Circuit Court for Prince George's County
Case No.: CT220486X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 760

September Term, 2022

KIMBERLY DAWN EVERETT

v.

STATE OF MARYLAND

Zic,
Ripken,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: July 3, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant was convicted by a jury in the Circuit Court for Prince George's County of stealing $48,000 from her mother, Bonnie, shortly before her mother's death in October 2017. At the time, Bonnie was confined in a nursing home suffering from dementia and other ailments. What led to the charges against appellant was her unlawful withdrawal of that money from the mother's bank account, which she was able, but not authorized, to do pursuant to a Power of Attorney agreement signed by the mother several months earlier.

Four separate crimes were charged:

- Count 1: Theft of at least $25,000 (Code, Crim. Law Art (CL) §7-104) between October 4 and 10, 2017;
- Count 2: Counterfeiting of Orders for Money or Goods (CL §8-609(b)(3)) between October 6 and 10, 2017;
- Count 3: Embezzlement, Fraudulent Misappropriation as a Fiduciary (CL §7-113) between October 4 and 8, 2017; and
- Count 4: Embezzlement, Fraudulent Misappropriation as a Fiduciary (CL §7-113) between October 4 and 8, 2017.

Appellant was convicted and sentenced for all four crimes, but, as the result of suspensions entered with respect to those sentences, the effective sentence was six months in prison followed by five years of probation and restitution in the amount of $42,500 under Count 1. Appellant complains in this appeal (1) that the evidence was insufficient to sustain the convictions, (2) that the trial court abused its discretion by

allowing impermissible opinion testimony by a lay witness, and (3) that the convictions under Counts 2, 3, and 4 merge into the conviction under Count 1.

The State concedes that appellant's convictions under Counts 2, 3, and 4 do merge into the conviction under Count 1 and that the sentences imposed for those three convictions must be vacated. We agree.

BACKGROUND

In December 2004, Bonnie executed a Will leaving all of her net assets to her husband, George. That document is important to this case only with respect to Bonnie's signature on it and to the fact that appellant was named as an alternative personal representative of the estate if, as happened, Bonnie's husband predeceased her.

Following George's death in 2015 and an injury to her back in 2017, Bonnie was confined to nursing homes, initially in Virginia but ending up eventually in Scott's Convenient Living in Prince George's County, where, except for a brief hospital admission, she remained until her death on October 8, 2017. That facility was described by appellant's older sister Alisa as a private home in which Bonnie lived in "a very small bedroom." Alisa testified that in 2016, Bonnie was diagnosed with Parkinson's disease, had trouble taking her medications, and was getting anxious and taking falls, which is what led to her going into a nursing home.

According to appellant, the move to Scotts occurred in July 2017 and was arranged by appellant upon learning suddenly that Bonnie's insurance would no longer

pay for her residence at the Virginia facility. Appellant testified that the move to Scott's involved a monthly charge of $2,500 plus a deposit of $4,000, which she paid. She did not, at the time, inform the other members of the family of what she had done.

On May 31, 2017, while still residing at a nursing home in Virginia, Bonnie signed a Durable Power of Attorney appointing appellant, who lived in Maryland, as her attorney-in-fact with full authority to act on her (Bonnie's) behalf. That authority included managing and conducting all of Bonnie's affairs and exercising all of her legal rights and powers, including opening, maintaining, and closing bank accounts, making deposits and withdrawals, investing property owned by Bonnie, and entering into contracts on her (Bonnie's) behalf.

There were two limitations on these and other powers listed in the Power of Attorney. One was that, although her agent (appellant) was not to be liable for a "judgment error made in good faith," she "shall be liable for willful misconduct or the failure to act in good faith." The second limitation, in Bonnie's handwriting, was that appellant "is limited to her responsibility as my power of attorney [and] cannot make cash withdrawals without my permission" or "add her name to my account." The Power of Attorney was signed in Virginia and stated that it was to be governed by Virginia law.

Appellant's sister Alisa, whom appellant regarded as abusive, testified that she had visited Bonnie in May of 2017 and, at that time Bonnie was talking, was upright in her

bed, and could eat on her own but was unable to walk and needed help getting to the bathroom.

Alisa visited Bonnie four times in July and August, following Bonnie's move to Scotts. In a mid-July visit, Bonnie said Alisa's name but nothing else and failed to notice the presence of Alisa's daughter. According to Alisa, Bonnie "was just kind of there." In an August 5 visit, Bonnie was not responsive. In a visit on August 15, supposedly for a family meeting to discuss an "end stage dementia diagnosis," no other family members showed up, and Bonnie was unable to communicate. That was Alisa's last visit. The owner of the facility called her and said that she was no longer allowed to visit.

Another relative, Carol, Bonnie's cousin, had similar experiences. She visited Bonnie several times in September. On her first visit, Bonnie was lying in bed fully dressed and totally unresponsive – never opened her eyes, never moved. That occurred again on the second and third visits as well – no response, never opened her eyes, never acknowledged Carol's presence.

As noted, Bonnie died on October 8. The cause of death listed on her death certificate was dementia. Appellant was named, and initially served, as personal representative of the estate.

APPELLANT'S CONDUCT

On September 21, 2017, a check on Bonnie's bank account for $300, purportedly signed by Bonnie, was made out and paid to appellant. On October 4, 2017 – four days before Bonnie died – a check for $3,000 drawn on Bonnie's bank account, purportedly signed by Bonnie, was made out and paid to appellant. Appellant testified that that transfer was a loan to her, to reimburse her "moving and labor expenses." Appellant testified that her mother was lucid when she wrote the check and that the loan was to reimburse her for the expenses she and her husband incurred in assisting her mother during the summer and that she paid it back in November.[1]

A third check, for $45,000 was issued and paid to appellant on October 6, two days before Bonnie's death. The check states that it was for "burial and final expenses." Appellant told her successor personal representative that it was for "relocation expenses" for Bonnie and for the cost of cleaning out Bonnie's house, which had recently been sold. She later told her successor personal representative that it was a gift.

On October 16, 2018, appellant filed a petition in the Orphans Court for "limited orders," intended to allow her to locate a bank statement. That petition was granted the same day. On November 16, she filed a petition to open a Small Estate. She also completed a Schedule B, attached to which was a copy of bank records showing a balance, as of the date of Bonnie's death, of $48,470.92, funeral expenses of $8,489, and

[1] Another transfer of $3,000 was made the day after Bonnie died. That was an electronic transfer directly into an account at appellant's bank described by Sharon Kelsey, the successor Personal Representative. *See* Transcript II-15.

administration costs of $150. On November 13, 2017, appellant was appointed Personal Representative of the Estate.

On January 3, 2018, Alisa filed a petition complaining about the slow progress in the Estate and seeking the removal of appellant as personal representative. Appellant responded that the estate was scheduled to close on May 2. On March 22, Alisa reported that appellant had removed thousands of dollars from Bonnie's bank account before her actual appointment as personal representative and sought her removal.

Concern about those events and others led Alisa, in March 2018, to file a motion to remove appellant as personal representative. Appellant moved to dismiss the motion, but after a hearing on April 25, 2018, appellant was removed, and on or about June 22, 2018, Sharon Kelsey was appointed to take her place. Ms. Kelsey was an attorney who had handled between 75 and 100 estate cases, 40 of them as a personal representative but also as a court-appointed guardian for people with Alzheimer's and dementia.

Following a review of the estate, Ms. Kelsey concluded that criminal activity may have occurred and filed a motion in the Orphans Court to refer the matter to the State's Attorney for criminal prosecution. The court agreed, and that is what triggered the criminal case.

SUFFICIENCY OF THE EVIDENCE

The basis of the case against appellant was that Bonnie did not write or authorize the writing of the checks for $45,000 and $3,000, that, due to her dementia and physical

condition, she had no capacity to do so, and that those checks were written and signed instead by appellant. Appellant contends that the State failed to present any evidence of Bonnie's condition during the time those checks were written. She acknowledges the listing of dementia on Bonnie's death certificate but contends that there was no evidence that, on the days when those checks were written, she did not have periods of lucidity.

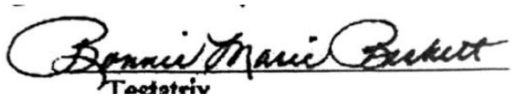
The only evidence, in that regard, she says, is her testimony that, due to the medications Bonnie was taking, Bonnie was asleep most of the day but was awake and lucid "for a discrete period each morning." The fact that dementia is listed as the cause of her death, appellant contends, is irrelevant because "dementia" is too broad a term to support a rational inference beyond a reasonable doubt, and its symptoms can vary from person to person and can be managed by medications.

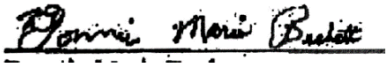
There are two responses to appellant's claim. First, notwithstanding the testimony of two defense witnesses that appellant was an honest person, the jury was not required to accept the truth of any of appellant's testimony as to Bonnie's occasional lucidity in the morning.[2] It was entitled to credit the testimony of Alisa or Carol as to their observations of an essentially comatose Bonnie on each of the several times they visited – no recognition that they were there or who they were, coupled with the conclusion that

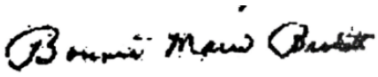
[2] As required by law, the jury was instructed that "[y]ou are the sole judge of whether a witness should be believed. In making this decision you may apply your own common sense and life experiences. Deciding whether a witness should be believed you should carefully consider all the testimony and evidence as well as whether the witness's testimony was affected by other factors."

she suffered from dementia. Second, dealing with the issue of dementia are the varying signatures on the various documents, which could well cause the jury to question whether the signatures on the two withdrawals that were the heart of this case were, in fact, those of Bonnie and conclude that appellant signed those documents.

We have added those signatures, which are in the record, to this Opinion, so we could see what the jury saw.

2004 will: 

May 2017 Power of Attorney: 

May 2017 Power of Attorney: 

September 21, 2017, $300 check: 

(State's Ex. 6 at 4; State's Ex. 17 at 4; State's Ex. 19 at check no. 1618).

Below are the disputed signatures:

October 4, 2017, $3,000 check: 

October 6, 2017, $45,000 check: 

(State's Ex. 15 at check no. 1623; State's Ex. 19 at check nos. 1622 & 1623).

Do they prove that Bonnie had dementia? Not necessarily. But are they evidence that the signatures on the two checks at issue were not, in fact, Bonnie's? Yes. The signatures on the 2004 Will and the May 2017 Power of Attorney contain Bonnie's

middle name "Marie." The checks allegedly written by appellant do not contain any middle name and they are certainly larger and have a much more pronounced "B."

Could the jury also conclude that, in light of Bonnie's statements in her Power of Attorney precluding appellant from withdrawing money from her account, she would not have authorized appellant to do that, especially if she was lucid at the time? Yes. The jury did not need to find that Bonnie was suffering from acute dementia, although there was evidence from which it could and may have done so. It simply needed to find that, based on her overall physical and mental condition, whatever its cause, Bonnie did not sign those checks or authorize appellant to do so.

LAY OPINION

This complaint by appellant challenges the court's allowing Ms. Kelsey to offer her observation that "when people age their signature gets smaller and shakier, not larger and more robust, especially if they have dementia."

This issue arose as Ms. Kelsey, the substitute personal representative, was describing what she observed as she was reviewing the documents filed in the Estate. She said that she noticed that Bonnie's signature on the May 2017 Power of Attorney was "very small and very frail" but that the signatures on the disputed checks were "very large and very robust," something that may be a matter of opinion as to what is "small and frail" or "large and robust" but, if so, is hardly an opinion that requires expertise. In any event, for

purposes of **comparison**, which was the point of Ms. Kelsey's testimony, anyone looking at those signatures could see for themselves the obvious differences in them.

The objection was to what she said next – that based on her experience with elderly people who decline, as they decline their signatures get "more shaky, more smaller" that they are not as "firm and robust as they were when they are older." The objection seemed to go to the age connection.

Appellant argues that, if a witness is not admitted as an expert, "their testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue," citing Md. Rule 5-701. We agree. That is what the Rule says and means.

The Rule is consistent with what the Supreme Court (of Maryland) has said in its decisional law. In *State v. Payne and Bond*. 440 Md. 680, 698 (2014), the Court held that:

> "A non-expert witness may offer opinion testimony in very limited circumstances, as prescribed by Maryland Rule 5-701, which allows a lay witness to offer an opinion that is both (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of as fact in issue. The rationale for the standard set by Rule 5-701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness."

That test was not satisfied in *Payne*, or in *Ragland v. State*, 385 Md. 706 (2005), but this case is different. Ms. Kelsey claimed no special training in the aging process or in handwriting but merely recounted her observations dealing with documents filed in

estates that as people decline from age their signatures get more shaky. **But that was not in dispute.** No one questioned the validity of the signature in May 2017, which is where the shortness or shakiness, in comparison with the 2004 signature, was observed. **What was at issue was the validity of the signatures on the October checks.** They were neither smaller nor shakier than the May 2017 or 2004 signatures but quite the opposite. **That (plus the absence of a middle name, the circumstances under which they were written, and the varying explanations of why they were written) are what made them suspicious.**

The jury had before it the various signatures, beginning with the 2004 will and continuing through the October 2017 disbursements. It could see the obvious differences between 2004 and May of 2017 and the complete and sudden reversal of that difference only five months later. It would not necessarily have the knowledge that Ms. Kelsey had from her multiple experiences with the signatures of elderly people on wills and other estate documents, however, that would explain the **normality** of the shrinking of Bonnie's known signatures over a 13-year period and the **abnormality** of the "robust" signatures and the absence of a middle name, only five months later. We find no abuse of discretion in the allowance of Ms. Kelsey's testimony.

JUDGMENTS ENTERED ON COUNTS 2, 3, AND 4 REMANDED FOR MERGER INTO JUDGMENT ENTERED ON COUNT 1; JUDGMENT ON COUNT 1 AFFIRMED; COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.