Circuit Court for Calvert County
Case Nos. C-04-CV-17-000003 & 04-C-16-001314

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 41

September Term, 2018

KATHY L. BROWN

v.

ROSA WATSON

Meredith,
Kehoe,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of a challenge to the last will and testament of Wayne McGahan ("Wayne"), who died on May 11, 2016. That will, dated about seven months earlier, left Wayne's entire estate to Kathy Brown ("Kathy"), his cousin's daughter, to whom he also had granted a power of attorney. On September 28, 2016, in the Orphans' Court for Calvert County, Rosa Watson ("Rosa"), Wayne's daughter, filed a petition to caveat the will. On March 7, 2017, the orphans' court transmitted four issues to the Circuit Court for Calvert County, for a jury trial: 1) Whether Wayne was legally competent to execute his last will; 2) Whether Kathy procured that will by fraud; 3) Whether Kathy procured that will by exercising undue influence; and 4) Whether there was a confidential relationship between Kathy and Wayne. The case proceeded to trial on February 6-7, 2018. The jury answered all four questions in the affirmative.

Kathy noted a timely appeal, presenting three questions, which we have rephrased for clarity:

I. Did the trial court abuse its discretion by ruling that "a witness who was an LCSW" could not "offer her opinion as a lay witness regarding [Wayne's] competency"?

II. Did the trial court abuse its discretion by restricting defense counsel's closing argument?

III. Did the trial court abuse its discretion by admitting into evidence pleadings from another case between the parties?

After the appeal was noted, the court consolidated this case with a suit for an accounting that Rosa had brought against Kathy in the circuit court on November 30, 2016.

For the following reasons, we shall affirm the judgment.[1]

FACTS AND PROCEEDINGS

At trial, Rosa testified in her own case and called as witnesses David Brown (her half-sister's husband) and Maryland State Trooper Vet Jackson. She also called Kathy as an adverse witness. Kathy called Thomas Pelagatti, Esquire, who drafted the last will; Rosemary Keffler, Esquire, who prepared the power of attorney naming Kathy as Wayne's agent and drafted the will in effect before the last will; two Calvert County Department of Social Services ("DSS") social workers assigned to Wayne's case; Wayne's pastor; and an acquaintance of Wayne's from church.

The evidence favorable to the verdict showed the following.

Rosa was born in 1981 to Wayne and to Rosa Romero, who were never married. Their relationship ended when Rosa was about five years old. A few years later, Wayne married a woman named Carolyn. Although Rosa lived with her mother, she visited her father and Carolyn about twice a month. After Rosa's mother passed away in 1996, Wayne and Carolyn, who had no children herself, "took [her] in[.]" The three became very close; Carolyn embraced Rosa as a daughter. Rosa maintained a close relationship with her father

[1] On February 7, 2018, the clerk of the circuit court entered into the record, on a "Daily Sheet," the jurors' answers to the four questions on the verdict sheet. The next day, a true test copy of that "Daily Sheet" was received by the Register of Wills for Calvert County. As this Court held in *Wall v. Heller*, 61 Md. App. 314, 325 (1985), "a determination by a circuit court of issues certified to it by the orphans' court, pursuant to [present Md. Code Ann. (2017, 2019 Supp.), § 2-105 of the Estates and Trust Article] is an appealable final judgment under [present Md. Code Ann. (2017, 2019 Supp.) § 12-301 of the Courts and Judicial Proceedings Article]."

and Carolyn throughout the years. She spoke to Carolyn on the phone daily and to Wayne several times a week. Wayne retired from his career in the military in 2001.

Rosa testified that her oldest son also was very close to Wayne and Carolyn. From around 2007 until 2009, when Rosa was divorced and living in Virginia, Wayne would take her son for the weekend about twice a month, and she would visit Wayne and Carolyn about once a month. Near the end of 2008, Wayne and Carolyn moved from their house in West Virginia, which they then rented out, into Wayne's recently deceased mother's house in Huntington, Maryland. Around that time, Wayne contacted Rosemary Keffler, a local attorney, about closing his mother's estate. On December 31, 2008, he signed a will prepared by Ms. Keffler that left everything in equal shares to Rosa and Carolyn, and if either one did not survive the other, to the one still living, with Rosa's share to be distributed *per stirpes*.

Around 2009, Wayne suffered a stroke. A year or so later, Carolyn told Rosa that Wayne had been diagnosed with dementia, for which he was on medication.

Rosa further testified that Wayne and Carolyn were married for 34 years and that Carolyn took impeccable care of Wayne and kept him organized. She set out his clothes and gave him medications daily, and she paid the bills.

On December 24, 2014, Carolyn died after a two-year illness. She had been in and out of the hospital for several months. The day before she died, hospital personnel called Rosa, who at that time was newly married, had just moved to Florida, and had recently given birth to a son. They told her that Carolyn was on her deathbed and suggested that arrangements be made for Wayne to visit her at the hospital one last time. Wayne could

not drive, so Rosa called several people asking if they could take her father to see Carolyn, including her half-sister Reina Brown, who was her mother's first child (not by Wayne). Reina and her husband David Brown, who were living in Baltimore, agreed to help.

David Brown testified that when they arrived at Wayne's house in Huntington on December 24, 2014, it was in horrible condition. There was trash, spoiled food, and the smell of urine and feces all about the house. There were broken windows and the lights were out. Wayne was lying in a soiled bed wearing only an adult diaper.

According to David, in early January 2015, he and Reina sat down with Wayne to discuss his situation. Wayne acknowledged that he was not able to live alone. They agreed that Reina would be paid $100 a day to cook and clean for him and to make sure he took his medications and was bathed and dressed appropriately. David, who was in the construction business, repaired two toilets in Wayne's house that were not working, removed the feces-covered carpets, and added handrails throughout the house so Wayne could navigate more easily with his walker. Reina and David went through numerous boxes of papers that were lying about the house in which they found uncashed checks, unpaid bills, and unopened mail.

To David, Wayne appeared weak, frail, confused, and "at a complete loss." Sometimes he "seemed aware of what was going on and at other times he just seemed disconnected." Wayne complained that since his stroke, he could no longer do things he enjoyed. If left alone, he lacked the initiative to groom himself. He often refused to accept that he was disabled and tried to move about the house without his walker. When he talked about Rosa and his grandson, however, he was "always in a good mood[.]" Wayne spoke

to David about his will and said "Rosie is my daughter, and she is the only one, and she is going to get everything, and I'm going to pay that house off in West Virginia before she gets it, and she is going to get that house, and she is going to get this house."

From January to March 2015, Wayne was in and out of the hospital for short stays. David testified that in March 2015, Wayne became increasingly irritable. He began to insist, often angrily, that his health would improve if he were admitted to a hospital. David described Wayne as "lovable" but "difficult to deal with because he . . . didn't want to take orders. He didn't want to take orders from anyone."

Around mid-March 2015, Wayne was admitted to a hospital for a few days and then was transferred to NMS, a rehabilitation facility in Annapolis. The Browns continued to check on Wayne sometimes during the week and every weekend. During his time at NMS, Wayne once left the facility without permission and barefoot and engaged in other problematic and sometimes violent behavior. The caregivers at NMS suggested that Wayne might need a specialized facility that focused on patients with dementia.

Rosa had been coming to Maryland to visit Wayne every month for a week at a time. Because Wayne's health insurance for nursing care at NMS was running out, she and her husband began to make plans for him to move to Florida to live with them. Rosa contacted Ms. Keffler, who advised her to seek a guardianship and gave her the name of an attorney. Rosa contacted the attorney in April and on June 2, 2015, she filed a petition for guardianship. She then visited Wayne and made arrangements for Wayne to be transported to Florida on June 26. Rosa hired a medical van to transport Wayne to the airport that day. David and Reina Brown would be there to meet him, and Reina would accompany him on

the plane. According to David, the decedent was "jubilant" about leaving NMS, because "[h]e felt like he was in jail or worse." The plan did not go as anticipated, however. While in the medical van on the way to the airport, Wayne became combative and jumped out of the van as it was moving. He was taken to Calvert Memorial Hospital where he was admitted and remained until September 11, 2015.

On July 2, 2015, Rosa obtained a physician's certificate attesting that Wayne was in need of a guardianship.[2] On July 30, 2015, she reluctantly decided to drop her effort to become her father's guardian, however. Because Wayne was insisting he did not need a guardian, Ms. Keffler had filed an opposition to the petition and Rosa's lawyer had told her that it would cost $10,000 to pursue the contested guardianship case, which she did not have. Rosa still believed Wayne needed a guardian based on his medical diagnosis, but she represented to the court that she no longer wished to be appointed as his guardian. Then, on August 10, 2015, Ms. Keffler filed a motion opposing any guardianship and

[2] The certificate was signed by Dr. A. Krup at Calvert Memorial Hospital. It stated that, based on a physical examination and a mental health evaluation, Wayne had symptoms of, "failure to thrive, hemiplegia, anemia, hypertension, cerebrovascular accident, diabetes, dementia, and depression." Dr. Krup reported that due to his Alzheimer's Disease, dementia, and behavioral issues, Wayne "has a mental disability which interferes with the ability to communicate reasonable decisions regarding health care, food, clothing, shelter or administration of property[.]" Dr. Krup further reported that, in his professional opinion, Wayne needed a guardian because he had a disability "which prevents her/him from making or communicating responsible decisions concerning her/his person" and "any responsible decisions concerning her/his property." He also reported that Wayne did "not have sufficient mental capacity to understand the nature of guardianship and cannot consent to the appointment of a guardian."

seeking a dismissal of the case. The motion was supported by two physician certificates.[3] On August 31, 2015, the court dismissed the guardianship petition.

Rosa testified that during the hospitalization she worked with hospital personnel and DSS social workers to make plans for Wayne's discharge from the hospital and for in-home health care workers to assist him after he was home. She was able to arrange for home health care assistance that would be partially paid for by Wayne's insurance. Wayne's monthly pension, an annuity, and social security benefits would be sufficient to cover the balance.

On September 11, 2015, Wayne was discharged to home from the hospital. The DSS workers had arranged for home health care workers to attend to him during the weekend immediately after his return. Due to some sort of miscommunication, those workers did not show up and Wayne was left unattended.

According to Rosa, Kathy called her during the summer of 2015, while Wayne was in the hospital. Rosa had never heard of Kathy before. Kathy said she was Wayne's cousin and that she was living in the area near Wayne. She offered to check on Wayne once he

[3] These physician certificates also were signed by doctors at Calvert Memorial Hospital. The first was written by Dr. Thomas Annulis on August 2, 2015, and the second was written by Dr. Dupak Shaw on August 3, 2015. Both doctors reported that they had known Wayne for a month or more and their separate physical and mental examinations lasted about 30 minutes. Both doctors reported that Wayne suffered from, among other things, moderate Alzheimer's Disease, which was permanent and progressive and interfered with his "ability to make or communicate responsible decisions regarding health care, food, clothing, shelter, or administration of property." One doctor reported that Wayne needs "supervision with all financial matters" and the other doctor reported that he needed supervision with some "financial" matters. Both doctors stated that Wayne had the capacity to consent to the appointment of a guardian, however.

was home. Rosa thought Kathy sounded nice, so she agreed. During the remainder of Wayne's hospitalization, they texted back and forth frequently about his condition. Kathy attended some of the discharge planning meetings at the hospital with Wayne, Ms. Keffler, hospital staff, and the DSS workers.

Rosa noticed that soon after Wayne was discharged from the hospital Kathy stepped up her involvement with him. Kathy continued to text Rosa frequently and the subject of Kathy's getting Wayne's power of attorney came up. Given the problems that had occurred when the home health workers had left Wayne unattended over the weekend following his discharge, and because she thought Kathy would use the power of attorney for simple things, like helping Wayne with groceries, Rosa agreed to that idea. She believed Wayne needed as much help as they could get for him.

Kathy testified that her father and Wayne were first cousins. She had seen Wayne infrequently over the years and neither she nor anyone in her family knew he had a daughter. Beginning in 2010, she fell on hard times due to an automobile accident that rendered her unable to work. She filed for bankruptcy in 2012. In 2014, her husband became disabled due to health problems, which worsened after a heart attack in 2015. (He died in April 2017.)

According to Kathy, in November 2014, when Carolyn was ill, Carolyn reached out to her to see if she could help by checking in on Wayne, which she did. From then until the end of 2014, she visited Wayne about four times. According to Kathy, from January 2015 until September 9, 2015, she "withdrew from the situation" and visited Wayne only twice because she understood from conversations with Rosa that the family would be

taking care of him. However, when Wayne was in the hospital in the summer of 2015, he would call her often, sometimes multiple times a day at all hours of the night, begging her to get him out. Kathy testified that she repeatedly told Wayne that Rosa had told her "to step out of the picture" and that "I cannot help, your daughter wants to do this, I cannot help you."

When Wayne was discharged from the hospital and the arranged in-home care failed to show up, Kathy stepped in to help. On September 21, 2015, Wayne signed a power of attorney prepared by Ms. Keffler naming Kathy as his agent. That day he also signed an advanced medical directive giving Kathy authority to make medical decisions for him. Kathy testified that when Wayne came home from the hospital and saw his bank statement, he was "livid" because he thought Rosa had stolen money from him. According to Kathy, before she had his power of attorney, Wayne's bank account had "70, 80 grand," but when she became power of attorney it was "less than 40." On cross-examination, she conceded, however, that Wayne's account actually went from $43,000 to about $20,000, and that she was responsible for spending half of the amount drawn down.[4]

Kathy acknowledged that before she obtained Wayne's power of attorney, he could not manage his finances and needed assistance with daily activities. Immediately after she obtained his power of attorney, she discharged the professional in-home care workers that Rosa had arranged for him and undertook to manage his care. For this, she paid herself

[4] Rosa testified that her two largest expenses for her father while he was in the hospital were the legal fees for defending the guardianship and a deposit for an assisted living facility, which he did not go to.

and her husband from Wayne's account. She also used Wayne's account to pay three neighbors to watch him and take care of the house and yard. None of the care Kathy arranged was covered by insurance. She acknowledged that Wayne was completely dependent upon her and the caregivers she arranged for him.

Within a few weeks of being granted Wayne's power of attorney, Kathy contacted attorney Thomas Pelagatti about preparing a new will for Wayne. Wayne had never met Mr. Pelagatti before. Kathy testified that Wayne wanted to cut Rosa out of his will and give all his money to her (Kathy) because of "all the money that was stolen, that he felt like he was betrayed because he was stuck in hospitals." On October 2, 2015, Mr. Pelagatti's office emailed Kathy a will information sheet. She filled it out, stating that Wayne wished to leave his estate to her, and sent it back to Mr. Pelagatti. The next day, she contacted the police and reported that Wayne suspected that Rosa had stolen several items from his house while he was in the hospital. Kathy acknowledged that she knew Wayne had dementia, and when the police came to the house in response to the report, she and Wayne were unable to show that anything was missing.

On the morning of October 16, 2015, Ms. Brown arranged for a neurologist who had never seen Wayne before to examine him. Based on a 35-minute examination, and without any access to Wayne's health history, the doctor determined that Wayne was

competent.[5] That afternoon, Kathy took Wayne to Mr. Pelagatti's office, where he executed the new will.

Mr. Pelagatti testified that generally during a will signing he asks the testator basic identifying information, including name, address, and date of birth; whether he understands that the document is a will; whether it disposes of his estate as he wishes; and whether anyone is forcing him to sign it. He recalled that in response to whether the will reflected how he wanted to dispose of his estate, Wayne "blurted out, yes, I am leaving everything to Kathy and cutting my daughter out since she stole money from me." Until then, Mr. Pelagatti did not know that Wayne had a daughter. Wayne signed the will, which as drafted left everything to Kathy, and then to her husband if she predeceased him (Wayne). The will made no provision for Rosa or her children.

On October 27, 2015, Kathy changed the beneficiary on Wayne's $25,000 life insurance policy to herself. She also had Wayne's pension benefits changed to be payable to her. She sold his property in West Virginia at the end of December 2015, netting a profit of about $70,000.

Wayne died on May 11, 2016. By then, his bank account was depleted and he had no assets. The profits from the sale of the West Virginia property were gone. On

[5] The neurologist, Dr. Floranda, wrote in his report that he was unable to review any previous testing but "[d]iscussed with patient and his cousin Kathy Brown, who has the power-of-attorney, that patient exhibited good insight and judgment with an MMSE score of 26/30." The doctor concluded that, in his medical opinion, Wayne "is competent in understanding fully, execute and to make [sic] informed decisions regarding his own financial and health affairs with the caveat that these are carefully explained to him." He noted that Wayne was agitated, which was "probably due to underlying psychiatric history and recent stress with his daughter stealing his money."

September 30, 2016, Rosa, through counsel, filed suit in the Circuit Court for Calvert County seeking an accounting.

Both Rosa and Kathy testified that from about September until November 2015, they were in communication about issues related to Wayne. Rosa testified that she only had a few phone calls with her father during that time and they were very brief. Her phone calls with Wayne became more and more sporadic because his phone was constantly disconnected. When she did manage to speak to him, he did not express any anger toward her. Rosa also testified that she sent her father letters during this time, and while he previously had been very good about responding to her letters, he never responded to these. Rosa testified that when she came to Maryland at Thanksgiving 2015 to visit her father, she went to his house and discovered that the locks had been changed. From then on, the only way she could communicate with Wayne was through Kathy.

According to Rosa, although she and Kathy communicated in the September through November 2015 period, Kathy never told her that she had fired the in-home health care professionals she (Rosa) had arranged for; that Wayne was going to change or had changed his will; that Wayne thought she (Rosa) had stolen from him; and that she (Kathy) was going to sell Wayne's property in West Virginia. Rosa only learned these things after Wayne died.

Ms. Keffler testified that she had drafted the will that Wayne executed in 2008. After Carolyn died, he contacted her about handling Carolyn's estate and drafting a power of attorney for him because he was having trouble managing his affairs without Carolyn. In January 2015, Ms. Keffler met with Wayne at his home because he could not drive.

Kathy was present. Subsequently, Ms. Keffler met with Wayne to have him sign a document making her (Ms. Keffler) the personal representative of Carolyn's estate and a power of attorney making Kathy his agent. Because Wayne was indecisive about granting his power of attorney to Kathy instead of to Rosa, he did not sign the power of attorney.

The next time Ms. Keffler had contact with Wayne was when he was discharged from NMS. The topic again was a power of attorney. Because the discharge papers from NMS stated that Wayne suffered from dementia, she told him she was unwilling to have him sign a power of attorney without more clarification. Around that time, she had several conversations with Rosa about her either clarifying that Wayne was mentally competent to sign a power of attorney naming Rosa as his agent or filing a guardianship proceeding.

Wayne called Ms. Keffler numerous times during his admission to Calvert Memorial Hospital, complaining that he wanted to be discharged and that Rosa was stealing money from him. Based on what Wayne was saying, Ms. Keffler filed a complaint against Rosa with the State's Attorney's Office, alleging that some rental checks from Wayne's West Virginia property had been improperly cashed by her. Ms. Keffler also alleged that Rosa and Reina and David Brown had forged Wayne's signature on checks. Maryland State Trooper First Class Vet Jackson was assigned to investigate the complaint. After several months, he determined that the allegations were unfounded and closed the case.[6] At trial, Trooper Jackson testified that he had interviewed all those involved in the

[6] The rental checks were never cashed but had been misplaced, and they were ultimately turned over to Kathy, who by then had Wayne's power of attorney. The other checks were determined not to have been forged.

matter, including Wayne, and that every time he spoke to Wayne, Wayne told him he was "being held prisoner in his own home and that he was being mistreated." Kathy was the person he was referring to as his captor.

As noted, Kathy called two DSS caseworkers to testify. Patrice Brooks was a family services caseworker and was assigned to Wayne's case in September 2014, when Carolyn was in the hospital. When she checked in on him at home, he was "very kind" but was unkempt and the house was in disarray. She remembered that he was proud of his family and spoke lovingly of them. She conversed with Rosa, who stepped in to arrange for help for her father, and the case was closed. She did not detect any tension between Wayne and Rosa. In July 2015, when a request was made for a guardianship assessment of Wayne, she visited him at Calvert Memorial Hospital. His manner had changed, and he was extremely irritable.

Maura Vilkoski testified that in July 2015, she was assigned to perform a guardianship assessment on Wayne, who desperately wanted to get out of the hospital and back into his house. She worked with Rosa and the hospital personnel to arrange for Wayne to be discharged to home on Friday, September 11, 2015, with DSS arranged in-home health care assistance for the weekend. When she went to Wayne's house on Monday, September 14, however, she found him sitting in the living room in his hospital gown. He had defecated in the kitchen and had fallen and fractured his foot. He had not taken his medication because he could not cross the room to get to it. Apparently, hospital personnel had not notified the home health care service of his discharge date.

Keith Schukraft, Wayne's pastor, testified he visited Wayne once a week from February 2015 until he died, mostly at his house and sometimes at the hospital. During that time, Wayne only could walk around "a little bit" and rarely left his room. Wayne relied on others for "virtually everything[.]"

Donald Downs, a church member who visited with Wayne a few times in the month or so before he died, testified that at a birthday party for Wayne not long before he died Wayne was sobbing and saying, "I wish my daughter was here. I miss my grandkids. She stole money from me."

We shall include additional information in our discussion of the issues, as relevant.

DISCUSSION

I.

In her first question presented, Kathy contends the trial court abused its discretion by not allowing "a witness who was an LCSW" to offer a lay witness testimony about Wayne's competency. The admissibility of both a lay witness or expert witness opinion lies largely within the discretion of the trial court, and the court's action will seldom constitute grounds for reversal. *See Warren v. State*, 164 Md. App. 153, 166 (2005) (lay opinion testimony) and *Myers v. Celotex Corp.*, 88 Md. App. 442, 460 (1991) (expert opinion testimony).

There was no evidence at trial that Patricia Brooks was an LCSW. Maura Vilkoski was the only witness called at trial who was an LCSW, and therefore this question presented clearly pertains to her testimony. In her discussion, however, Kathy includes a brief argument that the trial court abused its discretion in a ruling about Ms. Brooks's

testimony. Rosa asserts that because Kathy's question presented conflicts with her argument, in that it does not include Ms. Brooks's testimony, and because Kathy's argument about Ms. Brooks is conclusory, Kathy has not preserved for review any argument regarding Ms. Brooks's testimony.

We agree that the argument as to Ms. Brooks is not preserved for review. We shall address it in any event even though it lacks merit, as does the argument as to Ms. Vilkoski.

In the summer of 2015, Ms. Brooks was an investigator with the Adult Protective Services unit of the DSS and Ms. Vilkowski was an LCSW with that unit. In July of that year, Ms. Vilkowski was assigned to perform a guardianship assessment of Wayne. Both women attended several meetings at Calvert Memorial Hospital with Wayne, Rosa, hospital staff, Ms. Keffler, and Kathy in an effort to resolve the conflict between the hospital personnel, who did not want to discharge Wayne because they thought he was incapacitated, and Wayne, who wanted to go home.

In her direct examination by Kathy's counsel, Ms. Brooks explained that during these meetings she and Ms. Vilkowsku were "trying to discuss what it meant in their book [the hospital's] to be incapacitated versus incompetent, and what that looked like for us as investigators and . . . how that needed to play out." Kathy's counsel then asked her what the terms "incapacitated versus incompetent" mean. Rosa's lawyer objected on the ground that the question "calls for a legal conclusion." The court sustained the objection, stating "[i]n this case it will." Then, on cross, Rosa's lawyer asked whether the efforts in the meetings would have been undertaken "if [Wayne] was capable of taking care of himself. There was no objection. Ms. Brooks answered:

> Again, I - - what I know, just having so much experience as an investigator, is that we oftentimes have, you know, meetings, family meetings, bringing the resources around the table to discuss what should happen for a person that's aging. And what may look like somebody is having a difficult time managing certain systems, or managing their household, or their finances, does not always equate to them being - - and I'm trying to be cautious here, Your Honor.

At that point, counsel for Rosa said Ms. Brooks had "more or less answered [the] question, at least to the best of your ability[]" and asked, "[Y]ou are basically saying these meetings occurred, but you can't testify as to whether he would or would not need these services to get by?" Ms. Brown answered, "Correct." Cross-examination then ended and counsel for Kathy did not opt for redirect examination.

Kathy argues that the court's ruling that Ms. Brooks could not state an opinion about the difference between a patient's being "incapacitated" or "incompetent" was an abuse of discretion. Although she offers in support a case holding that a lay witness is competent to give an opinion about whether a person was sane or insane, based on the witness's observation of the person's appearance and conduct and on common experience and knowledge, *see Doyle v. Rody*, 180 Md. 471 (1942), that case, and the topic of lay witness testimony generally, is not relevant to the ruling she is complaining about. The court's ruling was not in response to a question in which Ms. Brooks had been asked to give a lay opinion, based on her observations, about Wayne's sanity, or even about his competency. She had been asked to define terms that could have legal significance in this case, and the court ruled that she could not do so, as that would amount to stating a legal conclusion. Kathy does not provide any argument on appeal as to why this ruling, given its basis, was wrong. Accordingly, her argument not only is unpreserved but lacks merit.

In Ms. Vilkowski's cross-examination by Rosa's lawyer, she was asked whether she was aware that Wayne had been diagnosed with dementia in 2012. She responded that she was aware of his diagnosis but did not know when it had been made. When asked whether she knew that he had been diagnosed with dementia before he was hospitalized in 2015, she testified that in July 2015, her agency performed "a mini-mental" on Wayne and, because he met the "cognitive criteria," the DSS did not "move forward with the guardianship assessment."

Then, on re-direct examination by Kathy's counsel, the following took place:

> [COUNSEL FOR KATHY]: So a diagnosis of dementia, does that mean that someone is impaired and unable to care for –
>
> [COUNSEL FOR ROSA]: Objection, Your Honor.
>
> [COUNSEL FOR KATHY]: He asked.
>
> [COUNSEL FOR ROSA]: Well, I asked to look at the medical records, very precise.
>
> THE COURT: He did ask, I was listening very carefully. So go ahead and state your question now.
>
> [COUNSEL FOR KATHY]: Does a diagnosis of dementia mean that someone is incapacitated – or sorry, is unable to care for themselves?
>
> [WITNESS]: No.
>
> [COUNSEL FOR ROSA]: Objection, Your Honor, and move to strike. There has already been testimony it's a continuum.
>
> THE COURT: Pardon?
>
> [COUNSEL FOR ROSA]: There has already been testimony it's a continuum of diagnosis.
>
> THE COURT: It is. It is.

> [COUNSEL FOR ROSA]: So I mean to answer like that in a vacuum.
>
> [COUNSEL FOR KATHY]: So can I ask her what a diagnosis of dementia means?
>
> [COUNSEL FOR ROSA]: No. Objection, Your Honor.
>
> THE COURT: Because you need medical testimony.
>
> [COUNSEL FOR ROSA]: Yes, Your Honor.
>
> THE COURT: I am going to agree with him on that. I really am. She is here for a specific purpose, and I'm going to have to sustain your objection.
>
> [COUNSEL FOR KATHY]: Okay.

Counsel for Kathy then stated she had no further questions.

Kathy argues that the trial court abused its discretion by not allowing Ms. Vilkoski to "explain what dementia is or how [Wayne's] diagnosis of dementia played into her decision, as well as the department's decision not to apply for guardianship of [the decedent]." Rosa responds that the court did not abuse its discretion because Kathy's counsel was asking about the meaning of a medical diagnosis of dementia, not how the diagnosis played into her decision to have him discharged from the hospital.

It is plain from the record that Kathy's counsel did not ask Ms. Vilkoski how Wayne's dementia diagnosis shaped her decision and the DSS's decision not to pursue a guardianship for him. Rather, Kathy's counsel asked Ms. Vilkowski "what a diagnosis of dementia means."

Rule 5-701, which governs opinion testimony by lay witnesses, provides: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the

perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." By contrast, opinion testimony by expert witnesses, which is governed by Rule 5-702, only will be admitted through a qualified expert when the expert testimony is appropriate on the particular subject and when there is a sufficient factual basis for it.

In *Ragland v. State*, 385 Md. 706, 717-18 (2005), the Court of Appeals clarified the distinction between lay opinion and expert opinion testimony, explaining that lay opinion testimony is that which "is rationally based on the perception of the witness including":

> the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. . . . Other examples . . . include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, [and] the value of one's property.

Id. at 717-18 (quotation marks and citation omitted, second ellipses added). The Court held that a lay opinion is not admissible when it is testimony "based upon specialized knowledge, skill, experience, training or education." *Id.* at 725 (footnote omitted). In that case, two police officers who had not been identified as expert witnesses sought to testify that based on their experience an interaction they witnessed was a drug deal. Holding that testimony by police officers that they had witnessed a drug deal was not lay witness testimony but was expert testimony that was improperly admitted because the officers had not been identified as experts in discovery.

The court's ruling was not an abuse of discretion. Ms. Vilkowski was asked a medical question: What does a diagnosis of dementia mean? This is not a question that

called for a lay opinion. She was not being asked to describe Wayne's behavior as she had observed it. She was being asked to define a medical term. This does not appear to be a question within the expertise of an LCSW, and even if it is, Ms. Vilkowski was not identified as an expert witness prior to trial and was not qualified as an expert witness in court. The court's ruling was not an abuse of discretion.

II.

Kathy next contends the trial court abused its discretion by allowing Rosa's lawyer to "argue specific elements of law but subsequently restrict[ing her own] counsel's closing argument from arguing case law examples[.]" Apparently recognizing that she did not preserve this issue for review, Kathy argues that we should apply a plain error standard of review.

After both parties rested, the court and counsel discussed jury instructions. The court agreed to give Maryland Civil Pattern Jury Instructions ("MPJI-Cv"), 29:1 on due execution; 29:2 on testamentary capacity, and 29:4 on undue influence. Rosa's lawyer proposed that the court give a non-pattern "jury instruction number three" on the elements of undue influence. That instruction provided:

> There is no test to determine the existence of undue influence with mathematical certainty. We have recognized in many appellate cases several elements characteristic of its presence, including:
>
> The benefactor and beneficiaries are involved in a relationship of confidence and trust;
>
> The will contains substantial benefit to the beneficiary;
>
> The beneficiary caused or assisted in effecting execution of will;

There was an opportunity to exert influence;

The will contains an unnatural disposition;

The bequests constitute a change from a former will; and

The testator was highly susceptible to the undue influence.

Moore v. Smith, 321 Md. 347 (1990).[7]

[7] At the time of trial, MPJI-Cv 29:4 on "undue influence" provided:

A will is not valid if it was the result of or was obtained by the use of undue influence imposed on the maker of the will.

Undue influence means that domination and influence were exercised by another person to such an extent that the maker was prevented from exercising free judgment and choice. That influence must amount to force or coercion and must operate at the time the will was executed.

Although undue influence may result from the confidential relationship between the maker of a will and a person who is a beneficiary under the will, the existence of a confidential relationship does not create a presumption that any part of the will resulted from undue influence.

Only the portions of the will which are affected by the undue influence are invalid. Thus, the entire will is invalid only if all of its provisions are affected by undue influence or the provisions that are so affected may not be separated from those which are not affected without totally destroying the harmony and intent of the maker's wishes.

The comment section stated: "For a review of the seven elements characteristic of the presence of undue influence, see *Moore v. Smith*, 321 Md. 347 [] (1990)."

In 2019, MPJI-Cv 29:4 was amended to include the following additional verbiage at the end of the instruction:

In assessing whether the will was the result of undue influence, you may consider whether the following factors exist:

(continued)

Kathy's counsel objected. The court stated it was inclined to give proposed jury instruction number three and to allow the parties to argue in closing the elements of undue influence and give examples from cases. Specifically, the court stated:

> [Y]ou all are free to talk about examples, if you want to, consistent with what the law says obviously, but I don't -- I mean I sit in this -- stood in the well of this courtroom and argued to juries on many occasions about criminal cases and what facts should be gleaned from what the law said about those and gave examples, consistent with the law. So I didn't really see that there was a whole lot of -- didn't see that there was a problem with this.

Kathy's lawyer continued to object, stating that proposed jury instruction number three was "unnecessary" because the court already had included the pattern undue influence jury instruction in those it was going to give. She explained, "I think it puts more emphasis on that element because it continues to explain in more detail and depth beyond what [the] standard Civil Pattern Jury Instructions do[.]" Ultimately, the court agreed,

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> (1) The maker of the will and the beneficiary are involved in a relationship of confidence and trust;
>
> (2) The will contains substantial benefit to the beneficiary;
>
> (3) The beneficiary caused or assisted in effecting execution of the will;
>
> (4) There was an opportunity to exert influence;
>
> (5) The will contains an unnatural disposition;
>
> (6) The bequests constitute a change from a former will;
>
> (7) The maker of the will was highly susceptible to the undue influence; and
>
> (8) Any other relevant factors.

removed Rosa's proposed jury instruction number three, and gave both parties "leeway to argue any examples that you feel are appropriate." When Rosa's lawyer asked to clarify whether the court's ruling meant he could argue in closing the several factors used to determine undue influence in Maryland, the court stated that it did.

During closing argument, Kathy's lawyer told the jury that Wayne's state of mind at the time he signed the will was what mattered. She argued:

> This other evidence and testimony about what [Wayne] might have done, and certain things he might have said, and issues that he may have had prior, are completely irrelevant to this case. They don't matter. It's where he was at the time he signed his will. There is case law on it, and it also specifically says that –

At that point, Rosa's lawyer asked to approach the bench. At the ensuing bench conference, he said: "I thought when we discussed we were going to talk about some of the elements generically, I didn't realize we were going to cite case law." The court responded: "I really did want you to confine yourselves to any arguments about elements that you wanted, not kind of a general discussion[.]" This followed:

> THE COURT: It's okay. It's all right. But that's what I really wanted you to confine yourself.
>
> [KATHY'S COUNSEL]: Okay.
>
> THE COURT: Okay.
>
> (Counsel returned to the trial tables and the following ensued:)
>
> THE COURT: Okay. You are ready. Go ahead.
>
> [KATHY'S COUNSEL]: So without getting too much into the case law that you don't have in front of you, and that you are not able to read, there is a presumption of sanity. And even if someone might have diminished capacity, even if someone might have dementia, that doesn't mean that they are incompetent to execute a will. It's what they were at the time that they

> actually executed that document, what they were thinking, what they were feeling.

Five paragraphs later, Kathy's counsel ended her closing argument.

In rebuttal closing, Rosa's attorney stated: "And cases in Maryland have talked about some elements that can be considered when you are thinking about undue influence." Without objection, Rosa's counsel spoke about the seven factors of undue influence. Kathy's counsel did not raise any further complaints or objections related to closing arguments.

Kathy now argues that her attorney believed the court had authorized counsel to include in closing argument a discussion about case law on testamentary capacity, confidential relationships, and execution of a will, not just case law on undue influence. She states that she "does not take issue" with the closing argument given by Rosa's lawyer. She argues, however, that she was "greatly prejudiced by her counsel's inability to argue the specific elements taken from the case law of her choice." She concedes that her counsel was not "intentionally misled" by the court but argues that her counsel was disadvantaged by her "interpretation" of the trial court's ruling.

At trial, Kathy's lawyer did not object to the court's guidance in advising her to confine her argument to its ruling. Although Kathy asks for plain error review and cites *State v. Rich*, 415 Md. 567 (2010), and its four-factor test for plain error review, she never states why plain error review is appropriate. She simply makes the bald statement that she was "greatly prejudiced." Moreover, it is clear from her argument that it was her lawyer's

interpretation of the trial court's ruling, not the ruling itself, that caused her to be prejudiced.

To invoke plain error review, there must have been error by the trial court, not by counsel. *Nelson v. State*, 137 Md. App. 402, 423-24 n.5 (2001) ("[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court."). Here, the court made a clear ruling that counsel could argue the elements of undue influence, which Kathy's counsel (and Rosa's counsel) did. There was no error in this ruling, much less plain error. Accordingly, we decline to exercise plain error review. *See Mines v. State*, 208 Md. App. 280, 303 (2012) (declining "the invitation to conduct plain error review, because such review is within our unfettered discretion.") (quotation marks and citation omitted), *cert. denied*, 430 Md. 346 (2013).

III.

Before Rosa rested her case, her lawyer moved to admit the complaint and answer in the related suit that Rosa had filed against Kathy for an accounting. Kathy's lawyer objected on the ground that "it's confusing. It's a different case, it's not something before this jury, and I don't believe it's relevant." However, counsel for both parties advised the court, erroneously, that the accounting case had been consolidated with the case that was being tried.[8] When the court expressed its intention to admit the documents, Kathy's

[8] Both parties believed that on July 25, 2017, the petition to caveat the will and the accounting complaint were consolidated based on a pre-trial hearing that day at which the (continued)

lawyer reiterated her desire that the court give the jury some context for the documents. The following colloquy occurred:

> [ROSA'S COUNSEL]: Yes, Your Honor. At this time [Rosa] would move to admit what's been collectively marked as [Rosa's] Exhibit 13, which is the Complaint and Answer in a case seeking accounting in this court[.]
>
> * * *
>
> THE COURT: And for the reasons that you stated while the jury was out of the room, you are objecting?
>
> [KATHY'S ATTORNEY]: Yes.
>
> THE COURT: Okay. Ladies and gentlemen, I have overruled [Kathy's] objection, and I'm going to let you see that there was another case that was filed wherein [Rosa] asked for an accounting. Just so you all know that that was an actual case that existed, and now it's been subsumed by this case, but there was another case, and that's what these exhibits show you.

Kathy now contends the trial court abused its discretion by allowing the complaint and answer in the accounting case into evidence. She argues that these documents unduly prejudiced her because they were "sent to the jury absent any context or instruction[,] served no necessary purpose[,] and served only to unduly emphasize the fact that Rosa had sued Kathy in another matter."

Rosa responds that Kathy did not preserve this issue for review because she did not object at trial to earlier admitted similar testimony, and in any event, the argument is without merit. We agree this argument is not preserved for review.

parties agreed about consolidation and the court noted that an order would be forthcoming. The order consolidating the cases was not entered until June 19, 2018, after trial, and then was revised on August 10, 2018, in an order changing which case was the lead case.

Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *Benton v. State*, 224 Md. App. 612, 627 (2015) (quotation marks and citations omitted).

Earlier in the trial, Rosa testified on direct examination, without objection, that she had been asking for an accounting from Kathy for "almost two years now" but had yet to receive one. And, on direct examination of Ms. Keffler, Kathy's counsel elicited that Rosa had asked for an accounting of Wayne's assets in another legal proceeding, but she believed that under the law Rosa was not entitled to that information. Additionally, when called adversely, Kathy testified on direct-examination, without objection:

> [ROSA'S COUNSEL]: When [Rosa] did ask you for an accounting, and she did it a couple of different ways, one of which was formally in a legal proceeding, correct?
>
> [KATHY]: I never had a legal proceeding for accounting. I mean until all this started, then we had –
>
> [ROSA'S COUNSEL]: Oh, that's right. But after – after Wayne's death, a request was made for an accounting again, and you opposed it?
>
> [KATHY]: Huh-uh, no, sir.
>
> [ROSA'S COUNSEL]: No?
>
> [KATHY]: The only accounts that I had is when all this was started through the courts as far as the – how do you – I don't even know the word, I don't know, but when the court's started, that's when I was contacted through the estate, the lawyers for the estate, and all the accounting was turned over to them, receipts, everything was turned over to them.

By not objecting earlier when the same information was moved into evidence, Kathy waived any objection she had to that evidence and therefore this issue is not properly before us. We do not hesitate to note, in addition, that the trial judge admitted these documents in part because both counsel told him, inaccurately, that the cases had been consolidated and that we see no prejudice to Kathy from the admission of these documents in any event.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.