2012 WL 7153922 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,
v.
Robert T. FORD, Defendant-Appellant.

Nos. 4-12-0591, 4-12-0592.
November 5, 2012.

Appeal from the Circuit Court of the Seventh Judicial Circuit Sangamon County, Illinois
No. 11-CF-814, 08-CF-1261
Honorable April Troemper Judge Presiding.
Oral Argument Requested

Brief and Argument for Plaintiff-Appellee

John C. Milhiser, Sangamon County State's Attorney, Sangamon County Complex, Springfield, Illinois 62701.

Patrick Delfino, Director, Robert J. Biderman, Deputy Director, Anastacia R. Brooks, Staff Attorney, State's Attorneys Appellate Prosecutor, 725 South Second Street, Springfield, Illinois 62704, (217) 782 - 8076, Counsel for Plaintiff-Appellee.

***i** POINTS AND AUTHORITIES

*1 NATURE OF THE CASE

Following a jury trial, defendant was convicted of financial exploitation of the **elderly** and was sentenced to 24 months' probation.

*2 ARGUMENT

I DEFENDANT FAILS TO PERSUADE THAT SUBSTANTIVE DUE PROCESS PREVENTS THE LEGISLATURE FROM CRIMINALIZING FINANCIAL EXPLOITATION OF THE ELDERLY, AS KNOWINGLY MISUSING ASSETS IN A FIDUCIARY RELATIONSHIP IS NOT "WHOLLY INNOCENT CONDUCT."

In Illinois, the legislature attached felony criminal penalties to anyone who knowingly "illegally" used the "assets or resources" of an **elderly** person, including the "misappropriation" of those assets by "breach of a fiduciary relationship." 720 ILCS 5/16-1.3(a) (West 2008). Starting in 2004, the crime no longer required intent to permanently deprive the **elderly** person of the use, benefit, or possession of his or her property. See Public Act 93-301, §10, eff. January 1, 2004.

Defendant claims that section 16-1.3 violated substantive due process because it subjected "wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." (Def. br., 19) In this context, "innocent" conduct refers to that which is "not germane to the harm identified by the legislature" and "wholly unrelated to the legislature's purpose in enacting the law." See *People v. Hollins*, 2012 IL 112754, §28.

***3** Therefore, a criminal statute is irrational if it sweeps too broadly by potentially punishing a significant amount of conduct not related to the statute's purpose, as in *People v. Madrigal*, 241 I11.2d 463, 473, 948 N.E.2d 591, 597 (2011) (declining to believe that "this is a rational way of addressing the problem of identity theft"). In *Madrigal*, the statute criminalized numerous innocuous things like Google searches to look up how a neighbor did in the Chicago Marathon. 241 I11.2d at 471-472, 948 N.E.2d at 596.

Madrigal is distinguishable from the present case, where defendant erroneously asserts that section 16-1.3(a) criminalized all "incorrect" financial decisions made on behalf of the **elderly**. (Def. br., 20) In particular, defendant fails to persuade that the statute against financial exploitation of the **elderly** would have been violated by someone who controlled an **elderly** person's estate, created an account in the **elderly** person's name, and invested in assets that happened to lose value over time as a result of market fluctuation. (Def. br., 23) Defendant does not establish that the "stock market crash of 2008 and 2009" created numerous felons regardless of state of mind. (Def. br., 23) The statute required "misappropriation" of assets, such as by breach of a fiduciary relationship. See 720 ILCS 5/16-1.3(a) (West 2008).

***4** Defendant fails to persuade that due process requires "an intentional decision to defraud." (Def. br., 23) A statute that requires a knowing mental state rather than criminal intent may bear a rational relationship to the legislature's objective. See *People v. Marin*, 342 Ill.App.3d 716, 729, 795 N.E.2d 953, 963 (1st Dist. 2003). In some cases, requiring a mental state of criminal intent could defeat the statute's purpose. See *Marin*, 342 Ill.App.3d at 727, 795 N.E.2d at 962.

Here, the legislature sought to protect the **elderly** from breaches of trust and confidence even where the misuse of their assets and resources is not intended to permanently deprive them of property. See Public Act 93-301, §10, eff. January 1, 2004. The legislature rationally used section 16-1.3(a) to provide a **vulnerable** segment of the population with broader protections against exploitation taking forms not encompassed by existing intentional theft statutes.

Defendant cites his mother's purported intention to allow him to "control her financial decisions." (Def. br., 20) However, defendant fails to establish that section 16-1.3(a) does not distinguish between "misappropriation" and "acts legitimately undertaken" through power of attorney. (Def. br., 21) Defendant erroneously refers to the prosecution's interpretation of section 16-1.3(a) as "strict liability." (Def. br., 23)

***5** Actually, the prosecution alleged that section 16-1.3(a) applied because defendant knowingly obtained and illegally used his mother's assets by breaching their fiduciary relationship at times when he sold her condominium and withdrew her retirement income into his own account without paying much of her nursing home expenses. (No. 4-12-0591: R. Vol. I, C5-C6; Vol. III, C634-C641; No. 4-12-0592: R. Vol. VI, 49-53) Defendant does not persuade that his conduct here constituted legitimate activity by someone having power of attorney. See *In re Estate of Savage*, 259 Ill.App.3d 328, 330-332, 631 N.E.2d 797, 799-800 (4th Dist. 1994) (upholding finding under very similar circumstances that joint accounts were actually "convenience accounts" and concluding that fiduciary's use of the funds was fraudulent).

Defendant also claims that section 16-1.3(a) unconstitutionally required him to prove his innocence through demonstrating that the withdrawals of his mother's assets into his own accounts were for his mother's benefit. (Def. br., 21) However, the trial court did not instruct the jury with a presumption of fraud that would ordinarily attach to such transactions. See Savage, 259 Ill.App.3d at 330, 631 N.E.2d at 799. The trial court instructed the jury only that "defendant is not required to prove his innocence." (R. Vol. III, C624-C642) Even if the trial court had properly ***6** instructed the jury with a permissive presumption of fraud by a fiduciary, section 16-1.3(a) by itself does not create any compulsion for an accused to explain, which arises "simply from the force of circumstances." See *Yee Hem v. United States*, 268 U.S. 178, 185 (1925); *People v. Hester*, 131 I11.2d 91, 99-100, 544 N.E.2d 797, 801 (1989) (permissive presumption "places no burden on the defendant").

***7 ARGUMENT**

II THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO REQUIRE THE PROSECUTION TO PRESENT EVEN MORE INFORMATION IN RESPONSE TO HIS MOTION FOR A BILL OF PARTICULARS.

Defendant argues that the trial court's failure to grant his motion for a bill of particulars denied him the ability to prepare and present an appropriate defense. (Def. br., 24-29) Defendant claims that he was "never informed of the particular financial transactions that were deemed misappropriation." (Def. br., 25)

However, defendant acknowledges (Def. br., 25, 27) that the prosecution responded with a letter and accompanying spreadsheet claiming that he misappropriated funds when he sold the condominium and "every time" when he moved the "direct monthly deposits" from his mother's account into his own account from January 1, 2004, through October 31, 2008. (4-12-0592: R. Vol. I, C87-C93) The spreadsheet specified the dates and dollar amounts of each of the direct monthly deposits into the victim's identified checking account, defendant's withdrawals thereof from that checking account, and corresponding deposits into defendant's identified checking account. (R. Vol. I, C89-C93)

***8** Defendant fails to explain exactly how more information was required before trial for him to prepare a defense. Instead, the defense complained before trial that all of the transactions over four years cannot be criminal. (R. Vol. IV, 5, 7) The defense asserted that misappropriation is "not a crime" and that defendant "does not have to prove his innocence." (R. Vol. IV, 14) On appeal, defendant focuses on the peculiarity of the prosecution's allegation that he "misappropriated money that he legally possessed." (Def. br., 28) Defendant asserts prejudice arising from his purported need to prove his innocence through justifying "each and every financial transaction over a period of several years." (Def. br., 28)

However, the prosecution's response to the motion for a bill of particulars informed the defense in detail about every allegation of his wrongdoing. (R. Vol. I, C87-C93) The defense could not have been prejudiced once the prosecution disclosed the transactions at issue. Defendant had "sufficient notice" (R. Vol. I, C176) about all of the transactions so he could prepare for justifying them at trial. The purpose of a bill of particulars is not to burden the prosecution with generating defenses on behalf of defendant. Cf. People v. Whitlock, 174 Ill.App.3d 749, 770, 528 N.E.2d 1371, 1383 (4th Dist. 1988) (the function of a bill of ***9** particulars is to permit "the defendant" to prepare his own defense, and to limit the evidence which may be introduced by the prosecution).

Distinguishable is *United States v. Bortnovsky*, 820 F.2d 572, 573-574 (2d Cir. 1987), where the district court abused its discretion in denying a motion for a bill of particulars "identifying which of appellants' insurance claims for burglary losses were fraudulent and which of the many invoices submitted to substantiate these claims were falsified." The government did not "specify the dates of the staged burglaries or enumerate which of numerous documents were falsified." 820 F.2d at 574. Instead, the government provided "mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified or which of some fifteen burglaries would be demonstrated to be staged." 820 F.2d at 575. Defense counsel in *Bortnovsky* had only four days to prepare, and the government alleged at trial only that four burglaries were fabricated and only three documents were false. 820 F.2d at 574-575. *Bortnovsky* is different in a major way from the present case, where the prosecution consistently maintained that all of defendant's withdrawals from 2004 to 2008 of his mother's assets constituted breach of a fiduciary relationship. (4-12-0592: R. Vol. IV, 11; Vol. VI, 53)

***10** Defendant alleges that the "creation of a joint tenancy" gives rise to a presumption that defendant's mother "did so with the intent of making a gift" to defendant. (Def. br., 26) A presumption of donative intent attendant to survivorship joint tenancies is conclusive unless clear and convincing evidence of a lack of donative intent is shown. *In re Estate of Harms*, 236 Ill.App.3d 630, 639, 603 N.E.2d 37, 44 (4th Dist. 1992). However, a presumption of fraud attaches to gifts made to one who stands as a fiduciary to the donor. 236 Ill.App.3d at 639, 603 N.E.2d at 44. This court ruled that these "conflicting presumptions cancel each other." 236 Ill.App.3d at 640, 603 N.E.2d at 44.

Defendant's claim about restitution is irrelevant in this context. (Def. br., 28-29) Defendant asserts that the trial court's restitution order reflects a ruling that, for much of the time in question, defendant spent appropriately his mother's funds. (Def. br., 28-29) However, defendant offered exhibits and testimony at the hearing on restitution in an effort to recreate the amounts that he spent for his mother's benefit. (4-12-0591: R. Vol. X, 43-52) The restitution order referred to defendant's exhibit No. 3 when offsetting his mother's losses. (R. Vol. IV, C729-C732) The trial court remarked that it presumed that defendant did not present at trial the documentation and testimony from the restitution ***11** hearing "so as to avoid possible self-incrimination." (R. Vol. IV, C729) Defendant fails to establish on this record whether the trial court's ruling on his motion for a bill of particulars in fact hindered him from presenting such evidence at trial in his defense.

***12 ARGUMENT**

III THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ELEMENTS OF THE OFFENSE.

Defendant contends that the trial court failed to properly instruct the jury on the applicable law by allegedly not requiring the prosecution to prove of "all elements of the offense." (Def. br., 30) Defendant complains that the trial court refused his proposed

instruction that the prosecution must prove that he intended to permanently deprive his mother of the use, benefit, or possession of the property in accordance with Illinois Pattern Jury Instruction, Criminal 4th, No. 13.36. (Def. br., 31)

However, the crime of financial exploitation of the **elderly** no longer required intent to permanently deprive the **elderly** person of the use, benefit, or possession of his or her property. See Public Act 93-301, §10, eff. January 1, 2004. Therefore, defendant's argument cannot succeed unless this court accepts his premise that the amendment by Public Act 93-301 was "constitutionally infirm." (Def. br., 32) See *People v. Bannister,* 232 I11.2d 52, 83, 902 N.E.2d 571, 591 (2008) (where pattern jury instructions had not yet been revised to track amended statutory language, it was necessary ***13** for the trial court to use a modified IPI instruction). The State already responded to defendant's constitutional claims in the first section of argument, which is incorporated here by reference.

Defendant also contests the trial court's decision to instruct the jury with People's number 16. (Def. br., 32) At trial, the defense objected only on the basis that the instruction was "not IPI." (4-12-0592: R. Vol. VI, 26) The prosecution correctly noted that the language "parallels the statute." (R. Vol. VI, 25) See 720 ILCS 5/16-1.3(a) (West 2008) ("The illegal use of the assets or resources of an **elderly** person or a person with a disability includes, but is not limited to, the misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law"); *People v. Hudson,* 222 II1.2d 392, 400, 856 N.E.2d 1078, 1082 (2006) ("Where there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction").

Defendant also fails to persuade that the trial court erred in instructing the jury with a legal definition of "fiduciary." (Def. br., 32-33) Defendant observes that "All breaches of fiduciary duty are not crimes." (Def. br., 33) ***14** However, defendant has not shown that the trial court actually instructed the jury that all breaches are criminal. (Def. br., 33) The jury instructions required the prosecution to prove that defendant illegally used over $5,000 in assets of an **elderly** person over 80 years, or over $100,000 in assets of an **elderly** person over 60 years. (R. Vol. III, C634-C641)

Defendant argues that the trial court should have instructed the jury about the presumption of donative intent that arises when a person creates a joint tenancy and provides funds for the account. (Def. br., 33) However, the presumption is canceled out when the purported gift is made to one who stands as a fiduciary to the donor. See *In re Estate of Harms,* 236 Ill.App.3d 630, 639-640, 603 N.E.2d 37, 44 (4th Dist. 1992). Moreover, defendant's cited authority does not appear to encompass the situation where monthly direct deposits are being automatically made into an existing joint account. *Cf. Rasmussen v. LaMagdelaine,* 208 Ill.App.3d 95, 103, 566 N.E.2d 864, 869 (2d Dist. 1991) (determining intent as of time of joint account's creation). Therefore, defendant fails to persuade that the law provided for a presumption of donative intent each time his mother's pension and social security funds were credited to their joint account while he was a fiduciary.

***15 ARGUMENT**

IV DEFENDANT FAILS TO PERSUADE THAT THE TRIAL COURT'S COMMUNICATION TO THE JURY DENIED HIM DUE PROCESS.

Defendant claims that the trial court issued an ex parte written note to the jury without first consulting with defense counsel. (Def. br., 34-36) Following closing arguments, the trial court orally instructed the jury and questioned whether an instruction needed to be amended. (4-12-0592: R. Vol. VI, 86) The prosecutor stated, "I believe we'll have to amend the verdict form." (R. Vol. VI, 86) The trial court informed the jury, "We'll do that before we actually provide you with a copy... You will be provided with a clean copy, after we make one modification." (R. Vol. VI, 86-87) The trial court sent the jury to the conference room to begin their deliberations. (R. Vol. VI, 87)

Outside the jury's presence, the trial court suggested a need to correct an instruction, which defense counsel identified as People's No. 11. (R. Vol. VI, 88) The trial court noted that the second proposition refers to the age of 80. (R. Vol. VI, 88) The prosecutor

replied, “That's correct. And it should.” (R. Vol. VI, 88) The trial court did not believe that the jury heard the distinction that if it is only ***16** $5,000, it had to be over the age of 80. (R. Vol. VI, 88) In the presence of defense counsel, the trial court remarked, “we‘ll just send it back to the jury in its current form and we'll indicate that no additional instructions need to be modified and they are to consider them as they were read.” (R. Vol. VI, 89)

Defense counsel did not object but instead said, “Thanks, Your Honor.” (R. Vol. VI, 90) The written instructions sent to the jury also included a hand-written note signed by the judge, which read that “The jury is to consider the jury instructions in their *current form and as read in open court. No* further modifications need to be made.” (Emphases in original.) (4-12-0591: R. Vol. III, C643)

After trial, defense counsel complained that the “normal” procedure to follow is for the defense to have an opportunity to see the written note and comment, object, or agree. (R. Vol. VIII, 7-9) The trial court claimed that its representation to the defense in court was “pretty much 99 percent what was submitted to the jury.” (R. Vol. VIII, 9) The trial court emphasized that it “made it clear” to the defense that it was going to indicate to the jury that the “instructions would remain in their current form and there was no need to make any further modifications.” (R. Vol. VIII, 9-10)

***17** The foregoing parts of the record affirmatively rebut defendant's allegation that the trial court had “prepared” the note “without consultation” with defense counsel. (Def. br., 35) Defendant cites no case holding that the constitution demands that the defense must be permitted to preview verbatim text before any note is sent to a deliberating jury and that hearing a correct and complete oral description of the proposed communication would not satisfy the rights to be present and participate in the proceeding. *Cf. People v. McDonald*, 168 I11.2d 420, 459-460, 660 N.E.2d 832, 849 (1995) (rights to be present and participate were deprived when litigant was neither present nor informed of a jury's note before the judge returned a response).

In any event, defendant fails to demonstrate any prejudice from the defense's inability to preview the exact text of the note. Defendant asserts that the defense could have suggested “alternative language” to avoid signaling to jurors that “they could not seek modification or clarification of the instructions.” (Def. br., 35-36) However, defendant does not persuade that the written note actually conveyed such a “false impression.” (Def. br., 36)

After the trial court promised jurors that their written copy of its oral instructions would contain one modification, the note indicated simply that no modifications were needed. ***18** (4-12-0591: R. Vol. III, C643; 4-12-0592: R. Vol. VI, 86-87) Defendant was not prejudiced by the note's text, especially considering the context, because jurors were not misinformed about being able to ask the trial court for clarification.

*19 ARGUMENT

V THE RECORD EVIDENCE WAS SUFFICIENT TO PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

Defendant claims that the prosecution failed to prove that (1) he possessed “the required mental state” and (2) he illegally used funds through breach of a fiduciary duty. (Def. br., 39) Defendant asserts that defendant was the only witness who testified about how the money was spent. (Def. br., 39) Defendant cites no authority for the proposition that money moved between accounts “cannot be the basis for a conviction under the financial exploitation of the **elderly** statute.” (Def. br., 39)

The question on appeal is “whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *People v. Cunningham*, 212 I11.2d 274, 279, 818 N.E.2d 304, 307 (2004). The requirement that a reviewing court must view the evidence “in the light most favorable to the prosecution” includes allowing all reasonable inferences from the record in favor of the prosecution. 212 I11.2d at 280, 818 N.E.2d at 308.

The prosecution needed to prove that defendant knowingly misappropriated his mother's assets through breach of a ***20** fiduciary relationship. 720 ILCS 5/16-1.3(a) (West 2008). "A defendant's mental state is ordinarily proved circumstantially by inferences reasonably drawn from the evidence." *People v. Grimes*, 386 Ill.App.3d 448, 455, 898 N.E.2d 768, 775 (4th Dist. 2008).

Judith Morris testified that she was administrator at Patricia Ford's nursing home. (R. Vol. VII, 39) Her stay began in March 2005, and the arrangement was for the home to be paid her long-term care insurance payment and her social security. (R. Vol. VII, 39-41) The account soon became behind in payment. (R. Vol. VII, 41) Defendant told Morris about catching up on past due amounts by paying the home the proceeds when selling his mother's condominium. (R. Vol. VII, 44-45, 51) Morris claimed that she did not know that the condominium had been sold, and she denied having received any money from its sale. (R. Vol. VII, 45)

According to Morris, the home also did not see the insurance check prior to mid-2007, and defendant did not pay through all of the insurance payments. (R. Vol. VII, 41-42) Because the home was not receiving the payments, Morris told defendant that the home would start withholding information from the insurance company. (R. Vol. VII, 60-61) Starting in mid-2007, defendant signed an assignment of insurance benefits so that the insurance company could pay the home directly. (R. ***21** Vol. VII, 42) In July 2007, defendant also signed a contract with the home as a responsible party or guarantor. (R. Vol. VII, 43)

Mary Geising was the home's bookkeeper, and she sent bills to defendant. (R. Vol. VII, 71-72) The account became in arrears right after the first month. (R. Vol. VII, 73) The bills contained notations identifying how much was in arrears and how many months had not been paid. (R. Vol. VII, 73) By July 2007, the debt to the home was about $46,000. (R. Vol. VII, 74) The long-term care insurance benefits were assigned to the home because defendant had failed in his duty to turn the proceeds over to the home each month. (R. Vol. VII, 83) The insurance never covered the entire debt. (R. Vol. VII, 83)

Rita Gerstung from Heartland Credit Union testified that the deposits into the joint account held by defendant and his mother were his mother's pension and social security. (R. Vol. VII, 99-100) Heartland's records reflected that defendant began his own account at Heartland in September 2004. (P. ex. No. 21; R. Vol. I, C108) Shortly after the joint account was credited with her $806.78 pension and $937 social security, defendant transferred $1,717.52 to his own Heartland account. (R. Vol. I, C54, C108)

The evidence showed that defendant withdrew the following amounts from the joint account to his own account:

September 2004	$1,717.52	November 2006	$1,850
October 2004	$1, 650	December 2006	$1,800
November 2004	$1,700	January 2007	$1, 800
December 2004	$1,665.91	February 2007	$1,850
January 2005	$1,698.93	March 2007	$1,850
February 2005	$1, 686.33	April 2007	$1,820
March 2005	$1,736	May 2007	$1,800
April 2005	$1,800	June 2007	$1,850
May 2005	$1,800	July 2007	$1,830
June & July 2005	$3,300	August 2007	$1,800
August 2005	$1,750	September 2007	$1,850

September 2005	$1,750	October 2007	$1, 800
October 2005	$1,750	November 2007	$1,850
November 2005	$1,800	December 2007	$1,800
December 2005	$1,750	January 2008	$1,900
January 2006	$1,800	February 2008	$1,850
February 2006	$1,800	March 2008	$1,800
March 2006	$1,800	April 2008	$1,900
April 2006	$1,700	May 2008	$1,800
May 2006	$1,850	June 2008	$1,900
June & July 2006	$3,620	July 2008	$1,900
August 2006	$1,700	August 2008	$1, 860
September 2006	$1,800	September 2008	$1,800
October 2006	$1,800	October 2008	$1,900

***23** (P. ex. No. 21; R. Vol. III, C54-C159) The foregoing amounts total $89,384.69 in Patricia Ford's pension and social security that defendant withdrew into his own account. Defendant also deposited into his own Heartland account $19,679.50 in February 2006 from the sale of his mother's condominium. (R. Vol. III, C125)

Susan Jackson of the Illinois State Police testified that Patricia Ford turned 80 years old the day after entering the nursing home. (R. Vol. VII, 112) Jackson noted that the deposits from Patricia Ford's pension and social security were appearing in defendant's account in virtually the same amounts within days. (R. Vol. VII, 120) One $5,000 check from defendant's Heartland account was made to the nursing home in February 2006. (R. Vol. VII, 125)

Defendant testified that he paid his mother's expenses out of their joint account. (R. Vol. VII, 165-166) He assured her that he "would take care" of her wishes "to go to St. Joe's." (R. Vol. VII, 168) He testified that all of the long-term care insurance money went to the home. (R. Vol. VII, 168) However, he admitted that he was "too sporadic" in paying the home with the insurance proceeds, so he agreed for the insurance to paid directly to the home. (R. Vol. VII, 172) Defendant later claimed that he made sure that the home got "[e]very dime" the insurance paid. (R. Vol. VII, 203) ***24** Defendant alleged that the home was accepting just the insurance payment to keep his mother there. (R. Vol. VII, 176-178) Defendant admitted that he never told Morris about his mother's pension and social security income. (R. Vol. VII, 206-207)

Defendant acknowledged that he told Morris "that we couldn't afford all of this." (R. Vol. VII, 174) Defendant testified that he had been up to "eyeballs in debt." (R. Vol. VII, 179) Defendant explained that he found a better paying job so he could afford the nursing home once the insurance money ceased, because his mother's monthly pension and social security totaled only $1,900. (R. Vol. VII, 178-179) Defendant talked about paying down his debt and getting ready to absorb the cost of the nursing home once the insurance ran out. (R. Vol. VII, 182) Defendant claimed, "The whole thing was about keeping my mom in St. Joe's." (R. Vol. VII, 181) Defendant admitted that some of the money in the joint account was used for him to pay down his debt and also for him to live on. (R. Vol. VII, 182-183)

Defendant noted that he sold his mother's condominium, using his power of attorney, and the proceeds were about $20,000. (R. Vol. VII, 191) When asked if the check were made out to his mother, defendant answered, "If you say--I don't remember." (R. Vol. VII, 208) Defendant deposited the ***25** $19,679.50 check into his own account. (R. Vol. VII, 209) He needed to pay back some commissions, and he sent $5,000 to St. Joe's right away. (R. Vol. VII, 191-192) He put the remainder in his "stock account" to "hold it and see where we were going." (R. Vol. VII, 192)

Defendant also claimed that he transferred the funds out of the joint account at Heartland to protect them from his son. (R. Vol. VII, 199) When asked if he moved the money that way for five years to protect it from his son, defendant replied, "Well, we set it up that way originally and then we just kept that routine up." (R. Vol. VII, 200-201) Defendant admitted that not all of that money went to defray his mother's nursing home expenses. (R. Vol. VII, 201) Defendant did not know what percentage of the withdrawn money went for his mother's use. (R. Vol. VII, 205)

Here, the monthly direct deposits into the Heartland joint account did not represent gifts to defendant. See *In re Estate of Savage*, 259 Ill.App.3d 328, 330-332, 631 N.E.2d 797, 799-800 (4th Dist. 1994) (finding that joint account was for convenience). In *Savage*, a debt for the father's nursing home charges was unpaid. 259 Ill.App.3d at 330, 631 N.E.2d at 799. The father in *Savage* knew that the account assets would be necessary for his continuing expenses at an age where "considerable expenses could be incurred for special care." ***26** 259 Ill.App.3d at 331, 631 N.E.2d at 800. "To conclude that a donative intent existed would require a belief that others could use funds necessary for his care" and that the father lacked concern for his own financial security. 259 Ill.App.3d at 331-332, 631 N.E.2d at 800.

Therefore, misappropriations of assets by breach of fiduciary relationship occurred in all of defendant's withdrawals from the Heartland joint account into his own Heartland account, along with the deposit of the condominium sale proceeds into his own account. Defendant cites no authority that he cannot be convicted for moving money between accounts. (Def. br., 39) The jury did not have to believe his allegations about trying to protect his mother's retirement income from his son and about the home being satisfied with collecting just the CNA insurance. (R. Vol. VII, 176-178, 199) It can be inferred that defendant illegally used a total of $109,064.19 of his **elderly** mother's assets, based on enriching himself with $89,384.69 of her retirement income direct deposits and $19,679.50 from the condominium sale (even though he did pay $5,000 of the illegally commingled funds to the nursing home soon thereafter).

Defendant cites no authority that findings at the post-trial hearing on restitution, affected by defendant's testimony and defense exhibits admitted only at that hearing, ***27** should "call into question" whether the trial evidence met the prosecution's burden of proof. (Def. br., 40) If defendant had exculpatory evidence, he should have offered it during the trial. See *People v. Flint*, 141 Ill.App.3d 724, 730, 490 N.E.2d 1025, 1029 (2d Dist. 1986) ("Because the statements were not admitted into evidence at the trial here, we may not consider them in determining whether defendant was proved guilty beyond a reasonable doubt").

In any event, defendant claimed at the restitution hearing to have paid the nursing home $59,486 from his personal Heartland account and personal and business Marine Bank accounts, ending in February 2007. (Supp. R., Def. ex. Nos. 3, 4) However, defendant received insurance proceeds from CNA at a rate of $92.50 per day on account of the 746 days his mother stayed at the home from March 16, 2005, though March 31, 2007. (Supp. R., Def. ex. Nos. 6, 8) Defendant would have collected a total of about $69,000 in periodic payments from CNA before the home started crediting assigned benefits on account of April 2007 and beyond.

Defendant requested that the trial court consider his payments "and credit any restitution award." (R. Vol. IV, C694) The trial court appears to have set off the restitution award by the $59,486 that defendant paid the nursing home, along with defendant's other claimed expenditures on his ***28** mother's behalf. (R. Vol. IV, C731-C732) However, the trial court did not consider that all of defendant's $67,548.71 in credited expenditures from 2005 to 2007 had been effectively funded from $69,000 of her long-term care insurance proceeds. The personal losses Patricia Ford suffered from defendant siphoning all of her retirement income and disposing of her condominium were in no way compensated by defendant directing for her benefit most of the proceeds of *her* other major financial resource, the CNA long-term care policy.

Defendant cannot complain about perceiving a need to prove at trial how he spent the funds he withdrew from the joint account. (Def. br., 39) Section 16-1.3(a) by itself does not create any compulsion for an accused to explain, which arises "simply from the force of circumstances." *See Yee Hem v. United States*, 268 U.S. 178, 185 (1925). Therefore, defendant was not unconstitutionally compelled to give explanatory evidence as a result of the prosecution's proof of his bank transactions.

Although defendant would not have breached the fiduciary relationship by making a transaction for his mother's benefit, he should not assume that a breach of fiduciary relationship could be exonerated through proof that his mother eventually benefitted from an asset he misappropriated. The statute against financial exploitation of the **elderly** no longer ***29** required an intent to permanently deprive the **elderly** person of the benefit of the property. See 720 ILCS 5/16-1.3 (a) (West 2008); Public Act 93-301, §10, eff. January 1, 2004.

Where a "fiduciary writes a check on his principal's funds to himself personally, it may be that the fiduciary was entitled to receive payment for salary, expenses, or the like." *County of Macon v. Edgcomb*, 274 Ill.App.3d 432, 436, 654 N.E.2d 598, 601 (4th Dist. 1995). In a civil case, a fiduciary would have to overcome a presumption of fraud by proving that the transaction was fair. See *In re Estate of DeJarnette*, 286 Ill.App.3d 1082, 1091, 677 N.E.2d 1024, 1030 (4th Dist. 1997).

Mandatory presumptions are not permitted in criminal cases because "a verdict may not be constitutionally directed against a defendant in a criminal case." See *People v. Watts*, 181 I11.2d 133, 147, 692 N.E.2d 315, 323 (1998). "A permissive presumption, on the other hand, is one where the fact finder is free to accept or reject the suggested presumption." *People v. Hester*, 131 I11.2d 91, 99-100, 544 N.E.2d 797, 801 (1989) (recognizing that it "places no burden on the defendant").

Defendant had no burden of production or persuasion in this case because the jury did not receive any unconstitutional instruction on a mandatory presumption. (R. ***30** Vol. III, C624-C642) Defendant's financial dealings with the nursing home were not "an element of the indictment." (Def. br., 40) The arrearages instead helped the jury to infer circumstantially that all of the Heartland withdrawals and deposits from September 2004 to October 2008 were not gifts but knowing breaches of the fiduciary relationship benefitting defendant to his mother's detriment. See *Savage*, 259 Ill.App.3d at 330-332, 631 N.E.2d at 799-800 (citing father's unpaid nursing home debts when rebutting donative intent and finding that daughter's "use of the account funds while acting as a fiduciary was fraudulent").

*31 CONCLUSION

WHEREFORE, the PEOPLE OF THE STATE OF ILLINOIS respectfully request that the judgment of the circuit court be affirmed, and that costs be assessed pursuant to 55 ILCS 5/4-2002.

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