2010 WL 4358594 (N.C.) (Appellate Petition, Motion and Filing)
Supreme Court of North Carolina.

STATE OF NORTH CAROLINA,
v.
Kenneth Thomas FORTE.

No. 431P10.
October 7, 2010.

From Richmond County No. 09CRS518-20, No. COA09-1591

Petition for Discretionary Review under G.S. 7A-31

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***1** TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Kenneth Thomas Forte respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals affirming the trial court's conclusion that Ernest Lindsey was competent to testify as a witness on the basis that the decision of the Court of Appeals involves legal principles of major significance to the jurisprudence of the State, and the decision of the Court of Appeals appears likely to be in conflict with the decision of the Supreme Court. *See* N.C.G.S. § 7A-31(c). If the decision of the court below is allowed to stand, the two-part test set out in N.C.G.S. § 8C-1, Rule 601(a) will be reduced to a one-part test, since the decision of the Court of Appeals eliminates the Rule in 601(a)(1) which states that a witness is not competent to testify if he is "(1) incapable of expressing himself concerning the matter to be understood, ..."

***2 STATEMENT OF PROCEDURAL HISTORY**

Defendant Kenneth Thomas Forte ("Mr. Forte" or "defendant") was indicted on February 2, 2009, for three counts of exploitation of **elder** adult. (Record on Appeal at 3-5) ("R. at ___") Two of the indictments, 09 CR 518 and 09 CR 520, were brought as Class H felonies under N.C.G.S. § 14-32.3(c). One indictment, 09 CR 519, was brought as a Class H felony under N.C.G.S. § 14-112.2(b). [1] (*Id.*) Defendant was arraigned at the March 30, 2009, term of Richmond County Superior Court, pleading not guilty. (R. at 6)

Defendant's case came on for trial at the June 8, 2009, Criminal Session of Richmond County Superior Court, the Honorable Joseph Crosswhite presiding. Defendant was found guilty on all three counts on June 16, 2009. (R. at 9-11)

Defendant was sentenced the same day. Judge Crosswhite consolidated the three convictions, and after finding that defendant had 0 criminal history points, sentenced defendant to a term of 6-8 months. Judge Crosswhite suspended that sentence subject to 60 months supervised probation. Defendant also was ordered to pay restitution in the amount of $35,000. (R. at 12-16)

Ronald Barbee, trial counsel for defendant, gave oral notice of appeal to the North Carolina Court of Appeals at the conclusion of the trial on June 16, 2009. (R. at 17)

***3** On September 7, 2010, the Court of Appeals, in a unanimous, published opinion, affirmed the decision of the trial court. (A copy of the decision of the Court of Appeals is attached hereto.)

STATEMENT OF THE FACTS

A. Overview.

Defendant was indicted on three counts of exploitation of an **elder** adult under two statutes. The first statute was N.C.G.S. § 14-32.3, effective December 1, 1995. That statute states in pertinent part:

(c) Exploitation. -- A person is guilty of exploitation if that person is a caretaker of a disabled or **elder** adult who is residing in a domestic setting, and knowingly, willfully, and with the intent to permanently deprive the owner of property or money: (i) makes a false representation, (ii) **abuses** a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or **elder** adult gives or loses possession and control of property or money.

If the loss of property or money is of a value of more than one thousand dollars ($ 1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of less than one thousand dollars ($1,000) the caretaker is guilty of a Class 1 misdemeanor.

(d) Definitions. -- The following definitions apply in this section:

(1) Caretaker. -- A person who has the responsibility for the care of a disabled or **elder** adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or **elder** adult voluntarily or by contract.

* * *

(4) **Elder** Adult. -- A person sixty (60) years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

N.C.G.S. §14-32.3(c),(d).

***4** Effective December 1, 2005, N.C.G.S. § 14-32.3(c) was repealed. In its place came a new statute, N.C.G.S. § 14-112.2, "Exploitation of an **elder** adult or disabled adult." Following is the pertinent sections of that statute:

(a) The following definitions apply in this section:

* * *

(2) **Elder** adult. -- A person sixty (60) years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

(b) It is unlawful for a person: (i) Who stands in a position of trust and confidence with an **elder** adult or a disabled adult, or (ii) who has a business relationship with an **elder** adult or disabled adult to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an **elder** adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the **elder** adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the **elder** adult or disabled adult.

* * *

(d) A violation of subsection (b) of this section is punishable as follows:

* * *

(3) If the funds, assets, or property involved in the exploitation of the **elderly** person or disabled adult is valued at less than twenty thousand dollars ($20,000), then the offense is a Class H felony.

N.C.G.S. § 14-112.2(a)(2), (b), (d)(3).

Because some of defendant's alleged activities took place prior to December 1, 2005, and some after December 1, 2005, he was indicted under both statutes. More specifically, defendant was indicted under N.C.G.S. § 14-32.3(c), in indictment 09 CR 518, for the time period December 30, 2003 through December 31, 2004. Defendant was then indicted under the same statute, ***5** N.C.G.S. § 14-32.3(c), in indictment 09 CR 520 for the time period January 1, 2005 through November 30, 2005. Finally, defendant was indicted under N.C.G.S. § 14-112.2(b), in indictment 09 CR 519, for activities which allegedly took place between December 1, 2005, and June 1, 2006. (R. at 3-5) Accordingly, the time frame for all defendant's alleged activities includes the years 2004, 2005 and one-half of 2006.

The State's case included four witnesses and various exhibits. Put simply, the theory of the State's case was that defendant Kenneth Forte, an accomplished hardwood artist who had never before been accused of or convicted of any crime, took advantage of an **elderly** man, Ernest Lindsey. More specifically, the State alleged that Mr. Forte tricked Mr. Lindsey into writing scores of checks made out to himself (Mr. Forte).

The State introduced into evidence as Exhibits 5-13 a series of checks written by Mr. Forte and signed by Mr. Lindsey for the period dating from December 18, 2003 through June 1, 2006. These checks include eight which paid Mr. Lindsey's taxes, 10 to pay his insurance, 28 to the Town of Ellerbe, 32 to Progress Energy, five for the Postmaster and Farm Supply, 27 to Ellerbe Telephone, four to Rachel Cromer, 12 to Delores Bordeaux, and 92 to Kenneth Forte.[2] (Transcript at 324-343) (T.at ___)[3]

Evidence from Mr. Forte did not dispute that Mr. Lindsey signed the checks that had been introduced into evidence by the State. Instead, evidence from Mr. Forte was that Mr. Forte had done ***6** various jobs around Mr. Lindsey's home, such as repairing and remodeling, and that some of the checks were for payment to Mr. Forte for labor and supplies. Other checks were to reimburse Mr. Forte for items he purchased for Mr. Lindsey. Finally, other checks made out to Mr. Forte were for the purpose of securing cash for Mr. Lindsey, since Mr. Lindsey did not have a local checking account. At the close of the trial, after the jury had rendered its verdict, the State conceded that Mr. Forte had in fact done certain work for Mr. Lindsey, and the State agreed that this should be taken into account when determining restitution. Therefore, instead of demanding the full amount of the 91 checks written to Mr. Forte totaling $45,000, the State agreed to allow restitution in the amount of $35,000, thus crediting $10,000 for work performed for Mr. Lindsey by Mr. Forte. (T. at 9, 32-33)

Following are excerpts from Mr. Lindsey's voir dire and trial testimony. This is the only testimony relevant to this petition.

B. Ernest J. Lindsey- Voir Dire.[4]

The voir dire of Ernest J. Lindsey begins on page 355 and ends on page 400 of the trial transcipt. Mr. Lindsey is in a wheelchair. (T. at 359)

Mr. Lindsey was born on XX/XX/1910, but does not know how old he is. (T. at 356) Following are key colloquies from Mr. Lindsey's voir dire.

Q: [District attorney Layton] That man right there (indicating) - do you know him as Kenny Forte?

A. Wait a minute. Looked like to me that old rascal - looked like to me I know him from somewhere. (Mr. Forte removed his glasses) No, that don't help me a bit. Let's see. That old rascal --1 shouldn't call him a rascal, because I don't know him that well, do I?

***7** (T. at 357)

* * *

Q. [Defense attorney Saunders] Do you know this man seated beside me (indicating)?

A: Huh?

Q: Do you know this man?

A: A while ago I said J knew him. But, I mean, the same thing now. I knew him then, I know him now. That's all I can --

Q: Do you know his name?

A: Mr. Forte.

Q: How long have you known Mr. Forte?

A: I couldn't tell you. I couldn't tell you. But its been quite a while that I known Mr. Forte. I knew him well, because he got stuff that I wished I had - beautiful moustache.

(T. at 363)

* * *

Q: [Defense attorney Saunders] Let me ask you this, Mr. Lindsey. Do you have a checking account?

A: Huh?

Q: Do you have a checking account?

A: Not that I know of. If I did - if I had one, I'd know it. But I don't know that I've got a checking account.

Q: Do you remember ever having a checking account?

A: No. I mean, yeah, I think I told them a while ago I had a checking account somewhere. But I don't remember where it was.

(T. at 364)

* * *

***8** Q: [Defense attorney Saunders] Do you understand that a trial is going on here, and Mr. Forte is being tried?

A: Yeah, I understand that part, I'm dumb, but I'm not quite that dumb. Yeah.

Q: Do you have any information -- do you think you got information that would be helpful to this Court about that - about Mr. Forte's trial?

A: I mean, I can't -- I mean, I just don't get - don't quite understand the question. I understand what you're saying, but what it means, or is emanating from, I just can't say.

(T. at 365)

* * *

Q: [Defense attorney Saunders] Did Mr. Forte help you get a truck at one time?

A: I couldn't say that. I really don't remember. Now if he did-if he helped me, he did. If he didn't help me, I can't say he didn't. I mean, I don't -I just don't have that kind of memory you know.

(T. at 367)

Q: [Defense attorney Saunders] Do you remember Mr. Forte now?

A: Now, see, there's somebody asked me that just a while ago. Sure I remember Mr. Forte. That beautiful moustache.

Q: What do you remember about Mr. Forte?

A: The main thing I remember - he was gentleman to start with. Next thing I remember is the beautiful moustache he got there. The first time I-I -- look at him smiling now. He's still got that moustache.

(T. at 369)

* * *

Q: [Defense attorney Saunders] Do you recall having some dealings with him [Mr. Forte]?

A: Say what?

***9** Q: Do you remember having some dealings with Mr. --

A: Just like I said a while ago. You asked me a question there. I had some deals, but it wasn't no business. No kind of deal that you couldn't speak with - I mean, couldn't talk to people.

That's the kind of man I tell you, if you understand what I'm trying to say. And I swear up and down --1 don't want to be telling no lie, if I can help it. On account of I don't believe in that.

(T. at 375)

* * *

Q: [Defense attorney Saunders] And have your dealings with him, as far as you know, always been on the square?

A: On the level, far as I know. That's all I can say.

He's sitting over there smiling now, looking like a --I can't say what I want to say, but -- he looked like a gentleman. That's good enough.

Q: Do you remember Mr. Forte visiting with you in your home?

A: I just told you -- excuse me. I just told you a few minutes ago I do -I do remember him visiting me in the home. But how long ago -I don't know exactly how long it has been. And I don't know for what reason he be coming at that time.

I told you that just a few minutes ago, and I still say the same thing. I still say the same thing right now. I say the same thing right now that I said then.

My dad was an old-time preacher, and he didn't believe in telling lies. He didn't believe in telling people lies, and he didn't believe in telling people to tell lies for him. That's just as far as I could go.

Somebody say, “well, you're a preacher?” No, hell, no, I ain't no preacher. I'm not a preacher.

(T. at 376-77)

* * *

Q: [Defense attorney Saunders] Well, let me ask you this. Do you have anything bad to say about Mr. Forte?

***10** A: Oh, no. Hell, no. No, indeed. All 1 can say is he is a gentleman.

Q: You're speaking of Mr. Forte here?

A: Huh?

Q: Talking about Mr. Forte?

A: Sure. That gentleman there with the pretty moustache. Wish I could get the moustache he got.

What you laughing about? You know I - you know 1 --

Oh, boy. Please ask me some more questions that I can answer.

(T. at 378-79)

* * *

Q: [District attorney Layton] Do you remember any time that he would cut your toe nails?

A: Say what?

Q: Cut your toe nails.

A: Say what now?

Q: Do you remember Mr. Forte cutting your toe nails on your feet?

A: Somebody asked me that just some time ago, just recently.

Q: Yes, sir, I asked you that. We talked about that a while ago.

A: We did, yeah. That's all I can say, Miss. I don't --I hope I don't try to be the smart ass or nothin, but that's all I can say.

Q: Do you remember him cutting your toe nails?

A: I just said just a few minutes ago I remember it. But I don't remember the date or nothing like that.

Q: Do you remember him cutting your toe nails?

***11** A: Yeah, I told somebody that I remember somebody cutting my toe nails. Now, does that answer your question? I hope so. (T. at 390-91)

C. Ernest Lindsey Trial Testimony.

Mr. Lindsey's trial testimony begins on page 416 and ends on page 496. Mr. Lindsey testified from a wheelchair. Most of Mr. Lindsey's testimony was disjointed and incoherent. (*See, e.g.,* one of Mr. Lindsey's ramblings, beginning on line 10 of page 483 and ending on line 5 of page 486.) Given space limitations, following are a sampling of colloquies from Mr. Lindsey's testimony. [5]

Q: [Defense attorney Bowden] And I'm going to ask you some questions. When I ask you these questions, 1 have no intentions to be disrespectful to you. Do you understand that?

A: What's that term you used in there?

Q: Disrespectful to you. I have no intentions of being disrespectful to you by the questions that I ask you. Do you understand that?

A: I mean I just -- no, I don't. But it's just something that I just don't understand right there. I just don't understand it right there. That's all I can say.

Q: How many children do you have?

A: How many children do I have?

Q: Yes, sir.

A: How man children do 1 have? Do I have any children? I mean, I just -- I can't answer that right now, because I don't understand it. Break it down.

***12** Q: Okay. Now you said your daughter is Mrs. Delores Lindsey Bordeaux; is that correct?

A: Yes. Sitting right behind you (indicating).

Q: Right. Who is her mother. [6]

A: Huh?

Q: Who is your daughter's mother? What's her name?

A: My daughter's mother? Is that right?

Q: Yes, sir.

A: My daughter's mother- what's her name? I can't remember right now. I mean, she got a name, but I can't -- I've heard it, but I don't remember. I don't remember.

(T. at 440-442)

* * *

Q: [District attorney Layton] Do you remember Mr. Forte doing stuff for your feet? Cutting your toe nails?

A: Mr. Forte doing something for my feet? I don't remember that good. I'm not saying it wasn't done, but I just don't -- I don't remember that.

(T. at 420)

Q: [District attorney Layton] When Mr. Forte put that handrail in your house, did you pay him for that?

A: Did I pay him for that?

Q: Yes, sir.

A: He put a handrail in the house? Let me see - did he -- you asked me did I pay him for that?

Q: Yes. For putting the handrail there for you.

***13** A: It's there now?

Q: Yes.

A: I'm muddled up here right now. I don't -I just don't -- somebody got a beautiful - two different handwritings here. Look at this handwriting up here at the top. Look at that.

(T. at 433)

* * *

Q: [Defense attorney Bowden] She's not here now. Your daughter lives in Missouri, doesn't she?

A: Live where?

Q: You say your daughter. Doesn't she live in Missouri?

A: You say did she live in Missouri? Delores, my daughter, sitting right there (indicating). Didn't she used to live at Missouri somewhere?

Q: Doesn't she live there now? She's been living there for a number of years?

A: Living here - right here. Right here in Rockingham. In Rockingham.

(T. at 474-475) [7]

* * *

Q [Defense attorney Bowden] Do you know Kenneth Forte?

A: You say do I knew him?

Q: Yes. The gentleman seated over here (indicating).

A: I've been asked that question today, I think, two or three times. You say do I know him?

Q: Yes.

***14** A: Yes, I know him. He's a very fine gentleman. That's all I know. Now what else do I need to tell you about --

Q: And how long would you say you have known Mr. Forte?

A: Well, I can't say. I don't know just how long I've known him. It's been quite a while, quite a while.

Q: Did you know his father?

A: No, no. [8]

Q: Now did Mr. Forte ever visit your home?

A: Mr. Forte ever visit my home? Not that I --I mean, I just don't remember. Did Mr. Forte ever visit my home right where I live in Ellerbe; is that right? Is that what you mean to say?

Q: Yes, sir,

A: I don't know. I just don't know.

(T. at 486-487)

REASONS WHY CERTIFICATION SHOULD ISSUE

The only issue defendant asks this Court review is whether Ernest Lindsey, whose voir dire and trial testimony is set out in the Statement of the Facts, *supra*, was competent to testify. If the decision of the court below is allowed to stand, the two-part test set out in N.C.G.S. § 8C-1, Rule 601(a) will be reduced to a one-part test, since the decision of the Court of Appeals eliminates the rule in Rule 601(a)(1) which states that a witness is not competent to testify if he is "(1) incapable of expressing himself concerning the matter to be understood, . . ." *See* Opinion of the Court of Appeals at pp. 11-16. Defendant will first discuss the law as it applies to the testimony of Mr. ***15** Lindsey, and then discuss why the decision of the Court of Appeals departs from this Court's prior decisions and sets a new dangerous precedent.

Ernest Lindsey, Based on his Voir Dire Testimony, Was Not Competent to Testify at Trial.

Generally, every person is competent to be a witness. *See* N.C.G.S. § 8C-1, Rule 601(a). A witness is not competent to testify, however, if he is "(1) incapable of expressing himself concerning the matter as to be understood, ... or (2) incapable of understanding the duty of a witness to tell the truth." N.C.G.S. § 8C-1, Rule 601(b). Accordingly, the "requirements are that: the witness is able 'to understand and relate, under the obligations of an oath, facts which will assist the jury in determining the truth'; and he has 'personal knowledge of the matter to which he testifies.' " *Aquino*, 149 N.C. App. at 178-89, 560 S.E.2d at 557, *quoting*, *Redd*, 144 N.C. App. at 255, 549 S.E.2d at 880; *State v. Pope*, 24 N.C. App. 217, 220, 210 S.E.2d 267, 270 (1974), *cert. denied*, 286 N.C. 419, 211 S.E.2d. 799 (1975) (same).

Accordingly, to test the competency of a witness, "the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts." *State v. Liles*, 324 N.C. 529, 553, 379 S.E.2d 821, 823 (1989); *State v. Cooke*, 278 N.C. 288, 290, 179 S.E.2d 365, 367 (1971) (same).

In this case, the trial court did conduct a voir dire to determine if Mr. Lindsey was competent to testify. Mr. Lindsey's voir dire testimony is set out in pages 355-400 of the transcript. Selected portions of Mr. Lindsey's voir dire testimony are set out on pages 13-19 of this Brief. Mr. Lindsey was clearly befuddled. At first, he wasn't even sure he knew Mr. Forte. (T. at 357). He did not know how long he had known Mr. Forte. (T. at 363) He did not know whether he had a checking ***16** account. (T. at 364) He did not know whether Mr. Forte helped him purchase a truck, which Mr. Forte did. (T. at 367; 615) He did not remember why Mr. Forte came to his home. (T. at 376-77) He did not know whether Mr. Forte had clipped his toe nails. (T. at 390-91) The main thing Mr. Lindsey seemed to remember about Mr. Forte was his "beautiful moustache." (T. at 364; 369; 378-79) But, the most crucial question posed to Mr. Lindsey was this:
Q: [Defense attorney Saunders] Do you have any information -- do you think you got information that would be helpful to this Court about that - about Mr. Forte's trial?

A: I mean, 1 can't -- I mean, I just don't get - don't quite understand the question. I understand what you're saying, but what it means, or is emanating from, 1 just can't say.

(T. at 365)

As this Court stated in *State v. Liles*, the trial judge "must assess the capacity of the proposed witness to ***understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts:"*** *Liles*, 342 N.C. at 553, 379 S.E.2d at 823. (Emphasis added). The question asked by Mr. Saunders, i.e., did Mr. Lindsey have information that would be helpful to the Court with regard to Mr. Forte's trial, is a restatement of the rule set forth in *Liles*. Sadly, Mr. Lindsey did not even understand the question.

The prejudicial effect of Mr. Lindsey's testimony before the jury cannot be underestimated. The jury saw a wheelchair-bound man who did not know how many children he had, the name of his daughter's mother, or where his daughter lived. (T. at 440-442; 474-75) Mr. Lindsey's entire trial testimony begins on page 416 and ends on page 496 of the transcript. Portions of that testimony are set forth on pages 19-23 of the Brief. It is clear from these excerpts, and even more clear from ***17** reading Mr. Lindsey's entire trial testimony, that he not only cannot manage his affairs, he is incompetent and incoherent.

The key issue before the jury was whether Mr. Lindsey was competent, i.e., could manage his affairs, when he was dealing with Mr. Forte. It would be virtually impossible for the jury to look at Mr. Lindsey as he testified, and not *assume and believe* that he was also incompetent and incoherent when he was dealing with Mr. Forte. The fact is, however, that his dealings with Mr. Forte began in 2004, five years before the trial, and ended in mid-2006, three years before the trial.

Any tiny relevance which could be gleaned from Mr. Lindsey's trial testimony, and it would be difficult to glean any, is certainly outweighed by the prejudicial affect of the jury seeing an incompetent and babbling man sitting across from Mr. Forte. *See* N.C.G.S. § 8C-1, Rule 401 & 403. Mr. Forte could not receive a fair trial following the testimony of Ernest Lindsey.

Following the voir dire of Mr. Lindsey, counsel for defendant objected to his testimony, arguing that he was incompetent to testify. (T. at 402) Unfortunately, it appears that the trial court limited its analysis to Rule 601(b)(2), i.e., whether Mr. Lindsey was capable of understanding the duty of a witness to tell the truth. Indeed, the trial court stated that, "the question is does the witness have the capacity to understand the difference between telling the truth and lying." (T. at 402) The trial court apparently did not consider Rule 601(b)(1), whether Mr. Lindsey was "incapable of expressing himself concerning the matter as to be understood, ..." The trial court **abused** its discretion in concluding that Mr. Lindsey was competent to testify.

Decision of the Court of Appeals.

The Court of Appeals candidly concedes that, "Although the trial court *did not make a specific finding as to whether Lindsey was capable of expressing himself so as to be understood* ***18** *concerning the matters about which he was to testify*, the findings made by the trial court and its conclusion that he was competent clearly establish that the trial court exercised its discretion in declaring Lindsey competent as a witness." *See* Opinion of Court of Appeals at pp. 12-13 (emphasis added). The Court of Appeals then concludes as follows:

> As in *Oliver* and *Gordon*, Lindsey did, at certain points in this testimony, show an understanding of the difference between truth and falsehood and of the importance of telling the truth. This testimony supports *the implicit finding of the trial judge* - - who was present and able to observe Lindsey's demanor firsthand -- that the witness was competent.

Id. at pp. 15-16 (emphasis added).

Simply put, the court below literally blue penciled Rule 601(a)(1), leaving 601(a)(2) as the only test as to whether a witness is competent to testify. Clearly, as this Court pointed out in *State v. Liles*, the trial judge "must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts." *Id*. at 553, 379 S.E.2d at 823. The Court of Appeals first acknowledged that the trial court in this case did not make a finding as to 601(a)(1), and then relies on what it calls the "implicit finding of the trial judge" as to whether Mr. Lindsey was competent to testify.

If the North Carolina General Assembly wanted only one test as to the competency of a witness, i.e., whether the witness was capable of understanding the duty to tell the truth, it would have written Rule 601 to include only that test. Instead, the General Assembly clearly included *two distinct tests*. If a witness fails either of the two tests, the witness is not competent to be a witness. The Court of Appeals, by collapsing Rule 601(a)(1) into Rule 601(a)(2) not only usurps the authority of the North

Carolina General Assembly, but also flies in the face of this Court's opinion in *State* ***19** *v. Liles*, in which this Court clearly and emphatically stated that the trial judge should make an assessment under Rule 601(a)(2).

ISSUE TO BE BRIEFED

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issue in its brief for review: Did the Court of Appeals err in affirming the trial couit in concluding that Ernest Lindsey was competent to testify under Rule 601(a)(1)?

STATE'S RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

***1** TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

NOW COMES the State of North Carolina, by and through Roy-Cooper, Attorney General, and M. Lynne Weaver, Assistant Attorney General, responding to defendant's Petition for Discretionary Review pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31. The State respectfully shows the Court that discretionary review should be denied because the petition does not meet the standards for discretionary review set forth in N.C.G.S. § 7A-31.

The defendant cannot demonstrate that: (1) the subject matter of the appeal has significant public interest; (2) the cause involves legal principles of major significance to the jurisprudence of the State; or (3) the decision of the Court of ***2** Appeals appears likely to be in conflict with a decision of the Supreme Court.

At issue in this case was whether the victim, Ernest Lindsey, who was 99 years old at the time of trial, was competent to testify. Following lengthy *voir dire*, the trial court, in its discretion and after careful observation of the witness, found that Mr. Lindsey was competent to testify at trial.

The Court of Appeals, in an unanimous, published opinion, issued after oral argument by counsel and after a thorough review of the record and the law, correctly held that the trial court did not **abuse** its discretion in allowing Mr. Lindsey to testify. The Court of Appeals properly followed the standard of review as established by this Court, as there was competent evidence in the record, both from the *voir dire* examination and from Mr. Lindsey's direct testimony, to support the trial court's decision.

Contrary to the defendant's assertions, the Court of Appeals, expressly citing to prior decisions of this Court, held that the trial court's findings and its conclusion that Mr. Lindsey was competent to testify “clearly establish that the trial court exercised its discretion in declaring Lindsey competent as a witness” and that Mr. Lindsey understood his duty to tell the truth such as to satisfy the minimal standard under Rule 601. (Court of Appeals decision at 13-16.)

As held by this Court and as observed by the Court of Appeals ***3** in its decision, unless a defendant can show that the trial court's ruling on competency was “arbitrary” or “could not have been the result of a reasoned decision, [the trial court's ruling] will not be disturbed on appeal.” *State v. Rael*, 321 N.C. 528, 532, 364 S.E.2d 125, 128 (1988).

STATEMENT OF THE FACTS

The State presented testimony from five witnesses at trial: (1) Dolores Lindsey Bordeaux, the daughter of the victim Ernest Lindsey; (2) John Bordeaux, Dolores Bordeaux's husband and son-in-law of Mr. Lindsey; (3) Detective Wendell Sessoms of the Richmond County Sheriff's Department; (4) Laura Rachel Cromer, a sister and next-door-neighbor of Mr. Lindsey; and (5) the victim, Ernest Lindsey. [1]

The State's evidence at trial tended to show the following: Mr. Ernest Lindsey was born in 1910 [2] and grew up in Richmond County. (T pp. 25-26) When he was a young man, he went into the military and then moved to Washington, D.C., where he worked for the federal Government Printing Office ("GPO") for over thirty years. (T pp. 27, 297) After he retired from the GPO, Mr. Lindsey moved back to Richmond County and purchased a home in Ellerbe next ***4** door to his youngest sister, Laura Cromer. (T p. 27)

Mr. Lindsey's daughter and only child, Dolores Lindsey Bordeaux, moved to St. Louis, Missouri in 1972 to attend graduate school. (T pp. 25, 88) While living there, she married a man from St. Louis, John Bordeaux, and has lived in St. Louis with her family since then. (T pp. 25, 30) Mrs. Bordeaux typically visited her father at least two times a year, in the spring and during the Thanksgiving holidays, and, in some years, she came to North Carolina more often to see her father. (T pp. 31, 61, 113) Mrs. Bordeaux's husband accompanied his wife for her visits to her father up through June 2006, after which he has usually just visited during the holidays. (T pp. 31, 181-182) When the Bordeauxs visited Mr. Lindsey, they stayed at Mr. Lindsey's home and typically stayed a week. (T pp. 61-62) Mrs. Bordeaux testified that she typically talked with her father on the telephone at least three times a week. (T p. 31)

The Bordeauxs came to know the defendant sometime around 1999, when the defendant offered to assist Mr. Lindsey with filing an insurance claim arising from hurricane damage to Mr. Lindsey's house. (T pp. 33-34, 114-116) The defendant's father was respected in the community and knew the claims adjuster. (T p. 116) The previous year the defendant and his father had done some renovation work to a building on Mr. Lindsey's property that was used as a beauty parlor. (T pp. 114, 598-600) Immediately prior ***5** to 1998, the defendant had worked for a period for the State of North Carolina's Division of Juvenile Justice as an instructor at Samarkand. (T pp. 266-267) After leaving Samarkand, the defendant did not have any formal employment. (T p. 766) Instead, the defendant worked various odd jobs, including doing home repair work, although he was not licensed as a contractor; yard work with his tractor, including mowing and plowing; helping senior citizens with various tasks; farming; and creating and selling his artwork, which was decorative wood art. (T pp. 283, 288, 766)

Beginning at some point around 2002, the defendant began spending much more time with Mr. Lindsey at his home. (T p. 41) Mr. Lindsey lived alone and had stopped driving in 2000. (T pp. 50, 152) Mr. Lindsey's sister Mrs. Cromer brought Mr. Lindsey his breakfast and dinner every day, and he received his lunch from Meals on Wheels. (T pp. 76, 173, 307-308) Mrs. Cromer testified that her brother "got close to [the defendant]" during this time, and that defendant drove a wedge between her and her brother, but that she continued to provide meals for him and to check on him. (T pp. 299, 315-316) The defendant began performing numerous tasks around Mr. Lindsey's house, including home repairs, such as work on a hot water heater, installing new counter tops in Mr. Lindsey's kitchen, work in a bathroom, and installing a handrail in the hallway. (T pp. 35, 123, 302) Following the death of a family friend, Shane Martin, who had previously driven Mr. Lindsey, the ***6** defendant began driving Mr. Lindsey wherever Mr. Lindsey needed or wanted to go - including to run errands, to pay bills, and to shop for groceries - and, further, Mr. Lindsey informed his daughter that he had placed the defendant on his automobile insurance policy. (T pp. 82, 122, 224, 304, 638-639)

Beginning sometime in 2002, the defendant also began assisting Mr. Lindsey with his business affairs, including assisting Mr. Lindsey in paying his bills through his checking account. (T pp. 35-36, 125, 223) The defendant routinely wrote out checks to pay Mr. Lindsey's bills each month because Mr. Lindsey had difficulty writing, and the defendant then handed the checks over to Mr. Lindsey to sign. (T p. 223) Prior to the defendant's becoming close to Mr. Lindsey and spending considerable amounts of time with him, Mr. Lindsey's sister Laura Cromer had helped her brother with paying his bills. (T p. 303)

Mr. Lindsey had a joint checking account with his daughter Mrs. Bordeaux, and she had been on the account since she was in college. (T pp. 37, 143) Mr. Lindsey's two sources of income were his federal retirement and Social Security. (T p. 27) Sometime

around the end of 2004, Mrs. Bordeaux looked at her father's bank account statements and noticed unusual account activity, in that checks for extraordinarily large sums of money, often at least $800.00 to $900.00 each month, were being written to the defendant. (T pp. 40, 37-39) When Mrs. Bordeaux asked her father about the ***7** checks, she testified that her father's answers were "very vague and ... confused about what was happening." (T p. 41) Further, at one point around this time in late 2004 or early 2005, Mr. Lindsey telephoned Mr. Bordeaux because Mr. Lindsey did not understand why "he didn't have as much money [in his bank account] for something." (T pp. 38-39) Becoming concerned, Mrs. Bordeaux and her husband asked the defendant several times, by phone and in person, about the checks, but the defendant was very evasive, responding that he "was covered" and claiming that he merely cashed the checks written to him and gave the cash back to Mr. Lindsey. (T pp. 40-41, 121-122, 223)

Mr. Bordeaux testified that beginning as early as 2004, he became concerned about the deteriorating physical and mental condition of Mr. Lindsey, and that he questioned the defendant's close relationship and business arrangement with his father-in-law. (T p. 130) He testified that his wife "was in denial about the whole thing" and was initially reluctant to accept the changes in her father or to recognize that the defendant might be taking financial advantage of Mr. Lindsey's deteriorating physical and mental condition. (T p. 130) Mrs. Bordeaux testified that around this time, she finally grew to realize that her father was "different ... in terms of how he looked physically, [and] in terms of where things were in his house." (T p. 38) Previously, Mr. Lindsey had been "very fastidious, very particular about all ***8** kinds of things" but she noticed that his appearance had changed. (T p. 38)

Reluctant to upset Mr. Lindsey or to deprive him of the defendant's assistance or companionship, Mr. and Mrs. Bordeaux asked the defendant on several occasions to mail them receipts for anything that the defendant was ostensibly purchasing on behalf of Mr. Lindsey, and to mail them any bills that the defendant represented that he was paying on Mr. Lindsey's behalf with cash by writing checks to himself. Alternatively, the Bordeauxs asked the defendant to give these receipts and bills to Mrs. Cromer. (T pp. 41-42) The Bordeauxs further requested that the defendant not write any checks to himself in an amount greater than $500.00 without notifying them first. (T pp. 42, 124-125) The defendant told the Bordeauxs that he would comply with their requests, but he never did. (T pp. 41-42)

For much of 2005, the Bordeauxs were unable to travel to North Carolina because Mrs. Bordeaux was injured and Mr. Bordeaux suffered from several illnesses. (T pp. 113-114) After their recovery, around January 2006, the Bordeauxs checked Mr. Lindsey's bank account statements on-line since they had recently begun conducting some of their banking on-line. (T pp. 197-198, 200-201, 204-205) To their alarm, they saw numerous checks for large amounts being written from Mr. Lindsey's account to the defendant.

According to Mr. Bordeaux, the account activity "had ... a ***9** pattern to it..." (T p. 198) "A[t] the first of the month when [Mr. Lindsey] got his biggest check it was $900.00 to $1300.00 out of that check [that was going to the defendant]. And when [Mr. Lindsey] got the other check it was $300.00, $400.00, $500.00 out of the other one. And so that would deplete [Mr. Lindsey's] account down to the fact that he only had like a couple hundred dollars left in the account. And [Mr. Lindsey previously] just didn't spend that kind of money." (T p. 201)

Frantic, Mr. and Mrs. Bordeaux telephoned Mr. Lindsey numerous times. (T p. 199) Mrs. Bordeaux testified that her father was "unable to clearly state what was going on"; his "memory was impaired, and he was confused." (T pp. 44-45, 58, 68, 70) After unsuccessful attempts to discuss the matter with the defendant, on April 24, 2006, the Bordeauxs sent the defendant a letter by certified mail, demanding that the defendant cease handling Mr. Lindsey's financial affairs, including writing checks to himself from Mr. Lindsey's bank account. (T pp. 44, 56, 127, 133-135)

In June 2006, the Bordeauxs came to visit Mr. Lindsey in North Carolina. Mrs. Bordeaux testified that her father was physically "frail," he was "thinner, he appeared much older ... [and] he was very confused." (T pp. 44-45) Mrs. Bordeaux testified that her father "could not answer questions about his ... financial state [or] what he was doing with his money," and she stated that he was mentally unable to do so because "his memory was impaired." (T pp. ***10** 68-70) When the Bordeauxs asked Mr. Lindsey

about the checks to the defendant, Mr. Lindsey "had some idea that he and [the defendant] were in a business relationship" and he became extremely "agitated." (T pp. 68-70)

The Bordeauxs reviewed Mr. Lindsey's checkbook, including the memo notations describing the expenses, and saw myriad checks written to the defendant for highly questionable expenses. Among other expenses, Mr. Bordeaux recalled the following in particular, which he believed were either completely inappropriate for a 96-year-old man or grossly unreasonable, and thus raised enormous red flags: $1000.00 for an exhibition tent; $900.00 for a power washer; $600.00 for power washing services, when Mr. Lindsey's home was small; and $400.00 to trim Mr. Lindsey's toenails. (T pp. 30, 136-137, 145) In addition, there were checks written to the defendant dated after the Bordeauxs' April 24, 2006 letter to the defendant demanding that he stop handling Mr. Lindsey's financial affairs. (Record p. 8, T pp. 42-43, 218)

At that time, the Bordeauxs went to the sheriff's office and talked with Detective Wendell Sessoms, taking with them copies of some of the checks written to the defendant from Mr. Lindsey's account. (T p. 216) Detective Sessoms reviewed the checks and saw that they totaled approximately $18,000 to $20,000, and that most of the checks did not have any explanation in the memo section. (T pp. 218-219) Detective Sessoms testified that one check that ***11** caught his eye was one written to the defendant for $400.00 or $500.00 for a pedicure. (T p. 219) Detective Sessoms went by the defendant's home and asked the defendant to come to the police station because he wanted to ask him some questions. (T pp. 220-221) The defendant subsequently met with Detective Sessoms at the police station.

The defendant told Detective Sessoms that he regularly assisted Mr. Lindsey in paying his bills since it was an effort for Mr. Lindsey to write out checks. (T p. 223) The defendant told Detective Sessoms that he would write out checks and hand them to Mr. Lindsey to sign. (T p. 223) When asked about the check for the pedicure, the defendant told Detective Sessoms that he had clipped Mr. Lindsey's nails, massaged his feet, and taken care of his feet. (T p. 222) The defendant told Detective Sessoms that he took the defendant places in his truck, including to pay Mr. Lindsey's bills and to visit with friends. (T p. 224) The defendant also told Detective Sessoms that, for those checks that did not have an explanation in the memo line, he would cash the check, and give the cash back to Mr. Lindsey but that he never asked Mr. Lindsey what he did with the cash. (T pp. 223, 226) The defendant also told Detective Sessoms that Mr. Lindsey sometimes "gave" him gifts, such as the pressure washer, a laser-guided saw, and cash. (T pp. 224-226) Shortly afterwards, the defendant stopped answering the detective's questions. (T p. 233)

***12** Detective Sessoms testified that, after talking with the defendant, he talked further with the Bordeauxs and confirmed that Mr. Lindsey did not keep more than a few hundred dollars on his person or in his home at any time, and that they had never seen any large amounts of cash in Mr. Lindsey's house. (T pp. 140, 163, 257) Detective Sessoms further testified that he talked with Mr. Lindsey and that he would not have brought charges against the defendant "if Mr. Lindsey had told [him] that he gave [the defendant] money, and that [Mr. Lindsey] was aware of the amount of money that [the defendant] had actually gotten from the checks that were being written." (T p. 227)

Mrs. Bordeaux testified that, in 2006, after reporting the defendant's activities to the police, she and her husband made arrangements for Mr. Lindsey's adult niece to live with Mr. Lindsey, since Mr. Lindsey was unable to take care of his own affairs; and Mrs. Bordeaux began paying all of her father's bills on-line. (T pp. 32-33, 49, 67, 73) At the time of trial, Mrs. Bordeaux testified that, when his niece was at work each day, the family had a personal caregiver that came for two hours each day to bathe her father and assist with personal chores, and that her aunt Laura Cromer had continued to provide meals for her father, in addition to those provided by Meals on Wheels. (T pp. 75-77)

The State introduced into evidence copies of checks written on Mr. Lindsey's checking account for the period December 30, 2003 up ***13** through June 1, 2006. (Record on Appeal p. 8, State's Exhibit 13) (T pp. 105-108, 333-343) The checks written on Mr. Lindsey's bank account showed the following activity: (1) eight checks payable to the Richmond County Tax Office and North Carolina Department of Revenue totaling $2,285.55; (T pp. 333-335) (2) ten checks payable to N.C. Farm Bureau Mutual Insurance totaling $2,175.08; (T pp. 336-337) (3) twenty-eight checks payable to the Town of Ellerbe totaling $497.01; (T pp. 337-338) (4) thirty-two checks payable to Progress Energy totaling $3,476.19; (T p. 339) (5) five checks payable to Postmaster

and Farm Supply Company totaling $128.25; (T pp. 339-340) (6) twenty-seven checks payable to Ellerbe Phone Company totaling $801.44; (T pp. 340-341) (7) four checks payable to Laura Cromer totaling $330.00; (T p. 341) (8) twelve checks payable to Delores Bordeaux totaling $4150.00; [3] (T p. 342) and (9) ninety-two checks payable to the defendant Kenneth Forte totaling $45,412.26 (T p. 343). For purposes of showing a common plan or scheme, the State also introduced one hundred and five additional checks payable to the defendant from Mr. Lindsey's bank account for the period April 1, 2002 through December 23, 2003, which preceded the offense dates of the State's indictment. (T pp. 345, 347-348, 350)

***14** Ten witnesses testified for the defense, primarily attesting that, to their knowledge, the defendant had a good reputation in the community. One of the defendant's witnesses, Robert Armstrong, testified that had gotten to know Mr. Lindsey through the defendant, and that he had visited Mr. Lindsey's house at least ten times when the defendant was there. (T p. 542) Mr. Armstrong testified that Mr. Lindsey "thought very highly of [the defendant], and "trusted him to no end." (T p. 545) Mr. Armstrong observed that the defendant drove Mr. Lindsey places he needed to go and performed tasks around Mr. Lindsey's house. (T pp. 532, 542) Mr. Armstrong had never been present at Mr. Lindsey's house when the defendant paid Mr. Lindsey's bills or when the defendant obtained checks from Mr. Lindsey to cash, but he testified that, on at least one occasion, he had observed the defendant hand Mr. Lindsey cash that appeared to be about $100.00 or a little more. (T pp. 543-545)

The defendant took the stand and testified in his defense. The defendant, who was born in 1950 and was fifty-nine years old at the time of trial, testified that he had lived in Ellerbe for about fifteen years, and that he had moved back to North Carolina in 1995 to take care of his aging parents who lived in the community. (T pp. 592, 595)

The defendant testified that his father was well-known in the community, and the defendant began helping people in the community ***15** "with plowing people's fields, making gardens for them," and helping "people that needed [help] doing [things]." (T p. 596) The defendant testified that his income was derived from "my art, farming, stocks, bonds." (T p. 766) On cross-examination, the defendant acknowledged that in the six months prior to trial, up through June 2009, he had earned approximately $5,000 to $7,000 from his art work. (T p. 767)

The defendant testified that he was introduced to Mr. Lindsey by his father in 1998, when Mr. Lindsey was looking for someone to perform renovation work and repairs on the beauty shop on his property, which the defendant agreed to do, and Mr. Lindsey paid him for the work. (T pp. 599, 601) Shortly after finishing the work on the beauty shop, the defendant testified that he performed other jobs around Mr. Lindsey's home, including replacing trim work on his roof and installing new entry doors to his house. (T pp. 610-612)

The defendant testified that, over time, and particularly after the death of the defendant's father in 2004, he and Mr. Lindsey became very close and "became far more than good friends" and that he became Mr. Lindsey's "confidante." (T pp. 604-605, 771) Mr. Lindsey was not able to drive, and the defendant testified that he regularly drove Mr. Lindsey "wherever [Mr. Lindsey] wanted to go." (T p. 614) Among other places, the defendant testified that he regularly drove Mr. Lindsey to the ***16** grocery store for his bi-weekly or monthly grocery shopping trips, and the defendant accompanied Mr. Lindsey in the store and helped him with his grocery shopping and assisted him with the groceries when they returned home. (T pp. 638-639) The defendant testified that he regularly drove and accompanied Mr. Lindsey on other shopping trips, including to the drug store; to the dentist; to pick up dentures for Mr. Lindsey; to the bank; to the ballet; and even to the courthouse to record Mr. Lindsey's will. (T pp. 640-644, 711, 742)

The defendant testified that, in addition to taking Mr. Lindsey "anywhere he wanted to go," he assisted Mr. Lindsey with various personal tasks. For example, when Mr. Lindsey complained of having a toothache, the defendant testified that he assisted Mr. Lindsey with making an appointment with a local dentist, and that he took Mr. Lindsey for his appointment to see the dentist. (T pp. 642-643)

In another instance, the defendant testified that Mr. Lindsey desired to select a headstone for his grave, so the defendant informed Mr. Lindsey of three purveyors of tombstones in Rockingham. (T p. 658) The defendant testified that he drove Mr. Lindsey to the three locations, and Mr. Lindsey selected the stone he wanted. (T pp. 658-659)

The defendant also testified that he regularly took care of Mr. Lindsey's feet, by washing them, oiling them, cutting the ***17** nails, and rubbing his feet, and that Mr. Lindsey paid him for these services. (T pp. 708, 721-722, 728, 732)

The defendant testified that, beginning in 2002, Mr. Lindsey asked him to help him with paying his bills and writing his checks. (T p. 680) The defendant testified that Mr. Lindsey "didn't feel like doing [his household finances]" so the defendant assisted him with that responsibility. (T p. 680) The defendant testified that, prior to his expected arrival at Mr. Lindsey's house, Mr. Lindsey routinely would set out his checkbook on a bar in his living room, together with all of his bills, including his water bill, telephone bill, and electric bill. (T p. 681) The defendant testified that he would write out the checks for Mr. Lindsey, writing in the dates, amounts, and payees, and then hand the checks to Mr. Lindsey to sign. (T p. 681-682) After Mr. Lindsey signed the checks, the defendant took care of mailing the checks or delivering them. (T p. 682)

Mr. Lindsey banked at First Union, which later became Wachovia. (Record on Appeal p. 8, State's Exhibit 13) (T p. 742) The defendant testified that when Mr. Lindsey wanted cash, he would ask the defendant to write out a check to himself, and the defendant would hand it to Mr. Lindsey to sign. (T pp. 690-691) The defendant testified that he would go to his bank, cash the check, and bring the money back to Mr. Lindsey. (T p. 691)

At the conclusion of his direct testimony, defendant's counsel ***18** questioned the defendant about each of the ninety-two checks written out to the defendant on Mr. Lindsey's bank account for the period December 30, 2003 through June 1, 2006, showing the defendant each check one at a time, in chronological order. (T pp. 693-737) The defendant testified that he wrote out the checks, payable to himself, at Mr. Lindsey's direction, and that Mr. Lindsey signed the checks. (T pp. 693-737) The vast majority of the checks contained no writing on the memo line indicating the purpose of the check. A small number of the checks contained notations describing a purpose for the check; for example, on two checks were written the word "foot", and the checks were in the amounts of $500.00 and $273.76 (T pp. 721-722, 728) (Record on Appeal p. 8, State's Exhibit 13, Check nos. 3901, 3950) In addition, five checks bore the notation "cash" on the memo line in the amounts of $1000.00 (Check no. 3915); $1500.00 (Check no. 3916); $1400.00 (Check no. 3922); $1800.00 (Check no. 3935); and $200.00 (Check no. 3981). (Record on Appeal, p. 8, State's Exhibit 13)

Out of the ninety-two checks, on direct examination, the defendant professed to remember the exact purpose for forty-seven of the checks, although the checks had been written between three and five years earlier, and only a small number contained notations indicating their purpose. (T pp. 693-737)

On cross examination, the prosecutor randomly selected seven ***19** of the same checks that the defendant had previously described in detail the checks' purpose, but which contained no written description in the memo line. (T pp. 745-758) In each instance, on cross examination, the defendant was unable to state the purpose of the check, saying he "could not remember," or the defendant offered an answer that was different than the response the defendant gave on direct examination. (T pp. 745-758) Further, on cross examination, after being shown the reverse of two checks bearing the notation "cash," the defendant acknowledged that the checks contained a stamp revealing that they had been deposited into the defendant's personal bank account. (T pp. 758-760)

The defendant testified that he had not had any contact with Mr. Lindsey since the charges were brought on June 9, 2006. (T pp. 239, 606)

DISCRETIONARY REVIEW SHOULD NOT BE GRANTED BECAUSE THE DEFENDANT CANNOT MEET THE STANDARDS SET FORTH IN G.S, § 7A-31, AND, MOREOVER, THE COURT OF APPEALS' OPINION WAS CORRECTLY DECIDED.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING ERNEST LINDSEY TO TESTIFY.

Standard of Review: A trial court's ruling on the competency of a witness to testify is reviewed for **abuse** of discretion on appeal. *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987).

The defendant asserts that the trial court **abused** its discretion in permitting Ernest Lindsey to testify as a witness for ***20** the State. The State submits that, in citing to decisions of this Court, the Court of Appeals correctly held that the trial court's ruling was not an **abuse** of discretion, and the trial court's ruling should be allowed to stand on appeal.

Notably, in his Petition for Discretionary Review, and in his prior brief filed with the Court of Appeals, *the defendant fails to cite to anv case in which this Court or the Court of Appeals has disturbed the ruling of a trial court as to the competency of a witness to testify*. See Petition for Discretionary Review, p. 15 (citing cases).

Indeed, Rule 601 of the North Carolina Rules of Evidence provides that, as a general rule, "[e]very person is competent to be a witness except . . . when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, . . . or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601.

Citing to decisions of this Court, the Court of Appeals correctly observed:
"This subdivision (b) establishes a minimum standard for competency of a witness...." *State v. DeLeonardo*, 315 N.C. 762, 766, 340 S. E. 2d 350, 354 (1986). **"The issue of the competency of a witness to testify rests in the sound discretion of the trial court based upon its observation of the witness."** *State v. Rael*, 321 N.C. 528, 532, 364 S.E.2d 125, 128 (1988). **"Absent a showing that a trial court's ruling as to competency could not have been the result of a reasoned decision, it will not be disturbed on appeal."** *Id*. (Emphasis added.)

***21** (Court of Appeals decision, p. 12)

The Court of Appeals further noted that, in this case, after observing Mr. Lindsey testify on *voir dire*, the trial court expressly found as follows:
In rendering this decision, I have reviewed the Davis case. [*State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269 (1992).] My understanding is Rule 601(b) says it does not ask how bright, how young or how old a witness is. Instead, the question is does the witness have the capacity to understand the difference between telling the truth and lying.

In the Court's discretion, I do find that [Mr. Lindsey is] capable of telling the difference between the truth and a lie.

Further, in the Court's discretion, under this standard, I find that he does have the capacity to testify for the State in this matter.

(Court of Appeals decision, p. 12)

As observed by the Court of Appeals,
Rule 601(b) does not ask how bright, how young, or how old a witness is." *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269 (1992). In determining the competency of a young child or a developmentally delayed individual to testify, this Court has stated that "[i]t matters not that some of the witness's answers during voir dire are ambiguous or vague or that they are

unable to answer some of the questions which are put to them" as such performance is not unusual when the witness is a young child or a developmentally delayed individual. *State v. Oliver*, 85 N.C. App. 1, 8, 354 S.E.2d 527, 532 (1987) (citing *State v. Gordon*, 316 N.C. 497, 503, 342 S.E.2d 509, 512 (1986)).

(Court of Appeals decision, pp. 13-14)

The Court of Appeals further cited to decisions of this Court, where this Court upheld a trial court's ruling as to competency, ***22** even where the trial court did not make a specific finding as to whether the witness was capable of expressing herself, holding that it was clear that the trial court exercised its discretion in declaring the witness competent to testify. (Court of Appeals decision, pp. 12-13, citing *State v. Eason*, 328 N.C. 409, 427, 402 S.E.2d 809, 818 (1991); *State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988); *Rael*, 321 N.C. 52, 364 S.E.2d 125; *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987)).

As observed by the Court of Appeals, courts have found that witnesses with limited mental faculties, as well as children as young as four years old are competent to testify where they understand their duty to tell the truth. *State v. Ward*, 118 N.C. App. 389, 393-396, 455 S.E.2d 666, 668-670 (1995) (court did not err in allowing a four-year old victim to testify to events that occurred when she was two years old, and where witness gave inconsistent answers); Davis, 106 N.C. App. at 605, 418 S.E.2d at 269 (where testifying child witness was "intellectually limited," the court did not **abuse** its discretion where witness indicated she understood her duty to tell the truth); *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986), cert, *denied*, 319 N.C. 675, 356 S.E.2d 791 (1987) (court did not **abuse** its discretion in allowing a four-year old child to testify); *Meadows*, 158 N.C. App at 393-394, 525 S.E.2d at 474 (court did not **abuse** its discretion in allowing a five-year old child to testify about events that ***23** occurred when the child was three years old).

As noted by the Court of Appeals, courts have held that, even if a witness's answers during voir dire are "ambiguous or vague or they are unable to answer some of the questions that are put to them," a trial court does not **abuse** its discretion in allowing such a witness to testify if the witness is able to express himself or herself and understands the duty to tell the truth. State v. Oliver, 85 N.C. App. 1, 8-9, 354 S.E.2d 527, 531-532 (1987) (where sixteen year-old mentally deficient witness correctly stated her birthday, where she went to school and indicated she understood her duty to tell the truth, she was not incompetent as a witness although she was unable to state where in town she lived, how long she had lived there, how long it had been since August, and was unable to answer some questions). Further, any "[c]onflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony."*State v. Cooke*, 278 N.C. 288, 291, 179 S.E.2d 365, 368 (1971); *Ward*, 118 N.C. App. at 397, 455 S.E.2d at 670.

Voir Dire of Mr. Lindsev

In the instant case, during a lengthy voir *dire* which covered forty-six pages of the trial transcript (T pp. 354-400), although there were understandably many things that Mr. Lindsey could not remember, Mr. Lindsey correctly testified to: (1) his full name, Ernest James Lindsey; (T p. 356) (2) his birthdate, XX/XX/1910; (T p. 356); (3) the identity of his sister Laura Rachel Cromer, by pointing her out at trial; (T p. 360) and (4) his understanding of his duty to tell the truth and his ability to distinguish between the truth and a lie, as shown by the following testimony:
Prosecutor: Are you going to tell us the truth?

Mr. Lindsey: I'll do the best I know how, so help me. If I know, I tell the truth so help me God.

* * *

Prosecutor: If I said there was an elephant sitting right there -

Mr. Lindsey: An elephant?

Prosecutor: An elephant. Would that be me telling the truth or me telling a lie?

Mr. Lindsey: I'm looking down there. You said if I tell you that there's an elephant sitting right there? I mean, how could I know that?

Prosecutor: But is that me telling the truth, or am I telling a lie?

Mr. Lindsey: You'd be telling a lie. I can't see no elephant standing right there.

Prosecutor: There's no elephant, is there?

Mr. Lindsey: That's right.

(T pp. 357-358, 360)

On cross-examination during *voir dire*, Mr. Lindsey testified to the following: (1) he knew he was at the courthouse; (T p. 362) (2) in Ellerbe where he lived; (T p. 362) (3) that a trial was going on and the defendant was being tried; (T p. 365) (4) the ***25** identity of his son-in-law; (T p. 367) (5) the identity of the defendant, and that he remembered the defendant visiting him at his home; (T pp. 363, 375-376) (6) he was retired from the Government Printing Office, and he got a retirement check in the mail; (T pp. 377-378, 385) (7) the identity of his daughter; (T p. 380) (8) the identity of his sister; (T p. 380); (9) he had a checking account; (T p. 364) and (10) he recognized his own signature. (T p. 382)

On re-direct examination during *voir dire*, Mr. Lindsey testified: (1) that he knew that his daughter's name had been on his checking account "a good while," but he did not remember exactly how long; (T pp. 393-394); (2) he remembered the defendant cutting his toenails; (T p. 391) but (3) that he would not have paid $500 to have someone cut his toenails. (T p. 392) Throughout the *voir dire*, Mr. Lindsey repeatedly reiterated his duty to tell the truth, and when he could not remember something, he stated he "could not remember," citing to his duty to tell the truth. (T pp. 357-358, 365, 367-368, 372, 374, 375)

Following the *voir dire*, citing to this Court's decision in *State v. Davis*, 106 N.C. App. 596, 605, 418 S.E.2d 263, 269, cert. *denied*, 333 N.C. 347, 426 S.E.2d 710 (1993), the trial court found, in its discretion, that Mr. Lindsey was "capable of telling the difference between the truth and a lie," and that Mr. Lindsey had the capacity to testify for the State. (T p. 402)

Based on the above *voir dire*, the trial court's ruling that ***26** Mr. Lindsey was competent to testify was not an **abuse** of its discretion, and, as correctly held by the Court of Appeals, the defendant cannot meet his burden of showing that the trial court's ruling "could not have been the result of a reasoned decision," and, therefore, "it [should] not be disturbed on appeal." *Rael*, 158 N.C. App. at 393-394, 581 S.E.2d 472 at 474.

Trial Testimony of Mr. Lindsey

Responding further, the State observes that, in his Statement of Facts, defendant has "cherry-picked" portions of the trial testimony of Mr. Lindsey, which undisputedly show that, as a 99-year old man, Mr. Lindsey's memory was impaired. However, many of the transcript portions cited by the defendant are from the cross-examination of Mr. Lindsey, which covered fifty-eight pages of trial transcript, which followed the previous day's extensive *voir dire* of Mr. Lindsey. What is clear from the cross-examination is that Mr. Lindsey was keenly aware of his duty to tell the truth; that he repeatedly stated he could not remember details, rather than trying to recount information that he could not recall; and that he was extremely tired after two days on the witness stand.

In his "cherry-picking" of the trial transcript, defendant overlooks the crucial fact that, during his direct examination, which covered a fairly brief twenty-two pages of the transcript, Mr. Lindsey was capable of expressing himself concerning the matters that were being tried, and he clearly testified to ***27** important, relevant facts that could have assisted the jury in determining the truth in this case.

On direct examination at trial, Mr. Lindsey initially and correctly testified as to the following facts: (1) his name; (T p. 416) (2) his birthdate; (T p. 416) (3) that he lived in Ellerbe, in his house; (T p. 416) (4) that he recognized the defendant, saying, "Oh, yes, Mr. Forte in Ellerbe?"; (T p. 417) (5) that he remembered Mr. Forte putting up a handrail in his house; (T p. 417) (6) the identity of his daughter; (T p. 423) and (7) that his daughter's name was on his checking account. (T p. 423).

Mr. Lindsey went on to offer the following testimony regarding the matters being tried:

(1) *Check to Defendant for $500.00 for "Foot"*

The prosecutor showed Mr. Lindsey a check written to the defendant for $500.00. (T p. 420) Mr. Lindsey was able to read the check, and he testified that the signature was his handwriting [which it was], that he did not recognize the handwriting on the payee line [which was the defendant's handwriting], as it did not look like his handwriting. (T pp. 419-420) Mr. Lindsey read that the memo line on the check said "foot." (T p. 420) Mr. Lindsey testified that he did not remember the defendant cutting his toenails, but he testified that his memory was "not that good." The prosecutor then asked:
Prosecutor: Would you have paid him [the defendant] $500.00 to do something for your feet?

***28** Mr. Lindsey: I don't - I just can't imagine a man giving somebody $500.00 to do feet - whatever was done....

(T p. 421)

(2) *Check to Defendant for $1000.00 "Cash"*

Continuing her direct examination, the prosecutor showed Mr. Lindsey a check written to the defendant dated May 19, 2005 for "cash." Mr. Lindsey read the amount on the check, which was for $1,000.00. After testifying that he did not believe the handwriting on the payee line was his handwriting [which it was not], Mr. Lindsey further testified:
Prosecutor: Let me ask you this. Would Mr. Forte - would you give him a check and he'd go cash that and bring you that $1,000.00 back?

Mr. Lindsey: Oh, no. I don't remember that at all.

Prosecutor: Would you ever keep $1,000.00 on your person?

Mr. Lindsey: Would I ever keep - No, indeed. No. No, indeed.

(T pp. 424-425)

(3) *Check for "Tent, Pedicure and Manicure" for $970.00*

The prosecutor handed Mr. Lindsey another check written out to the defendant dated March 1, 2006 in the amount of $970.00, and Mr. Lindsey read the information on the check, including the memo line which contained the notation "tent, pedicure, and manicure," which was in the defendant's handwriting. After Mr. Lindsey's review of the check, he testified as follows:

***29** Prosecutor: Do you have a tent at your house?

Mr. Lindsey: No. I don't have no tent at my house.

Prosecutor: Would you have paid Mr. Forte $970.00 for a tent and a pedicure and a manicure?

Mr. Lindsey: Oh, hell, no. No.

(T pp. 429-430)

(4) ***Check to Defendant for Cash for $1500.00***

At the end of the direct examination, the prosecutor handed Mr. Lindsey another check, which Mr. Lindsey correctly read as having been written to the defendant on May 3, 2005, in the amount of $1500.00. Following his review of the check, Mr. Lindsey testified:
Prosecutor: Did Mr. Forte ever bring you $1500.00 cash back from the bank?

Mr. Lindsey: Oh, no. I know nothing about no $1500.00.

Prosecutor: Mr. Forte - he would not cash checks and bring the cash back to you?

Mr. Lindsey: Bring me the cash? Miss, I don't understand. No. How would he bring me that much?

(Tpp. 436-437)

Cross Examination of Mr. Lindsey

By the time of his cross-examination, Mr. Lindsey was very obviously tired, but still very cognizant of his duty to tell the truth; as a result, he often responded that he did not remember or that he did not know the answer to a question. (T pp. 441-495) ***30** Nonetheless, on cross-examination, the defendant correctly-testified to, among other things: (1) the identity of his daughter, and that she lived in Missouri, stating, "I don't remember her living in Rockingham"; (T p. 441, 474-475) (2) that he was retired from the Government Printing Office with full benefits; (T p. 443) (3) that he received his retirement check each month at the first of the month; (T p. 452-454) (4) that he cashed the check at the bank; (T p. 457) and (5) his signature. (T p. 460) [4]

CONCLUSION

Under this extensive record, as set forth above, the trial court did not **abuse** its discretion in permitting the victim Mr. Lindsey to testify at trial, and the Court of Appeals, expressly citing to Rule 601(b) and to the decisions of this Court, correctly affirmed the trial court's ruling.

Thus, the defendant cannot begin to meet his burden of demonstrating that this case meets the standards required under N.C.G.S. § 7A-31(c), as the subject matter of the appeal does not have significant public interest; the case does not involve legal principles of major significance to the jurisprudence of the State; and the decision of the Court of Appeals is consistent with the ***31** decisions of this Court.

According, the defendant's Petition for Discretionary Review should be denied.

Footnotes

1 As explained in the Statement of Facts, *infra*, effective December 1, 1995, the General Assembly approved a bill imposing criminal penalties for, among other things, exploitation of an **elder** adult. *See* N.C.G.S. § 14-32.3(c). Effective December 1, 2005, however, N.C.G.S. § 14-32.3(c) was repealed with the passage of N.C.G.S. § 14-112.2, entitled "Exploitation of an **elder** adult or disabled adult." The former N.C.G.S. § 14-32.3(c) is similar to, although not identical with, N.C.G.S. § 14-112.2(b).

2 Although the State's Exhibit 13 indicates there are 92 checks, there are actually 91 checks written to Mr. Forte by Mr. Lindsey.

3 The State also introduced 105 checks made out to Kenneth Forte for the period dating April 1, 2002 through December 23, 2003. These checks were introduced pursuant to Rule 404(b) of the North Carolina Rules of Civil Procedure, not as substantive evidence.

4 Prior to Mr. Lindsey's testimony, a voir dire was held outside the presence of the jury.

5 To really comprehend Mr. Lindsey's testimony, both voir dire and trial testimony, it is necessary to read each in its entirety.

6 Ms. Bordeaux's mother would be Mr. Lindsey's late wife.

7 Mr. Lindsey's daughter, Delores Bordeaux, lives in St. Louis, Missouri, and has lived there since 1972. (T. at 24-25)

8 Mr. Lindsey knew Mr. Forte's father. (T. at 598-600)

1 The State understands that Mr. Lindsey is now deceased, having died sometime after the defendant's trial.

2 Mrs. Bordeaux testified that Mr. Lindsey's official birth records show that he was born in 1910, but that family members believed he may have been born ten years earlier in 1900, based on accounts from Mr. Lindsey and other family members. (T pp. 25-26)

3 Mrs. Bordeaux testified that, sometime in 2006, once she realized the extent of the defendant's activities, she began writing checks off of the account to keep her father's funds from being available to the defendant. (T pp. 47-48, 204)

4 Among other items, Defendant notes that Mr. Lindsey could not remember his late wife's name. (Petition for Discretionary Review, pp. 12, 16) However, this lapse is not surprising, since Mr. Lindsey's daughter had previously testified that her parents divorced when she was five years old; therefore, the defendant presumably had not had any contact with his former wife since at least 1955 or earlier. (T pp. 25, 53)

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