females in inappropriate places and they stated that would cost him. And Mr. Lindsey would come up with cash from somewhere. Sometimes he would stuff it in their blouses or whatever. (T. at 537-538)

LAURA ABRAMS

Laura Abrams is a correctional officer at the Scotland Correctional Institution in Laurinburg. She also maintained a beauty salon for 21 years. (T. at 550-551)

Ms. Abrams used the beauty salon on Mr. Lindsey's property as her beauty salon. Before using it, however, it needed repairs. Mr. Forte did extensive work on the beauty salon. (T. at 553-557) Mr. Lindsey purchased equipment for the beauty salon. It was very expensive. (T. at 558-560)

Mr. Lindsey would keep a lot of money with him. He had a paper bag. Inside the paper bag he had a small lockbox. And inside of that he had a Royal Crown bag. He had money stuffed in it. The bills were all hundred dollar bills. (T. at 561-564)

Mr. Lindsey asked Ms. Abrams about doing a pedicure for him. She looked at his feet. He could barely walk. His feet were in really bad shape. They were really bad. They were calloused, very unkempt. His toe nails were maybe about an inch past the tip of his toes, kind of curled under. They were real thick and had a foul odor. It would have taken quite a bit to get them done. Ms. Abrams would probably charge \$1,000 for what they looked like. (T. at 573-74)

CHARACTER WITNESSES

Nine other individuals, including the Mayor of Ellerbe (Rodney McCaskill), and a probation officer (Al Williams), testified that Mr. Forte had a good reputation in the community for truthfulness and honesty. (T. at 264-295; 578-590; 789-828)

KENNETH FORTE

Kenneth Forte is a nationally and internationally-known artist recognized for his work with hardwoods.¹³

Mr. Forte attended Moorehouse College in Atlanta and graduated from North Carolina A&T University in Greensboro. He did post-graduate work at Ohio Dominican University in Columbus, Ohio. (T. at 592-93)

Mr. Forte has worked for the United States Department of Agriculture as a meat inspector. He then worked at Upjohn Pharmaceuticals as a veterinary sales representative for six or seven years. He worked at McNeill Laboratories for two-and-a-half years. He also worked at Scott Paper Company from 1973 until 1983. (T. at 593-94)

¹³ Kenneth Forte's artwork is sold through various galleries, including Olde Mill Gallery & Studios. See Appendix-2, www.oldemillgallery.org/artists/kforte/php.

In 1988 the State of Ohio recognized Mr. Forte for his artwork and asked him to design ornaments for the White House Christmas tree. They were selected. (T. at 595)

Mr. Forte moved to North Carolina to take care of his parents in July 1995. He worked as a lead instructor, developing a program at IMPACT. (T. at 595-96)

Mr. Forte has had 20 major exhibits and is represented in 15 galleries throughout the United States and one in Japan. He has been married 28 years. His wife, Diana, is a professional ballerina. (T. at 597)

Mr. Forte met Mr. Lindsey through Mr. Forte's father. Mr. Forte and his father worked on Mr. Lindsey's beauty salon, which was on Mr. Lindsey's property in 1998. (T. at 598-600) After Mr. Forte finished working on the beauty shop, he began to do other jobs around Mr. Lindsey's house. (T. at 610-612) Mr. Lindsey did not drive, and Mr. Forte would take Mr. Lindsey wherever he wanted to go. (T. at 614)

Mr. Forte continued to do work for Mr. Lindsey, including putting up vinyl siding and a new roof on his residence in 2004. (T. at 625-626) Mr. Forte painted Mr. Lindsey's house in the spring of 2005, (T. at 627), and put up a handrail in Mr. Lindsey's bedroom in 2005. (T. at 635)

Mr. Forte purchased a pressure washer for Mr. Lindsey. Mr. Forte used it to pressure wash Mr. Lindsey's house. Mr. Lindsey then told Mr. Forte to store the

pressure washer in Mr. Forte's garage. Mr. Forte has not used it since. (T. at 664-665)

In January 2005, Mr. Lindsey asked Mr. Forte why he was no longer doing art exhibits. Mr. Forte said he did not have a tent. Mr. Lindsey bought Mr. Forte a tent so he could do exhibitions. (T. at 666-667)

Mr. Lindsey wrote a check for \$500 to Mr. Forte with the word "foot" written in the memo section. This payment was for extensive work Mr. Forte did on Mr. Lindsey's feet during a period of six months. This payment was also for various other services performed by Mr. Forte, including cleaning his rug and putting a new runner down on top of the rug. (T. at 721-722)

When Mr. Forte received a letter from John and Delores Bordeaux about Mr. Lindsey writing checks to Mr. Forte, Mr. Forte read the letter to Mr. Lindsey. Mr. Lindsey became visibly upset and said, "This is my damned money. Nobody has any business meddling in my business." (T. at 682-683)

Mr. Lindsey's bank was in Washington D.C. Mr. Lindsey did not have a checking account in Ellerbe. When Mr. Lindsey wanted money, he would write a check to Mr. Forte. Mr. Forte would cash the check and bring the money back to Mr. Lindsey. (T. at 690-691) Mr. Lindsey also wrote checks to Mr. Forte to reimburse Mr. Forte for items purchased for him. (T. at 760)

Mr. Forte never took any money that he was not authorized to take. (T. at 692)

LEGAL ANALYSIS

- I. THE TRIAL COURT ERRED BY FAILING TO DISMISS AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE ALL THREE CHARGES OF EXPLOITATION OF AN ELDER ADULT IN THAT, IN THE LIGHT MOST FAVORABLE TO THE STATE, THE STATE DID NOT PRODUCE SUBSTANTIAL EVIDENCE THAT ERNEST LINDSEY WAS AN "ELDER ADULT" AS THAT TERM IS DEFINED BY STATUTE.**

(Assignments of Error 1-2; 4-5) (R. at 18-19)

A. Standard of Review.

When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 381 (1981). In ruling upon a defendant's motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *Id.* This Court's review of the trial court's denial of a motion to dismiss is *de novo*. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

B. The State Did not Produce Substantial Evidence That Ernest Lindsey was an “Elder Adult” as that Term is Defined by Statute.

This is a case of first impression. Neither N.C.G.S. § 14-32.3, nor its replacement statute, N.C.G.S. § 14-112.2, has ever been cited, much less discussed, by this Court or our Supreme Court. Nevertheless, both statutes have the same clear definition of the term “elder adult.” An elder adult is a “person sixty (60) years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person’s rights and resources and to maintain the person’s physical and mental well-being.” N.C.G.S. § 14-32.3(d)(4) & N.C.G.S. § 14-112.2(a)(2). At the conclusion of the State’s evidence, and after all the evidence, counsel for defendant made a motion to dismiss all three charges pursuant to N.C.G.S. § 15A-1227, on the grounds that the State had failed to produce substantial evidence that Ernest Lindsey was an “elder adult.” (T. at 503; 833) For the reasons stated herein, the trial court erred by failing to grant this motion.

At the close of the State’s evidence, the only possible evidence that Mr. Lindsey was an elder adult was that (1) he was in his mid-90's, (2) he wrote 91 checks to Kenneth Forte over a period of approximately 120 weeks, and (3) testimony of four witnesses. First, with regard to Mr. Lindsey’s age, it would be incorrect and ageist to assume that because Mr. Lindsey was in his mid-90's, that he fit the statutory

definition of elder adult, i.e., someone not able to manage his affairs. Indeed, United States Supreme Court Justice John Paul Stevens will be 90-years-old this April. It would be insulting to say the least to assume that Justice Stevens was an “elder adult” under these statutes.

Second, the fact that Mr. Lindsey wrote Mr. Forte 91 checks over a period of 120 weeks is not “substantial evidence” to allow this case to get to the jury. There are myriad reasons that Mr. Lindsey could have written these checks to Mr. Forte. Mr. Lindsey could have been paying Mr. Forte for his services. Mr. Lindsey could have been reimbursing Mr. Forte for items purchased by Mr. Forte for Mr. Lindsey. Mr. Lindsey could have asked Mr. Forte to cash checks to provide cash for Mr. Lindsey. Or even more simply, Mr. Lindsey could have simply liked Mr. Forte, and wanted to help him out financially. The point is that, at the close of the State’s evidence, the fact that Mr. Lindsey wrote these checks to Mr. Forte was not enough to take this case to the jury.¹⁴

¹⁴ Indeed, a look at some of the checks written to Mr. Forte in State’s Exhibit 13 shows numerous checks written for odd amounts such as \$630 (check # 3793), \$292 (check # 3795), and \$816.75 (check # 3800). This would indicate that many checks were written to reimburse Mr. Forte for items purchased for Mr. Lindsey. (*See* R. at 8) (checks forwarded to Court pursuant to Rule 9(d) of the North Carolina Appellate Procedure.)

Third, there is the testimony of four witnesses. Three of these witnesses, Det. Sessoms, Mr. Lindsey's son-in-law John Bordeaux, and Mr. Lindsey's sister Laura Cromer, had absolutely nothing to say about Mr. Lindsey's mental state. This simple fact, in and of itself, should be terribly troublesome to the State. The State's entire theory was that Mr. Lindsey was not competent to manage his affairs between 2004 and June 2006. Yet, three of the four witnesses testifying for the State said absolutely nothing about Mr. Lindsey's mental state. The only rational inference is that there was nothing peculiar about Mr. Lindsey's mental state during this time frame.

Finally, we have the testimony of Mr. Lindsey's daughter, Delores Bordeaux. Her testimony could not be more helpful to defendant Kenneth Forte. As set out in detail in pages 8-12 of the Statement of Facts, *supra*, Ms. Bordeaux testified that her father *could manage* his affairs during the time period relevant to these charges. More specifically, Ronald Barbee, the attorney for Mr. Forte, questioned Ms. Bordeaux as to each of the areas set out in both statutes, i.e., could Mr. Lindsey provide for his social, medical, psychiatric, psychological, financial, or legal services. In each and every case, Ms. Bordeaux testified that her father could manage his affairs.

Stated differently, the only witness for the State to testify as to Mr. Lindsey's ability to manage his affairs stated unequivocally that he could do so during the relevant time period. This testimony, coupled with the deafening silence of the other

witnesses with regard to Mr. Lindsey's mental capacities, speaks volumes. Given the evidence before the trial court at the close of the State's evidence, there was not substantial evidence that Ernest Lindsey was an elder adult pursuant to either N.C.G.S. § 14-112.2 or the now-defunct N.C.G.S. § 14-32.3. Accordingly, all three charges should have been dismissed.

II. THE TRIAL COURT ERRED BY FAILING TO DISMISS AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE TWO CHARGES AGAINST DEFENDANT BASED UPON N.C.G.S § 14-32.3, IN THAT, IN THE LIGHT MOST FAVORABLE TO THE STATE, THE STATE DID NOT PRODUCE SUBSTANTIAL EVIDENCE THAT DEFENDANT WAS A "CARETAKER" AS THAT TERM IS DEFINED BY STATUTE.

(Assignments of Error 1 & 3) (R. at 18)

A. Standard of Review.

The standard of review is the same as that in Issue I. (*See* Brief at 28-29)

B. The State Did not Produce Substantial Evidence that Kenneth Forte Was a "Caretaker" as that Term is Defined by Statute.

At the close of the State's evidence, and at the close of all evidence, counsel for defendant made a motion to dismiss two of the three charges pursuant to N.C.G.S. § 15A-1227, on the grounds that the State had failed to produce substantial evidence

that defendant was a “caretaker” as that term is defined in N.C.G.S. § 14-32.3.¹⁵ The trial court denied defendant’s motion. For the reasons stated herein, the trial court should have granted defendant’s motion.

An essential element of the crime of exploitation of an elder adult in N.C.G.S. § 14-32.3(c) is that the defendant must be a “caretaker” of an elder adult. *See* N.C.G.S. 14-32.3(c). The term “caretaker” is defined in subsection (d)(1) as a “person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.” *See* N.C.G.S. § 14-32.3(d)(1). As discussed earlier, neither this Court nor our Supreme Court has cited or discussed N.C.G.S. § 14-32.3. Accordingly, we must look elsewhere for a fuller understanding of the definition of the term “caretaker.”

Fortunately, the term “caretaker” has been used in another similar context, thus providing some guidance as to the intent of the General Assembly. In Chapter 7B, Juvenile Code, the term “caretaker” is defined as it applies to juveniles. A caretaker is any “person other than a parent, guardian, or custodian who has responsibility for

¹⁵ This argument relates to indictments 09 CR 518 and 09 CR 520, both of which charged defendant with exploitation of elder adult pursuant to N.C.G.S. § 14-32.3(c). The term “caretaker” does not appear in N.C.G.S. § 14-112.2, the statute which replaced N.C.G.S. § 14-32.3(c).

the health and welfare of a juvenile in a residential setting. . . .” See N.C.G.S. § 7B-101(3); see also *In the Matter of H.S.F.*, 176 N.C. App. 189, 2006 WL 389614 *2, *disc. rev. denied*, 360 N.C. 534, 633 S.E.2d 817 (2006) (distinguishing the terms “caretaker” from “custodian”). Even in the light most favor to the State, there was not substantial evidence that Mr. Forte was the “caretaker” of Mr. Lindsey.

The State produced evidence that Mr. Forte wrote out checks for Mr. Lindsey to sign, occasionally drove for Mr. Lindsey, took care of his feet for a short period of time, and did various odd jobs around Mr. Lindsey’s house. Certainly, these limited activities cannot, as a matter of law, transform a friendly relationship between two individuals into that of a caretaker of an elderly adult.

It is undisputed that Mr. Lindsey lived alone during the period of time he was friends with Mr. Forte. Mr. Forte did not cook or clean for Mr. Lindsey and did not bathe Mr. Lindsey. Mr. Forte was not responsible for providing medication to Mr. Lindsey. Mr. Forte was not responsible for Mr. Lindsey. He was not Mr. Lindsey’s caretaker.

Indeed, if driving an elderly person around, clipping his nails, and writing out checks for him to sign can transform one into a “caretaker,” the term would lose its intended meaning. As for the odd jobs, there are not many of us who could do the remodeling and other work performed by Mr. Forte. That cannot, as a matter of law,

transform Mr. Forte into a “caretaker” as that term is defined in N.C.G.S. § 14-32.3(d)(1).

For these reasons, the trial court erred by not dismissing the two indictments based upon N.C.G.S. § 14-32.3(c).

III. THE TRIAL COURT ERRED BY ALLOWING ERNEST LINDSEY TO TESTIFY ON BEHALF OF THE STATE, IN THAT MR. LINDSEY WAS NOT A COMPETENT WITNESS PURSUANT TO N.C.G.S. § 8C-1, RULE 601(b), IN THAT, BASED ON MR. LINDSEY’S VOIR DIRE TESTIMONY, MR. LINDSEY WAS INCAPABLE OF EXPRESSING HIMSELF CONCERNING THE MATTER AS TO BE UNDERSTOOD, AND HIS PRESENCE BEFORE THE JURY WAS SO PREJUDICIAL AS TO DENY DEFENDANT A FAIR TRIAL.

(Assignments of Error 8) (R. at 19)

A. Standard of Review.

Whether a witness is qualified to testify is “a matter which rests in the sound discretion of the trial court in light of its observation of the particular witness.” *State v. Aquino*, 149 N.C. App. 172, 179, 560 S.E.2d 552, 557 (2002), quoting, *State v. Redd*, 144 N.C. App. 248, 255, 549 S.E.2d 875, 880 (2001).

B. Ernest Lindsey, Based on his Voir Dire Testimony, Was not Competent to Testify at Trial.

Generally, every person is competent to be a witness. *See* N.C.G.S. § 8C-1, Rule 601(a). A witness is not competent to testify, however, if he is “(1) incapable

of expressing himself concerning the matter as to be understood, . . . or (2) incapable of understanding the duty of a witness to tell the truth.” N.C.G.S. § 8C-1, Rule 601(b). Accordingly, the “requirements are that: the witness is able ‘to understand and relate, under the obligations of an oath, facts which will assist the jury in determining the truth’; and he has ‘personal knowledge of the matter to which he testifies.’” *Aquino*, 149 N.C. App. at 178-89, 560 S.E.2d at 557, *quoting*, *Redd*, 144 N.C. App. at 255, 549 S.E.2d at 880; *State v. Pope*, 24 N.C. App. 217, 220, 210 S.E.2d 267, 270 (1974), *cert. denied*, 286 N.C. 419, 211 S.E.2d. 799 (1975) (same).

Accordingly, to test the competency of a witness, “the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts.” *State v. Liles*, 324 N.C. 529, 553, 379 S.E.2d 821, 823 (1989); *State v. Cooke*, 278 N.C. 288, 290, 179 S.E.2d 365, 367 (1971) (same).

In this case, the trial court did conduct a voir dire to determine if Mr. Lindsey was competent to testify. Mr. Lindsey’s voir dire testimony is set out in pages 355-400 of the transcript. Selected portions of Mr. Lindsey’s voir dire testimony are set out on pages 13-19 of this Brief.¹⁶ Mr. Lindsey was clearly befuddled. At first, he

¹⁶ To get a clear picture of whether Ernest Lindsey was competent to testify under Rule 601(b), it is helpful to read the entire voir dire testimony. Due to space limitations, defendant set out only certain portions of his voir dire testimony.

wasn't even sure he knew Mr. Forte. (T. at 357). He did not know how long he had known Mr. Forte. (T. at 363) He did not know whether he had a checking account. (T. at 364) He did not know whether Mr. Forte helped him purchase a truck, which Mr. Forte did. (T. at 367; 615) He did not remember why Mr. Forte came to his home. (T. at 376-77) He did not know whether Mr. Forte had clipped his toe nails. (T. at 390-91) The main thing Mr. Lindsey seemed to remember about Mr. Forte was his "beautiful moustache." (T. at 364; 369; 378-79) But, the most crucial question posed to Mr. Lindsey was this:

Q: [Defense attorney Saunders] Do you have any information - - do you think you got information that would be helpful to this Court about that - about Mr. Forte's trial?

A: I mean, I can't - - I mean, I just don't get - don't quite understand the question. I understand what you're saying, but what it means, or is emanating from, I just can't say.

(T. at 365)

As our Supreme Court stated in *State v. Liles*, the trial judge "must assess the capacity of the proposed witness to ***understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts.***" *Liles*, 342 N.C. at 553, 379 S.E.2d at 823. (Emphasis added). The question asked by Mr. Saunders, i.e., did Mr. Lindsey have information that would be helpful

to the Court with regard to Mr. Forte's trial, is a restatement of the rule set forth in *Liles*. Sadly, Mr. Lindsey did not even understand the question.

The prejudicial effect of Mr. Lindsey's testimony before the jury cannot be underestimated. The jury saw a wheelchair-bound man who did not know how many children he had, the name of his daughter's mother, or where his daughter lived. (T. at 440-442; 474-75) Mr. Lindsey's entire trial testimony begins on page 416 and ends on page 496 of the transcript. Portions of that testimony are set forth on pages 19-23 of the Brief. It is clear from these excerpts, and even more clear from reading Mr. Lindsey's entire trial testimony, that he not only cannot manage his affairs, he is incompetent and incoherent.

The key issue before the jury was whether Mr. Lindsey was competent, i.e., could manage his affairs, when he was dealing with Mr. Forte. It would be virtually impossible for the jury to look at Mr. Lindsey as he testified, and not *assume and believe* that he was also incompetent and incoherent when he was dealing with Mr. Forte. The fact is, however, that his dealings with Mr. Forte began in 2004, five years before the trial, and ended in mid-2006, three years before the trial.

Any tiny relevance which could be gleaned from Mr. Lindsey's trial testimony, and it would be difficult to glean any, is certainly outweighed by the prejudicial affect of the jury seeing an incompetent and babbling man sitting across from Mr. Forte.

See N.C.G.S. § 8C-1, Rule 401 & 403. Mr. Forte could not receive a fair trial following the testimony of Ernest Lindsey.

Following the voir dire of Mr. Lindsey, counsel for defendant objected to his testimony, arguing that he was incompetent to testify. (T. at 402) Unfortunately, it appears that the trial court limited its analysis to Rule 601(b)(2), i.e., whether Mr. Lindsey was capable of understanding the duty of a witness to tell the truth. Indeed, the trial court stated that, “the question is does the witness have the capacity to understand the difference between telling the truth and lying.” (T. at 402) The trial court apparently did not consider Rule 601(b)(1), whether Mr. Lindsey was “incapable of expressing himself concerning the matter as to be understood, . . .” The trial court abused its discretion in concluding that Mr. Lindsey was competent to testify.

For this reason, Kenneth Forte deserves a new trial, one at which Ernest Lindsey does not testify.

CONCLUSION

Kenneth Forte respectfully requests that the Court reverse the trial court’s decision to deny defendant’s motions to dismiss at the close of the State’s evidence, and the close of all evidence. In the alternative, at the very least, defendant

respectfully requests that this Court order a new trial for Kenneth Forte at which Ernest Lindsey will not be allowed to testify.

This the 17 day of March, 2010.



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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 28(j)(2)(A)2, counsel for defendant certifies that this brief uses proportional type, Times New Roman 14 pt., and that this brief contains 8,668 words, less than the 8,750 words allowed.



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APPENDIX

N.C.G.S. § 14.32.3 A-1

Printout from www.oldemillgallery.org/artists/kforte/php A-3

CHAPTER 246
SENATE BILL 127AN ACT TO IMPOSE CRIMINAL PENALTIES FOR THE ABUSE, NEGLECT,
OR EXPLOITATION OF DISABLED OR ELDER ADULTS LIVING IN A
DOMESTIC SETTING.

The General Assembly of North Carolina enacts:

Section 1. Article 8 of Chapter 14 of the General Statutes is amended by adding a new section:

§ 14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.

(a) Abuse. -- A person is guilty of abuse if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, with malice aforethought, knowingly and willfully: (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the disabled or elder adult in a place or under a condition that is cruel or unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the abuse, the caretaker is guilty of a Class F felony. If the disabled or elder adult suffers injury from the abuse, the caretaker is guilty of a Class H felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(b) Neglect. -- A person is guilty of neglect if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, wantonly, recklessly, or with gross carelessness: (i) fails to provide medical or hygienic care, or (ii) confines or restrains the disabled or elder adult in a place or under a condition that is unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony. If the disabled or elder adult suffers injury from the neglect, the caretaker is guilty of a Class I felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(c) Exploitation. -- A person is guilty of exploitation if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting, and knowingly, willfully and with the intent to permanently deprive the owner of property or money: (i) makes a false representation, (ii) abuses a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or elder adult gives or loses possession and control of property or money.

If the loss of property or money is of a value of more than one thousand dollars (\$1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of less than one thousand dollars (\$1,000) the caretaker is guilty of a Class I misdemeanor.

(d) Definitions. -- The following definitions apply in this section:

- (1) Caretaker. -- A person who has the responsibility for the care of disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.
- (2) Disabled adult. -- A person 18 years of age or older or a lawful emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).
- (3) Domestic setting. -- Residence in any residential setting except for a health care facility or residential care facility as these terms are defined in G.S. 14-32.2.
- (4) Elder adult. -- A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well being."

Sec. 2. This act becomes effective December 1, 1995, and applies to offenses committed on or after that date.

In the General Assembly read three times and ratified this the 14th day of June, 1995.

DENNIS A. WICKER

Dennis A. Wicker
President of the Senate

HAROLD J. BRUBAKER

Harold J. Brubaker
Speaker of the House of Representatives



Meet Our Artists

- [Gloria Arango](#)
- [Mary Erickson](#)
- [Kenneth T. Forte](#)
- [Marilyn Hartness](#)
- [LouAnn Ingram](#)
- [Joseph Madaras](#)
- [Denny Maloney](#)
- [Vicky McLain](#)
- [Curtis McNair](#)
- [June Rollins](#)
- [Lourdes Silva](#)
- [Andy Smith](#)
- [Rev. Robert Smith](#)
- [Barry Stebbing](#)

General Information

Exhibits & Events Galleries

s c h e d u l e . . .

Olde Mill Gallery and the Lockhart-Taylor Center Ingram Room are available to host your next event. Contact us at 704-272-5457 for additional information.

Olde Mill Gallery is a service provided by New Ventures Business Development, Inc., a 501(c)3 organization as determined by the Internal Revenue Service. New Ventures holds Charitable Solicitation License #SL005639 issued by the N.C. Secretary of State. Your donation is tax deductible.

Make a Donation

Kenneth T. Forte, Hardwood Sculpture

Kenneth T. Forte is a designer and artist with exceptional skill, knowledge and appreciation of hardwoods. His works have been exhibited and commissioned nationally and internationally for the White House Pageant of Peace, the National African American Museum and Cultural Center, and the Columbus Museum of Art to name a few.

For over 40 years he has crafted finished three dimensional forms exhibiting spiritual and aesthetic awareness. Each piece combines the techniques of sculpting, carving, turning and flat joinery. The trademark of Kenneth Forte's works are the absence of stains, paints and metal emphasizing the natural beauty and harmony of the hardwoods themselves. All items available for purchase are functional, limited edition, one-of-a-kind hardwood pieces of art. Larger commissioned works, like furniture, will be reviewed and accepted on a case-by-case basis as the artist's schedule permits.



Many of the hardwoods, combinations or singular boards, are from his private collection, which consists of species collected during business travels of 34 years around the world -- England, Africa, South and Central America, etc. Mostly, the woods fit the rare category; Padauk, Ebonies, Bloodwood, Zebrawood, Snakewood, English Brown Oak, Goncalo Alves, Cocobola, Purpleheart, Satinwood, Canary wood, Bubinga, Birdseye and Curly Maple, and Pink Ivory are but a few. All were salvaged from various sites not logged for the woods.

CERTIFICATE OF SERVICE

I, Seth R. Cohen, attorney for defendant in the above-entitled action, do hereby certify that I have served a copy of the foregoing, Brief, on opposing counsel of record at the last known address known to me, by placing said document in an envelope in the U.S. Post Office in Greensboro, North Carolina, this 17 day of March, 2010, said envelope being addressed as follows:

M. Lynne Weaver
Assistant Attorney General
Consumer Protection Division
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602



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