

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0336

State of New Hampshire

v.

Elizabeth Seibel

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

THE OFFICE OF THE NEW
HAMPSHIRE ATTORNEY GENERAL

Brandon H. Garod
N.H. Bar No. 21164
Senior Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-1217

(10-minute, 3JX Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
ISSUES PRESENTED	5
STATEMENT OF THE CASE	6
STATEMENT OF FACTS.....	7
SUMMARY OF THE ARGUMENT.....	19
ARGUMENT	21
I. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT’S CONVICTION FOR THEFT BY UNAUTHORIZED TAKING FOR MAKING MULTIPLE ONLINE TRANSFERS OF FUNDS FROM S.S.’S BNH ACCOUNT ENDING IN 9487 INTO THE DEFENDANT’S PERSONAL CHASE BANK ACCOUNT ENDING IN 7432 WHERE THE EVIDENCE SHOWED THE DEFENDANT KNEW S.S. HAD ONLY AUTHORIZED HER TO BE A JOINT OWNER FOR THE LIMITED PURPOSE OF HELPING HER PAY BILLS.....	21
II. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT’S CONVICTION OF GUILTY OF THEFT BY UNAUTHORIZED TAKING FOR MAKING MULTIPLE PERSONAL PURCHASES USING FUNDS FROM S.S.’S BNH ACCOUNT ENDING IN 2731 FOR THE PURPOSE OF PURCHASING, RENOVATING, FURNISHING AND PAYING NEARLY ALL EXPENSES ASSOCIATED WITH THE RIVER HOUSE WHEN THE DEFENDANT KNEW THAT S.S. DID NOT KNOW THAT THE HOME WAS BEING PURCHASED IN HER NAME AND THE DEFENDANT MADE MULTIPLE EFFORTS TO CONCEAL THE EXPENSES FROM S.S.....	28

III. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT’S CONVICTION FOR FINANCIAL EXPLOITATION OF AN ELDERLY ADULT WHEN THE DEFENDANT VIOLATED HER FIDUCIARY OBLIGATION TO OBSERVE THE STANDARDS OF A PRUDENT PERSON WHEN DEALING WITH S.S.’S MONEY, BY USING THE MONEY FOR HER OWN BENEFIT. 33

CONCLUSION 37

CERTIFICATE OF COMPLIANCE 38

CERTIFICATE OF SERVICE..... 39

TABLE OF AUTHORITIES

Cases

<i>State v. Folley</i> , 172 N.H. 760 (2020).....	21, 34
<i>State v. Kelly</i> , 159 N.H. 449 (2009)	21, 22, 23
<i>State v. Newcomb</i> , 140 N.H. 72 (1995).....	23
<i>State v. Saintil-Brown</i> , 172 N.H. 110 (2019)	passim
<i>State v. Saunders</i> , 164 N.H. 342 (2012).....	22, 23

Statutes

RSA 631:9	6, 15, 34
RSA 631:9, I(a)(2).....	34
RSA 637:3	6

ISSUES PRESENTED

I. Whether the court erred by finding that the evidence was sufficient to support the defendant's conviction for theft by unauthorized taking for obtaining or exercising unauthorized control over money from S.S.'s Bank of New Hampshire account ending in 9487 by making multiple transfers into her personal Chase bank account?

II. Whether the court erred by finding that the evidence was sufficient to support the defendant's conviction for theft by unauthorized taking for obtaining or exercising unauthorized control over money from S.S.'s Bank of New Hampshire account ending in 2731 by making multiple personal purchases using S.S.'s funds?

III. Whether the court erred by finding that the evidence was sufficient to support the defendant's conviction for financial exploitation of an elderly adult for taking financial resources belonging to S.S. for her own profit or advantage, in breach of a fiduciary obligation recognized in law?

STATEMENT OF THE CASE

In 2016 and 2017, the defendant, Elizabeth Seibel, was charged by indictment with two counts of theft by unauthorized taking or transfer in violation of RSA 637:3, and one count of financial exploitation of an elderly, disabled, or impaired adult in violation of RSA 631:9. DBAI 3-5.¹ At the conclusion of the State's case, the defendant made a motion to dismiss the charges. T 365-83. The court (*Ignatius, J.*) denied the motion. T 399-407. In March 2018, following a four day bench trial, the defendant was convicted on all three charges. T 468-69. The defendant filed a motion to set aside the verdicts in April 2018. DBAII 65-66. The court denied the motion. NOA 14-15. On May 23, 2018, the court sentenced the defendant to twelve months in the house of corrections, with three months suspended for five years on one count of theft, and two to four years at the state prison, all suspended for five years, concurrent with each other but consecutive to the stand committed sentence on the remaining charges. ST 75-78.

This appeal followed.

¹ Citations to the record are as follows:

“DB__” refers to the defendant’s brief and page number.

“DBAI__” and “DBAII__” refer, by volume number, to the appendices to the defendant’s brief containing documents other than the appealed decision.

“T__” refers to the consecutively paginated transcripts of the trial on March 19-22, 2018 and the page number.

“ST__” refers to the transcript of sentencing on May 23, 2018 and the page number.

“NOA__” refers to the defendant’s notice of appeal filed June 13, 2018 and page number.

“AD__” refers to the appendix containing the appealed decision and the page number.

STATEMENT OF FACTS

S.S. moved to New Hampshire in December 2012. T 25. Prior to moving to New Hampshire, S.S, who was 82 years old, lived in New Orleans with her husband, Sheldon. T 19, 26. S.S. and Sheldon had three children: Lynn Coatney, Kimberly Gibson, and Andrew Seibel. T 19-20, 26, 213-214. Andrew Seibel was married to the defendant, Elizabeth Seibel at all times relevant to this case. T 21-22, 213-214. The defendant commonly goes by the name Lisa Seibel. T 22.

In May of 2012, Lynn's daughter disclosed that Sheldon had sexually abused her at a young age. T 28, 87, 215. The disclosure destroyed Lynn's relationship with S.S. and Sheldon. T 215-216. S.S. decided that it was best for her and Sheldon to move out of New Orleans and relocated to New Hampshire to be close to Andrew and the defendant. T 28. Since Sheldon was suffering from significant health problems at the time, S.S. moved them into an assisted living facility in Littleton. T 28-29. Shortly after arriving in New Hampshire, Sheldon committed suicide. T 27, 29, 216.

During their marriage, Sheldon was responsible for managing all of the finances because, as S.S. put it, she came from the era "[w]hen men handled the finances, the women said '[Y]es.'" T 30. Sheldon would pay bills, file income taxes and balance bank accounts, while S.S. would sign financial documents at his direction without reading them. T 217. S.S. was also incapable of using a computer and did not know how to use online banking. T 39, 197, 218.

Following Sheldon's death, all of S.S.'s money was held at Chase Bank. T 31. In early January 2013, S.S. owned a Chase checking account ending in 5185 ("Chase 5185") containing over \$11,000 and four CDs with Chase valued at \$110,000. DBAI 46. The CDs were the result of money that had been inherited from one of Sheldon's aunts. T 34. S.S. and Sheldon put the inherited money into CDs with the hope that the money would be enough to take care of them until they died. T 34. Due to the high costs associated with Sheldon's death, S.S. telephonically cashed out one of her CDs, valued at \$20,000, in February 2013. T 35-37, DBAI 62, 457. The defendant assisted S.S. with cashing the CD because S.S. did not know how to do so on her own. T 36-37.

Following Sheldon's death, S.S. executed a durable power of attorney that granted Andrew the authority to act on her behalf. T 37-38, 88-91; DBAI 6. The durable power of attorney also authorized the defendant to act on S.S.'s behalf if Andrew was incapable of doing so. T 90; DBAI 6. In December 2012, S.S. opened a checking account with Bank of New Hampshire ending in 9487 ("BNH 9487"). DBAI 145. S.S. was initially the sole owner of the account. DBAI 145. In January 2013, Andrew and the defendant added themselves to BNH 9487 as joint owners. T 45; DBAI 143. S.S. discovered that the defendant and Andrew added themselves as joint owner on her account when she saw all three names printed on her checks. T 45. S.S. thought it was "poor business" to comingle finances and did not like the idea of Andrew or the defendant being joint owners on her account. T 46. When S.S. confronted them about adding themselves to the account, the defendant and Andrew convinced

S.S. that it would be beneficial because it would make it easier to pay bills. T 46.

Andrew and the defendant never contributed any money into BNH 9487 during its existence. T 316. Beginning in January 2013, BNH 9487 was funded with money from multiple sources that belonged solely to S.S. T 292-93, 297, 301-02, 316-17. The account was primarily funded with approximately \$18,000 from Chase 5185, \$28,000 in life insurance proceeds and approximately \$3,500 each month from social security and pension payments. T 291-92; DBAI 261, 264, 288, 293, 456.

In March 2013, S.S. moved from Littleton to a condominium in Conway to be closer to Andrew and the defendant. T 40-41. Between March and August 2013, S.S. lived independently, paid her own bills, did her own grocery shopping, and cooked for herself. T 42. S.S. saw Andrew and the defendant frequently for meals. T 43. Anytime S.S. needed to reimburse Andrew or the defendant for anything or wanted to give them gifts, she did so by writing them checks. T 43; DBAI 240, 244, 252, 256.

Between May and August 2013, no debits or withdrawals were made from Chase 5185. DBAI 79-93. The balance of Chase 5185 was \$1,069.32 and had been growing by approximately \$174 each month. DBAI 92. The monthly growth was attributable to interest from S.S.'s remaining CDs. DBAI 92. In September and early October, the defendant made three online transfers totaling \$1,100 from Chase 5185 to a Chase account ending in 7432 ("Chase 7432") belonging to the defendant. T 295-296; DBAI 464. The transfers effectively moved all of the interest that had been earned from S.S.'s CDs during the prior four months into the defendant's Chase account and into her control. DBAI 459-464. These online transfers marked the

beginning of regular online transfers of S.S.'s funds into the defendant's Chase 7432 account that continued for months. DBAI 464-472.

On October 28, 2013, the defendant transferred \$1,000 from BNH 9487 into Chase 7432 by online transfer. T 297; DBAI 224, 393, 465. The defendant then withdrew the \$1,000 from Chase 7432 by writing herself a check the same day. T 297; DBAI 394, 426. On November 21, 2013, the defendant transferred another \$1,000 from BNH 9487 to Chase 7432 by online transfer. T 297; DBAI 219, 393, 466. The defendant then withdrew the \$1,000 by writing herself a check the following day. DBAI 219, 398, 428. On December 20, 2013, the defendant transferred another \$1,000 from BNH 9487 into Chase 7432 by online transfer. T 297-98; DBAI 215, 401. The defendant then withdrew the \$1,000 by writing herself a check the following day. T 298; DBAI 401, 432. On January 30, 2014, the defendant transferred another \$1,000 from BNH 9487 into Chase 7432 by online transfer. T 298; DBAI 211, 405, 468. The defendant then withdrew the \$1,000 by writing herself a check the same day. DBAI 406, 436.

On February 25, 2014, two of S.S.'s CDs valued at \$20,000 each were telephonically cashed out and transferred to Chase 5185. T 302; DBAI 469. S.S. was unaware of the transactions and did not authorize anyone to cash out her CD's. T 52, 66, 84. Between February 27 and March 3, 2014, the \$40,000 proceeds from the sale of the CDs were transferred into BNH 9487 in four \$10,000 online transfers. T 302; DBAI 205, 469-470.

The day after S.S.'s CD's were cashed out, the defendant transferred \$2,000 from BNH 9487 into Chase 7432 by online transfer. T 302; DBAI 206, 469. The funds remained in the defendant's bank account and she quickly used them to purchase airfare and made other personal purchases.

DBAI 409-410. On March 26, 2014, the defendant transferred another \$1,000 from BNH 9487 to Chase 7432 by online transfer. T 302; DBAI 201, 413, 470. The funds remained in the defendant's account and she used them to make various personal purchases. DBAI 414. On April 14, 2014, the defendant transferred another \$1,000 from BNH 9487 into Chase 7432 by online transfer. T 305-06; DBAI 202, 414, 202, 471. The funds remained in the defendant's account and, again, she used them to make several purchases in Texas and California. DBAI 420.

In March 2014, Andrew and the defendant approached S.S. and claimed that they were planning to purchase a house on the Saco River in Conway ("the River House") and they proposed that she should move in with them and pay rent equivalent to what she was paying for her condominium. T 47, 201. Andrew and the defendant told S.S. that by living with them and contributing her share, S.S. would make it easier for them to afford the bills. T 47. Although S.S. valued her independence, she agreed to move in with Andrew and the defendant because she wanted to be helpful if she could. T 47.

The defendant contacted a real estate agent in late March and expressed interest in buying the River House. 46-47, 172. Later that day, Andrew, S.S. and the defendant visited the property with realtor Spring McKenney. T 171. During the showing, Andrew and the defendant were enthusiastic about buying the property and signed a Brokerage Relationship Disclosure Form acknowledging that they were customers of the real estate agency. T 172; DBAII 57. S.S. was unimpressed with home. T 48. S.S. told the defendant that she thought the home needed too much work and would be too expensive to renovate. T 48-49. Despite S.S.'s concerns, she agreed

to move into the home and pay rent because her financial contribution would make the project affordable for Andrew and the defendant who were very enthusiastic about the house. T 49, 52.

The defendant served as the primary point of contact with McKenney throughout the purchasing process. T 174. Whenever documents needed to be signed, McKenney would email the documents to the defendant who would scan and email signed copies back to her. T 175. Once it became time to make an offer on the property, the defendant began emailing documents indicating that S.S., not Andrew and the defendant, would be buying the house. T 174. S.S. never signed any documents in front of McKenney. T 175. Throughout her involvement in the transaction, McKenney, at the defendant's direction, would email documents needing S.S.'s signature to the defendant. T 175. The defendant would return the documents to McKenney, signed by S.S. T 175

Although S.S. signed several documents indicating that she was the buyer, she was unaware that she was purchasing the home. T 79. Prior to moving into the River House, the defendant asked S.S. to sign a significant number of documents without giving her time to review them. T 79-80. The defendant asked S.S. to sign documents quickly without affording her with an opportunity to review or understand what she was signing. T 79. S.S. signed the documents without understanding them because she trusted the defendant. T 79. Neither the defendant nor Andrew asked S.S. if she would be willing to purchase the River House. T 48. If anyone had asked S.S. to consider purchasing the River House, she would have declined due to her age and the amount of work it needed. T 48.

One of the documents S.S. signed was a “Special Power of Attorney” that granted the defendant broad powers to act on her behalf regarding the purchase of the River House. DBAII 10. The document specifically stated that the defendant was not permitted to use S.S.’s money for her own benefit or to make gifts to herself or others. DBAII 10. Although S.S. signed the document, her signature was notarized outside of her presence at Andrew’s request. T 253-54. The “Special Power of Attorney” also contains an illegible signature of an individual who allegedly witnessed the signing of the document. T 284. Despite a thorough investigation, law enforcement have been unable to determine the identity of the witness. T 284-85.

Meanwhile, the defendant’s online transfers of S.S.’s money into her personal account continued. T 306-07. On April 30, 2014, the defendant transferred another \$2,000 from BNH 9487 into Chase 7432 by online transfer. T 306; DBAI 198, 419, 471. On May 15, 2014, the defendant transferred an additional \$2,000 from BNH 9487 into Chase 7432 by online transfer. T 306-307; DBAI 198, 419,472. As with the prior transfers, the funds remained in the defendant’s account and she used them to make various personal purchases. DBAI 420-424.

In May 2014, S.S.’s last remaining CD, valued at \$50,000 was redeemed by telephone without her knowledge and deposited into Chase 5185. T 158, T 308, 312, DBAI 128. Between May 12 and May 22, over \$50,000 was moved from Chase 5185 to BNH 9487 by six online transfers. T 308, 312, DBAII 472. Andrew and the defendant used the funds to complete the purchase of the River House, even though neither asked S.S.

for permission to cash out her CDs or spend her money to purchase the River House. T 50-52,

On May 7, 2014, two checks were drawn on BNH 9487 that were noticeably different from all other checks written by S.S. during the account's existence. T 306-07; DBAI 452-54. The checks were different because although S.S. signed them, the defendant filled in the remainder of the information on the checks. T 306; DBAI 452-53. Both checks were made out to the real estate agency for the payment of escrow money in conjunction with the purchase of the house. T 306; DBAI 452-53.

On May 8, 2014, Andrew and the defendant opened a second joint checking account at Bank of New Hampshire ("BNH 2731"). DBAI 322. Like the prior joint account, BNH 2731 was owned jointly by S.S., Andrew and the defendant. DBAI 322. The only debit card issued on the account was issued to the defendant. T 310-11. S.S. was not aware that a second joint account had been opened. T 53, T 288. On May 20, 2014, \$20,000 of S.S.'s money was moved by online transfer from BNH 9847 to BNH 2731. DBAI 378. The following day, the defendant began writing checks against BNH 2731 to pay for renovations to the house. DBAI 380.

The closing was scheduled for May 30, 2014. T 311. The defendant attended the closing and used her authority as S.S.'s power of attorney to sign mortgage documents on S.S.'s behalf. DBAII 14-23. The defendant also withdrew \$23,269.60 from BNH 9487 to use as a down payment on the house. T 308, 311; DBAI 194. Despite meticulously calendaring appointments and events in her life, S.S. did not have the closing marked on her calendar. T 81. The day before the closing, Andrew called the real estate agent and falsely claimed S.S. was feeling ill and would not be

attending the closing. DBAII 62. S.S. was healthy at the time of the closing and attended a regularly scheduled exercise session that day. T 81, 273-74, 276. With S.S. absent, the defendant obligated S.S. to a 30 year, \$173,250 mortgage. DBAII 14.

S.S., Andrew and the defendant moved into the River House the following month. T 54. The defendant began using S.S.'s money to pay for expenses associated with the house. T 318. From May 2014 to May 2015, approximately \$90,000 of S.S.'s money was transferred online from BNH 9487 to BNH 2731. T 328, 332, 336, 340, 342, 346, 352, 358, 364, 368, 372, 378; DBAII 475-484. There were no other sources of income into BNH 2731. T 316. The defendant wrote \$42,370.87 worth of checks on BNH 2731, and made \$33,034.29 in debit card purchases on that account. T 312-15, 357; DBAI 472-84; DBAII 61.

The defendant also used a significant amount of S.S.'s money for personal purchases and gifts to herself. The defendant wrote herself six checks in 2014 totaling \$2,850. DBAII 4. In 2015, the defendant made multiple personal purchases unrelated to the River House² that were not for the benefit of S.S. including payments for her and Andrew's motor vehicle registrations, credit card bills and cell phone bills. In total, the defendant spent approximately \$2,285 of S.S.'s money after January 01, 2015³ that was not for the benefit of S.S. T 67-74. Once S.S. moved into the River

² Since S.S. was living in the River House, payments using S.S.'s money that were related to the River House were not included in calculating the total amount of the financial exploitation because they were arguably for S.S.'s benefit.

³ RSA 631:9 financial exploitation of an elderly disabled or impaired adult became effective on January 01, 2015.

House, she was unable to access her bank statements without assistance from Andrew or the defendant. T 60. S.S. did not know how to check her statements online and her mail was delivered to a post office box that she shared with Andrew and the defendant. T 39, 61. On one occasion, in response to S.S.'s request to see her bank statements, the S.S. asked the defendant responded "everything was alright" and "[she]" did not need to see [the statements]." T 60. The defendant eventually provided S.S. with her bank statements after putting it off several times. T 60. S.S. was used to reviewing her bank statements monthly but never asked for her statements again since it was such an ordeal the first time she asked. T 60-61.

S.S. lived in the house with Andrew and the defendant for approximately one year. T 53-54, 62-63. During this time, S.S. assumed that Andrew and the defendant were both contributing money into BNH 9487. T 61, 202. In February 2015, Andrew lied to S.S. by claiming that the CDs had been used to settle a lawsuit that had been brought against her. T 82, 202. No such lawsuit was ever filed. T 83, 216-17.

In June 2015, S.S.'s friend Carol Schuster was visiting from Texas and they decided to check the mail while running errands. T 61-63. While reviewing the mail, S.S. saw a mortgage statement that indicated that she owned the River House. T 63-63. S.S. became extremely upset and told Schuster that she thought Andrew and the defendant owned the house. T 201. S.S. thought she was only paying rent and helping with grocery and utility bills as Andrew and the defendant had represented to her when they suggested she move in with them. T 47, 201.

S.S. and Schuster went to the bank and learned that the S.S. had a second account at Bank of New Hampshire that was used to pay the vast

majority of the household bills. T 203. S.S. learned that her \$90,000 in remaining CDs were depleted and used to fund BNH 2731 without her knowledge or authorization. T 52, 66, 203.

S.S. sought the assistance of an attorney in order to gain a better understanding of her situation. T 64, 201, 204, 225-26, 228. When Andrew learned that S.S. had met with an attorney, he berated her and told her that she was suffering from Alzheimer's disease. T 205-206. S.S. and her attorney met with Andrew a few days later to try to get some clarity as to what had happened. T 239. Andrew was dismissive of S.S. and again claimed that she was suffering from Alzheimer's disease. T 239. S.S. did not have Alzheimer's disease or display any significant memory issues to those who interacted with her at this time. T 197, 206, 261, 229. During the Conway Police Department's investigation of this matter, Detective Ryan Wallace interviewed Andrew and the defendant and neither claimed that S.S. was forgetful or suffered from dementia. T 325. S.S. testified cogently at trial and the court found her to be a credible witness. T 400, 402, 404.

At the conclusion of the State's case, the defendant moved to dismiss all of the charges based on insufficiency of the evidence. T 366. Regarding the theft charges, the defendant argued that the evidence was insufficient because the State did not prove the defendant knew S.S. had not authorized the transfers or purchases. T 366-67, 371-72. Regarding the financial exploitation charge, the defendant argued that the evidence failed to show that the defendant violated a fiduciary duty to S.S. T 367, 380-83. Specifically, the defendant claimed the State failed to prove that she was acting in her capacity as S.S.'s power of attorney at the time she breached her fiduciary obligation. T 380. The court denied the defendant's motions

to dismiss. T 399-407. The defendant renewed her motions at the conclusion of the evidence. T 429. Once again, the court denied the motions. T 406-07.

The trial court found the defendant guilty of all three charges. T 468-69. Following trial, the defendant filed a motion to set aside the verdicts and a supporting memorandum. DBAII 65, 67. The court denied the motion, finding sufficient direct and circumstantial evidence on all three charges of the defendant's acts and mental state. AD 3. The trial court found the evidence sufficient to exclude all rational conclusions other than guilt beyond a reasonable doubt. AD 3.

SUMMARY OF THE ARGUMENT

I. The State's evidence was sufficient to prove all elements of the theft by unauthorized taking charge resulting from online transfers of S.S.'s funds into the defendant's personal bank account. S.S. testified that she never authorized the defendant to make any online transfers to herself. At the time the defendant made the transfers, she was aware that S.S. did not want a joint bank account and only agreed to the arrangement based on the defendant's representation that it would make it easier to assist S.S. with paying bills.

II. The State's evidence was sufficient to prove all elements of the theft by unauthorized taking charge resulting from unauthorized expenditures of S.S.'s funds from BNH 2731 to purchase, renovate and pay for all significant expenses associated with the River House. S.S. testified that the defendant deceived her into believing that the defendant and Andrew were purchasing the house and S.S. would only be paying rent. S.S. further testified that she told the defendant that she thought purchasing the house was a bad idea because of how expensive it would be. The state submitted both direct and circumstantial evidence that proved beyond a reasonable doubt that the defendant intentionally attempted to prevent S.S. from discovering that she and Andrew were using S.S.'s money to purchase and fund the house.

III. The State's evidence was sufficient to prove all elements of financial exploitation of an elderly adult. The defendant owed S.S. a fiduciary obligation recognized in law pursuant to a "Special Power of

Attorney” that authorized her to act on S.S.’s behalf. The terms of the fiduciary obligation as established by the language of the “Special Power of Attorney” required the defendant to observe the standards of a prudent person when dealing with S.S.’s property and prohibited her from using S.S.’s money for her own benefit. S.S. testified that the defendant used her funds to make numerous purchases that were not for S.S.’s benefit. The State was not required to prove that the defendant used her capacity as a fiduciary to make the unauthorized purchases.

ARGUMENT

I. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT’S CONVICTION FOR THEFT BY UNAUTHORIZED TAKING FOR MAKING MULTIPLE ONLINE TRANSFERS OF FUNDS FROM S.S.’S BNH ACCOUNT ENDING IN 9487 INTO THE DEFENDANT’S PERSONAL CHASE BANK ACCOUNT ENDING IN 7432 WHERE THE EVIDENCE SHOWED THE DEFENDANT KNEW S.S. HAD ONLY AUTHORIZED HER TO BE A JOINT OWNER FOR THE LIMITED PURPOSE OF HELPING HER PAY BILLS.

The defendant asserts that the State submitted insufficient evidence to prove that she knew S.S. had not authorized her to transfer funds from BNH 9487 into the defendant’s personal Chase bank account. DB 23. Since “[a] challenge to the sufficiency of the evidence raises a claim of legal error[,] . . . [this Court’s] standard of review is *de novo*.” *State v. Folley*, 172 N.H. 760, 766 (2020). When reviewing a sufficiency of the evidence challenge, this Court objectively reviews the entire trial record, including evidence presented by the defendant, to determine whether any rational trier of fact could have found all elements of the crime beyond a reasonable doubt, “considering all the evidence and all reasonable inferences drawn therefrom in the light most favorable to the State.” *State v. Saintil-Brown*, 172 N.H. 110, 117 (2019). It is the defendant’s burden to demonstrate that the evidence was insufficient to prove guilt. *Id.*

“In reviewing the evidence, [this Court will] examine each evidentiary item in the context of all the evidence, not in isolation.” *State v. Kelly*, 159 N.H. 449, 455 (2009). “The trier of fact may draw reasonable

inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom.” *Id.*

“[W]here the proof involves both direct and circumstantial evidence, a sufficiency challenge must fail if the evidence, including the [fact finder’s] credibility determinations, [are] such that a rational trier of fact could find guilt beyond a reasonable doubt, even if the evidence would support a rational conclusion other than guilt if the [fact finder] had resolved the credibility issues differently.” *State v. Saunders*, 164 N.H. 342, 352 (2012). However, if the proof involves wholly circumstantial evidence, the question is “whether, even assuming all credibility resolutions in favor of the State, the inferential chain of circumstances is of sufficient strength that guilt is the sole rational conclusion.” *Id.* The Court’s analysis “is not whether every possible conclusion consistent with innocence has been excluded, but, rather, whether all *reasonable* conclusions other than guilt have been excluded.” *Saintil-Brown*, 172 N.H. at 117 (emphasis added).

In this case, the State offered both direct and circumstantial evidence that the defendant knew she was not authorized to transfer S.S.’s money into her personal account. The defendant argues that the State’s evidence was insufficient because it failed to disprove the possibility that Andrew had tricked the defendant into genuinely believing that all of her conduct was authorized, and also argues that such an alternative conclusion was reasonable. DB 23. The defendant’s argument must fail because it applies the wrong legal standard. Since the State offered both direct and circumstantial evidence to prove the defendant’s knowledge that S.S. had not authorized her conduct, this Court considers whether the defendant has

met her burden of establishing that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Saunders*, 164 N.H. at 352.

Direct evidence is evidence that directly proves the fact for which it is offered, without requiring the factfinder to draw any inferences. *Kelly*, 159 N.H. at 453. Direct evidence specifically includes “the testimony of a person who claims to have personal knowledge of facts about the crime charged such as an eyewitness.” *Id. quoting State v. Newcomb*, 140 N.H. 72, 80 (1995). Perhaps the most significant direct evidence of the defendant’s knowledge was S.S.’s testimony regarding her initial discovery that BNH 9487 had been converted into a joint account. T 45-46. S.S. testified that she was surprised and concerned when she looked at her checkbook and discovered that Andrew and the defendant had been added as joint owners on BNH 9487. T 45-46. Upon discovering that her account had been converted into a joint bank account, S.S. testified that she asked “them” why they added themselves to the account and testified that that both the defendant and Andrew said that having a joint account would make it easier to pay bills. T 45-46. S.S. testified that she strongly believed that finances should be kept separate so that “each one knows what he’s doing and you don’t get in the way of the other.” T 46. S.S. described her conversation with the defendant about the joint account as going “through a deal” where the defendant claimed that having a joint account was in S.S.’s best interest because they would be able to assist her with paying bills. T 46.

S.S.’s testimony was direct evidence that the defendant knew that S.S. was unhappy about idea of sharing an account with the defendant and preferred that their finances be kept separate. S.S.’s testified that in

response to her concerns about the joint account, the defendant and Andrew attempted to justify their actions by claiming that a joint account would allow them to assist S.S. with paying bills. S.S.'s testimony is direct evidence that the defendant was aware that she was not authorized to transfer money to herself without authorization from S.S. and was only allowed to use S.S.'s money to assist her with paying bills.

In her brief, the defendant argues that the Court should minimize S.S.'s testimony when she refers to Andrew and the defendant as a collective unit without distinguishing between them. DB 24. While it is true that S.S. commonly answered questions by referring to Andrew and the defendant as "they", S.S. also distinguished between the two of them when she intended to indicate that only one was involved. *See, e.g.*, ("Andy said we had to use the rest of the CDs to fulfill a lawsuit"; T 82 ("Andy was waiting for me, sitting there and wanting to know why I had gone to the lawyer")). T 65. The defendant seems to ask the Court to scrutinize S.S.'s testimony and question whether she truly meant what she said. Such scrutiny would be inconsistent with the Court's standard of review. Since the Court is required to take the evidence and all reasonable inferences therefrom in the light most favorable to the State, the Court must assume that S.S. meant what she said and intentionally used the word "they" when intending to testify that both Andrew and the defendant took part in the conversation and referred to them individually when intending to convey that only one of them was involved.

S.S. additionally testified that she never authorized Andrew or the defendant to make any online transfer of her funds into their personal accounts. T 44. On the one occasion where S.S. wanted to make an online

transfer to pay for her late husband's medical and funeral expenses, she solicited the defendant to assist her with cashing out a CD and transferring the money. T 35-37. Accordingly, the defendant was aware that S.S. could not transfer money on her own and would seek help when she wanted her money transferred.

S.S. also testified that anytime she wanted to reimburse the defendant or give her money as a gift, she would do so by either writing a check or giving her cash. T 44. The records for BNH 9487 show a documented history of S.S. regularly writing modest checks to the defendant and others consistent with gifts and reimbursements. *See, e.g.*, (Check written to the defendant for \$400 with a memo line reading "BD") DBAI 188; (Check written to the defendant for \$200 with a memo line reading "makeup"). DBAI 244; *See also* DBAI 209, 240, 252, 256. The defendant's knowledge that S.S. would historically seek help when looking to transfer money and would write a check or provide cash when she wanted to make a gift on her own constituted additional evidence of her awareness that that S.S. had not authorized the online transfers.

Finally, the defendant's conduct showed a deliberate effort to take S.S.'s funds in increments that were small enough that S.S. would not notice. Between October and May 2014, the defendant made one online transfer each month for either \$1,000 or \$2,000. DBAI 465-472. The value of the transfers only increased to \$2,000 after several months of successfully taking \$1,000 without S.S. noticing. The defendant's decision to steal smaller sums of money from S.S. over a prolonged period instead of taking one or two large withdrawals was evidence that she was

attempting to conceal her conduct from S.S. and her knowledge that the withdrawals were unauthorized.

In the event this Court finds that the State's evidence of the defendant's mental state was purely circumstantial, the defendant's challenge still must fail. The defendant argues in her brief that the evidence did not rule out the possibility that Andrew deceived the defendant into believing that S.S. had authorized the online transfers and that the defendant acted in good faith when taking S.S.'s money for her personal use. DB 23. At the outset, there was no evidence introduced at trial by either party supporting Andrew's alleged deception of the defendant. Based on the evidence that was introduced, the possibility that the defendant was acting in good faith based on Andrew's deception is not a reasonable alternative to guilt. *Saintil-Brown, 172 N.H. at 117* (stating that the proper analysis is whether every *reasonable* conclusion consistent with innocence has been excluded, as opposed to every possible conclusion) (emphasis added).

The defendant knew S.S. was elderly, recently widowed, and had limited financial resources to support her needs for the duration of her life. Specifically, the defendant had recently assisted S.S. with cashing out a \$20,000 CD in order to pay for the extensive medical costs that her late husband had endured at the end of his life. T 35. S.S. testified that her hope was that the remaining CDs would be available to cover any unforeseen medical expenses she incurred throughout the remainder of her life. T 35. S.S. made clear to the defendant that she did not like the idea of mixing their finances together and believed that having a joint bank account was "poor business." T 46. The possibility that the defendant genuinely believed

that a few months later, S.S. abruptly stopped being concerned with money, abandoned her prior gifting tendencies, and authorized the defendant to spend her savings as she saw fit, based on nothing more than Andrew's representation is preposterous. Such an alternative is not reasonable, nor is it supported by a scintilla of evidence. Since the State is only required to disprove all *reasonable* conclusions other than guilt, the defendant has failed to meet her burden. *Saintil-Brown, 172 N.H. at 117* (emphasis added). The defendant's conviction for theft by unauthorized taking on the charge relating to unauthorized online transfers should be affirmed.

II. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR THEFT BY UNAUTHORIZED TAKING FOR MAKING MULTIPLE PERSONAL PURCHASES USING FUNDS FROM S.S.'S BNH ACCOUNT ENDING IN 2731 FOR THE PURPOSE OF PURCHASING, RENOVATING, FURNISHING AND PAYING NEARLY ALL EXPENSES ASSOCIATED WITH THE RIVER HOUSE WHEN THE DEFENDANT KNEW THAT S.S. DID NOT KNOW THAT THE HOME WAS BEING PURCHASED IN HER NAME AND THE DEFENDANT MADE MULTIPLE EFFORTS TO CONCEAL THE EXPENSES FROM S.S.

The defendant similarly argues that the trial court erred when it found the State's evidence sufficient to prove that the defendant knew that S.S. did not authorize the use of her funds to pay for essentially all expenses associated with the purchase of the River House. DB 23. There was overwhelming direct and circumstantial evidence that the defendant knew S.S. had not authorized her to use her funds to purchase or renovate the house. S.S. testified that both the defendant and Andrew took part in the initial conversation where S.S. was told that *they* were going to purchase a house and that they invited S.S. to live with them. T 47 (emphasis added). S.S. testified that both the defendant and Andrew deceived her during this conversation by claiming that S.S.'s financial commitment would be limited to paying rent equivalent to what she was currently paying at her condominium and assisting with some bills. T 48, 199. S.S.'s testimony was direct evidence of the defendant's knowledge that S.S. believed the defendant and Andrew were purchasing the home and had not authorized either of them make S.S. the purchaser of the home or to use her money to purchase, renovate, furnish or otherwise finance the home.

S.S. also testified that she was not enthusiastic about the proposal because she valued her independence, but agreed to the move into the home because she wanted to be helpful. T 48. Since S.S.'s sole reason for agreeing to the arrangement was to help the defendant and Andrew with being able to afford the home, the defendant was unquestionably aware that S.S. believed the defendant and Andrew would be purchasing the home and would be paying for the majority of the bills and expenses.

After S.S. agreed to the proposal, the defendant arranged with McKenney to view the house and did the majority of the talking during the showing. T 172, 174. McKenney testified that Andrew and the defendant identified themselves as the potential purchasers and spoke during the showing about how the home was going to work for their needs. T 174. S.S. was present for the showing but viewed only a portion of the home and then elected to wait in the car while the defendant and Andrew finished viewing the property. T 173. S.S. testified that after viewing the house, she made it clear to the defendant that she thought they were making a mistake by buying the property because it needed extensive work and it was going to be very expensive to renovate. T 48-49. The trial court accordingly heard direct evidence that the defendant knew S.S. was unimpressed by the home, thought that purchasing it would be a mistake and thought that it would cost too much money for the defendant and Andrew to renovate. Since S.S. expressed her concerns to the defendant at a time when she falsely believed that the defendant would be shouldering the bulk of the costs, the defendant unequivocally knew that S.S. would be unwilling to take on the massive expenditures on her own without any financial contribution from the defendant or Andrew.

In the event the Court finds that the State's evidence of the defendant's mental state was purely circumstantial, the defendant's challenge still must fail. In addition to the direct evidence already discussed, the trial court also heard overwhelming circumstantial evidence establishing the defendant's knowledge that her conduct was unauthorized. The evidence of the defendant's knowledge was sufficient to exclude all reasonable alternatives other than guilt.

McKenney's testimony that the defendant maintained complete control of the home buying process and made deliberate efforts to prevent S.S. from learning that she would be purchasing the River House and paying for the renovations is one example of the circumstantial evidence of the defendant's knowledge that was heard by the trial court. McKenney testified that she emailed all necessary forms to the defendant who then emailed them back to her with S.S.'s signature. T 175. S.S. conceded that her signature appeared on several documents that indicated that she was purchasing the home but testified that she would frequently sign documents at the defendant's request without thoroughly reviewing what she was signing. T 79-80. S.S. testified that throughout the process the defendant gave her numerous documents and pressured her to sign them quickly without giving her an opportunity to review or understand their contents. T 79-80. The defendant's actions in this regard clearly demonstrated an effort to prevent S.S. from discovering that she and Andrew were planning to have S.S. purchase the home and use her funds to finance it. If the defendant genuinely believed that S.S. had authorized her to use her money to finance the home, she would have said this to S.S. and would not have

rushed S.S. into signing the documents without giving her an opportunity to review them.

The trial court also heard circumstantial evidence that the defendant made efforts to prevent S.S. from learning that her money was being used to make escrow payments during the home buying process. T 306.

Detective Wallace testified that throughout the year and a half that BNH 9487 was in existence, the defendant filled out only two checks. T 306.

Wallace testified that both checks appeared to be escrow payments made to the real estate agency and were by signed by S.S., but the remainder of the information on the checks including date, amount, payee and memo line was in the defendant's handwriting. T 306. Since S.S. frequently wrote checks on BNH 9487, the fact that the defendant filled in all information other than S.S.'s signature strongly suggests that she did so to prevent her from discovering what the checks were being used for. If the defendant genuinely believed S.S. had authorized the use of her funds for the purchase of the home, she could have simply asked S.S. to write the checks as she did on all other occasions throughout the existence of BNH 9487. The fact that the defendant only chose to fill in the information on the two escrow checks is strong circumstantial evidence that she knew S.S. had not authorized the use of her funds and wanted to conceal the truth from her.

The trial court also heard testimony from S.S. that after she moved into the home, the defendant was reluctant to let her review her bank statements. T 60. When specifically asked how the defendant responded to her request to review her statements, S.S. testified "[i]t was said that I didn't need to." T 60. In her brief, the defendant again asks the court to scrutinize S.S.'s testimony and find that she meant something other than

what she said. DB 24. S.S. was specifically asked how *the defendant* responded to her request to review her bank statements. T 60 (emphasis added). The fact that S.S. chose to respond by saying “it was said” instead of “she said” cannot be inferred to mean that S.S. was unsure about who made the statement. Such an inference would disregard the Court’s obligation to consider the evidence and all reasonable inferences therefrom in the light most favorable to the state. *Saintil-Brown*, 172 N.H at 117. The defendant’s reluctance to allow S.S. to review copies of her bank statements at a time when the bulk of her funds were being spent without her authorization is additional circumstantial evidence that the defendant was aware that her use of S.S.’s funds was unauthorized.

Based on the totality of the direct and circumstantial evidence discussed above, a rational trier of fact, taking all evidence and inferences therefrom in the light most favorable to the state could have found beyond a reasonable doubt that the defendant knew her conduct was unauthorized. The evidence allows for no other reasonable conclusion. Accordingly, the defendant cannot satisfy her burden and her conviction for theft by unauthorized taking relating to unauthorized use of S.S.’s funds from BNH 2731 should be affirmed.

III. THE COURT DID NOT ERR WHEN IT FOUND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR FINANCIAL EXPLOITATION OF AN ELDERLY ADULT WHEN THE DEFENDANT VIOLATED HER FIDUCIARY OBLIGATION TO OBSERVE THE STANDARDS OF A PRUDENT PERSON WHEN DEALING WITH S.S.'S MONEY, BY USING THE MONEY FOR HER OWN BENEFIT.

The defendant argues that the State failed to prove she breached a fiduciary obligation to S.S. after January 1, 2015. DB 26. The defendant's argument relies on two distinct theories. DB 26. First, the defendant argues that the durable general power of attorney only authorized her to act on S.S.'s behalf if Andrew became "unavailable or unable to act." DB 26; DBAI 6. The State agrees that the durable power of attorney did not create a fiduciary obligation for the defendant. The language of durable power of attorney clearly establishes a fiduciary responsibility for Andrew and only anticipates shifting that obligation to the defendant if he is unable act. DBAI 6. Although both powers of attorney were admitted as exhibits during trial, the court did not rely on the durable power of attorney as evidence that the defendant breached a fiduciary obligation, but rather relied on the "Special Power of Attorney." T 406, 486 (finding that the fiduciary obligation was established through the special power of attorney).

Second, the defendant argues that the state failed to introduce evidence that she actually exercised any fiduciary powers after January 1, 2015 when RSA 631:9 became effective. DB 27. In making her argument, the defendant claims, without citing any authority, that the State was required to prove that she acted in her capacity as S.S.'s power of attorney

in order to prove she breached her fiduciary obligation. DB 28. Such a conclusion is inconsistent with the plain language of RSA 631:9, I(a)(2).

There are several variants of RSA 631:9 for which a defendant's actions can amount to financial exploitation of an elderly adult. In this case, the State charged the defendant with violating RSA 631:9, I(a)(2). In order to obtain a conviction under RSA 631:9, I(a)(2), the State is required to prove that the defendant: (1) breached a fiduciary obligation to S.S., (2) for her own profit or advantage, (3) by taking the financial resources of S.S. for the benefit of someone other than S.S., (4) the defendant's conduct was not authorized by the special power of attorney, and (5) the defendant acted recklessly. Nothing in the plain language of RSA 631:9, I(a)(2) can be construed as limiting its applicability to actions that are taken in a person's capacity as a fiduciary. Rather, the Court looks to the terms of the instrument establishing the fiduciary obligation to determine whether the defendant has breached her fiduciary duty. *See Folley*, 172 N.H. at 769-770.

In this case, the "Special Power of Attorney" gave the defendant the broad power to "do anything whatsoever that [S.S.] may or could do in person, with regard to [her] purchase of property located at 732 White Mountain Highway, Conway, NH 03818." DBAII 10. Although the purchase of the property was completed in April 2014, the document clearly anticipated that the defendant's fiduciary power would continue indefinitely as the document authorized the defendant to "bargain, sell, convey, lease mortgage or discharge" the property after the purchase was complete. DBAII 10. The instrument also stated that the defendant was "under a duty ("called a fiduciary duty") to observe the standards observed

by a prudent person dealing with the property of another.” DBAII 11. The “Special Power of Attorney” further stated that the defendant was “not entitled to use [S.S.’s], money or property for [her] own benefit or to make gifts to [her]self or others unless the Special Power of Attorney” authorized her to do so. DBAII 11. The “Special Power of Attorney” did not authorize the defendant to use S.S.’s money for her own benefit or to make gifts to herself. DBAII 11.

S.S. testified that the defendant made numerous unauthorized purchases using her money after January 1, 2015. T 67-74. Although the defendant did not use her authority as power of attorney to access S.S.’s funds, she was under a fiduciary obligation to observe “the standards of a prudent person” using S.S.’s money at the time and was expressly prohibited from using it to make personal purchases or gifts to herself. DBAII 11. The fact that the defendant took the money from a joint bank account where she could access the funds without exercising her fiduciary powers does not absolve her of her fiduciary obligation to S.S. This is especially true in the present case where S.S. had no knowledge of the joint account at issue or knowledge that her funds were transferred into the account without her authorization.

The evidence established that the defendant used S.S.’s money for her own benefit, without authorization from S.S. or the instrument establishing her ongoing fiduciary obligation. Accordingly, the defendant’s conduct amounted to a breach of her fiduciary obligation as established by the “Special Power of Attorney.” The defendant has failed to satisfy her burden of proving that no rational finder of fact could have found the defendant breached her fiduciary obligation beyond a reasonable doubt.

The defendant's conviction for financial exploitation of an elderly adult should therefore be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a ten-minute 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

THE OFFICE OF THE NEW
HAMPSHIRE ATTORNEY GENERAL

February 22, 2021

/s/Brandon H. Garod

Brandon H. Garod

N.H. Bar No. 21164

Senior Assistant Attorney General

New Hampshire Department of Justice

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3671

CERTIFICATE OF COMPLIANCE

I, Brandon H. Garod, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,309 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

February 22, 2021

/s/Brandon H. Garod
Brandon H. Garod

CERTIFICATE OF SERVICE

I, Brandon H. Garod, hereby certify that a copy of the State's brief shall be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

February 22, 2021

/s/Brandon H. Garod
Brandon H. Garod