UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1491

September Term, 2015

BOBBIE SUE LEWIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 30, 2016

Tried by a jury in the Circuit Court for Wicomico County, appellant, Bobbie Sue Lewis, was convicted of six counts of obtaining property by deception of an individual at least 68 years old, five counts of theft less than $1,000, and one count of theft scheme involving, at least $1,000 but under $10,000.[1] The trial court sentenced appellant to a total of eight years in prison, suspending all but 5 years, and ordered restitution to the victim in the amount of $3,763.56. Thereafter, appellant timely noted this appeal.

Appellant asks us to consider whether the evidence was legally sufficient to sustain her convictions. For the reasons that follow, we shall affirm the judgments entered in the circuit court.

FACTS AND LEGAL PROCEEDINGS

In early 2013, Carole Jones interviewed appellant for a position as a home health provider for her and her husband Kenneth "Buck" Jones, who, after having suffered a stroke, was bedridden and unable to talk. Appellant represented to Carole, or led Carole to believe, that she was a certified nursing assistant ("CNA"), although her license as a CNA had expired years before and had not been renewed.[2]

[1] During trial, the State *nolle prossed* three counts of the criminal information, and the trial court granted appellant's motion for judgment of acquittal on eight counts that alleged that appellant exerted undue influence over the victims, one count of obtaining property worth at least $10,000 by deception, and theft scheme of at least $10,000 but less than $100,000. The jury acquitted appellant of one count of obtaining property of an individual at least 68 years old, and theft less than $1,000.

[2] Because the victims and another trial witness share a surname, we will refer to them by their first names for clarity.

Appellant began working for the Joneses in their home in January 2013. At the time, both Carole and Buck were in their 80s, and Carole, while mobile and of sound mind, required assistance with her daily activities.[3] Carole was later diagnosed with liver cancer and required additional assistance before her death on October 26, 2013. In general, appellant provided round-the-clock care for the Joneses and was often called in on her days off, which prompted her, with Carole's permission, to enlist the aid of her sister, Sierra Lewis, as a second caregiver. Sierra began working for the Joneses in February 2013, and initially worked three days a week to appellant's four but later worked four days a week to appellant's three.[4] Also, on several occasions when appellant was unavailable, she had friends fill in for her with the Joneses.[5]

After Carole's death, Buck gave power of attorney over his affairs to Andrea Sparacino, Carole's granddaughter (his step-granddaughter). When Sparacino searched for Carole's checkbook to pay some of the Joneses' bills she could not find Carole's purse. Sparacino was also unable to find any recent bank statements or receipts for expenses advanced by the caregivers, although appellant claimed to have laid out money for the

[3] Trudy Adkins, a licensed graduate social worker for the Wicomico County Department of Social Services, had visited with the Joneses on several occasions and determined that Buck was a vulnerable adult, that is one unable to meet the activities of daily life—either mentally or physically—without assistance. She further determined that Carole was unable to care for herself physically.

[4] Sierra was aware that appellant earned more money per hour than she did, but she attributed it to her belief that appellant had her CNA license and the fact that appellant had worked for the Joneses about one month longer than she had.

[5] There was no dispute that appellant provided adequate care to the Joneses.

Joneses' medical supplies and food. Carole's purse eventually turned up, but, suspicious of appellant, Sparacino or another of Carole's family members contacted the police, alleging that appellant had stolen money from the Joneses.

Detective Robert Wilson of the Wicomico County Bureau of Investigation interviewed appellant on March 10, 2014 regarding the complaint of theft. A redacted version of the transcript of that interview was introduced into evidence as State's exhibit 10A. Therein, appellant admitted that she had filled out Carole's checks on occasion because Carole's hand shook, but she stated that Carole signed her own name, except on "maybe two" occasions when appellant had signed checks with Carole's permission. She further admitted that Carole had sometimes paid her (appellant's) mortgage, but appellant said she repaid Carole in cash. Also, she told the detective that Carole sometimes paid her cell phone bills but claimed that Carole withheld money from her paycheck each week to obtain reimbursement.

When Detective Wilson asked if she had purchased a chair for Buck Jones, appellant answered, "No, he already had a chair." Wilson then inquired why a check for $641 written to her from Carole's account said on the memo line: "For Buck's chair."[6] Appellant initially claimed it was for a shower chair, but at Wilson's expression of disbelief that a shower chair could have cost $641, she amended her answer to say she bought Buck a recliner, although she said that she could not remember when or where she had purchased it. Sparacino, in her testimony, denied that any recliner in her grandmother's house was

[6] The check, dated May 13, 2013, was actually written for $672.44.

new when she visited the house in 2013, and Sierra Lewis, who still worked for Buck at the time of trial, denied that any newly purchased reclining chair had entered the Jones residence during her tenure as caregiver.

The State's evidence showed that the Joneses had accounts at two pharmacies – at Apple Discount Drug and Pemberton Pharmacy. Appellant claimed that she had purchased medical supplies for the Joneses with her own money and then presented the receipts to Carole for reimbursement. One such "reimbursement" was in the amount of $832.95 for "medical supplies." Debbie Kukta, the comptroller for Apple Discount Drugs, testified, however, that all the Joneses' prescription purchases from her pharmacy were billed directly to Procare after approval by Coastal Hospice, and because the items were billed at a "zero co-pay," no money was collected upon delivery.

Craig Schury, the owner of Pemberton Pharmacy, testified that his pharmacy delivered medications to the Joneses' home. Those medications and home health items were generally paid for by check at the end of each month, and, rarely, upon delivery. Schury conceded that on some occasions, the Joneses' caregivers came into the store to make such purchases, but his records did not indicate any single charge in the amount of $832.95, and he found "no large co-pays that would have necessitated such a large . . . amount" in the aggregate.

Theresa Bozman who substituted for appellant with the Joneses when appellant was out of town, testified that appellant presented her with a $750 paycheck, which amounted to a $200 overpayment. Appellant told Bozman she had to take Carole to Baltimore for

medical treatment and asked Bozman to pay her the extra $200 in cash to cover motel, gas, meals, and incidentals for the trip. Bozman returned $200 to appellant as requested.

Lisa Marie Jones,[7] another fill-in caregiver, testified similarly, that although she was owed approximately $120 for her one day's work with the Joneses, the check appellant gave her was for $200. She returned the $80 overage in cash to appellant.

Patricia Dilworth testified that she also filled in for appellant as caregiver to the Joneses. She worked on approximately ten occasions and she charged $8.00 per hour. She received a paycheck that was $200 too much. Purportedly, the purpose of the overpayment was to reimburse appellant for taking Carole to Baltimore for medical treatment. Dilworth returned the $200 to appellant.[8]

Deysi Caseres testified that appellant paid her $600 by check for a child's bunk bed she had advertised for sale. The check was from Carole's checking account.[9] Appellant told Caseres that the bed was for her [appellant's] daughter, but the check indicated "bed & supplies" on the memo line. Caseres was uncomfortable about the check, which she believed had already been filled out, so she asked appellant to accompany her to the bank to ensure there were adequate funds in Carole's checking account to cover the check.

[7] There is no familial relation between Lisa Marie Jones and Carole or Buck Jones.

[8] Sierra Lewis testified she had seen appellant write checks that Carole Jones signed because Carole's hands shook too badly for her to write the entire check. Those checks usually included her and appellant's wages, along with reimbursement for any groceries, medications, and takeout dinners they had purchased for the Joneses.

[9] A copy of the cancelled check, along with all the records pertaining to the Joneses' checking account with M&T Bank, was introduced into evidence as State's exhibit 2.

In October 2013, April Powell, a friend of appellant's, was with her in Virginia when she observed appellant remove a checkbook from her purse, fill out a check, and sign Carole Jones's name to it, after which she asked Powell to take the check to appellant's husband so he could deposit it. In court, Powell agreed that the checkbook cover she had seen on that occasion was the same one as State's exhibit 4, which was Carole Jones's checkbook cover, and that the check marked State's exhibit 3 was the one she had seen appellant fill out in its entirety and sign with Carole's name.

On one occasion, Powell drove appellant and Carole to a hospital in Baltimore. Carole paid Ms. Powell $100 in cash for the trip. While there, she heard appellant instruct the hospital staff that Carole did not want any medical information released to her family members and that the staff should only discuss Carole's medical status with her. When appellant and Powell returned home after the hospital visit, appellant received a telephone call from a woman whose voice Powell recognized as Carole's. Powell heard appellant deepen her voice in an apparent attempt to convince Carole she was speaking to Buck. Concerned about appellant's behavior, Powell told appellant's husband she thought appellant had "gone overboard" and that she was "scared for [appellant]."

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, arguing, first, that the State's claim that at least $10,000 had been stolen from the Joneses was based on the numerous checks written from the Joneses' account to appellant. The amounts of the checks, however, did not specify the nature of the payments, and the testimony had proven that the checks were meant not only to cover appellant's legitimate wages but reimbursements for undisclosed amounts appellant had spent on behalf of the

Joneses. As such, defense counsel argued the total amount allegedly stolen was entirely speculative. Appellant further argued that no testimony supported the State's claims of theft or general deception or undue influence in obtaining the Joneses' property.

Appellant did not put on any evidence, and at the close of the entire case, she renewed her motion for a judgment of acquittal. The court granted the motion as to all charges related to obtaining property by undue influence, and, after a recess to review the transcript of appellant's interview with police, the charges alleging aggregate theft or obtaining property worth at least $10,000 but less than $100,000 were also dismissed. The remaining 14 charges were sent to the jury.

DISCUSSION

Appellant contends that the evidence produced at trial was insufficient to sustain her convictions because the State failed to prove that she took property from the Joneses by deception and without their authorization, as required by the applicable statutes. She also maintains that the evidence presented, that Carole had not authorized each of the payments evidenced by the checks filled out and/or signed by appellant, was entirely speculative.

The State first raises a preservation argument, contending that appellant failed to make the arguments she raises on appeal before the trial court. If preserved, the State continues, the evidence was sufficient to sustain the convictions of theft of less than $1,000, theft scheme involving an amount of at least $1,000, and obtaining property from someone at least 68 years old by deception.

We reject the State's argument that appellant failed to preserve the issue of the sufficiency of the evidence. In our view, appellant's argument in regard to her motion for

judgment of acquittal, that there had been no testimony presented by the State "to provide evidence that Bobbie Sue Lewis on these specific occasions and in this general sense acted by deception or undue influence . . . with respect to the general allegations" or reference to specific counts in the criminal information, sufficiently made clear to the trial court the argument she raises on appeal.

Ordinarily, Maryland appellate courts review the sufficiency of the evidence in a jury trial by

> asking whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Cox v. State*, 421 Md. 630, 656–57, 28 A.3d 687, 702–03 (2011) (citations and internal quotations marks omitted).
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> "In determining whether evidence was sufficient to support a conviction, an appellate court 'defer[s] to any possible reasonable inferences [that] the trier of fact could have drawn from the . . . evidence[.]'" *Jones v. State*, 440 Md. 450, 455, 103 A.3d 586, 589 (2014) (quoting *Hobby v. State*, 436 Md. 526, 538, 83 A.3d 794, 801 (2014)). "We defer . . . and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466, 10 A.3d 782, 791–92 (2010) (citing *State v. Smith*, 374 Md. 527, 557, 823 A.2d 664, 682 (2003)). In *Jones v. State*, we stated:
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> > In performing its fact-finding role, the trier of fact decides which evidence to accept and which to reject. Therefore, in that regard, it is not required to assess the believability of a witness's testimony on an all or nothing basis; it may choose to believe only part, albeit the greatest part, of a particular witness's testimony, and disbelieve the remainder.
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> 343 Md. 448, 460, 682 A.2d 248, 254 (1996) (citing *Muir v. State*, 64 Md. App. 648, 654, 498 A.2d 666, 668–69 (1985)).

Grimm v. State, 447 Md. 482, 494–95 (2016).

The same standard applies to all criminal cases, including those resting upon circumstantial evidence. *Handy v. State*, 175 Md. App. 538, 562 (2007). "'Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities.'" *Mangum v. State*, 342 Md. 392, 400 (1996) (quoting *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984)).

Appellant was convicted of obtaining property of an individual at least 68 years old by deception, theft less than $1,000, and theft scheme involving amounts of at least $1,000 but under $10,000. Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), §8-801 of the Criminal Law Article ("CL"), prohibits the exploitation of vulnerable adults and states, in pertinent part:

> (a) *Definitions.* – (1) In this section the following words have the meanings indicated.
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> (2) "Deception" has the meaning stated in § 7-101 of this article.
>
> (3) "Deprive" has the meaning stated in § 7-101 of this article.
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> (4) "Obtain" has the meaning stated in § 7-101 of this article.
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> (5) "Property" has the meaning stated in § 7-101 of this article.
>
> (6)(i) "Undue influence" means domination and influence amounting to force and coercion exercised by another person to such an extent that a vulnerable adult or an individual at least 68 years old was prevented from exercising free judgment and choice.
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> (ii) "Undue influence" does not include the normal influence that one member of a family has over another member of the family.
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> (7) "Value" has the meaning stated in § 7-103 of this article.
>
> (8) "Vulnerable adult" has the meaning stated in § 3-604 of this article.
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> (b) *Prohibited.* – (1) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult's property.
>
> (2) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person

> knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.[10]

Deception, as defined in CL §7-101(b)(1), means knowingly to:

> (i) create or confirm in another a false impression that the offender does not believe to be true;
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> (ii) fail to correct a false impression that the offender previously has created or confirmed;
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> (iii) prevent another from acquiring information pertinent to the disposition of the property involved;
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> (iv) sell or otherwise transfer or encumber property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, regardless of whether the impediment is of value or a matter of official record;
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> (v) insert or deposit a slug in a vending machine;
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> (vi) remove or alter a label or price tag;
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> (vii) promise performance that the offender does not intend to perform or knows will not be performed; or
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> (viii) misrepresent the value of a motor vehicle offered for sale by tampering or interfering with its odometer, or by disconnecting, resetting, or altering its odometer with the intent to change the mileage indicated.

To prove exploitation of a vulnerable adult by deception, there is no requirement that the victim be aware that he or she is being deceived. *Tarray v. State*, 410 Md. 594, 612 (2009).

CL §7-104 sets forth the general theft provisions and reads, in pertinent part:

> (a) *Unauthorized control over property.* –A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
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> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

[10] The State did not proceed under a theory of intimidation, and the trial court granted appellant's motion for judgment of acquittal with regard to charges alleging the exertion of undue influence. As such, the jury was instructed only on deception, and therefore that is the only modality we consider.

> (b) *Unauthorized control over property--By deception.*—A person may not obtain control over property by willfully or knowingly using deception, if the person:
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> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Finally, CL §7-103(f) permits an aggregation of a continuing course of thefts into one crime, with the aggregate value of the property or services, determining whether the theft scheme is a felony or misdemeanor.

Appellant contends that the State failed to prove she obtained property of the Joneses by deception or committed theft by unauthorized control over their property.[11] In our view, however, a reasonable jury could have inferred, from the evidence, several ways in which appellant procured property from the Joneses by deception or theft.

First, she wrote paychecks to her fill-in caregivers well in excess of their wages, allegedly to cover expenses for Carole's trip to a Baltimore hospital. But there was no plausible reason appellant would have been entitled to obtain cash from the caregivers when, according to the evidence, Carole always directly reimbursed appellant for her out-of-pocket expenses.

Second, appellant filled out checks for Carole's signature that contained inaccurate memoranda regarding the nature of the payments, falsely making them appear to be for

[11] There is no dispute that both Carole and Buck Jones were over the age of 68 at all relevant times, and appellant makes no specific argument that she did not intend to deprive them of their property.

items for the Joneses' benefit. One such check was for over $600, which appellant claimed to be for a new recliner for Buck. But neither Sparacino nor Sierra Lewis ever observed a new chair arrive at the Joneses' house, and there was no evidence indicating that the money had been used to purchase any other item for Buck. Another $600 check was purportedly for "bed & supplies," but according to the State's evidence, was, in actuality, for a bunk bed for appellant's daughter.

Third, appellant wrote out a check to herself for "med supplies" but the comptroller of the pharmacy where the Joneses purchased their prescriptions and medical supplies testified that such items were billed directly to Coastal Hospice, with no co-pay, so there would have been no reason for such expenditures on behalf of the Joneses. The manager of another pharmacy stated that the Joneses maintained an account at his store and were billed at the end of each month. Although he conceded that their caregivers occasionally came into the pharmacy to make purchases, to his knowledge, no recent purchases were made that would justify an $832 reimbursement to appellant, as one check indicated.

Finally, April Powell observed appellant in possession of Carole's checkbook in Virginia. She further observed appellant fill out and sign Carole's name to a check to be paid to the order of appellant's husband.

All of these actions by appellant can be said to have misled Carole Jones into believing that she had authorized legitimate payments to appellant for wages and reimbursements, and in so doing, appellant created a false impression in Carole that appellant knew was not true. Although appellant was undisputedly entitled to compensation for services rendered and reimbursements for outlays of cash on behalf of

the Joneses, she was not entitled to deceive Carole into overpaying her fill-in caregivers, purchasing items for appellant's own use, purporting to pay for medical items that required no payment, and writing a check payable to her husband.

Considering the totality of the circumstances, a reasonable jury could have inferred legitimately that Carole trusted appellant but that appellant deceived Carole and exercised unauthorized control over her property. Thus, viewing the evidence, as we must, in a light most favorable to the State, we conclude that the evidence was legally sufficient to sustain appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.