

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2018-0336

State of New Hampshire

v.

Elizabeth Seibel

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Appeal Pursuant to Rule 7 from Judgment  
of the Carroll County Superior Court

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BRIEF FOR THE DEFENDANT

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## QUESTION PRESENTED

1. Whether the court erred by finding the evidence sufficient to support the convictions.

Issue preserved by Elizabeth Seibel's motion to dismiss after the State rested, T3\* 366–83, the State's objection, T3 384–89, the court's ruling, T3 399–407, Elizabeth's motion to dismiss after the defense rested, T3 429, the court's ruling, T3 432, Elizabeth's motion to set aside the verdict and supporting memorandum, A2 65, 67, the State's objection, A2 75, and the court's ruling, AD 3.

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\* Citations to the record are as follows:  
“AD” refers to the appendix containing the appealed decision;  
“A1” and “A2” refer, by volume number, to the appendices containing documents other than the appealed decision;  
“T1,” “T2,” etc. refer, by volume number, to the transcripts of trial on March 19–22, 2018;  
“S” refers to the transcript of sentencing on May 23, 2018.

## STATEMENT OF THE CASE

In October 2016 and December 2017, the State obtained from Carroll County grand juries two indictments charging Elizabeth Seibel with theft by unauthorized taking or transfer and one indictment charging her with financial exploitation of an elderly adult. A1 3–5. At the conclusion of a four-day bench trial on March 19–22, 2018, the court (Ignatius, J.) found Elizabeth guilty of all the charges. T4 468–69. On May 23, 2018, the court sentenced Elizabeth on one of the theft convictions to twelve months at the house of corrections, with nine months to serve and three months suspended for five years, and on the remaining charges to two to four years at the state prison, all suspended for five years, concurrent with each other but consecutive to the house-of-corrections sentence. S 63–68; A2 82–87. The court granted bail pending appeal. S 75–78.

## STATEMENT OF THE FACTS

Prior to November 2012, S.S., then 82 years old, lived in New Orleans with her husband. T1 19, 26–28. S.S. and her husband, who had two daughters and one son, lived close to one of their daughters, Lynn, who had three children of her own. T1 20–21, 30–31, T2 213–14. S.S. and her husband were close with Lynn, talked with her every day, attended the same church, and celebrated birthdays and holidays together. T2 214. When S.S. and her husband bought a house, Lynn’s husband handled all the paperwork. T1 30–31.

In May of 2012, Lynn’s daughter disclosed that her maternal grandfather, S.S.’s husband, sexually abused her for eight years, starting when she was three years old. T1 28, 87, T2 215. The disclosure shattered S.S.’s relationship with Lynn. T2 215–16. Lynn “could not imagine, or understand, how [S.S.] did not know about the [abuse].” T2 215. S.S. decided to move with her husband to Littleton, New Hampshire, near where her son Andrew lived, which further angered Lynn. T1 25–29, 88. Lynn testified that “S.S. was supporting [her husband] by moving away” with him. T2 215. Lynn and S.S.’s other daughter, Kimberly, stopped talking to S.S. after she moved to New Hampshire. T1 21, 88, T2 213, 215–16.

Within a month after S.S. and her husband moved to New Hampshire, S.S.’s husband committed suicide. T1 27,

29, T2 216. S.S.'s son, Andrew, and his wife, Elizabeth Seibel, were suddenly the only family with whom S.S. was in contact. T1 21, 88. After her husband's suicide, S.S. executed a new will in which she disinherited her daughters and left her entire estate to Andrew and Elizabeth. T1 91, T2 244–45. She moved to a condominium in Conway, just down the road from Andrew and Elizabeth. T1 40–41. She saw them frequently. T1 92.

S.S. was not computer literate and needed help with her finances. T1 30, 39, T2 335. During her marriage, her husband always handled the finances. T1 30, T2 217. S.S. would sign financial documents without reading them. T2 217–18. She explained that she “was from that era . . . [w]hen the men handled the finances, and the women said, ‘[Y]es.’” T1 30.

Along with her new will, S.S. executed a durable general power of attorney granting Andrew broad authority to act on her behalf. T1 37–38, 88–91, T2 348; A1 6. The document authorized Elizabeth to act as S.S.'s agent if, and only if, Andrew was “unavailable or unable to act.” A1 6; T1 90.

In December 2012, when S.S. granted Andrew the durable general power of attorney, she owned four certificates of deposit (“CDs”) worth \$110,000 and had \$11,310.24 in her checking account at Chase bank. T1 31–32, 34, T2 286–87, 291; A1 26–27, 455. She received about \$3,500 per month in



social security and pension payments. T2 293. At that time, Andrew helped her open a new checking account with the Bank of New Hampshire. T1 33, T2 287, 291; A1 145. A month later, in January 2013, S.S. added Andrew and Elizabeth as co-owners of that account, and S.S. deposited about \$28,000 in life insurance proceeds and her monthly social security and pension payments into that account. T2 291–92; A1 143, 261, 264, 456. Although S.S. believed that Andrew and Elizabeth were also contributing to the joint account, all of the deposits came from S.S. T1 61, T2 292–93, 297, 301–02, 316–17.

In February 2013, S.S., in a telephone transaction, redeemed one CD worth \$20,000 and deposited the proceeds into her Chase account. T1 35–36, T2 292; A1 62, 457. The same day, she wrote a check transferring about \$18,000 from her Chase account into the jointly-owned Bank of New Hampshire Account. T2 292, A1 63–64, 257, 457.

Nothing significant happened until September 2013. T2 294. Between September 2013 and November 2013, someone transferred a total of \$1400, online, without S.S.'s authorization, from her solely-owned Chase checking account to another Chase checking account owned solely by Elizabeth. T1 44, T2 295, 336–37; A1 95, 106, 389, 397, 464–66. Between October 2013 and May 2014, someone transferred an additional \$11,000, online, without S.S.'s

authorization, from the jointly-owned Bank of New Hampshire account to Elizabeth's solely-owned checking account.

T1 44–45, 93–94, T2 296–98, 302, 305–06, 308, 336–38, 340; A1 198, 200–02, 206, 211, 215, 224, 393, 401, 405, 409, 413, 419, 465–72. It was not possible to determine who initiated these online transfers. T2 340–41.

In February 2014, someone redeemed two of S.S.'s CDs, worth \$40,000, by telephone, and deposited the proceeds into S.S.'s Chase account. T2 302; A1 116. In the following week, someone transferred \$40,000, online, from that account to the joint Bank of New Hampshire account. T2 302, 304–05; A1 116, 205, 469–70. S.S. did not authorize the redemption of these CDs or the transfer of these funds. T1 66.

In March 2014, Andrew and Elizabeth suggested that S.S. move with them to a new house. T1 47. S.S. believed that Andrew and Elizabeth would purchase the house and that she would pay them rent. T1 47, 50. S.S. was “[not] enthusiastic” about it, but agreed because she wanted to “be helpful.” T1 47, 52.

In March 2014, Elizabeth contacted a real estate agent to inquire about a property in Conway. T2 170–71. Andrew and Elizabeth signed a brokerage relationship disclosure form, and Andrew, Elizabeth, and S.S. all toured the property. T2 171–73; A2 57. Andrew and Elizabeth liked the property; Andrew planned to open a fly-fishing shop in a building next

to the house. T1 49–50. But S.S. was not impressed with the condition of the house and did not participate much in the showing. T2 173.

The following week, Elizabeth emailed the real estate agent a buyer-agency agreement signed solely by S.S. T2 174–75, 183, A2 58. A couple weeks later, a purchase-and-sales agreement, offering to purchase the property and signed solely by S.S., was presented to the seller. A2 26–32. S.S. later testified that, although the signature was hers, she did not recall signing the document. T1 74–76. The seller accepted the offer. A2 30–32.

On April 7, 2014, Elizabeth filled out two checks, totaling \$1850, for an earnest money deposit on the property. T2 306–07; A1 200, 204, 452–53. The checks were drawn on the joint account. T2 306–07; A1 200, 204, 452–53. S.S. signed the checks. T2 306–07; A1 200, 204, 452–53.

On April 22, 2014, S.S. signed a mortgage application for the property. A2 33–55. Her signature appears sixteen times in the mortgage documents. A2 33–55. She later testified that, although the signatures were hers, she did not remember signing the documents. T1 76–79.

Andrew worked at a car dealership with Sharon Knight, a notary public. T2 250–52. Shortly after the seller accepted the offer, Andrew told Knight that he needed a document notarized for his mother. T2 253–54. He gave Knight a

document entitled “Special Power of Attorney.” A2 10; T2 253. The document appointed Elizabeth to act on S.S.’s behalf regarding the purchase of the property. A2 10; T2 284. The document was already signed, purportedly by S.S. and a witness. A2 11; T2 284.

Knight knew that, “[w]hen you’re notarizing something, who you’re notarizing should be in front of you.” T2 252, 254–55. Although neither S.S. nor the witness were present, Knight notarized the document anyway “[b]ecause [she] trusted And[rew]” and “thought what he was doing was okay.” T2 254–55; A2 11.

S.S. later testified that, although the special power of attorney bore her signature, she did not recall granting Elizabeth a special power of attorney to buy the house, and probably did not read the document before signing it. T1 80. Attempts to locate the witness whose signature appears on the document were not successful. T2 284–86.

In May 2014, someone redeemed S.S.’s last remaining CD, worth \$50,000, by telephone, and deposited the proceeds, less an early redemption fee, into S.S.’s Chase account. T2 308, 312, A1 128. In the following two weeks, someone transferred \$50,000 from that account to the joint Bank of New Hampshire account. T2 308, A1 128, 193, 197. S.S. did not authorize the redemption of this CD or the transfer of these funds. T1 66.

Closing was scheduled for May 30, 2014. T 311. The prior day, Andrew called the realtor and told her that S.S. was feeling ill and would not be able to attend the closing. A2 62. S.S. later testified that she was not ill at that time, and records indicated that she attended a cardiovascular rehabilitation session on that day. T1 81, T2 273–74, 276. At the closing, Elizabeth purchased the house on S.S.’s behalf pursuant to the special power of attorney. T1 63–64, T2 227, 230–31; A2 23. She withdrew \$23,269.60 from the joint checking account to make the down-payment. T2 308, 311; A1 194. S.S., Andrew, and Elizabeth moved into the house the following month. T1 54.

From May 2014 to May 2015, someone deposited \$90,135.00 into a second joint Bank of New Hampshire checking account. A1 328, 332, 336, 340, 342, 346, 352, 358, 364, 368, 372, 378; T2 308–09, 312. Virtually all of it was transferred, online, from the first joint Bank of New Hampshire checking account. A1 151, 154–55, 157–58, 161–62, 165–66; 169–70, 173–74, 177–78, 182, 185–86, 190, 193–94; T2 308, 312–14, 316. Although the second account was also owned by S.S., Andrew and Elizabeth, S.S. testified that she was not aware of it. T1 53, T2 288. Someone paid the mortgage, \$1,357.27 per month, from the second account. A1 333, 336, 343, 348, 354, 361, 366, 369, 374, T2 318–20. Elizabeth wrote a total of \$42,370.87 in checks on that

account, and charged an additional \$33,034.29 to the debit card linked to the account. T2 312–15, 357; A1 472–84; A2 61.

These expenditures primarily related to the house, and consisted of expenses such as renovations, utilities, appliances and furniture. T1 59, T2 318–19; A2 3–5. However, \$11,003.23, representing twelve percent of the money that passed through the account, was spent on items that were not house-related. T2 321–22; A2 6–9. Of these expenditures, some, such as a newspaper subscription, may have been communal, but others, such as a payment to Elizabeth’s hairdresser, were clearly not. T1 71–73; A2 6–9. In any event, S.S. did not agree to pay for any of the expenditures. T1 50–52, 66–74.

In February 2015, Andrew told S.S. that the rest of her CDs had been redeemed in order to satisfy a lawsuit filed by her daughter regarding S.S.’s husband’s sexual assault of their granddaughter. T1 82–83, T2 202. This was false; no such lawsuit was ever filed. T1 83, T2 216–17.

In June 2015, S.S. had a friend visit from out-of-state. T1 62–63, T2 199. During her visit, they checked the mail and discovered a bill from the mortgage holder, which indicated that S.S. owned the house. T1 63–64, T2 200–01. They went to the bank and discovered that S.S. had been

paying the vast majority of the bills and that her accounts were depleted. T1 66, T2 202–04, 312, 315.

S.S. was extremely upset and spoke to a lawyer. T1 64, T2 201, 204, 225–26, 228. The lawyer called Andrew, who claimed that S.S. had dementia and “was in terrible shape,” but that was not consistent with the lawyer’s experience. T2 228–29. When S.S. next saw Andrew, he was angry and demanded to know why S.S. saw a lawyer. T1 65, T2 205. S.S. moved out the following day. T1 65, T2 206.

A few days later, S.S. and her lawyer met with Andrew. T2 239. Elizabeth was not present. T2 243. Andrew was dismissive of S.S. and claimed that she had Alzheimer’s disease. T2 239. The more S.S.’s lawyer questioned Andrew, the more upset he became. T2 239. He left the meeting abruptly. T2 239.

A few days later, someone recorded a deed, purportedly signed eight months earlier, transferring one half of the ownership of the property from S.S. to Andrew and Elizabeth. T2 240, 247; A2 12–13. When the lawyer later called Andrew, he said that he and Elizabeth recorded the deed “to protect themselves.” T2 248.

In February 2016, S.S.’s lawyer met briefly with Andrew and Elizabeth. T2 245. She asked them to sign a deed conveying their interest in the house back to S.S, so that S.S. could sell it without their involvement. T2 245–46. When

asked if Elizabeth “put up any resistance to that,” the lawyer answered, “There was some eye rolling and some hemming and hawing, but there was no extended resistance.” T2 246. Andrew and Elizabeth signed the deed conveying their interest back to S.S. T2 246.

At trial, S.S. indicated that she placed the blame for the thefts on her daughter-in-law, Elizabeth. T1 97, 147. When asked to explain, S.S. testified that Elizabeth was “very talented at . . . computer[s] and money transfers and things like that.” T1 147. She added, “And[rew] was good, but [Elizabeth] was better.” T1 147. The State chose to charge only Elizabeth, not Andrew. S 29. By the time of sentencing, Elizabeth had divorced Andrew. S 30. Because Andrew was never charged, Elizabeth bears sole responsibility for paying restitution to S.S. A2 83, 85.



## SUMMARY OF THE ARGUMENT

When the evidence of an element is solely circumstantial, it must exclude all reasonable conclusions consistent with innocence. To be guilty of theft by unauthorized taking or transfer, a person must know that the owner has not authorized her use of the property. Here, the evidence did not exclude the rational conclusion that Andrew deceived Elizabeth, causing her sincerely but falsely to believe that his mother authorized her use of the money.

To be guilty of financial exploitation, as charged here, a person must violate a fiduciary duty on or after the effective date of the statute. Here, there was no evidence that Elizabeth, on or after January 1, 2015, exercised any authority under any instrument that created a fiduciary duty. Because there was no evidence that Elizabeth purported to act as S.S.'s agent on or after the statute's effective date, the evidence was insufficient to prove that she violated a fiduciary duty during that time.

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

The State obtained three indictments against Elizabeth. Indictment 1296248C alleged that, between October 1, 2013, and May 31, 2014, Elizabeth committed theft by unauthorized taking or transfer by transferring funds from the joint Bank of New Hampshire Account into her own, solely-owned account, without S.S.'s authorization.

Indictment 1296246C alleged that, between May 1, 2014, and June 30, 2015, Elizabeth committed theft by unauthorized taking or transfer by making purchases using the joint Bank of New Hampshire account, without S.S.'s authorization.

Indictment 1452205C alleged that, between January 1, 2015, and June 30, 2015, Elizabeth committed financial exploitation of an elderly adult by making purchases using the joint Bank of New Hampshire account, in breach of a fiduciary duty.

The theft charges required the State to prove that Elizabeth obtained or exercised unauthorized control of money, and that she did so with a purpose to deprive. RSA 637:3, I. The purposeful mental state applies to each material element of the offense. RSA 626:2, I ("A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the

offense. . . . When the law defining an offense prescribes the kind of culpability that is sufficient for its commission, without distinguishing among the material elements thereof, such culpability shall apply to all the material elements, unless a contrary purpose plainly appears.” “Unauthorized” is a material, attendant-circumstances element. RSA 625:11, IV (defining “[m]aterial element”). When applied to an attendant-circumstances element, the purposeful mental state requires that the defendant act knowingly with respect to those circumstances. See Model Penal Code § 2.02(2) (“A person acts purposely with respect to a material element of an offense when . . . [,] if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.”). Thus, the State had to prove that Elizabeth knew that “the arrangement d[id] not provide [her] with a privilege to take funds from the account in the circumstances under which [she] withdrew them.” State v. Gagne, 165 N.H. 363, 372 (2013).

The financial exploitation charge required the State to prove that Elizabeth had a fiduciary duty and that she recklessly violated it by, without authorization from the instrument establishing the fiduciary duty, using S.S.’s property for the benefit of another. RSA 631:9, I(2); see also State v. Folley, 172 N.H. 760, 770 (2020) (distinguishing

between elements of theft and elements of financial exploitation). The effective date of the financial exploitation statute was January 1, 2015. Laws 2014, 151:5. Thus, the State had to prove that Elizabeth violated a fiduciary duty on or after January 1, 2015. See N.H. Const. Pt. 1, Art. 23; U.S. Const. Art. I, Section 10, Clause 1.

After the State rested, Elizabeth moved to dismiss all of the charges for insufficiency of the evidence. T3 366. Among other points, she argued that the theft charges should be dismissed because the evidence did not prove that she knew that S.S. did not authorize the transfers and expenditures. T3 366–67, 371–72. Regarding the financial-exploitation charge, she argued that the evidence did not prove that, on or after the effective date of the statute, she violated a fiduciary duty. T3 367, 380–83. She noted that, “in order for the State to say that she was abusing a fiduciary obligation [it] would have to show that she was acting under that fiduciary obligation.” T3 381. She argued that there was no evidence that any transaction on or after January 1, 2015, was “done in someone's capacity as a power of attorney.” T3 380.

The State objected. T3 384. It argued that Elizabeth knew that S.S. did not authorize the transactions at issue. T3 389. Regarding the financial-exploitation charge, it argued that the special power of attorney created a fiduciary

obligation that continued beyond the purchase of the house. T3 384–85.

The court denied the motions to dismiss. T3 399–407. The court did not expressly address the knowledge requirement of the theft charges. T3 399–405. Regarding the financial-exploitation charge, the court found sufficient evidence that Elizabeth violated a fiduciary duty after the effective date of the statute. T3 406–07.

Elizabeth renewed her motions to dismiss after she rested. T3 429. The court again denied them. T3 432.

Following trial, Elizabeth filed a motion to set aside the verdict and a supporting memorandum, in which she again argued that the evidence was insufficient. A2 65, 67. Regarding the theft charges, she argued that the evidence did not prove that she “had knowledge that [the financial] transfers were unauthorized.” A2 68, 70–71.

The State objected. A2 75. It argued that the evidence rendered unreasonable the hypothesis that Elizabeth did not know that the transactions were unauthorized. A2 78.

The court denied the motion. AD 3. It found the evidence “sufficient to exclude beyond a reasonable doubt all rational conclusions other than guilt.” AD 3. By finding the evidence sufficient to sustain each conviction, the court erred.

Motions to dismiss during and after trial raise the same issue: the legal sufficiency of the evidence. See State v.

Pratte, 158 N.H. 45, 49–50 (2008) (court erred in denying motion for JNOV because evidence was insufficient); State v. Spinale, 156 N.H. 456, 463 (2007) (“on a motion for JNOV, . . . the trial court applies the sufficiency standard”); State v. O’Neill, 134 N.H. 182, 185 (1991) (“We see no reason not to apply the same standard of review to [a trial court’s ruling on a motion for JNOV] as we apply to a legal challenge for insufficiency of the evidence”). Regardless of when the sufficiency challenge was made in the trial court, this Court, on review, considers all the evidence at trial, “including any evidence presented by the defendant.” Folley, 172 N.H. at 766.

Evidence is legally insufficient if no “rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State.” Id. When the evidence of an element is solely circumstantial, it must “exclude all reasonable conclusions except guilt.” Id.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits convictions on the basis of legally insufficient evidence. Jackson v. Virginia, 443 U.S. 307, 317–18 (1979). Because “[a] challenge to the sufficiency of the evidence raises a claim of legal error[,] . . .

[this Court's] standard of review is de novo." Folley, 172 N.H. at 766.

A. The theft indictments

The evidence was insufficient to prove that Elizabeth knew that S.S. did not authorize the transfer of money into Elizabeth's personal checking account or her expenditures from the joint checking account. More specifically, it failed to exclude the reasonable possibility that, just as Andrew lied to his mother, he lied to his wife as well, falsely telling her that his mother authorized the transfer of funds into her personal checking account and the expenditures from the joint checking account.

This possibility was reasonable. Elderly individuals frequently transfer their wealth to younger members of their own family. Thus, Elizabeth would have no reason to doubt Andrew's representations that S.S. authorized the transfer of funds into her personal checking account and the expenditures from the joint checking account.

The evidence, moreover, failed to exclude this possibility. There was no evidence that Andrew told Elizabeth that S.S. did not authorize the transfer of funds into her personal checking account or the expenditure of funds from the joint checking account.

While S.S.'s testimony was sufficient to establish that she did not authorize these transactions, it did not establish that Elizabeth was aware that S.S. had not authorized them. In her testimony, S.S. tended to refer to Andrew and Elizabeth as a single unit, without distinguishing between them. See, e.g., T1 46 ("They" decided to add themselves to her account); T1 61 ("They" said that the postal service would not deliver mail directly to the house). On one occasion, the prosecutor asked S.S. to whom, specifically, she meant to refer when she testified that "they" always picked up the mail from the post office. T1 61. She answered, "I don't know, but one or the other." T1 62.

When asked, "[W]hat was [Elizabeth's] response when you asked to see your bank statements?", S.S. answered with passive phrasing devoid of any subject: "It was said that I didn't need to." T2 60. Had S.S. intended to testify that Elizabeth told her that she "didn't need to," that would have been her testimony. S.S. then testified that, after a prolonged wait, "[t]hey plopped [the bank statement] down on the table" for her to read. T1 60. No reasonable factfinder could take this testimony literally – that Andrew and Elizabeth each took ahold of a single bank statement and together "plopped" it down on a table. Taken as a whole, S.S.'s testimony indicates that she often failed to distinguish the actions of her son from those of her daughter-in-law.



Elizabeth's knowledge was not necessary to facilitate Andrew's theft of money from his mother. S.S. made clear that she "was from that era . . . [w]hen the men handled the finances, and the women said, 'yes.'" T1 30. When S.S. and her ailing husband needed help buying a house in Louisiana, it wasn't their daughter who helped; it was their daughter's husband. T1 30–31. Because S.S. would have trusted Andrew much more than Elizabeth, particularly with financial matters, Elizabeth's assistance would have been of little value to Andrew in deceiving his mother, so he had no reason to tell her about it. And had Andrew told Elizabeth that his mother did not authorize the transactions, Elizabeth may have refused to participate in the theft.

The fact that Elizabeth made almost all of the expenditures at issue further supports the possibility that she lacked knowledge that S.S. did not authorize them. Andrew, aware that he was stealing large sums of money from his mother, avoided associating his name with the expenditures, while Elizabeth, believing that the expenditures were authorized, had no reason not to use her own checks or debit card.

Under the light-most-favorable standard, this Court will assume the truth of the facts to which S.S. testified. But that does not mean that this Court should assume the truth of her preferred explanation for those facts. It would no doubt be

difficult for any parent to contemplate the possibility that her own child would steal from her. It is understandable that S.S. may have preferred to believe an alternative narrative: a greedy daughter-in-law turns an otherwise loyal son against his own mother. The facts, however, did not support that narrative. Because the evidence failed to exclude the reasonable conclusion that Elizabeth did not know that S.S. did not authorize the transfers and expenditures at issue, it was insufficient to support the theft convictions.

B. The financial exploitation indictment

The financial exploitation indictment required the State to prove the existence and breach of a fiduciary obligation on or after January 1, 2015. Two powers of attorney were introduced into evidence: a durable general power of attorney that S.S. executed in December 2012, and a special power of attorney that S.S. executed in April 2014.

The evidence was insufficient to prove that Elizabeth breached any fiduciary duty under the durable general power of attorney that S.S. executed in December 2012, for two reasons.

First, the durable general power of attorney authorized only Andrew to act on S.S.'s behalf at that time. A1 6. It authorized Elizabeth to act as her agent if, and only if, Andrew became "unavailable or unable to act." A1 6. Only

Andrew, not Elizabeth, signed the agent's acknowledgement. A1 10. There was no evidence that Andrew was ever "unavailable or unable to act," and thus, no evidence that Elizabeth was ever empowered to take any action under that instrument.

Second, there is no evidence that either Andrew or Elizabeth actually exercised any powers under the instrument on or after January 1, 2015. While the evidence shows that Andrew or Elizabeth transferred funds, or spent money, from the joint bank accounts, they were able to do so in their personal capacity as co-owners of those accounts, not because of any power granted by the durable general power of attorney. Because there was no evidence that Andrew or Elizabeth purported to act as S.S.'s agent on or after January 1, 2015, the evidence could not have established that Elizabeth, on or after that date, breached any fiduciary duty created by that document.

For similar reasons, the evidence was insufficient to prove that Elizabeth, on or after January 1, 2015, breached any fiduciary duty created by the special power of attorney that S.S. executed in April 2014.

That document authorized Elizabeth to act on S.S.'s behalf "with regard to [S.S.'s] purchase of property located at 732 White Mountain Highway." A2 10. While the evidence showed that Elizabeth acted as S.S.'s agent when, in May

2014, she purchased the property on S.S.'s behalf, there was no evidence that Elizabeth acted as S.S.'s agent on or after January 1, 2015. As noted above, each transfer or expenditure of funds on or after January 1, 2015 was made from one of the two joint bank accounts. Elizabeth was able to perform these actions in her personal capacity as a co-owner of those accounts, not because of any power granted by the special power of attorney. Because there was no evidence that Elizabeth acted as S.S.'s agent on or after January 1, 2015, the evidence could not have established that Elizabeth, on or after that date, breached any fiduciary duty created by that document.

CONCLUSION

WHEREFORE, Elizabeth Seibel respectfully requests that this Court reverse.

Undersigned counsel requests a 10 minute, 3JX argument.

One of the appealed decisions is in writing and is appended to the brief, the others were not in writing and therefore are not appended to this brief.

This brief complies with the applicable word limitation and contains 4,774 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard  
Thomas Barnard

DATED: September 25, 2020