UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2257

September Term, 2014

TERRY ANN SHIPP

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: December 22, 2015

Following a bench trial in the Circuit Court for Prince George's County, Terry Ann Ship, appellant, was convicted of the following counts: (1) exploitation of a vulnerable adult, Md. Code (2002, 2012 Repl. Vol.), §8-801 of the Criminal Law Article ("Crim. Law"); (2) theft of at least $10,000 but less than $100,000, Crim. Law § 7-104(g)(1)(ii); and (3) theft at least $1,000 but less than $10,000, Crim. Law § 7-104(g)(1)(i). The court imposed concurrent sentences of 15 years, all but 30 days suspended, for exploitation of a vulnerable adult (Crim. Law) § 8-801, and 15 years, all but 30 days suspended, for theft at least $10,000 but less than $100,000 (Crim. Law) § 7-104(g)(1)(ii)[1] followed by a period of 5 years supervised probation. Additionally, the court ordered appellant to pay restitution to her victim, Dorothy Drogoz, in the amount of $109,901.26. Appellant noted a timely appeal and presents two questions, which we re-ordered for our review:

> [I]. [Whether] the evidence [was] legally insufficient to sustain [a]ppellant's conviction for obtaining the property of a vulnerable adult by undue influence?
>
> [II]. [Whether] the [circuit] court err[ed] in ordering restitution of $109,901.26?

For the reasons that follow, we shall affirm the judgments of the circuit court.

[1] The court merged the conviction for theft of at least $1,000 but less than $10,000, (Crim. Law) § 7-104(g)(1)(i), into the conviction for theft of at least $10,000 but less than $100,000, (Crim. Law) § 7-104(g)(1)(ii).

FACTUAL AND PROCERDURAL BACKGROUND

Beginning in May 2013, appellant, a certified geriatric nursing assistant, began working as an in-home healthcare attendant for 81-year-old Dorothy Drogoz, ("Ms. Drogoz"). Ms. Drogoz and appellant disagree regarding the details of their employment relationship. Ms. Drogoz testified that she hired appellant to perform duties such as paying bills, driving Ms. Drogoz to appointments, retrieving mail, running errands, and serving as her medical power of attorney. Appellant described a broader set of duties, however, both within Ms. Drogoz's home and beyond, ranging from caring for her dog to extensive cleaning of the house.

A dispute between the two pertains to their agreement regarding appellant's remuneration. Ms. Drogoz maintained at trial that they had agreed to an hourly rate of $9.50, and appellant asserted that the rate began at $20 per hour but increased to $25 per hour in July 2013 by a contract memorialized July 18, 2013, to that effect. Ms. Drogoz claimed not to have ever seen or signed the contract, and on the same day, she had been diagnosed with Alzheimer's disease.[2]

At issue are multiple checks made out to appellant and drawn from Ms. Drogoz's bank account. The payments by month were as follows:

May 2013	$2,691
June 2013	$3,087.15

[2] Ms. Drogoz's cousin, who held power of attorney for Ms. Drogoz, testified that the signature on the contract that was purportedly that of Ms. Drogoz was, indeed, not Ms. Drogoz's.

July 2013	$5,000
August 2013	$13,907
September 2013	$16,896
October 2013	$10,410
November 2013	$12,025
December 2013	$29,000[3]
January 2014	$16,436
February 2014	$5,869

Appellant contended these payments represent accurate remuneration for the services she performed for Ms. Drogoz, as demonstrated by a log she maintained of her work. Appellant testified that the increase in payments reflected an increase in the number of hours worked and the intensity of the work, including the need to enlist Shipp's uncle to assist, largely due to Ms. Drogoz's deteriorating mental health.[4] Ms. Drogoz denied authorizing any of these payments. She admitted that she signed the checks but claimed that appellant would fill in the amount to be paid. Ms. Drogoz also testified that appellant withheld the bank statements mailed to Ms. Drogoz's home but retrieved by appellant because Ms. Drogoz's immobility prevented her from retrieving her own mail. Appellant was terminated in February 2014. Charges were later filed against appellant based upon Ms. Drogoz's complaint.

[3] At times during trial, the December 2013 payment amount is referred to as $49,000, but that total would include a $20,000 check that was canceled.

[4] Appellant testified that her uncle's payment of $15 per hour "came out of the checks payable to [her]."

The circuit court found appellant guilty of the three counts as discussed above, reasoning:

> . . . I want to focus on the time frame of the July date where Ms. Drogoz was actually taken to a physician. And the information provided to the physician was actually provided by [appellant] regarding her inability to—her mental state.
>
> And it was based upon the testimony of [appellant] that we find that there was a contract entered into on the very date that [appellant] takes Ms. Drogoz to the doctor alleging that she is not totally with it. And the doctor, based upon some of the information provided by [appellant], makes a determination that there has been some impairment.
>
> [Appellant] further testified that prior to that, that she observed that Ms. Drogoz had hallucinations, that Ms. Drogoz was delusional. And yet, on that date, she decided to enter into a contract with Ms. Drogoz, who she's testified was not lucid.
>
> And thereafter, it is where we see the checks start to increase in amounts, and the visits to the doctor. And even the hospitalizations, when you look at the medical records, when she was brought to the hospital by [appellant], the information that was supplied to the medical advisors in the emergency room regarding Ms. Drogoz's altered state or mental capabilities was all provided by [appellant].
>
> So in a consultation report with Ms. Drogoz on February 6th of 2014, the psychiatric consultation report states that Ms. Drogoz was brought in. She's an 82-year-old African-American female. And she lives in a home with a healthcare attendant since last May.
>
> She was admitted for altered mental status and weakness, and she was referred to evaluate her competency. When she was interviewed, she said that her main complaint was that she thinks—and she was referring to her health person—she thinks I have hallucinations and anything. I lost my bank statement. She won't let me see the bank statement.
>
> She [w]as told since the beginning of the year several times by the healthcare attendant that she lost her bank statement. And she also told her

cousin about this two times, and the cousin drove down. She said she hasn't seen her bank statements since January, and the attendant gets the mail. I cannot go downstairs to get the mail.

* * *

And so it appears from the medical records, that in many of these instances, the issues with regard to mental status and impairment beyond what we would expect of an 82-year-old all came from the mouth of [appellant], the same [person] who entered into a contract with her and under whose sole custody or care Ms. Drogoz was in.

There's been no allegation that any of the information that's in the hospital report is incorrect or that any of the aspects of the hospital report that has been admitted, I believe through [appellant], are not true.

And so we have a woman who was totally reliant on [appellant] for medication, for care. She was totally responsible for Ms. Drogoz. And it was in her care that Ms. Drogoz was taken to the hospital with these allegations.

I've also had the opportunity to look through the logs that have been presented, and I find that they are not credible. I do not believe that they comport with the hours and with the time frames and with the amounts of the checks that have been submitted.

I have also had the opportunity to look at the receipts regarding expenses, and I find them to be exaggerated. I do not believe that they were single or small instances of inconsistencies. I do not believe they were accurate. . . .

I believe that [appellant] did intend and did, in fact, deprive Ms. Drogoz of her property by undue influence. And **I believe that the value is all of the checks after the July 18th date because that is the date that she signed a contract with a woman that she claimed up and to that date was hallucinating, was delusional** and had, in fact, taken to the doctor claiming as such.

> I find [appellant] guilty of Count 1, Count 2, and Count 3. And I find that the State has established that by beyond a reasonable doubt.

(Emphasis added). The circuit court's judgment of restitution was calculated by subtracting the payments made to appellant in May and June 2013 from the sum total of all payments made. Thus, of the $115,679.41 transferred to appellant, the court found $109,901.26 to be wrongly taken. This calculation was consistent with the court's finding that "the value is all of the checks after the July 18th date because that is the date that she signed a contract with a woman that she claimed up and to that date was hallucinating [and] delusional[.]"

DISCUSSION

I.

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence for her conviction on Count 1— exploitation of a vulnerable adult, Crim. Law § 8-801. When determining the legal sufficiency of evidence,

> we examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State. Moreover, we will ordinarily defer to the factual findings of the trier of fact, who is able to observe the demeanor of the witnesses and weigh their credibility.

Tarray v. State, 410 Md. 594, 607–08 (2009) (citations and quotation marks omitted).

Crim. Law § 8-801(b)(2) provides:

> A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.

The statute defines "[u]ndue influence" as "domination and influence amounting to force and coercion exercised by another person to such an extent that [the individual] was prevented from exercising free judgment and choice." Crim. Law § 8-801(a)(6)(i). At the outset, we observe that the Court of Appeals has also held that "the General Assembly intended to treat the crimes of theft and exploitation of a vulnerable adult as separate and distinct offenses." *Tarray*, 410 Md. at 610. Thus, appellant's conviction must rest upon one of the "modalities" outlined in the statute—deception, intimidation, or undue influence.

Appellant limits her appeal to the narrow question of whether there was sufficient evidence that she unduly influenced Ms. Drogoz. She contends that the State limited itself to undue influence in supporting the conviction because appellant's indictment included only that modality.[5] Appellant asserts that the State failed to present "anything that could

[5] Count 1 of the indictment reads:

> The grand jurors of the State of Maryland . . . do present that [appellant] on or about between the 15th day of May, 2013 and the 7th day of February, 2014, in Prince George's County, Maryland, **did with intent to deprive, knowingly and willfully obtain by undue influence**, US currency, having a value of at least $10,000 but less than $100,000 and belonging to [Ms. Drogoz], having reasonable knowledge that said victim is at least 68 years old, in violation of [ ]08-801(b) of the Criminal law Article[.]

(Emphasis added).

be equated with 'domination' or 'force or coercion' . . . to establish that [she] exerted 'undue influence' over Ms. Drogoz." The State disputes this, countering that appellant's control of Ms. Drogoz's financial assets while transferring the funds without her knowledge constitutes undue influence.

Both parties cite *Tarray v. State* for support, which appears to be the only reported appellate opinion concerning Crim. Law § 8-801. In that case, Mr. Wright, a man paralyzed from the waist down, hired Tarray as live-in caregiver "to help him perform his daily activities" and to provide some medical care at a salary of $350 per week. *Tarray*, 410 Md. at 599–600. During the course of her employment, Tarray demanded multiple pay raises, to which Mr. Wright assented, ultimately earning a weekly salary of $1000 per week. *Id.* at 600. Mr. Wright explained the reason for his agreement: "'Because . . . I was between a rock and a hard place. You know, where else am I going to go[?] I had no choice.'" *Id.* at 601 (alterations in original). Months later, after Mr. Wright had terminated Tarray's employment, he was hospitalized due to a urinary tract infection. *Id.* at 602. Tarray visited Mr. Wright at the hospital, and Mr. Wright agreed to (1) permit Tarray to continue to live in his home during the duration of his hospitalization and (2) transfer ownership of his truck to her after he had paid off its loan. *Id.* at 602–03. Mr. Wright again justified his agreement: "'Because I felt obligated due to them working for me . . . I didn't want to throw them out . . . on their ears.'" *Id.* at 603.

The Court of Appeals held "that the evidence was insufficient to support the conclusion that Tarray unduly influenced [Mr.] Wright, causing him to relinquish his property." *Id.* at 612. It reasoned:

> We note that although the circumstances surrounding the transfer of interest and possession with respect to the truck and house provide the State with its strongest argument in support of the presence of undue influence, any argument based on these circumstances fails. [Mr.]Wright's testimony rejects the notion that Tarray obtained the truck or house by "domination and influence amounting to force and coercion." At trial, [Mr.]Wright testified that he agreed to provide transportation and housing for Tarray because he felt obligated to do so out of a sense of loyalty in view of the benefit received from Tarray for prior services rendered. [Mr.] Wright's decision to part with his property in the way he did may seem unreasonable, but his testimony shows that he did so because of his own judgment rather than "force and coercion" to the extent that a vulnerable adult could not exercise his or her free will. *Cf. State v. Maxon*, 32 Kan. App.2d 67, 79 P.3d 202, 207–08 (2003) (concluding that the evidence was sufficient to show undue influence where the defendant orchestrated the transfers to coincide with the vulnerable adult's "manic or 'giving' periods"). Even though [Mr.] Wright was "between a rock and a hard place," as he testified, he still had the benefit of a choice.

Id. at 611.

In the case at bar, appellant highlights that the Court in *Tarray* concluded that the evidence was insufficient to find that Tarray unduly influenced Mr. Wright. Moreover, appellant points to *Tarray* for the proposition that her own acts could only conceivably be categorized as deceptive, and because the State relied upon undue influence and—she contends—"the same evidence cannot support a conviction" under two different modalities, reversal is required. The State distinguishes *Tarray* because the Court "relied on testimony by the victim showing that the transfer was because 'of his own judgment.'"

Here, the State argues, appellant's control over Ms. Drogoz's financial records and Ms. Drogoz's testimony that she was not aware of the payments made to appellant contradict any assertion that she transferred the funds because of her own judgment.

Viewing all reasonable inferences in the light most favorable to the State and deferring to the factual findings of the trier of fact, as we must when determining the sufficiency of the evidence, even assuming appellant's contention that the State has limited itself to the undue influence modality, we fail to see how no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Tarray*, *supra*, 410 Md. at 607–08 (citations and quotation marks omitted). We are persuaded that appellant exerted "domination and influence amounting to force and coercion . . . to such an extent that [Ms. Drogoz] was prevented from exercising free judgment and choice." *See* Crim. Law § 8-801(a)(6)(i). The Court of Appeals has stated that "[o]ne may infer coercion from the totality of the facts and circumstances surrounding the transfer of property." *Tarray*, 410 Md. at 610 (citation omitted).

The evidence presented at trial and the facts found by the circuit court suggest that appellant made large payments from Ms. Drogoz to herself in the form of personal checks of which Ms. Drogoz was unaware. Appellant took undue advantage of Ms. Drogoz's physical infirmity, preventing her from accessing or viewing her bank statements so as to monitor this behavior. And appellant entered into a contract with Ms. Drogoz increasing her own pay on the same day she brought Ms. Drogoz to a physician, suspecting dementia. We are satisfied that it was reasonable for the court to find these facts sufficient to conclude

that appellant exerted influence and domination sufficient to coerce Ms. Drogoz into obtaining her property in such a way that she was prevented from exercising free judgment and choice.

Tarray does not suggest otherwise. As summarized above, the Court rested its conclusion that Tarray had not exerted undue influence on the uncontroverted fact that Mr. Wright made the property transfers of his own free will. This key distinction places the facts of this case on the other side of the ledger. *Tarray* does not foreclose a conclusion that the evidence was sufficient to find appellant had unduly influenced Ms. Drogoz. Rather, the Court's emphasis upon free will underscores our conclusion that a rational trier of fact could have arrived at the conclusion reached by the circuit court.

II.

Restitution Order

Appellant's other assigned error relates to the circuit court's judgment ordering Shipp to pay $109,901.26 in restitution. Maryland Code (2001, 2008 Repl. Vol.), §11-603 of the Criminal Procedure Article ("Crim. Proc.") provides:

> (a) A court may enter a judgment of restitution that orders a defendant . . . to make restitution in addition to any other penalty for the commission of a crime . . . if:
>
> (1) as a direct result of the crime . . ., property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased;
>
> (2) as a direct result of the crime . . ., the victim suffered:
>
> * * *

(ii) direct out-of-pocket loss[.]

* * *

(b) A victim is presumed to have a right to restitution under subsection (a) of this section if:

(1) the victim or the State requests restitution; and

(2) the court is presented with competent evidence of any item listed in subsection (a) of this section.

We recently summarized Crim. Proc. § 11-603:

> Restitution, as applied in a criminal case under Maryland's Criminal Procedure 6 Article, is a criminal sanction, not a civil remedy. It serves at least three distinct purposes. First, it is a form of punishment for criminal conduct. Second, it is intended to rehabilitate the defendant. Lastly, it affords the aggrieved victim recompense for monetary loss. The predominant and traditional purpose of restitution is to reimburse the victim for certain kinds of expenses . . . incurred as a direct result of the defendant's criminal activity.

McCrimmon v. State, ___ Md. App. ___, No. 1255, Sept. Term 2013, slip op. at 5–6 (filed Oct. 27, 2015) (Internal citations and quotations omitted) (citation omitted).

Appellant does not quibble with the notion that restitution be made; rather, she contests the court's calculation. As stated above, the circuit court arrived at the restitution amount by crediting only the payments made to appellant in May and June of 2013. The restitution judgment reflects the entirety of the payments made to appellant beginning in July 2013, when questions regarding Ms. Drogoz's mental state arose. This calculation, appellant reasons, lacks the support of "competent evidence" principally because appellant continued to perform work for Ms. Drogoz after that time. Appellant points to the State's

contentions at trial that "[appellant] was entitled to $73,319.96 and . . . that $42,360.05 was the amount stolen from Ms. Drogoz." Because the appropriate metric for restitution is "either the victim's actual loss as a direct result of the crime . . . or actual expenses or losses, loss of earnings, or out-of pocket loss," appellant contends that "further proceedings are required to assess the proper restitution amount[.]" That the court simply ordered restitution in the amount of all money paid to appellant from July 2013 onward, appellant's argument, does not reflect the dictates of the restitution statute. She argues:

> The actual amount that [appellant] allegedly stole from Ms. Drogoz was not established by the State at trial and what was proffered by the State as an estimate was an amount drastically lower than what awarded by the court. The restitution award does not reflect the amount which was "stolen . . . converted, or unlawfully obtained." All testimony and evidence before the court was that [a]ppellant did provide such services to the victim during that period, which included such daily services as medication management, blood pressure management, cooking meals, changing diapers, and providing all personal and home care needs for the victim seven days per week. . . .
>
> The circuit court erred in failing to credit the value of the services provided by [appellant], none of which were contested by the State, from July 2013 to February 2014[.]

For its part, the State counters that its concessions as to the amount of restitution do not limit the court's final determination and that the court simply did not believe appellant's testimony regarding the work she alleged to have completed from July to February. The State highlights the court's explicit findings that appellant's work logs were not credible and that she was not "the one who provided care." Indeed, Ms. Drogoz's testimony suggests that appellant's uncle, and not appellant, performed the lion's share of the services

for Ms. Drogoz and that appellant appeared only occasionally to perform discrete tasks.[6] Thus, the State reasons, the restitution ordered is consistent with the court's findings.

We review a circuit court's restitution judgment for abuse of discretion. *Silver v. State*, 420 Md. 415, 427 (2011). Such abuse occurs when a circuit court "acts without reference to any guiding principles or rules of law or where no reasonable person would take the view adopted by the trial court." *Matoumba v. State*, 390 Md. 544, 552 (2006) (citation omitted). In reviewing what the circuit court may consider in arriving at its restitution amount,

> [Crim. Proc.] § 11–615 relaxes both the evidentiary burden and the hearsay rule with respect to restitution requests by making written statements or bills for medical, dental, hospital, counseling, funeral, and burial expenses admissible and legally sufficient evidence of the amount, fairness, and reasonableness of the charges and the necessity of the services or material provided. That section also places on a defendant who challenges the fairness or reasonableness of the charges or the necessity of the service the burden of proving that the amount is not fair or reasonable.

Chaney v. State, 397 Md. 460, 471 (2007).

Here, the circuit court was presented with conflicting evidence regarding the services performed by appellant, the salary to which appellant and Ms. Drogoz had agreed, and the physical and mental ailments under which Ms. Drogoz was suffering. The court expressly discredited much of appellant's testimony and found as a matter of fact that she had not performed services for Ms. Drogoz after May and June of 2013. Moreover, the

[6] Appellant and Ms. Drogoz presented drastically different accounts of the amount of care provided. For her part, appellant testified that she and her uncle regularly provided 24-hour care for Ms. Drogoz.

court explained its decision not to credit any work done after June 2013 "because that is the date that [appellant] signed a contract with a woman that she claimed up and to that date was hallucinating, was delusional and had, in fact, taken to the doctor claiming as such." Accepting these factual findings, as we must, and cognizant that appellant bears the burden of proving that the restitution amount is not fair or reasonable, we fail to see how the circuit court abused its discretion in arriving at the amount it ordered in restitution.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.