

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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REPLY BRIEF FOR THE DEFENDANT

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TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| Table of Authorities .....   | 3           |
| Argument   |             |
| I.    THE EVIDENCE WAS INSUFFICIENT TO<br>SUPPORT THE CONVICTIONS..... | 4           |
| B.    The financial exploitation indictment .....                      | 4           |
| Conclusion.....  | 13          |

TABLE OF AUTHORITIES

Page

**Cases**

Adelson v. Adelson,  
806 N.E.2d 108 (Mass App. Ct. 2004) ..... 11, 12

Blockburger v. United States,  
284 U.S. 299 (1932) ..... 10

In re Estate of O’Neill,  
\_\_\_ N.H. \_\_\_ (Dec. 22, 2020) ..... 5

Petition of New Hampshire Div. for Children,  
Youth & Families,  
\_\_\_ N.H. \_\_\_ (Dec. 9, 2020) ..... 5

State v. Folley,  
172 N.H. 760 (2020) ..... 8, 9, 11

State v. Woodbury,  
172 N.H. 358 (2019) ..... 5

Working Stiff Partners v. City of Portsmouth,  
172 N.H. 611 (2019) ..... 10

**Statutes**

RSA 631:9 ..... passim

RSA 637:3 ..... 7, 8, 9

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

B. The financial exploitation indictment

In her opening brief, Elizabeth noted that, to prove the financial exploitation charge, the State had to prove that she violated a fiduciary duty. DB\* 19–20. She argued that she could only violate a fiduciary duty by exercising some power under the instrument that created the fiduciary duty. DB 27–28. She argued that, because there was no evidence that, on or after January 1, 2015, the effective date of the statute, she exercised any power under the special power of attorney, she could not have violated a fiduciary duty created by that document. DB 27–28.

The State, in its brief, agrees that it had the burden to prove that Elizabeth “breached a fiduciary obligation.” SB 34. It also agrees that Elizabeth “did not use her authority as power of attorney to access S.S.’s funds.” SB 35. It argues, however, that the evidence was still sufficient because it was not “required to prove that [Elizabeth] acted in her capacity as S.S.’s power of attorney in order to prove she breached her fiduciary obligation.” SB 33–34. Thus, the parties’ dispute about the sufficiency of the evidence to prove the financial

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\* Citations to the record are as follows:  
“A1” and “A2” refer, by volume number, to the appendices containing documents other than the appealed decision;  
“DB” refers to the defendant’s opening brief;  
“SB” refers to the State’s brief.

exploitation charge boils down to a dispute about statutory construction.

In matters of statutory interpretation, this Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” In re Estate of O’Neill, \_\_\_ N.H. \_\_\_ (Dec. 22, 2020). It “construe[s] the Criminal Code according to the fair import of its terms and to promote justice.” State v. Woodbury, 172 N.H. 358, 366 (2019). Issues of statutory interpretation are reviewed de novo. Petition of New Hampshire Div. for Children, Youth & Families, \_\_\_ N.H. \_\_\_ (Dec. 9, 2020).

Broadly speaking, RSA 631:9, entitled “Financial Exploitation of an Elderly, Disabled, or Impaired Adult,” prohibits certain acts and omissions in two circumstances. Paragraph I(a) applies to acts and omissions that constitute a “breach of a fiduciary obligation recognized in law.” As originally enacted, Paragraph I(b) applied to “the use of undue influence, harassment, duress, force, compulsion, or coercion.” Laws 2014, 151:4. The legislature later amended paragraph I(b) to additionally apply “under any circumstances where the person knew that the elderly, disabled, or impaired adult lacked capacity to consent, or consciously disregarded a substantial and unjustifiable risk that the elderly, disabled, or impaired adult lacked capacity to consent.” Laws 2018, 308:1.

Unlike paragraph I(a), paragraph I(b) does not require a fiduciary duty. Unlike paragraph I(b), paragraph I(a) does not require “undue influence” or the like.

The State chose to charge Elizabeth under RSA 631:9, I(a)(2), which provides:

Whoever commits any of the following acts against an elderly, disabled, or impaired adult, as defined in RSA 631:8, shall be guilty of financial exploitation and penalized pursuant to RSA 631:10 if . . . [i]n breach of a fiduciary obligation recognized in law, including pertinent regulations, contractual obligations, documented consent by a competent person, including, but not limited to, an agent under a durable power of attorney, guardian, conservator, or trustee, a person, knowingly or recklessly, for his or her own profit or advantage . . . [u]nless authorized by the instrument establishing fiduciary obligation, deprives, uses, manages, or takes either temporarily or permanently the real or personal property or other financial resources of the elderly, disabled, or impaired adult for the benefit of someone other than the elderly, disabled, or impaired adult.

For three reasons, this Court should hold that paragraph I(a)(2) applies only to acts that constitute an exercise of a fiduciary power.

First, such a construction is supported by the plain language and structure of the statute, considered as a whole. The scope of paragraph I(a)(2) is narrow; it is specifically limited to situations involving “a fiduciary obligation” and to acts that are not “authorized by the instrument establishing fiduciary obligation.” Under these narrow circumstances, the prohibition it sets forth is broad: a fiduciary may not use the property of an elderly, disabled or impaired adult for someone else’s benefit.

The scope of Paragraph I(b) is wider; it does not require a fiduciary obligation. The prohibition it sets forth is correspondingly more limited; it does not ban any use of the property of an elderly, disabled or impaired adult for someone else’s benefit, but only prohibits “undue influence” and the like.

RSA 637:3, the general theft-by-unauthorized-taking statute, is also relevant. Its scope is wider still; it is not limited to elderly, disabled and impaired adults. Its prohibition is even more limited; it bans exercising unauthorized control over the property of another.

Of the three provisions, RSA 631:9, I(a)(2) has the narrowest scope, and the broadest prohibition. In light of the fact that RSA 631:9, I(a)(2) requires both a fiduciary obligation and acts beyond the authorization set forth in the instrument creating that obligation, it is only logical that the

provision's broad, sweeping prohibition would apply only to acts committed in a fiduciary capacity. Because RSA 637:3 already prohibits taking a person's property without his or her consent, and RSA 631:9, I(b) already prohibits taking an elderly, disabled, or impaired adult's property with his or her consent, but through undue influence or the like, there is no reason to expand the broad prohibition set forth in RSA 631:9, I(a)(2) to acts that do not involve the exercise of a fiduciary power.

Second, the State overlooks this Court's holding in State v. Folley, 172 N.H. 760 (2020). When that holding is considered, the State's proposed interpretation of RSA 631:9, I(a)(2) would produce absurd results.

In arguing that RSA 631:9, I(a)(2) applies to acts that were not exercised in any fiduciary capacity, the State appears to interpret the provision as imposing liability only for acts that were not authorized by the elderly, disabled or impaired adult. The State, for instance, argues that the evidence was sufficient to prove that Elizabeth violated this provision because "[S.S.'s] funds were transferred into the [second joint] account without her authorization," and that Elizabeth "used S.S.'s money . . . without authorization from S.S." SB 35.

In Folley, one of the defendants, James Folley, was convicted of violating RSA 631:9, I(a)(2) based on evidence



that the defendant's elderly sister granted him a power of attorney, and that he used that power of attorney to take money from her account. Id. at 770. The defendant argued that the evidence was insufficient to prove that victim did not authorize the withdrawals. Id. But this Court held that the victim's authorization was irrelevant to a charge under RSA 631:9, I(a)(2). Id. It explained:

[T]o prove the crime of financial exploitation of an elderly adult, the State was not required to prove that [the defendant] took funds without authorization from the victim; it was required to prove that [the defendant] took funds, in breach of a fiduciary duty, without authorization from the instrument establishing that fiduciary duty — the power of attorney.

Id. (original emphasis).

This Court's construction of the provision in Folley was correct. If RSA 631:9, I(a)(2) were construed to require the absence of the victim's authorization — either instead of or in addition to the absence of authorization in the instrument establishing the fiduciary duty — then there would be little to distinguish this crime from the crime of theft by unauthorized taking under RSA 637:3. Because, under such a construction, both crimes would require proof that defendant used the victim's property without the victim's authorization, the crimes would constitute the same offense for double

jeopardy purposes. Woodbury, 172 N.H. at 368 (offenses are the same, under the State Constitution, unless “proof of the elements of the crimes as charged will require a difference in evidence.”); Blockburger v. United States, 284 U.S. 299, 304 (1932) (offenses are the same, under the Federal Constitution, unless “each provision requires proof of a fact which the other does not.”). Here, the State clearly agrees that financial exploitation is the not the same offense as theft by unauthorized taking, since it obtained convictions and sentences for each offense based on the same alleged conduct. A1 3, 5; A2 82, 86.

“[I]t is a familiar principle of statutory construction that one should not construe a statute . . . to lead to an absurd result that the legislative body could not have intended.” Working Stiff Partners v. City of Portsmouth, 172 N.H. 611, 620 (2019). In light of the fact that a defendant can violate RSA 631:9, I(a)(2) for engaging in conduct that the victim authorized, it would produce absurd results to hold that the provision can also apply to acts that do not involve the exercise of fiduciary powers.

Assume, for instance, that an elderly individual grants a family member a power of attorney and that the instrument creating that power does not authorize the family member to use the victim’s property for the family member’s own benefit. Assume further that, without any undue influence or the like,

the elderly person sends the family member a check for \$100 for the family member's birthday. Under the State's proposed interpretation of the statute, it would violate RSA 631:9, I(a)(2) for the family member to accept the gift. Folley establishes that it would not be a defense that the elderly individual authorized the gift, and, under the State's interpretation, it would not be a defense that the family member did not exercise any fiduciary power in accepting it. In light of the absurd results that the State's interpretation would produce, this Court should reject it and affirm that the mere existence of a fiduciary instrument does not prohibit the fiduciary from accepting a gift that is conveyed independently from that instrument.

Finally, case law from Massachusetts supports Elizabeth's proposed construction. In Adelson v. Adelson, 806 N.E.2d 108, 115 (Mass App. Ct. 2004), the founder and a director of a closely held corporation purchased shares of the corporation from his adult son. Id. at 111-14. The son later sued the father, claiming, among other things, that father breached his fiduciary duty by either misrepresenting or failing to disclose material information about the value of company, for the purpose of inducing the son to sell his shares for less than their fair value. Id. at 116. The father prevailed in the trial court, and the son appealed. Id.

On appeal, the court acknowledged that “[t]here is no doubt that [the father] owed [the son] a fiduciary duty in respect to the operation of [the] close corporation.” Id. at 119. It added, however, that “[t]here is . . . nothing in [case law] which suggests that shareholders in a closely held corporation owe one another a duty of the utmost good faith and loyalty in any dealings beyond the operation of the corporate enterprise.” Id. at 120. The court noted that the son “does not claim, nor is there evidence to show, that [the father] was in breach of his duty of utmost good faith and loyalty in a matter of corporate governance.” Id. “Rather, the evidence presented shows a personal transaction between a father and his adult son.” Id. For these reasons, the Court concluded, “there was no evidence to show that [the father] owed [the son] either a fiduciary or special duty” in his purchase of the shares. Id.

Just as the father in Adelson did not owe the son a fiduciary duty with respect to acts that were not performed in his fiduciary capacity, Elizabeth did not owe S.S. a fiduciary duty with respect to acts that were not performed in her fiduciary capacity. Because there was no evidence that Elizabeth acted in her fiduciary capacity on or after January 1, 2015, the evidence could not have established that Elizabeth, on or after that date, breached any fiduciary duty.

CONCLUSION

WHEREFORE, Elizabeth Seibel respectfully requests that this Court reverse.

Undersigned counsel requests a 10 minute, 3JX argument.

This brief complies with the applicable word limitation and contains 1,941 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Brandon H. Garod, Senior Assistant Attorney General, through the electronic filing system's electronic service.

/s/ Thomas Barnard  
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