

2012 WL 7153921 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiffs-Appellees,

v.

FORD, Robert T., Defendant-Appellant.

Nos. 4-12-0591, 4-12-0592.

September 28, 2012.

Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County

Honorable April G. Troemper, Judge Presiding

Oral Argument Requested

Brief of Defendant-Appellant Robert T. Ford

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***i POINTS AND AUTHORITIES**

The Financial Exploitation of The **Elderly** Statute Violates the Substantive
Due Process Provisions of the United States and Illinois Constitutions.

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***1 NATURE OF THE CASE**

Following a jury trial Thomas Ford was convicted of financial exploitation of the **elderly** and sentenced to probation.

This is a direct appeal from the judgment of the court below. An issue regarding the constitutionality of the charging instrument was presented at trial and is raised on appeal.

ISSUES PRESENTED

I.

Whether the Financial Exploitation of the **Elderly** Statute violates the substantive due process provisions of the United States and Illinois Constitutions.

II.

Whether the failure to grant the motion for bill of particulars denied Tom Ford the ability to prepare and present an appropriate defense.

III.

Whether Tom Ford was denied due process by jury instructions that failed to fully and fairly explain to the jury the applicable law on the offense of financial exploitation of the **elderly**.

IV.

Whether Tom Ford was denied due process when the trial court improperly communicated with the jury during deliberations.

***2 V.**

Whether the evidence presented at trial failed to establish that Tom Ford was guilty of financial exploitation of the **elderly**.

JURISDICTION

Thomas Ford appeals from a final judgement of conviction in a criminal case. He was sentenced on February 14, 2012 to probation. On May 21, 2012 a final order determining restitution was entered. On June 6, 2012 a motion to reconsider the restitution order was denied. Notice of Appeal was filed June 25, 2012. Jurisdiction therefore lies in this Court pursuant to [Article VI, Section 6 of the Illinois Constitution](#), and [Supreme Court Rules 603 and 606](#).

STATEMENT OF THE FACTS

NOTE: This case is a consolidated appeal from the Circuit Court. The original indictment was dismissed by the State and a new charge filed under a separate Circuit Court number. The record has been prepared in two separate files. The files have been consolidated on appeal but the two record numbers remain. The Statement of facts will designate the separate records by Circuit Court and Appellate Court numbers.

2008 CF 1261 (4-12-0592)

On December 18, 2008, a three-count indictment, charging Robert Thomas Ford (referred to in this brief as Thomas or Tom) with Financial Exploitation of the **Elderly** in violation of 720 ILCS 5/16-1.3 (West 2006), was returned by the Sangamon County Grand Jury. (Vol. I, C.1-3) The indictment charged that between January 2004 and October 2008, Mr. Ford, “standing in a position of trust and confidence with Patricia Ford, a person with a disability, *3 age 83, obtained by deception and misappropriated property of Patricia Ford, United States Currency.” Each count of the indictment contained identical language. The amount of funds alleged to have been taken mirrored the statutory amounts classifying the felony offenses.

Mr. Ford entered a plea of not guilty on December 22, 2008. (Vol. I, C.9) Mr. Ford was initially represented in these proceedings by attorney John Madonia. (Vol. I, C. 224) On November 3, 2010, Mr. Madonia, as a result of his appointment as Associate Judge, withdrew as counsel for Mr. Ford. (Vol. I, C. 52) On November 30, 2010, the law firm of Feldman, Wasser, Draper & Cox entered its appearance for Mr. Ford. (Vol. I, C. 52)

On January 27, 2011, Mr. Ford requested a bill of particulars. (Vol. I, C.63-65) The request specifically noted the parent-child relationship between Patricia and Thomas Ford, and noted that the two owned various joint checking accounts. Mr. Ford sought an itemized list of the property obtained from Patricia Ford as well as the specific deceptive acts employed by Mr. Ford to obtain property from Patricia Ford. (Vol. I, C.64)

On May 8, 2011, the State responded to the request. The response stated that the “information (sic) sufficiently charges the defendant in accordance with applicable statutory provisions.” The response further stated that the defendant was not entitled to a bill of particulars. (Vol. I, C, 83-84) In addition the State provided to Mr. Ford and to the Court a letter dated April 5, 2011. The letter indicated that the case against Mr. Ford involved the transaction whereby Mr. *4 Ford sold Patricia Ford's condominium, and the actions of Mr. Ford from January of 2004 to October of 2008 where Mr. Ford withdrew money from Patricia Ford's account and deposited those funds into his account. (Vol. I, C.87)

On May 10, 2011, the Court denied Mr. Ford's request for a bill of particulars. In the order, the Court noted that the bill of particulars sought specific information regarding Mr. Ford's acts of deception. In response to that request the State deleted the language alleging “deception” and indicated that they would proceed on a theory of misappropriation of Patricia Ford's property. The request for a bill of particulars was denied because, “Defendant has received sufficient notice of the allegations against him.” (Vol. I, C.176)

On August 18, 2011, Mr. Ford filed a motion to dismiss. The Motion alleged that the indictment as amended failed to allege any mental state on the part of Mr. Ford and that the indictment punished potentially innocent conduct. These defects violated Mr. Ford's constitutional rights to due process under the Illinois and United States Constitutions. (Vol. I, C. 186-87) On August 23, 2011, the State acknowledged that the indictment omitted the word, “knowingly” and was therefore legally insufficient. The State requested that the indictment be dismissed and advised the Court it would seek a new indictment. (Vol. V, P. 3)

2011 CF 814 (4-12-0591)

On September 22, 2011, a new indictment was returned by the Sangamon County Grand Jury. The two-count indictment charged Mr. Ford with Financial *5 Exploitation of the **Elderly** in violation of 720 ILCS 5/16-1.3 (West 2010). Count one of the

indictment alleged that between January of 2004 and October 2008, Mr. Ford, "standing in a position of trust and confidence with Patricia Ford, age 83, knowingly obtained and illegally used the assets of Patricia Ford, being United states currency, valued in excess of \$100,000." Count two of the indictment contained identical language but valued the funds at greater than \$5,000. (Vol. I, C. 1-2) On October 5, 2011, Mr. Ford appeared in court on the new indictment. The State advised the Court that this was a "reindictment" of 2008 CF 1261 and superceded that case. (Vol. V, P.3) Mr. Ford entered a plea of not guilty to the new indictment. (Vol. I, C. 12)

Trial commenced December 5, 2011. After jury selection and opening statements, Janet Stivers was the first witness for the State. She is the niece of Patricia Ford and the cousin of Robert T. Ford, who is known by everyone as Tom. (Vol. VII, P. 22) Ms. Stivers would visit her Aunt Patricia at St. Joseph's Home and visited her early in 2008. Ms. Stivers became concerned about the condition of Pat Ford. She and her sister, Kay Schlosser, obtained guardianship over Pat Ford. After they became guardians, they deposited retirement and social security checks into Pat Ford's account and wrote checks to St. Joseph's Home. (Vol. VII, P.26) Ms. Stivers never had any conversation with Tom Ford regarding Patricia Ford's situation at St. Joseph's Home. (Vol. VII, P. 27)

During cross-examination Ms. Stivers stated that the employees of St. Joseph's Home stated that they were not able to get in touch with Tom Ford. *6 (Vol. VII, P.28) The guardianship proceeding involving Patricia Ford was Sangamon County Case 2008 P 541. (Vol. VII, P. 29) Tom Ford was never served with summons regarding the guardianship proceeding, but was served by publication. (Vol. VII, P.31-32) Ms. Stivers prepared an affidavit for service by publication stating that Tom Ford's place of residence could not be ascertained. She had seen Tom at several family functions prior to the guardianship proceedings. (Vol. VII, P. 34)

Sister Judith Norris was the administrator at St. Joseph's Home in March of 2005. (Vol. VII, P. 39) In March of 2005, Patricia Ford executed a contract with St. Joseph's Home and became a resident at the facility. People's exhibit two is a copy of the contract. (Vol. I, C. 27) St. Joseph's was advised that Patricia had long-term care nursing insurance and was receiving Social Security. (Vol. VII, P. 39-41) In July of 2007, Sister Judith met with Tom Ford. An assignment of benefits form was executed by Tom Ford, signed in his capacity as power of attorney. People's exhibit 22 is a copy of that assignment. It is dated May 30, 2007. (Vol. I, C. 30) On July 1, 2007, an extended contract between Patricia Ford and St. Joseph's was executed. Tom Ford signed the contract as power of attorney. People's exhibit 5 is a copy of the contract. (Vol. I, C. 31) Between March of 2005 and July of 2007 Sister Judith spoke with Mr. Ford by phone regarding problems with payment of Patricia Ford's charges. On one occasion she personally went to Tom Ford's place of employment in Springfield. (Vol. VII, P.44) Mr. Ford did tell her that when Patricia Ford's *7 condominium was sold that Tom Ford would make payment on the unpaid charges. But St. Joseph's did not receive funds from the condominium sale. (Vol. VII, P. 45)

On cross-examination Sister Judith could not recall any conversation with Tom Ford about a reduced charges for Patricia Ford at St. Joseph's Home. (Vol. VII P. 52) Sister Judith had difficulty contacting Tom Ford but was unaware that the nurses providing care for Patricia Ford had numerous contacts with Mr. Ford. (Vol. VII, P.54) The nurse's notes reflect many telephone communications between St. Joseph's, Tom Ford and his wife Darcy Ford. (Vol VII, P. 55-58) In December of 2008, certain charges owed by Patricia Ford were written off to benevolence. (Vol. VII, P. 65)

Mary Margaret Giesing was the bookkeeper at St. Joseph's Home from July of 1998 to March 31, 2008. (Vol. VII, P. 71) She was responsible for preparing bills for residents and making certain bills were paid. In 2005 she sent bills to Tom Ford. She would mail Tom Ford bills with notations of the amount of arrearage. (Vol. VII, P. 73) In July of 2007 there was a \$46,000 debt to the home that was written off as uncollectible by the accountants. (Vol. VII, P. 74) Insurance checks were received for Patricia Ford's rent and some Social Security. For many months there were no payments. (Vol. VII, P. 76)

Ms. Giesing was cross-examined. On May 30, 2007 an assignment of benefits from Patricia Ford's insurance provider was executed. After that date insurance payments came directly to St. Joseph's Home. (Vol. VII, P. 78) During *8 Patricia Ford's residence at St. Joseph's Home the monthly rate has varied. (Vol. VII, P. 80)

Denise Hartley began working in the bookkeeping office at St. Joseph's Home in March of 2008. After beginning her employment she became familiar with the financial account of Patricia Ford. (Vol. VII, P. 86) Between March and October of 2008 the only payments received for Patricia Ford were the insurance proceeds. Ms. Hartley sent bills to Tom Ford but received no response. The guardian has been paying bills since her appointment. (Vol. VII, P. 88-89) The present bill for Patricia Ford is \$1900 a month. The balance of her obligation is written off. (Vol. VII, P.90)

Rita Gerstung is the credit recovery officer for Heartland Credit Union. In 2008 she was served a subpoena for bank records and documents for Robert Ford and Patricia Ford. (Vol. VII, P. 95) People's Exhibit 21 consists of 206 pages of the records delivered in compliance with the subpoena. (Vol. VII, P. 96) The joint account was opened August 29, 2000. (Vol. VII, P. 97)

Kathy Jackson is the Vice-President of Deposit Operations at Marine Bank. In January of 2009 she complied with a subpoena for bank records of Robert, Darcy and Patricia Ford. (Vol. VII, P. 101) People's exhibit 20 consists of 309 pages of documents furnished in compliance with the subpoena. (Vol. VII, P. 101)

*9 People' exhibits 1, 2, 5, 20, 21, 22 were admitted into evidence. (Vol. VII, P. 106) Defendant's exhibits 1, 3, 4, 9, 17, and 18 were admitted into evidence. (Vol. VII, P. 109)

Susan Jackson has been an account supervisor with the Illinois State Police for 11 years. (Vol. VII, P. III) She reviewed people's exhibits 20 and 21 and prepared a spreadsheet of the activity in Patricia's accounts. People's Exhibit 7 is the five page spreadsheet covering January 2004 through October 2008. People's Exhibit 8 is a spreadsheet covering January 2005 through March 2006. (Vol. VII, P. 113) People's Exhibit 9 covers the period April 2006 through July 2007. People's Exhibit 10 covers July 3, 2007, through May 2, 2008. People's Exhibit 11 covers May 3, 2008 through October 3, 2008. People's Exhibits 7 through 11 were admitted into evidence. (Vol. VII, P. 114)

The first transaction Ms. Jackson observed was January 4, 2005. There were automatic deposits into Patricia Ford's accounts, and the next day the money was transferred into Thomas Ford's account at Heartland Credit Union. (Vol. VII, P. 118) Each month from January through April of 2006, funds were transferred from Patricia Ford's account to Thomas Ford's account. (Vol. VII, P. 119) The same procedure was followed from April 2006 through July of 2007. (Vol. VII, P. 120) In October of 2007 the procedure changed, and funds from Patricia Ford's account were transferred into Robert Ford' account at Marine Bank. (Vol. VII, P. 121) The amount of withdrawals from Patricia Ford's *10 account and transfers to Robert Ford's accounts from January 2004 through October 2008 exceeded \$100,000. (Vol. VII, P. 122)

Ms. Jackson was cross-examined. The Heartland account opened in 2000 was a joint account of Patricia Ford and Robert Ford. (Vol. VII, P. 123) Ms. Jackson was not provided with all of the checks from the accounts to review. (Vol. VII, P. 124) Ms. Jackson identified Defendant's Exhibit 19, a \$5,000 check written to St. Joseph's Home in February of 2006, and Defendant's Exhibit 20, \$2,000 check written to Don Curtis. (Vol. VII, P. 125-6)

The State rested. (Vol. VII, P. 127)

Mr. Ford moved for a directed verdict. The oral motion was based upon the failure of the State to present any evidence of deception, intimidation or improper conduct by Mr. Ford. The law established that Mr. Ford had the absolute right to use the money placed in a joint account. (Vol. VII, P. 129) In addition there was insufficient evidence of any intent to permanently deprive. (Vol VII, P. 130) Mr. Ford also sought a directed verdict because the statute as interpreted by the State punished a significant amount of wholly innocent conduct, thus rendering the theft statute unconstitutional. (Vol VII, P. 139) The motion for directed verdict was denied. (Vol. VII, P. 141)

Attorney David Reid, the first witness for Mr. Ford, testified by stipulation that in September of 2000 he met with Tom and Patricia Ford. He explained to them the legal ramifications of the Power of Attorney, and that by signing the documents Patricia

authorized Tom to have control over her *11 financial and legal matters. Patricia Ford wanted Tom to assume control over her financial affairs. Defendants Exhibits 21 and 22 are the Power of Attorney forms and were admitted into evidence. (Vol. VII, P. 142-3)

Thomas Ford then presented 3 character witnesses. Each testified that Mr. Ford had an excellent reputation in the Springfield community for honesty, integrity, truth, and veracity. In addition, each testified Mr. Ford's reputation for being a peaceful and law-abiding citizen was excellent. Their testimony is found in the record as follows: J.D. Knox, (Vol. VII, P.143-147) James Drew, (Vol. VII, P. 147-152) and Raymond Karcher (via stipulation, Vol. VII, P. 154)

Mr. Ford testified on his own behalf. Thomas Ford is 61 years old and has been recently employed at Feld Entertainment as the general manager of Ringling Brother's Circus. It is a full-time traveling job. (Vol. VII, P. 156) Prior to his employment with the circus he operated a Budget Truck Rental in Springfield for five years, was in the Army National Guard for 20 years, and worked for the Springfield Fire Department for 15 years. (Vol. VII, P. 160) After graduating from high school, Mr. Ford enlisted in the Army and served one year in Vietnam. (Vol. VII, P. 162)

Mr. Ford owns a mobile phone and has had the same telephone number for more than 10 years. He is married, has 4 grown children and is an only child. His father passed away when he was 25 years old. (Vol. VII, P. 163)

Patricia Ford entered the nursing home in 2006 or 2007. Her health was deteriorating prior to moving to the nursing home. (Vol. VII, P. 164) Prior to *12 moving to the nursing home Patricia lived in a condominium on 7th Street in Springfield. Mr. Ford wanted his mother to live independently in her residence as long as she could. Because of her declining health he arranged for to have meals delivered to her home. (Vol. VII, P. 165)

The joint account with his mother was established in 2000. He paid all of Patricia's bills from the account. He paid "just about everything," including Patricia's meals, utilities, and other expenses to make certain Patricia had companionship. Mr. Ford also arranged for Patricia to have visitors who were close to her age. (Vol. VII, P. 167) Patricia had a long-term care insurance policy that lasted four years. It was her wish that if she went into a facility it would be St. Joseph's Home. (Vol. VII, P. 168) Mr. Ford wanted to keep his mother in her own home for as long as possible because he felt her condition would deteriorate once she left her home. (Vol. VII, P. 169)

In March of 2005 Tom and his mother met with Sister Judith. The purpose of the meeting was to make arrangements for Patricia Ford's eventual moving to St. Joseph's Home. When Patricia Ford moved to St. Joseph's Tom Ford's business was failing. Mr. Ford advised the home about Patricia's long-term insurance policy. In July of 2007 another discussion took place. Mr. Ford agreed to have the insurance checks sent directly to St. Joseph's. Up until that time payments to St. Joseph's were sporadic. (Vol. VII, P. 171-72)

During the discussion with Sister Judith, Mr. Ford told her that he could no longer afford the expenses for his mother. Sister Judith replied that programs *13 were available to supplement the insurance. Mr. Ford understood that to mean that Patricia Ford would receive some assistance for her rent. (Vol. VII, P. 175) The insurance was a four year policy that would end in March of 2009. (Vol VII, P. 176-77) Mr. Ford knew that after the insurance ran out he would need additional funds each month of \$1,200 for Patricia's rent. He decided to look for a job other than the truck rental business. (Vol. VII, P. 179) After searching for employment he accepted the position with Feld Entertainment. (Vol. VII, P. 181) He intended to pay down his debt and then have funds to pay St. Joseph's when the insurance ran out. (Vol. VII, P. 182)

Mr. Ford believes that during the period his mother was in St. Joseph's and he had power of attorney, CNA paid St. Joseph's \$115,000. (Vol. VII, P. 184) After Mr. Ford signed the assignment of benefits Mr. Ford had no conversations with Sister Judith. (Vol. VII, P. 187) No family members ever contacted Mr. Ford to discuss Patricia Ford's condition. Mr. Ford was never contacted by law enforcement about Patricia Ford's finances. (Vol. VII, P. 187-89)

When Patricia moved to St. Joseph's the condominium was listed for sale. It took about a year to sell, and the proceeds were around \$20,000. (Vol. VII, P. 191) Mr. Ford sent St. Joseph's \$5,000 and invested the balance. (Vol. VII, P. 192)

Mr. Ford learned of the guardianship proceeding by a letter. He called an attorney, and thought the hearing was cancelled. He learned about the *14 guardianship order when he returned to Springfield after the original indictment. (Vol. VII, P. 195)

Mr. Ford was cross-examined. He opened a second account at Heartland because they suggested he do so. (Vol. VII, P. 199) Mr. Ford does not know the exact portion of funds transferred out of Patricia's account that went for her specific needs. (Vol. VII, P. 205) In discussions with St. Joseph regarding rent, Patricia's social security and pension were not discussed. (Vol. VII, P. 207)

The defense rested. (Vol. VII, P. 212) Mr. Ford's motion for directed verdict at the close of all evidence was denied. (Vol. VII, P. 219)

NOTE: The trial proceedings of December 7, 2011, were filed by the Clerk of the Circuit Court in the record designated 4-12-0592. They are found in volume VI of that record and are indicated by Vol. VI (592) followed with appropriate page number.

The conference of jury instructions began. People's Instruction 1-9 were given without objection. (Vol. VI, (592) P. 16-18) Discussion then commenced regarding People's Instruction 10 and Defendant's Instructions 4A and 4B. The People's proposed instruction eliminated the words, "by deception" and did not include the element of intent to permanently deprive. People's Instruction 10 (Vol. III, C. 595) was given over objection because, "The Court agrees that where the IPI and the law or the statute conflict, then the law or statute is going to be binding on the Court." (Vol VI, (592) P. 23) Based upon the Court's ruling Defendant's Instructions 4A and 4B (Vol. III, C. 620, 622) were refused. (Vol. VI (592) P. 23)

*15 People's Instruction 11 (Vol. III, C. 596), the companion instruction to People's Instruction 10, was given by the Court over objection for the same reasons stated by the Court regarding People's Instruction 10. (Vol VI, (592) P. 23)

People's Instructions 12 and 13 (Vol. III, C. 596-597) were identical instructions to People's Instruction 10 and 11 with the exception of amounts of money. They were given over objection for the reasons previously stated by the Court. (Vol. VI (592) P. 24)

People's Instruction 14 and 15 were given without objection. (Vol. VI (592) P. 25)

People's Instruction 16 (Vol. III, C. 601) provided, "The illegal use of the assets or resources of an **elderly** person includes but is not limited to, the misappropriation of those assets or resources or breach of fiduciary relationship." The instruction was tendered to parallel the statute, [720 ILCS 5/16-1.3 \(West 2010\)](#) (Vol. VI, (592) P. 25) People's Instruction 16 was allowed over objection. (Vol. VI, (592) P. 26)

People's Instruction 17, (Vol. III, C. 602) the Black's Law Dictionary definition of fiduciary was given over objection. (Vol VI (592) P. 28)

People's Instructions 19- 23 were given without objection. (Vol. VI (592) P. 29-30)

Defendant's Instruction 1 was given without objection. (Vol. VI, (592) P. 30)

*16 Defendant's Instruction 2, stated "When a person creates a joint tenancy in property it is presumed that the joint tenant who provided funds for the account did so with the intent of making a gift to the other joint tenant." The Court denied Defendant's Instruction 2 as well as 2A, an alternative presentation of the same instruction. (Vol. VI, (592) P. 35)

Closing argument proceeded. At the conclusion of the arguments counsel and the court discussed the instructions and potential changes. After discussion the Court indicated, "it would prepare a note that the jury is just to consider the instructions in its current form and no modifications were made." Neither counsel responded. (Vol. VI, (592) P. 90) A handwritten note was sent to the jury by the Court. (Vol. III, C. 643) The note stated, "The jury is to consider the jury instructions in their *current form and as read in open court*. No further modifications need be made." The Court signed the note.

After deliberations the jury returned a verdict finding Mr. Ford guilty of financial exploitation of the **elderly** in excess of \$5,000, and financial exploitation of the **elderly** in excess of \$100,000. (Vol. III, C. 646 -647) Judgment was entered on the verdicts and the case was continued for sentencing. (Vol III, C. 643)

NOTE: THE FOLLOWING PROCEEDINGS ARE FOUND IN THE RECORD OF CASE 4-12-0591.

On February 8, 2012, the Court considered arguments on Mr. Ford's motion for new trial and in arrest of judgment. (Vol. III, C. 651-661) The Court *17 made inquiry regarding Mr. Ford's request for a bill of particulars in 2008 CF 1261 and the new indictment in 2011 CF 814. The State agreed that the issue regarding the bill of particulars was properly before the Court. (Vol. VII, P. 13) The motion for new trial and in arrest of judgment was denied. (Vol. VII, P. 23)

On February 14, 2012, Mr. Ford appeared for sentencing. The Court sentenced Mr. Ford to two years probation and ordered that restitution would be determined after a hearing. (Vol. IX, P. 55) On February 15, 2012, the Court vacated the finding of guilty and conviction under Count II of the indictment as an included offense. (Vol. IV, (591) C. 759)

On March 9, 2012, a restitution hearing was held. Delores Hartley is the bookkeeper for St. Joseph's Home. From July 1, 2006 to June 30, 2007 there was an outstanding balance on the account of Patricia Ford in the amount of \$46,201.05. From August 2007 to June 30, 2008 there was an unpaid balance of \$18,548.37 for a total amount owed through June of 2008 of \$64,749.42. (Vol X, P. 10) As of March 1, 2012 the total unpaid balance for Patricia Ford was \$156,755.28. (Vol. X, P. 11) That amount does not reflect a donation received from the Drew Family Funds, donated to St. Joseph's Home for Patricia Ford in the amount of \$17,000. (Vol. X, P. 14) When Patricia Ford entered St. Joseph's Home she was billed \$3300 a month. (Vol. X, P. 32) From June of 2009 to March of 2012 Patricia Ford's bill totaled \$97,572.48. The last insurance payment was paid in April of 2009 for March. (Vol. X, P. 33) In February of 2009 the Guardians began paying \$1,500 a month. (Vol. X, P. 34)

*18 Mr. Ford testified after the trial he attempted to recreate as best he could the amount of money spent directly for the benefit of his mother. From January of 2004 through early 2009 he paid \$94,613.53 for Patricia Ford's benefit. (Vol. X, P. 51).

Counsel submitted written argument to the Court regarding the amount of restitution. On May 21, 2012 the Court entered a restitution order directing that Mr. Ford pay restitution in the amount of \$41, 651.12 to Patricia Ford and \$73,189.61 to St. Joseph's Home. Restitution was to be paid in 5 years. (Vol. IV, P. 726-36) The trial court determined that for the years 2005 and 2006 Mr. Ford actually paid more for Patricia Ford's benefit than she received. In 2005 Tom Ford was credited \$6,628.08 and in 2006, \$242.79. (Vol. IV, (591) C. 731-32)

On June 6, 2012, the Court denied Mr. Ford's motion to reconsider the restitution amount. (Vol. IV C. 761) Notice of Appeal was filed June 25, 2012. (Vol. IV, C 745-6)

ARGUMENT

I.

The Financial Exploitation of The **Elderly Statute Violates the Substantive Due Process Provisions of the United States and Illinois Constitutions.**

Review of a constitutional challenge to a statute is *de novo*. *People v. Moss*, 206 Ill. 2d 503, 520, 276 N.E. 2d 208, (2003). After the State dismissed the original indictment, the trial court did not address Mr. Ford's pre-trial motion to dismiss the subsequent indictment for due process violations. (Vol. I, (592) C. *19 186-87) The issue was however presented to the trial court in Mr. Ford's motion for a directed verdict (Vol VII, (591) P. 139) and via post-trial motion. (Vol. III, (591) C. 651-661) The issue was also presented and addressed by the Court during the conference on instructions as set forth in Argument III below.

A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity. *People v. Miller*, 171 Ill. 2d 330,333, 664 N.E. 2d 1021 (1996). The discretion granted to the legislature in defining criminal offenses is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law. *People v. Reed*, 148 Ill. 2d 1, 11, 591 N.E. 2d 455 (1992) A statute violates the due process clauses of both the Illinois and United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state. *People v. Zaremba*, 158 Ill. 2d 36, 40-43, 630 N.E. 2d 797 (1994); *People v. Wick*, 107 Ill. 2d 62, 66-67, 481 N.E. 2d 676 (1985).

Tom Ford was convicted of Financial Exploitation of the **Elderly**. 720 ILCS 5/16-1.3(a) (West 2010). The statute as applied to Mr. Ford violates the due process clauses of both the Illinois and United States Constitutions because it subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge. *People v. Madrigal* 241 Ill. 2d 463, 948 N.E. 2d 591 (2011). The evidence presented by the State at Mr. Ford's trial made no distinction between legally innocent conduct and conduct requiring a culpable mental state beyond mere knowledge. Such a method is not *20 a reasonable means of preventing the targeted criminal activity. *Madrigal*, 241 Ill. 2d at 468.

The financial exploitation statute is laudable in its purpose and goals. But the purpose and goal of the statute cannot be to criminalize all aspects of the financial management and control of an **elderly** person's estate. Under the theory presented in Mr. Ford's case, even though Patricia Ford's intention was to allow her son to control her financial decisions, he became subject to criminal prosecution if those decisions were deemed incorrect. If Thomas Ford improperly handled Patricia's financial affairs, a civil action could have rectified those errors. Instead his actions were deemed to be a violation of the criminal law without imposing any culpable mental state upon his conduct. Interpreting the criminal statute in this fashion is constitutionally impermissible.

Trial evidence established that in September of 2000 Tom's mother, Patricia Ford, executed a power of attorney that authorized Tom to have control over her financial and legal matters. Attorney David Reid prepared the documents and met with Patricia and Tom. It was clear to Mr. Reid that Patricia wanted Tom to assume control over her financial affairs. (Vol. VII, (591) P. 142-3)

720 ILCS 5/16-1.3(a) provides as follows:

A person commits the offense of financial exploitation of an **elderly** person or a person with a disability when he or she stands in a position of trust or confidence with the **elderly** person or a person with a disability and he or she knowingly and by deception or intimidation obtains control over the property of an **elderly** person or a person with a disability or illegally *21 uses the assets or resources of an **elderly** person or a person with a disability. 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.

While the statute represents a legitimate public interest, when applied to the facts of this case, it fails to afford Tom Ford due process because it makes no discernible distinction between acts legitimately undertaken by him through the legal relationship created by his power of attorney, and conduct that is alleged to be misappropriation of assets. The indictment charged that Tom Ford, "knowingly obtained and illegally used the assets of Patricia Ford." (Vol. I, (591) C. 1-2) The evidence presented at trial was simply put, evidence of all of Tom Ford's financial transactions from January, 2004 through October, 2008, the dates on

the indictment. The trial testimony of Susan Jackson of the Illinois State Police, found at Vol. VII, P. 111-125-6, is simply an examination of the financial records of the joint account of Patricia Ford and a presentation to the jury of total amounts received and spent. No distinction whatsoever was presented to the jury that any of the transactions could have legitimately been made for the benefit of Patricia Ford. Thomas Ford was placed in the position where not only was innocent conduct criminalized, the statute as interpreted by the State required Mr. Ford to justify each transaction and therefore establish his innocence. Such a shift in the burden of proof violates fundamental notions of due process and the presumption of innocence.

*22 The prosecution has the burden of proving beyond a reasonable doubt all the material and essential facts constituting the crime. *People v. Benson*, 19 Ill. 2d 50, 61, 166 N.E. 2d 80 (1960) It is not for the defendant to establish his innocence but for the prosecution to establish his guilt. *People v. Weinstein*, 35 Ill. 2d 467, 220 N.E. 2d 432 (1966). In Thomas Ford's trial, the Financial Exploitation of the **Elderly** statute was applied in a manner that violated his federal and state constitutional guarantees of due process.

The Identity Theft statute found unconstitutional in *Madrigal* required that the defendant act "knowingly." As Justice Garman noted in *People v. Hollins*, 2012II 112754, ¶ 27, the Identity Theft statute would potentially punish as a felony a wide range of wholly innocent conduct. This was not a rational way of addressing the issue of identity theft.

There can be no doubt that the evidence presented at trial made no discernible distinction between acts legitimately undertaken by Tom Ford under his power of attorney over the financial affairs of Patricia Ford, and actions that constituted illegal use of those assets. Facing a similarly drafted theft statute in 1994, the Supreme Court declared unconstitutional a provision that enabled law enforcement officers to conduct undercover investigations aimed at breaking up fencing operations. *People v. Zaremba*, 158 Ill. 2d 36, 630 N.E. 2d 797 (1994). The statutory provision provided that a person committed theft when he knowingly obtains or exerts control over property in the custody of any law *23 enforcement agency, which is represented by any law enforcement officer as being stolen. The Court determined that despite the laudable goal of confronting those who deal in stolen goods, the statute in question lacked a culpable mental state, because it required neither that the control over property be unauthorized nor that there be an intent to permanently deprive the rightful owner of the property at issue. *People v. Zaremba*, 158 Ill. 2d 36, 41, 630 N.E. 2d 797, 799 (1994).

The Financial Exploitation statute in question here faces the identical difficulty. Its laudable goal of protecting the **elderly** from theft cannot be applied to the lawful actions of one granted legal authority by the alleged victim to engage in financial activity. Under the theory of the case as presented by the state, had Tom Ford used Patricia Ford's funds to purchase stock in 2008, only to see the value of that stock decline during the stock market crash of 2008 and 2009, he would be guilty of theft regardless of his state of mind when he invested.

Clearly, an intentional decision to defraud must be required and proven. The statute speaks of deception, intimidation, undue influence, breach of fiduciary relationship and fraud. The State presented no evidence directed towards any of those elements. The state's strict liability interpretation of the statute denies Tom Ford due process under both the United States and Illinois Constitutions.

*24 In *People v. Tolliver*, 147 Ill. 2d 397, 589 N.E. 2d 527 (1992), the Supreme Court upheld a statute that criminalized possession of a motor vehicle title without complete assignment, and which had no mental state element in the statute as written. But the Court noted that the statute had to be read in conjunction with a requirement of "criminal knowledge" or knowledge with an intent to defraud or commit a crime. No such requirement was made of the State in Tom Ford's trial, indeed the jury was not even instructed that the intent to permanently deprive was an element of the offense. The statute in question as applied to Tom Ford should be declared unconstitutional and the indictment in this case should be dismissed.

II. The Failure to Grant the Motion For a Bill of Particulars Denied Tom Ford the Ability to Prepare and Present an Appropriate Defense.

A trial court's decision on a motion for a bill of particulars is reviewed for **abuse** of discretion. *People v. Lego*, 116 Ill. 2d 323, 337, 507 N.E. 2d 800 (1987). An **abuse** of discretion occurs when the trial court's ruling is "arbitrary, fanciful, [or] unreasonable," or where no reasonable person would take the view adopted by the trial court. *People v. Hall*, 195 Ill.2d 1, 20, 743 N.E. 2d 126 (2000). A bill of particulars may be required when an indictment fails to sufficiently specify the particulars of the charged offense in order to enable a defendant to prepare a defense. 725 ILCS 5/111-6 (West 2010).

*25 Tom Ford requested a bill of particulars prior to trial. The request was considered and denied by the Court. (Vol. I, (592) C.176) The issue was presented in Mr. Ford's post-trial motion. (Vol. III, (591) C. 651-661) The Court denied the request because the State had provided "voluminous" discovery and would proceed to trial only on a theory of misappropriation. The allegation of deception was deleted from the indictment.

The purpose of a bill of particulars is to give the defendant notice of the charge, and to inform the defendant of the particular transactions in question, thus enabling preparation of a defense. *People v. Woodrum*, 223 Ill. 2d 301-302, 860 N.E. 2d 259 (2006). In the context of Mr. Ford's trial, the failure to grant his request for a bill of particulars denied him due process and a fair trial because he was never informed of the particular financial transactions that were deemed misappropriation. Thus, the evidence at trial consisted of a blanket allegation from the State that every time Mr. Ford moved money from Patricia Ford's account to his account he was misappropriating funds. The burden of proof then improperly shifted to Mr. Ford to somehow justify these financial transaction.

Mr. Ford's request for a bill of particulars stands in contrast to a recent Illinois Supreme Court decision reviewing such a request. In *People v. Woodrum*, 223 Ill. 2d 286, 860 N.E. 2d 259 (2006), the Illinois Supreme Court discussed the decision whether to allow a request for a bill of particulars. The *26 defendant sought a specific statement of the alleged unlawful purpose of his conduct in order to prepare a defense. In its written objection to the request for a bill of particulars, however, the State informed defendant that the evidence consisted of the videotape and defendant's "detailed written confession." At the hearing on defendant's motion, the prosecutor stated that the only additional evidence to be presented was testimony of the children identifying themselves on the videotape, and the parents' testimony that defendant did not have permission to take the children inside his residence. At trial, the State confined its evidence to the videotape, defendant's written statement, and the testimony of the children and their parents.

The Supreme Court found that the indictment and the State's disclosures were sufficient to enable defendant to prepare his defense. The trial court, therefore, did not **abuse** its discretion in denying defendant's motion for a bill of particulars. *Woodrum*, 223 Ill. 2d at 302, 860 N.E. 2d at 271. In the context of Mr. Ford's trial, it cannot be denied that he was granted by Patricia Ford the power and authority to use her funds. That is the legal impact of a power of attorney. The creation of a joint tenancy as occurred in this case, created a presumption that Patricia Ford did so with the intent of making a gift to Tom Ford. *Rasmussen v. LaMagdelaine*, 208 Ill. App. 3d 95, 103, 566 N.E. 2d 864, 869 (2d Dist. 1991). The State's indictment alleged that Mr. Ford misappropriated money over which he had ownership. Even though the State presented a large amount of documentation, it merely consisted of bank account *27 records. No effort was made by the State to show which specific transactions violated Illinois law. Instead, Tom Ford was left to justify each transaction.

Through his request for a Bill of Particulars Tom Ford sought to learn what funds were specifically misappropriated. In *United States v. Bortnovsky*, 820 F. 2d 572 (2d Cir. 1987), the defendants were charged with a scheme to defraud FEMA by submitting fraudulent insurance claims for burglary losses. They sought a bill of particulars to identify fraudulent and falsified documents.

Reversing the trial court's denial of a request for bill of particulars, the Second Circuit found that, "The Government did not fulfill its obligation merely by providing 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." *Bortnovsky*, 820 F. 2d at 575.

The difficulty for Mr. Ford becomes clear when the trial record is reviewed. The State's response to the request for a bill of particulars was to indicate in a written communication that the case against Mr. Ford involved the transaction whereby Mr. Ford sold Patricia Ford's condominium, and the actions of Mr. Ford from January of 2004 to October of 2008 where Mr. Ford withdrew money from Patricia Ford's account and deposited those funds into his account. (Vol. I, (592) C.87) During opening statements and trial the State proceeded on a different theory by introducing substantial testimony from St. Joseph's Home regarding balances due and unpaid in the account of Patricia Ford. St. Joseph's *28 Home, though un-named in the indictment, became an alleged victim of Thomas Ford.

It was the peculiar nature of the allegations against Tom Ford that justified his request for a bill of particulars. He was alleged to have misappropriated money that he legally possessed. Under the unique circumstances of this indictment and this trial, the failure to grant Mr. Ford's request for a bill of particulars created substantial prejudice. Mr. Ford was obligated to justify each and every financial transaction over a period of several years. In effect, he was required to prove his innocence. For the reasons set forth in Argument One, this shifting of the burden of proof is constitutionally impermissible.

A review of the trial court's comprehensive order of restitution exemplifies the difficulty facing Thomas Ford in preparing his defense. After a restitution hearing, the order was entered May 21, 2012. (Vol IV (591), P. 726-36) The court found that in the year 2005, Tom Ford actually paid \$6,628.08 over and above funds that his mother received. For that year Tom Ford was credited that amount. (Vol. IV (591) P. 731) For the year 2006, the trial court found that Mr. Ford paid \$242.79 over and above Patricia Ford's funds. Tom Ford was again credited that amount. (Vol. IV (591) P. 732) The indictment spans 58 months. For a minimum of 24 of those 58 months, almost one-half of the time period *29 alleged in the indictment, the trial court determined that Tom Ford was expending the funds of Patricia Ford in an appropriate and proper fashion.

A bill of particulars would have required the State to identify how and when funds were misappropriated. A bill of particulars would have allowed Mr. Ford to specifically answer the general allegation that every dollar of Patricia Ford's funds was improperly expended. Given the general allegations of the indictment as well as the particular facts and circumstances of this case, a bill of particulars was essential to Mr. Ford's ability to present his defense. The failure to grant his request was an **abuse** of discretion. Tom Ford should receive a new trial.

III. Tom Ford was Denied Due Process by Jury Instructions that Failed to Fully and Fairly Explain to the Jury the Applicable Law on the Offense of Financial Exploitation of the **Elderly.**

Instructions convey the legal rules applicable to the evidence presented at trial. They function as a critical guide to the jury's deliberations toward a proper verdict. *People v. Hudson*, 222 Ill.2d 392, 399, 856 N.E.2d 1078 (2006). The task for a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *People v. Pollock*, 202 Ill.2d 189, 210, 780 N.E.2d 669 (2002). The proper standard of review is whether the trial court **abused** its discretion. *People v. Jones*, 219 Ill.2d 1, 31, 845 N.E.2d 598 (2006). "A trial court *30 **abuses** its discretion if jury instructions are not clear enough to avoid misleading the jury." *In re Timothy H.*, 301 Ill. App.3d 1008, 1015, 704 N.E.2d 943 (1998).

At Mr. Ford's trial the instructions surrounding the offense of Financial Exploitation of the **Elderly** created a dilemma because of legal ambiguities in the interpretation of the statute. During the instruction conference both the State and Mr. Ford presented differing theories on the elements of the offense and the application of various legal rules. The trial court's decisions on the instructions when viewed in their entirety failed to provide Tom Ford with due process because they did not properly instruct the jury on the applicable law. More importantly, they failed to hold the State to its constitutionally required burden of proof beyond a reasonable doubt on all elements of the offense.

The State has the burden of proving the elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). Under the Fourteenth Amendment and the Sixth Amendment of the United States Constitution, and [article 1 section 2 of the Illinois Constitution](#), a criminal defendant is entitled to "a jury determination that he is guilty of every element

of the crime with which he is charged, beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310 (1995); *People v. Thurow*, 203 Ill. 2d 352, 370, 786 N.E. 2d 1019 (2003)).

*31 At Mr. Ford's trial the jury, over his objection, was instructed that to sustain the charge of financial exploitation of the **elderly** the state was required to prove, “That the defendant knowingly obtained control and illegally used the assets of Patricia Ford.” (Vol. III, (591) C. 635, 637) The Court declined to instruct the jury as Mr. Ford proposed that the State was required to prove that, “The defendant intended to permanently deprive Patricia Ford of the use, benefit, or possession of that property.” (Vol. III, (591) C. 616, 618) Mr. Ford's tendered instruction on this issues was Illinois Pattern Jury Instruction, Criminal No. 13.36 (hereinafter IPI Criminal 4th No. 13.36) The court instruction varied from the language of the IPI because the statutory language of the financial exploitation of the **elderly** statute had been modified by the legislature in August of 2002. This legislation deleted the requirement of intent to permanently deprive. (Vol. VII, (591) P. 137)

In *People v. Layne*, 286 Ill. App. 3d 981, 987, 677 N.E. 2d 469 (5th Dist. 1997), the Fifth District recognized that the intent to permanently deprive was an element of the offense of financial exploitation of the **elderly**. While the legislature may have acted in response to *Layne*, IPI Criminal 4th 13.36 remains in the language and form as tendered by Mr. Ford. The element of “intent to permanently deprive” remains in the instruction.

For the reasons set forth above in Argument I., the legislative action that eliminated the intent to permanently deprive as an element of the financial *32 exploitation of the **elderly** statue created a criminal statute that punishes innocent conduct and therefore is contrary to the mandate of *People v. Madrigal*, 241 Ill. 2d 463, 948 N.E. 2d 591 (2011). To conclude that one can be guilty of financial exploitation of the **elderly**, without the intent to permanently deprive, is to create a criminal statute that not only punishes innocent conduct, but can create criminal liability for financial transactions undertaken in good faith resulting in economic loss. The element instructions approved by the trial court in Mr. Ford's case were constitutionally infirm, incorrect as a matter of law, and failed to appropriately guide the jury to distinguish between criminal and non-criminal activity. The non-IPI issues instructions provided by the court were an **abuse** of discretion.

Additional instructions provided to the jury exacerbated the incorrect interpretation of the financial exploitation of the **elderly** statute by the State. Over objection the court instructed the jury in a Non-IPI instruction that “The illegal use of assets or resources of an **elderly** person includes but is not limited to, misappropriation of those assets or resources or breach of fiduciary relationship. (Vol. III (591) C. 601)

Finally, over objection, the Court included the *Black's Law Dictionary* definition of fiduciary as, “one who owes to another the duty of good faith, trust, confidence, and candor, who must exercise a high standard of care in managing *33 another's money or property.” All breaches of fiduciary duty are not crimes. To instruct the jury in this fashion was an **abuse** of discretion.

Finally, the Court refused Mr. Ford's instruction on the legal relationship created by a joint tenancy. His instructions 2 and 2a, (Vol III. (591) C. 613-14) were based upon Illinois case law that, ‘when a person creates a joint tenancy in property it is presumed that the joint tenant who provided funds for the account did so with the intent of making a gift to the other tenant.’ *Rasmussen v. LaMagdaleine*, 208 Ill. App. 3d 95, 103, 566 N.E. 2d 864 (2d Dist. 1991) Thomas Ford's along with the testimony of David Reid, the attorney who created the power of attorney documents clearly established that this was Patricia Ford's intent. The jury should have been instructed regarding the law.

The Court's instructions when viewed in their entirety had the end result of turning a family probate dispute into a criminal trial. Even worse, it was a criminal trial where the State received the additional advantage of not even being required to present proof beyond a reasonable doubt on all elements of the offense. The instruction when viewed in their entirety denied Tom Ford due process of law and a fair trial. His conviction should be reversed.

***34 IV. Tom Ford was Denied Due Process When the Trial Court
Improperly Communicated with the Jury During Deliberations.**

At the conclusion of closing arguments, the court read the instructions to the jury, and observed what it believed was an error on one of the instructions. The court advised the jury that they would receive a copy of the instructions after one modification. (Vol. VI, (592) P. 86-87) After discussion it was determined that no modification was required. The court indicated, "it would prepare a note that the jury is just to consider the instructions in its current form and no modifications were made." Neither counsel responded. (Vol. VI, (592) P. 90) A handwritten note was sent to the jury by the Court. (Vol. III, C. 643) The note stated, "The jury is to consider the jury instructions in their *current form and as read in open court*. No further modifications need be made." The court signed the note. (Vol. III, (591) C. 664)

In his post-trial motion Mr. Ford objected to the note. (Vol. III, (591) C. 653) On February 8, 2012, the court conducted a hearing on the post-trial motion. Both the State and counsel for Mr. Ford indicated that they were unaware that the court had sent a note to the jury. (Vol. VIII (591) P. 4-7) The court indicated it believed that the procedure employed in sending the note to the jury was appropriate. (Vol VIII (591) P. 8)

In the trial court's view the note was not an *ex parte* communication with the jury. A fair reading of the record indicates confusion and no response from *35 either the State or Mr. Ford's counsel to the court's indication that it would prepare a note. But silence cannot presume the waiver of an important right of the defendant. A criminal defendant has a constitutional right to be present during a communication between the judge and jury following the jury's retiring to deliberate. *People v. McDonald*, 168 Ill. 2d 420, 660 N.E. 2d 534 (1995). Assuming that this was a matter for the trial court's discretion, the court **abused** that discretion when it prepared a note without consultation with either counsel, and the note incorrectly suggested to the jury that "no further modifications need to be made."

Whether to issue supplemental instructions in response to questions from the jury rests with the discretion of the trial court, and should such clarification be requested, the court has a duty to ascertain from the jury what information they might require to attempt to clarify issues in their minds. Even where proper instructions have been given, where the jury raises explicit questions on a point of law, the trial court has a duty to clarify the issue in the minds of the jury. *People v. Oden*, 261 Ill. App. 3d 41, 45-46, 633 N.E. 2d 1385 (5th Dist. 1994) Had the court inquired of counsel before sending the note to the jury, counsel certainly would have suggested alternative language that did not give the jury the incorrect belief that no modifications could be made to the instructions. For example, the jury could have been informed, "Ladies and Gentlemen, the instructions you have received are correct. You may begin your deliberations." Or as an alternative, "Ladies and gentlemen, you may begin your deliberations *36 with the instructions as received." Either note would have been a correct statement of the law.

If the communication by the court to the jury was *ex parte*, Mr. Ford must still establish injury or prejudice to show grounds for a new trial. *People v. Childs* 159 Ill. 2d 217, 227-28 636 N.E. 2d 534 (1994) The note delivered to the jury without consultation with counsel prejudiced Mr. Ford by giving the jury the incorrect impression that they could not seek modification or clarification of the instructions. This false impression prejudiced Mr. Ford. His conviction should be reversed and a new trial ordered.

**V. The Evidence Presented at Trial Failed to Establish that
Tom Ford was Guilty of Financial Exploitation of the **Elderly**.**

The evidence presented at trial failed to establish beyond a reasonable doubt that Tom Ford was guilty of financial exploitation of the **elderly**. The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) When a court reviews a conviction to determine whether the constitutional right recognized in *Winship* was violated, it must ask "whether the record evidence could

reasonably support a finding of guilt beyond a reasonable doubt.” *Jackson* *37 v. *Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, (1979) The question is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789 The *Jackson* formulation establishes the standard of review for claims that the evidence was insufficient to sustain a conviction. *People v. Collins*, 106 Ill.2d 237, 261, 478 N.E.2d 267 (1985) It applies in all criminal cases, regardless of the nature of the evidence. *People v. Pollock*, 202 Ill.2d 189, 217, 780 N.E.2d 669 (2002) All reasonable inferences from the record must be viewed in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E. 2d 304 (2004).

Tom Ford recognizes that when he asks for a review of the sufficiency of the evidence before this Court he is not entitled to a new trial. Viewing the evidence most favorable to the prosecution means the reviewing court must indulge all reasonable inferences in favor of the prosecution. But unreasonable inferences may not be made. If the record supports only one inference the court must accept it even if it favors the defendant. *Cunningham*, 212 Ill. 2d at 280, 818 N. E. 2d at 308 A conviction may not stand if the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E. 2d 262 (2005)

In Mr. Ford's case, a combination of several factors, the interpretation of the statute, the legal instructions, and the State's theory of the case have *38 resulted in a trial where the totality of the evidence presented failed to establish criminal conduct by proof beyond a reasonable doubt. Several of these issues have been addressed in other sections of Mr. Ford's brief and will not be re-stated in this section. This section will focus only on the testimony of the witnesses and what evidence was presented to the jury. That evidence, even when viewed in a light most favorable to the State, failed to meet the burden of proof beyond a reasonable doubt.

The indictment charged that between January of 2004 and October 2008, Mr. Ford, “standing in a position of trust and confidence with Patricia Ford, age 83, knowingly obtained and illegally used the assets of Patricia Ford, being United states currency, valued in excess of \$100,000.” (Vol. I (591) C. 1-2) The two counts of the indictment contained identical language but placed different totals on the amount of money involved.

The State presented 6 witnesses at trial. Janet Stivers testified regarding the guardianship for Patricia Ford established without the knowledge of Tom Ford. Two witnesses were foundation witnesses to establish the identity of the accounts held by Patricia and Tom Ford. Two witnesses from St. Joseph's home established that portions of Patricia Ford's account at the home were delinquent. Susan Jackson of the Illinois State Police examined the accounts and testified to the jury regarding total amounts of funds moved between the various accounts.

*39 How did Tom Ford illegally use the money from Patricia Ford's account? The State relied upon the statutory definition that the illegal use of assets or resources of an **elderly** person includes, but is not limited to, the misappropriation of those assets or resources or breach of fiduciary relationship. (Vol. III, (591) C. 640) At no time during Mr. Ford's trial did the State establish how he, as a joint owner of funds available to Patricia Ford, possessed the required mental state necessary to establish by proof beyond a reasonable doubt that he was guilty of financial exploitation. The State also failed to present any evidence that established a breach of fiduciary duty or a misappropriation of funds. The mere fact that there was money moved between legally established accounts cannot be the basis for a conviction under the financial exploitation of the **elderly** statute.

The State's case was that he took money from Patricia Ford's account and used it for many purposes. Mr. Ford was the only witness who provided testimony regarding how the funds were spent. As has been argued in other portions of this brief, requiring him to justify the expenditures, absent evidence in the State's case in chief, had the constitutionally flawed impact of shifting the burden of proof from the State to Mr. Ford.

In reviewing the evidence presented against Mr. Ford, this Court should consider two other important elements. As previously noted, the State could have cured the flaw in their presentation by a bill of particulars. Instead they *40 argued that the indictment was sufficient. But the indictment fails to mention St. Joseph's Home. It was not until opening statements that there

was any indication that the St. Joseph's Home payments were an element of the indictment. Again, the burden of proof was shifted and Tom Ford was required to offer testimony regarding the financial dealing with St. Joseph's Home.

Finally, after Mr. Ford was convicted, a lengthy hearing was held regarding the amount of restitution. The trial court determined that for the years 2005 and 2006, Mr. Ford actually paid more for Patricia Ford's benefit than he transferred from her accounts. The restitution order actually gave Mr. Ford credit for these overpayments. In 2005 Tom Ford was credited \$6,628.08 and in 2006 \$242.79. (Vol. IV, (591) C. 731-32) That finding by the trial court alone should call into question whether the evidence against Mr. Ford met the standard of proof beyond a reasonable doubt.

Tom Ford does not seek to second-guess the jury in the present case. Evaluating the sufficiency of the evidence in this case requires consideration of the indictment, statute, request for bill of particulars, jury instructions and testimony of witnesses. All of those considerations even when viewed in the light most favorable to the State clearly establish that the evidence against Mr. Ford did not rise to proof beyond a reasonable doubt. His conviction should be reversed.

***41 CONCLUSION**

For the foregoing reasons, Robert Thomas Ford respectfully requests that the Court reverse his conviction for financial exploitation of the **elderly**, or in the alternative, reverse the conviction and remand this case to the circuit court for a new trial.

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