

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA

v.

KENNETH THOMAS FORTE

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From Richmond County  
No. 09 CRS 518-20

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BRIEF FOR THE STATE

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FILED  
2009 APR 19 P 2 41  
Clerk of Superior Court  
Richmond County, NC

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v.	)	<u>From Richmond County</u>
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BRIEF FOR THE STATE

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STATEMENT OF THE CASE

The defendant has presented an accurate Statement of the Case, and, therefore, the State adopts the defendant's Statement.

STATEMENT OF THE FACTS

The State presented testimony from five witnesses at trial: (1) Dolores Lindsey Bordeaux, the daughter of the victim Ernest Lindsey; (2) John Bordeaux, Dolores Bordeaux's husband and son-in-law of Mr. Lindsey; (3) Detective Wendell Sessoms of the Richmond County Sheriff's Department; (4) Laura Rachel Cromer, a sister and next-door-neighbor of Mr. Lindsey; and (5) the victim, Ernest Lindsey.

The State's evidence at trial tended to show the following: Mr. Ernest Lindsey was born in 1910<sup>1</sup> and grew up in Richmond

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<sup>1</sup>Mrs. Bordeaux testified that Mr. Lindsey's official birth records show that he was born in 1910, but that family members believed he may have been born ten years earlier in 1900, based on

County. (T pp. 25-26) When he was a young man, he went into the military and then moved to Washington, D.C., where he worked for the federal Government Printing Office ("GPO") for over thirty years. (T pp. 27, 297) After he retired from the GPO, Mr. Lindsey moved back to Richmond County and purchased a home in Ellerbe next door to his youngest sister, Laura Cromer. (T p. 27)

Mr. Lindsey's daughter and only child, Dolores Lindsey Bordeaux, moved to St. Louis, Missouri in 1972 to attend graduate school. (T pp. 25, 88) While living there, she married a man from St. Louis, John Bordeaux, and has lived in St. Louis with her family since then. (T pp. 25, 30) Mrs. Bordeaux typically visited her father at least two times a year, in the spring and during the Thanksgiving holidays, and, in some years, she came to North Carolina more often to see her father. (T pp. 31, 61, 113) Mrs. Bordeaux's husband accompanied his wife for her visits to her father up through June 2006, after which he has usually just visited during the holidays. (T pp. 31, 181-182) When the Bordeauxs visit Mr. Lindsey, they stay at Mr. Lindsey's home and typically stay a week. (T pp. 61-62) Mrs. Bordeaux testified that she typically talks with her father on the telephone at least three times a week. (T p. 31)

The Bordeauxs came to know the defendant sometime around 1999, when the defendant offered to assist Mr. Lindsey with filing an insurance claim arising from hurricane damage to Mr. Lindsey's

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accounts from Mr. Lindsey and other family members. (T pp. 25-26)

house. (T pp. 33-34, 114-116) The defendant's father was respected in the community and knew the claims adjuster. (T p. 116) The previous year the defendant and his father had done some renovation work to a building on Mr. Lindsey's property that was used as a beauty parlor. (T pp. 114, 598-600) Immediately prior to 1998, the defendant had worked for a period for the State of North Carolina's Division of Juvenile Justice as an instructor at Samarkand. (T pp. 266-267) After leaving Samarkand, the defendant did not have any formal employment. (T p. 766) Instead, the defendant worked various odd jobs, including doing home repair work, although he was not licensed as a contractor; yard work with his tractor, including mowing and plowing; helping senior citizens with various tasks; farming; and creating and selling his artwork, which was decorative wood art. (T pp. 283, 288, 766)

Beginning at some point around 2002, the defendant began spending much more time with Mr. Lindsey at his home. (T p. 41) Mr. Lindsey lived alone and had stopped driving in 2000. (T pp. 50, 152) Mr. Lindsey's sister Mrs. Cromer brought Mr. Lindsey his breakfast and dinner every day, and he received his lunch from Meals on Wheels. (T pp. 76, 173, 307-308) Mrs. Cromer testified that her brother "got close to [the defendant]" during this time, and that defendant drove a wedge between her and her brother, but that she continued to provide meals for him and to check on him. (T pp. 299, 315-316) The defendant began performing numerous tasks around Mr. Lindsey's house, including home repairs, such as work on a hot water heater, installing new counter tops in Mr. Lindsey's

kitchen, work in a bathroom, and installing a handrail in the hallway. (T pp. 35, 123, 302) Following the death of a family friend, Shane Martin, who had previously driven Mr. Lindsey, the defendant began driving Mr. Lindsey wherever Mr. Lindsey needed or wanted to go - including to run errands, to pay bills, and to shop for groceries - and, further, Mr. Lindsey informed his daughter that he had placed the defendant on his automobile insurance policy. (T pp. 82, 122, 224, 304, 638-639)

Beginning sometime in 2002, the defendant also began assisting Mr. Lindsey with his business affairs, including assisting Mr. Lindsey in paying his bills through his checking account. (T pp. 35-36, 125, 223) The defendant routinely wrote out checks to pay Mr. Lindsey's bills each month because Mr. Lindsey had difficulty writing, and the defendant then handed the checks over to Mr. Lindsey to sign. (T p. 223) Prior to the defendant's becoming close to Mr. Lindsey and spending considerable amounts of time with him, Mr. Lindsey's sister Laura Cromer had helped her brother with paying his bills. (T p. 303)

Mr. Lindsey has a joint checking account with his daughter Mrs. Bordeaux, and she has been on the account since she was in college. (T pp. 37, 143) Mr. Lindsey's two sources of income were his federal retirement and Social Security. (T p. 27) Sometime around the end of 2004, Mrs. Bordeaux looked at her father's bank account statements and noticed unusual account activity, in that checks for extraordinarily large sums of money, often at least \$800.00 to \$900.00 each month, were being written to the defendant.

(T pp. 40, 37-39) When Mrs. Bordeaux asked her father about the checks, she testified that her father's answers were "very vague and ... confused about what was happening." (T p. 41) Further, at one point around this time in late 2004 or early 2005, Mr. Lindsey telephoned Mr. Bordeaux because Mr. Lindsey did not understand why "he didn't have as much money [in his bank account] for something." (T pp. 38-39) Becoming concerned, Mrs. Bordeaux and her husband asked the defendant several times, by phone and in person, about the checks, but the defendant was very evasive, responding that he "was covered" and claiming that he merely cashed the checks written to him and gave the cash back to Mr. Lindsey. (T pp. 40-41, 121-122, 223)

Mr. Bordeaux testified that beginning as early as 2004, he became concerned about the deteriorating physical and mental condition of Mr. Lindsey, and that he questioned the defendant's close relationship and business arrangement with his father-in-law. (T p. 130) He testified that his wife "was in denial about the whole thing" and was initially reluctant to accept the changes in her father or to recognize that the defendant might be taking financial advantage of Mr. Lindsey's deteriorating physical and mental condition. (T p. 130) Mrs. Bordeaux testified that around this time, she finally grew to realize that her father was "different . . . in terms of how he looked physically, [and] in terms of where things were in his house." (T p. 38) Previously, Mr. Lindsey had been "very fastidious, very particular about all kinds of things" but she noticed that his appearance had changed.



(T p. 38)

Reluctant to upset Mr. Lindsey or to deprive him of the defendant's assistance or companionship, Mr. and Mrs. Bordeaux asked the defendant on several occasions to mail them receipts for anything that the defendant was ostensibly purchasing on behalf of Mr. Lindsey, and to mail them any bills that the defendant represented that he was paying on Mr. Lindsey's behalf with cash by writing checks to himself. Alternatively, the Bordeauxs asked the defendant to give these receipts and bills to Mrs. Cromer. (T pp. 41-42) The Bordeauxs further requested that the defendant not write any checks to himself in an amount greater than \$500.00 without notifying them first. (T pp. 42, 124-125) The defendant told the Bordeauxs that he would comply with their requests, but he never did. (T pp. 41-42)

For much of 2005, the Bordeauxs were unable to travel to North Carolina because Mrs. Bordeaux was injured and Mr. Bordeaux suffered from several illnesses. (T pp. 113-114) After their recovery, around January 2006, the Bordeauxs checked Mr. Lindsey's bank account statements on-line since they had recently begun conducting some of their banking on-line. (T pp. 197-198, 200-201, 204-205) To their alarm, they saw numerous checks for large amounts being written from Mr. Lindsey's account to the defendant.

According to Mr. Bordeaux, the account activity "had . . . a pattern to it..." (T p. 198) "A[t] the first of the month when [Mr. Lindsey] got his biggest check it was \$900.00 to \$1300.00 out

of that check [that was going to the defendant]. And when [Mr. Lindsey] got the other check it was \$300.00, \$400.00, \$500.00 out of the other one. And so that would deplete [Mr. Lindsey's] account down to the fact that he only had like a couple hundred dollars left in the account. And [Mr. Lindsey previously] just didn't spend that kind of money." (T p. 201)

Frantic, Mr. and Mrs. Bordeaux telephoned Mr. Lindsey numerous times. (T p. 199) Mrs. Bordeaux testified that her father was "unable to clearly state what was going on"; his "memory was impaired, and he was confused." (T pp. 44-45, 58, 68, 70) After unsuccessful attempts to discuss the matter with the defendant, on April 24, 2006, the Bordeauxs sent the defendant a letter by certified mail, demanding that the defendant cease handling Mr. Lindsey's financial affairs, including writing checks to himself from Mr. Lindsey's bank account. (T pp. 44, 56, 127, 133-135)

In June 2006, the Bordeauxs came to visit Mr. Lindsey in North Carolina. Mrs. Bordeaux testified that her father was physically "frail," he was "thinner, he appeared much older ... [and] he was very confused." (T pp. 44-45) Mrs. Bordeaux testified that her father "could not answer questions about his ... financial state [or] what he was doing with his money," and she stated that he was mentally unable to do so because "his memory was impaired." (T pp. 68-70) When the Bordeauxs asked Mr. Lindsey about the checks to the defendant, Mr. Lindsey "had some idea that he and [the defendant] were in a business relationship" and he became extremely "agitated." (T pp. 68-70)

The Bordeauxs reviewed Mr. Lindsey's checkbook, including the memo notations describing the expenses, and saw myriad checks written to the defendant for highly questionable expenses. Among other expenses, Mr. Bordeaux recalled the following in particular, which he believed were either completely inappropriate for a 96-year-old man or grossly unreasonable, and thus raised enormous red flags: \$1000.00 for an exhibition tent; \$900.00 for a power washer; \$600.00 for power washing services, when Mr. Lindsey's home was small; and \$400.00 to trim Mr. Lindsey's toenails. (T pp. 30, 136-137, 145) In addition, there were checks written to the defendant dated after the Bordeauxs' April 24, 2006 letter to the defendant demanding that he stop handling Mr. Lindsey's financial affairs. (Record p. 8, T pp. 42-43, 218)

At that time, the Bordeauxs went to the sheriff's office and talked with Detective Wendell Sessoms, taking with them copies of some of the checks written to the defendant from Mr. Lindsey's account. (T p. 216) Detective Sessoms reviewed the checks and saw that they totaled approximately \$18,000 to \$20,000, and that most of the checks did not have any explanation in the memo section. (T pp. 218-219) Detective Sessoms testified that one check that caught his eye was one written to the defendant for \$400.00 or \$500.00 for a pedicure. (T p. 219) Detective Sessoms went by the defendant's home and asked the defendant to come to the police station because he wanted to ask him some questions. (T pp. 220-221) The defendant subsequently met with Detective Sessoms at the police station.

The defendant told Detective Sessoms that he regularly assisted Mr. Lindsey in paying his bills since it was an effort for Mr. Lindsey to write out checks. (T p. 223) The defendant told Detective Sessoms that he would write out checks and hand them to Mr. Lindsey to sign. (T p. 223) When asked about the check for the pedicure, the defendant told Detective Sessoms that he had clipped Mr. Lindsey's nails, massaged his feet, and taken care of his feet. (T p. 222) The defendant told Detective Sessoms that he took the defendant places in his truck, including to pay Mr. Lindsey's bills and to visit with friends. (T p. 224) The defendant also told Detective Sessoms that, for those checks that did not have an explanation in the memo line, he would cash the check, and give the cash back to Mr. Lindsey but that he never asked Mr. Lindsey what he did with the cash. (T pp. 223, 226) The defendant also told Detective Sessoms that Mr. Lindsey sometimes "gave" him gifts, such as the pressure washer, a laser-guided saw, and cash. (T pp. 224-226) Shortly afterwards, the defendant stopped answering the detective's questions. (T p. 233)

Detective Sessoms testified that, after talking with the defendant, he talked further with the Bordeauxs and confirmed that Mr. Lindsey did not keep more than a few hundred dollars on his person or in his home at any time, and that they had never seen any large amounts of cash in Mr. Lindsey's house. (T pp. 140, 163, 257) Detective Sessoms further testified that he talked with Mr. Lindsey and that he would not have brought charges against the defendant "if Mr. Lindsey had told [him] that he gave [the

defendant] money, and that [Mr. Lindsey] was aware of the amount of money that [the defendant] had actually gotten from the checks that were being written." (T p. 227)

Mrs. Bordeaux testified that, in 2006, after reporting the defendant's activities to the police, she and her husband made arrangements for Mr. Lindsey's adult niece to live with Mr. Lindsey, since Mr. Lindsey was unable to take care of his own affairs; and Mrs. Bordeaux began paying all of her father's bills on-line. (T pp. 32-33, 49, 67, 73) At the time of trial, Mrs. Bordeaux testified that, when his niece was at work each day, the family had a personal caregiver that came for two hours each day to bathe her father and assist with personal chores, and that her aunt Laura Cromer had continued to provide meals for her father, in addition to those provided by Meals on Wheels. (T pp. 75-77)

The State introduced into evidence copies of checks written on Mr. Lindsey's checking account for the period December 30, 2003 up through June 1, 2006. (Record on Appeal p. 8, State's Exhibit 13) (T pp. 105-108, 333-343) The checks written on Mr. Lindsey's bank account showed the following activity: (1) eight checks payable to the Richmond County Tax Office and North Carolina Department of Revenue totaling \$2,285.55<sup>2</sup>; (T pp. 333-335) (2) ten checks payable

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<sup>2</sup>As set forth above, checks written on Mr. Lindsey's account for the relevant time period were entered into the record and published to the jury, but the totals are not reflected in the testimony. The totals cited above are shown in the Record on Appeal, page 8, item number 2, which is a pie chart used by the State in its closing argument summarizing the totals of the checks submitted to the jury. (T pp. 874, 863-873)

to N.C. Farm Bureau Mutual Insurance totaling \$2,175.08; (T pp. 336-337) (3) twenty-eight checks payable to the Town of Ellerbe totaling \$497.01; (T pp. 337-338) (4) thirty-two checks payable to Progress Energy totaling \$3,476.19; (T p. 339) (5) five checks payable to Postmaster and Farm Supply Company<sup>3</sup>; (T pp. 339-340) (6) twenty-seven checks payable to Ellerbe Phone Company totaling \$801.44; (T pp. 340-341) (7) four checks payable to Laura Cromer totaling \$330.00; (T p. 341) (8) twelve checks payable to Delores Bordeaux totaling \$4150.00<sup>4</sup>; (T p. 342) and (9) ninety-two checks payable to the defendant Kenneth Forte totaling \$45,412.26 (T p. 343). For purposes of showing a common plan or scheme, the State also introduced one hundred and five additional checks payable to the defendant from Mr. Lindsey's bank account for the period April 1, 2002 through December 23, 2003, which preceded the offense dates of the State's indictment. (T pp. 345, 347-348, 350)

Ten witnesses testified for the defense, primarily attesting that, to their knowledge, the defendant had a good reputation in the community. One of the defendant's witnesses, Robert Armstrong, testified that had gotten to know Mr. Lindsey through the defendant, and that he had visited Mr. Lindsey's house at least ten times when the defendant was there. (T p. 542) Mr. Armstrong

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<sup>3</sup>This item is not listed in the pie chart but a "Miscellaneous" category is totaled at \$128.25. (Record on Appeal, p. 8, item no. 2)

<sup>4</sup>Mrs. Bordeaux testified that, sometime in 2006, once she realized the extent of the defendant's activities, she began writing checks off of the account to keep her father's funds from being available to the defendant. (T pp. 47-48, 204)

testified that Mr. Lindsey "thought very highly of [the defendant], and "trusted him to no end." (T p. 545) Mr. Armstrong observed that the defendant drove Mr. Lindsey places he needed to go and performed tasks around Mr. Lindsey's house. (T pp. 532, 542) Mr. Armstrong had never been present at Mr. Lindsey's house when the defendant paid Mr. Lindsey's bills or when the defendant obtained checks from Mr. Lindsey to cash, but he testified that, on at least one occasion, he had observed the defendant hand Mr. Lindsey cash that appeared to be about \$100.00 or a little more. (T pp. 543-545)

One defense witness, Laurie Abrams, testified that, back in 1998, she used the building on Mr. Lindsey's property as a beauty salon that she operated. (T p. 553) At that time the defendant was performing some repairs on the building. On one occasion, Mr. Lindsey asked Ms. Abrams to drive him to a furniture store so he could purchase new shelves for the salon, and she observed that he had a bag of cash with him and paid for the items in cash. (T pp. 561-563) However, Ms. Abrams had not used Mr. Lindsey's building for a long time and had not had any contact with Mr. Lindsey since at least 2002. (T p. 575) Ms. Abrams further testified that she had seen Mr. Lindsey's feet on one occasion, and that she would have charged him \$1000.00 for a pedicure, but she conceded that the most she had ever actually charged for a pedicure was \$50.00 when she worked at a spa in Pinehurst. (T pp. 573-575)

The defendant took the stand and testified in his defense. The defendant, who was born in 1950 and was fifty-nine years old at

the time of trial, testified that he had lived in Ellerbe for about fifteen years, and that he had moved back to North Carolina in 1995 to take care of his aging parents who lived in the community. (T pp. 592, 595)

The defendant testified that he graduated from North Carolina A&T University and did post-graduate work at Ohio Dominican University, finishing his schooling in 1983. (T pp. 592-593, 765) The defendant testified that he met his wife, a professional ballerina, when he lived in Ohio, and that they had been married twenty-eight years. (T p. 597) The defendant testified that he had worked as a meat inspector for the Department of Agriculture; as a veterinary sales representative for Upjohn Pharmaceuticals; and later in sales for McNeill Laboratories; and then he worked for Scott Paper Company from 1973 until 1986. (T pp. 593-594)

Since 1986, for the past twenty-three years, the defendant testified that he has worked independently as an artist in wood work, including making and selling wooden Christmas ornaments and other wooden objects. (T pp. 594-595, 766) After moving back to North Carolina in 1995, the defendant worked for a brief period of about two years as an instructor in the IMPACT program at Morrison Institute in Samarkand, until the program was discontinued for financial reasons around 1998. (T pp. 595-596)

The defendant testified that his father was well-known in the community, and the defendant began helping people in the community "with plowing people's fields, making gardens for them," and helping "people that needed [help] doing [things]." (T pp. 596)



The defendant testified that his income was derived from "my art, farming, stocks, bonds." (T p. 766) On cross examination, the defendant acknowledged that in the six months prior to trial, up through June 2009, he had earned approximately \$5,000 to \$7,000 from his art work. (T p. 767)

The defendant testified that he was introduced to Mr. Lindsey by his father in 1998, when Mr. Lindsey was looking for someone to perform renovation work and repairs on the beauty shop on his property, which the defendant agreed to do, and Mr. Lindsey paid him for the work. (T pp. 599, 601) Shortly after finishing the work on the beauty shop, the defendant testified that he performed other jobs around Mr. Lindsey's home, including replacing trim work on his roof and installing new entry doors to his house. (T pp. 610-612)

The defendant testified that, over time, and particularly after the death of the defendant's father in 2004, he and Mr. Lindsey became very close and "became far more than good friends" and that he became Mr. Lindsey's "confidante." (T pp. 604-605, 771) Mr. Lindsey was not able to drive, and the defendant testified that he regularly drove Mr. Lindsey "wherever [Mr. Lindsey] wanted to go." (T p. 614) Among other places, the defendant testified that he regularly drove Mr. Lindsey to the grocery store for his bi-weekly or monthly grocery shopping trips, and the defendant accompanied Mr. Lindsey in the store and helped him with his grocery shopping and assisted him with the groceries when they returned home. (T pp. 638-639) The defendant testified

that he regularly drove and accompanied Mr. Lindsey on other shopping trips, including to the drug store; to the dentist; to pick up dentures for Mr. Lindsey; to the bank; to the ballet; and even to the courthouse to record Mr. Lindsey's will. (T pp. 640-644, 711, 742)

The defendant testified that, in addition to taking Mr. Lindsey "anywhere he wanted to go," he assisted Mr. Lindsey with various personal tasks. For example, when Mr. Lindsey complained of having a toothache, the defendant testified that he assisted Mr. Lindsey with making an appointment with a local dentist, and that he took Mr. Lindsey for his appointment to see the dentist. (T pp. 642-643)

Similarly, the defendant testified that around 2004, upon learning that the defendant did not have homeowners insurance, the defendant contacted the manager at Farm Bureau and requested that the manager come out to Mr. Lindsey's home and meet with Mr. Lindsey. (T p. 612) The defendant testified that he introduced them, and Mr. Lindsey decided to purchase a homeowners' policy and to include his vehicle on the policy as well. (T p. 613) The defendant testified that Mr. Lindsey requested that the defendant be placed on his automobile insurance. (T p. 613) The defendant further testified that Mr. Lindsey requested that the defendant make the recording entries in his checkbook and write out the check to the insurance agent so Mr. Lindsey could sign it. (T pp. 612-613)

In another instance, the defendant testified that Mr. Lindsey

desired to select a headstone for his grave, so the defendant informed Mr. Lindsey of three purveyors of tombstones in Rockingham. (T p. 658) The defendant testified that he drove Mr. Lindsey to the three locations, and Mr. Lindsey selected the stone he wanted. (T pp. 658-659)

The defendant also testified that he regularly took care of Mr. Lindsey's feet, by washing them, oiling them, cutting the nails, and rubbing his feet, and that Mr. Lindsey paid him for these services. (T pp. 708, 721-722, 728, 732)

The defendant testified that, beginning in 2002, Mr. Lindsey asked him to help him with paying his bills and writing his checks. (T p. 680) The defendant testified that Mr. Lindsey "didn't feel like doing [his household finances]" so the defendant assisted him with that responsibility. (T p. 680) The defendant testified that, prior to his expected arrival at Mr. Lindsey's house, Mr. Lindsey routinely would set out his checkbook on a bar in his living room, together with all of his bills, including his water bill, telephone bill, and electric bill. (T p. 681) The defendant testified that he would write out the checks for Mr. Lindsey, writing in the dates, amounts, and payees, and then hand the checks to Mr. Lindsey to sign. (T p. 681-682) After Mr. Lindsey signed the checks, the defendant took care of mailing the checks or delivering them. (T p. 682)

Mr. Lindsey banked at First Union, which later became Wachovia. (Record on Appeal p. 8, State's Exhibit 13) (T p. 742) The defendant testified that when Mr. Lindsey wanted cash, he would

ask the defendant to write out a check to himself, and the defendant would hand it to Mr. Lindsey to sign. (T pp. 690-691) The defendant testified that he would go to his bank, cash the check, and bring the money back to Mr. Lindsey. (T p. 691)

At the conclusion of his direct testimony, defendant's counsel questioned the defendant about each of the ninety-two checks written out to the defendant on Mr. Lindsey's bank account for the period December 30, 2003 through June 1, 2006, showing the defendant each check one at a time, in chronological order. (T pp. 693-737) The defendant testified that he wrote out the checks, payable to himself, at Mr. Lindsey's direction, and that Mr. Lindsey signed the checks. (T pp. 693-737) The vast majority of the checks contained no writing on the memo line indicating the purpose of the check. A small number of the checks contained notations describing a purpose for the check; for example, on two checks were written the word "foot", and the checks were in the amounts of \$500.00 and \$273.76 (T pp. 721-722, 728) (Record on Appeal p. 8, State's Exhibit 13, Check nos. 3901, 3950) In addition, five checks bore the notation "cash" on the memo line in the amounts of \$1000.00 (Check no. 3915); \$1500.00 (Check no. 3916); \$1400.00 (Check no. 3922); \$1800.00 (Check no. 3935); and \$200.00 (Check no. 3981). (Record on Appeal, p. 8, State's Exhibit 13)

Out of the ninety-two checks, on direct examination, the defendant professed to remember the exact purpose for forty-seven of the checks, although the checks had been written between three

and five years earlier, and only a small number contained notations indicating their purpose. (T pp. 693-737)

On cross examination, the prosecutor randomly selected seven of the same checks that the defendant had previously described in detail the checks' purpose, but which contained no written description in the memo line. (T pp. 745-758) In each instance, on cross examination, the defendant was unable to state the purpose of the check, saying he "could not remember," or the defendant offered an answer that was different than the response the defendant gave on direct examination. (T pp. 745-758) Further, on cross examination, after being shown the reverse of two checks bearing the notation "cash," the defendant acknowledged that the checks contained a stamp revealing that they had been deposited into the defendant's personal bank account. (T pp. 758-760)

The defendant testified that he had not had any contact with Mr. Lindsey since the charges were brought on June 9, 2006. (T pp. 239, 606)

#### ARGUMENT

**I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS THE OFFENSES CHARGED, AS THERE EXISTED SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE VICTIM ERNEST LINDSEY WAS AN "ELDER ADULT."**

**Defendant-Appellant's Assignments of Error #1-2, 4-5 (R pp. 18-19) (T pp. 504, 521, 833, 835)**

Standard of Review: The Supreme Court's ruling in *State v. Olson* sets out the general rules governing a motion to dismiss based on insufficiency of the evidence as follows:

On a defendant's motion for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. What constitutes substantial evidence is a question of law for the court. To be 'substantial,' evidence must be existing and real, not just 'seeming or imaginary.' Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

*State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citations omitted). Whether the evidence was substantial is a question of law, which is reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 522-523, 644 S.E.2d 615, 621 (2007).

The defendant was found guilty of three counts of exploitation of an elder adult. Two counts arose from the defendant's activities for the period December 30, 2003 through December 31, 2004 (9 CR 518) (R pp. 3, 9, 12-16), and the period January 1, 2005 through November 30, 2005 (9 CR 0520). (R pp. 5, 11, 12-16). The third count arose from the defendant's activities for the period December 1, 2005 through June 1, 2006 (9 CR 519). (R pp. 4, 10, 12-16)

The two counts covering the defendant's activities from December 30, 2003 through November 30, 2005 were brought under former N.C. Gen. Stat. § 14-32.3(c), which was in effect for offenses committed on or after December 1, 1995 until November 30, 2005. N.C. Gen. Stat. § 14-32.3(c) and (d), as it was in effect

for the period up through November 20, 2005, provides, in relevant part:

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

. . . .

(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 (\$1000) the caretaker is guilty of a Class H felony....

(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 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. Gen. Stat. § 14-32.3(c), (d).

Effective December 1, 2005, the General Assembly repealed N.C. Gen. Stat. § 14-32.3(c), and enacted a new exploitation statute, N.C. Gen. Stat. § 14-112.2, which is effective for all offenses committed on or after that date. The third count against the

defendant was brought under the new statute, N.C. Gen. Stat. § 14-112.2. That statute provides, in relevant part:

**§ 14-112.2. Exploitation of an elder adult or disabled adult.**

(a) The following definitions apply in this section:

. . . .

(2) 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.

(b) It is unlawful for a person (i) who stands in a position of trust and confidence with an elder adult or 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.

N.C. Gen. Stat. § 14-112.2(a), (b).

In his first assignment of error, the defendant contends that the trial court erred in denying his motion to dismiss each of the charges of exploitation of an elder adult, on the ground that the State presented insufficient evidence that the victim Ernest Lindsey was an "elder adult" as defined by the statute. The State submits that the defendant's argument is unavailing and should be denied.

The statutory definition of an "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" - remained unchanged following the enactment of N.C. Gen. Stat. § 14-112.2 in 2005, so the same definition applies to each of the counts of exploitation brought against the defendant.

While there are no cases from the North Carolina Supreme Court or this Court that cite section 14-32.3 or section 14-112.2, the State submits that, under the plain language of the statute, there existed substantial evidence in the record from which the jury could find that Ernest Lindsey was an "elder adult."

During the time period these offenses were committed, from late 2003 up through 2006, Mr. Lindsey was 93 to 96 years old. Construed in the light most favorable to the State, the evidence showed that Mr. Lindsey was unable to drive a car and had not driven since at least 2000; that he could not provide meals for himself, as these were provided by Meals on Wheels and his sister Laura Cromer; that he was largely unable to manage his financial affairs and had difficulty writing checks, as this was done by Laura Cromer up through approximately 2002, when the defendant began assisting Mr. Lindsey with this responsibility; and that, beginning at least as early as 2004, and very likely well before that time, the defendant was "confused" and unable to understand his financial affairs. Mrs. Bordeaux did not see her father in 2005, but, by 2006 when she saw him, she observed that her father was "thin" and "frail," and that his memory was seriously impaired.

Under this record, there existed substantial evidence from

which the jury could find that Mr. Lindsey was an "elder adult" as defined in the statute. Accordingly, the defendant's assignment of error should be overruled.

**II. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS THE OFFENSES CHARGED UNDER G.S. § 14-32.3, AS THERE EXISTED SUBSTANTIAL EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE DEFENDANT WAS A "CARETAKER" AS DEFINED IN THE STATUTE.**

**Defendant-Appellant's Assignments of Error # 1, 3 (R p. 18) (T pp. 504, 521, 833, 835)**

Standard of Review: The Standard of Review is the same as that set forth under Section I. of the Argument above.

As his second assignment of error, the defendant argues that the trial court erred in denying his motion to dismiss the two counts of exploitation brought pursuant to former G.S. § 14-32.3(c), on the ground that the defendant was not a "caretaker" as defined in the statute. For the reasons set forth below, the defendant's assignment of error should be overruled.

As stated above, former section 14-32.3(c) and (d) provide:

- (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 (\$1000) the caretaker is guilty of a Class H felony....
- (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.

While North Carolina's courts have not addressed the question of who may constitute a "caregiver" under this statute, the statute should be construed "with regard to the evil which it is intended to suppress." *State v. Carrilo*, 149 N.C. App. 543, 548, 562 S.E.2d 47, 50 (2002), citing *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990). The statutory language does not limit "caregiver" to a single person, as, in many instances and as in this case, there may be several persons who provide care and act as caregivers for an elderly adult.

The record showed that the defendant voluntarily assumed the responsibility of providing care to Mr. Lindsey in numerous important aspects. Mr. Lindsey could not drive, and the defendant testified that he regularly drove and accompanied Mr. Lindsey "anywhere he needed to go," including monthly or bi-weekly trips to the grocery store and helping Mr. Lindsey with his grocery shopping; to other stores, including the drug store; to the dentist; to the bank; to purchase dentures; to social events such as the ballet; and even to the courthouse to record Mr. Lindsey's will. Further evidence of the defendant's extensive services in personally driving, assisting, and accompanying Mr. Lindsey was the fact that Mr. Lindsey placed the defendant on his automobile insurance policy. Beginning around 2002, the defendant began taking care of Mr. Lindsey's household finances, by writing out

checks to pay Mr. Lindsey's bills, including Mr. Lindsey's utility bills, recording the payments, and making sure that the checks were mailed or delivered. Further, the defendant assisted and advised Mr. Lindsey with important purchases, such as purchasing homeowners' insurance and purchasing a tombstone, and made arrangements for the purchases by either arranging for a representative to come to Mr. Lindsey's home while the defendant was there, or taking and accompanying Mr. Lindsey to make the purchases. The defendant also made appointments for Mr. Lindsey, such as dental appointments. The defendant testified that he personally cared for Mr. Lindsey's feet by washing them, oiling them, cutting the nails, and massaging his feet. In addition, the defendant regularly performed home maintenance and repairs around Mr. Lindsey's home. The testimony was that Mr. Lindsey "trusted [the defendant] to no end" (Robert Armstrong); that the defendant became very close to Mr. Lindsey and spent a lot of time with him (Laura Cromer); that the defendant was Mr. Lindsey's "confidante", and that they were "far more than good friends" (the defendant).

In addition, as set forth in section I. above, the evidence showed that, during this time, Mr. Lindsey's mental and physical health were declining - that he was becoming frail and confused, and suffering from the effects of old age.

Thus, the State submits that, viewed in the light most favorable to the State, there existed substantial evidence from which the jury could find that the defendant voluntarily assumed responsibility for the care of Mr. Lindsey, that the defendant

willfully abused a position of trust, and, as a result, he obtained substantial funds from Mr. Lindsey's bank account - specifically, 92 checks totaling over \$45,000. Accordingly, this assignment of error should be overruled.

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING ERNEST LINDSEY TO TESTIFY ON BEHALF OF THE STATE.**

**Defendant-Appellant's Assignment of Error # 8 (R p. 19) (T p. 402)**

Standard of Review: A trial court's ruling on the competency of a witness to testify is reviewed for abuse of discretion on appeal. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

As his final assignment of error, the defendant asserts that the trial court abused its discretion in permitting Ernest Lindsey to testify as a witness for the State. The State submits that the trial court's ruling was not an abuse of discretion, and should be allowed to stand on appeal.

Rule 601 of the North Carolina Rules of Evidence provides that, as a general rule, "[e]very person is competent to be a witness except . . . when the court determines that he is (1) incapable of expressing himself . . . or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601. North Carolina courts have long held that "[t]he competency of a witness is a matter which rests in the sound discretion of the trial judge. Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Meadows*, 158

N.C. App. 390, 393-394, 581 S.E.2d 472, 474 (2003), quoting *State v. Ford*, 136 N.C. App. 34, 639, 525 S.E.2d 218, 221-222 (2000), and *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987). "When exercising its discretion the trial court must rely on [its] personal observation of the [witness's] demeanor and responses to inquiry on *voir dire* examination." *Meadows*, 158 N.C. App at 394, 525 S.E.2d at 474 (citing cases).

Further, "Rule 601(b) does not ask how bright, how young or how old a witness is. Instead, the question is: does the witness have the capacity to understand the difference between telling the truth and lying?" *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269 (1992), *cert. denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). Thus, courts have found that witnesses with limited mental faculties, as well as children as young as four years old are competent to testify where they understand their duty to tell the truth. *State v. Ward*, 118 N.C. App. 389, 393-396, 455 S.E.2d 666, 668-670 (1995) (court did not err in allowing a four-year old victim to testify to events that occurred when she was two years old, and where witness gave inconsistent answers); *Davis*, 106 N.C. App. at 605, 418 S.E.2d at 269 (where testifying child witness was "intellectually limited," the court did not abuse its discretion where witness indicated she understood her duty to tell the truth); *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987) (court did not abuse its discretion in allowing a four-year old child to testify); *Meadows*, 158 N.C. App at 393-394, 525 S.E.2d at 474

(court did not abuse its discretion in allowing a five-year old child to testify about events that occurred when the child was three years old).

Courts have held that, even if a witness's answers during *voir dire* are "ambiguous or vague or they are unable to answer some of the questions that are put to them," a trial court does not abuse its discretion in allowing such a witness to testify if the witness is able to express himself or herself and understands the duty to tell the truth. *State v. Oliver*, 85 N.C. App. 1, 8-9, 354 S.E.2d 527, 531-532 (1987) (where sixteen year-old mentally deficient witness correctly stated her birthday, where she went to school and indicated she understood her duty to tell the truth, she was not incompetent as a witness although she was unable to state where in town she lived, how long she had lived there, how long it had been since August, and was unable to answer some questions). Further, any "[c]onflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony." *State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971); *Ward*, 118 N.C. App. at 397, 455 S.E.2d at 670.

In the instant case, on *voir dire*, Mr. Lindsey correctly testified to: (1) his full name, Ernest James Lindsey; (T p. 356) (2) his birthdate, September 2, 1910; (T p. 356); (3) the identity of his sister Laura Rachel Cromer, by pointing her out at trial; (T p. 360) and (4) his understanding of his duty to tell the truth and his ability to distinguish between the truth and a lie, as shown by the following testimony:

Prosecutor: Are you going to tell us the truth?

Mr. Lindsey: I'll do the best I know how, so help me. If I know, I tell the truth so help me God.

\* \* \*

Prosecutor: If I said there was an elephant sitting right there -

Mr. Lindsey: An elephant?

Prosecutor: An elephant. Would that be me telling the truth or me telling a lie?

Mr. Lindsey: I'm looking down there. You said if I tell you that there's an elephant sitting right there? I mean, how could I know that?

Prosecutor: But is that me telling the truth, or am I telling a lie?

Mr. Lindsey: You'd be telling a lie. I can't see no elephant standing right there.

Prosecutor: There's no elephant, is there?

Mr. Lindsey: That's right.

(T pp. 357-358, 360)

On cross-examination during *voir dire*, Mr. Lindsey testified to the following: (1) he knew he was at the courthouse; (T p. 362) (2) in Ellerbe where he lived; (T p. 362) (3) that a trial was going on and the defendant was being tried; (T p. 365) (4) the identity of his son-in-law; (T p. 367) (5) the identity of the defendant, and that he remembered the defendant visiting him at his home; (T pp. 375-376) (6) he was retired from the Government Printing Office, and he got a retirement check; (T pp. 377-378) (7) the identity of his daughter; (T p. 380) and (8) he recognized his own signature. (T p. 382)



On re-direct examination, Mr. Lindsey testified that he knew that his daughter's name had been on his checking account "a good while," but he did not remember exactly how long. (T pp. 393-394) Throughout the *voir dire*, Mr. Lindsey repeatedly reiterated his duty to tell the truth, and when he could not remember something, he stated he "could not remember," citing to his duty to tell the truth. (T pp. 357-358, 365, 367-368, 372, 374, 375)

Following the *voir dire*, citing to this Court's decision in *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269, cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993), the trial court found, in its discretion, that Mr. Lindsey was "capable of telling the difference between the truth and a lie," and that Mr. Lindsey had the capacity to testify for the State. (T p. 402)

The State submits that, based on the above *voir dire*, the trial court's ruling that Mr. Lindsey was competent to testify was not an abuse of its discretion, and the defendant cannot meet his burden of showing that the ruling "could not have been the result of a reasoned decision," and, therefore, "the ruling must stand on appeal." *Meadows*, 158 N.C. App. at 393-394, 581 S.E.2d 472 at 474.

If, however, the Court should find that the trial court erred in permitting Mr. Lindsey to testify, the State submits that the defendant cannot meet his burden under G.S. § 15A-1443 to show that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached..." N.C. Gen. Stat. § 15A-1443(a). Indeed, in his testimony at trial, Mr. Lindsey testified that the defendant "[wa]s a fine man" who

"never stole ... money" from him. (T pp. 494-495) As set forth in the Statement of the Facts above, the State's evidence - without Mr. Lindsey's testimony - conclusively showed that Mr. Lindsey was suffering from confusion and age-related dementia during the period charged under the indictments; that the defendant was extremely close to Mr. Lindsey during that period, which the defendant conceded; and that the defendant obtained large sums - specifically, ninety-two checks totaling over \$45,000 - from Mr. Lindsey by writing checks to himself on Mr. Lindsey's account. Under this substantial record, the defendant cannot demonstrate that there exists a "reasonable possibility" that, had Mr. Lindsey not testified, "a different result would have been reached." Accordingly, the defendant's assignment of error should be overruled.

**CONCLUSION**

The defendant received a trial free from prejudicial error, and, therefore, the judgment of the Superior Court of Richmond County should be affirmed.

Respectfully submitted, this the 19<sup>th</sup> day of April, 2010.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

Seth R. Cohen  
Smith, James, Rowlett & Cohen, LLP  
P.O. Box 990  
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This the 19<sup>th</sup> day of April, 2010.

  
\_\_\_\_\_  
M. Lynne Weaver  
Assistant Attorney General