2012 IL App (4th) 100132-U

Filed 3/21/12

NO. 4-10-0132

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
SANDRA GAYLE,	)	No. 07CF1287
Defendant-Appellant.	)	
	)	Honorable
	)	John A. Mehlick,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State sufficiently proved defendant guilty of the financial exploitation of an elderly person and of a person with a disability beyond a reasonable doubt.

(2) The trial court did not commit plain error by giving a jury instruction that failed to ask the jury to determine all elements of the offense, because the jury instruction did not involve a disputed issue in the case and the integrity of the judicial process and the fairness of defendant's trial were not threatened.

(3) The admission of the victim's statement, "she stole money from me," during the testimony of the victim's counsel without objection, did not violate defendant's sixth-amendment confrontation rights or deny defendant the effective assistance of counsel.

(4) Defendant was entitled to a $5 credit against her fine for the time she spent in jail while awaiting sentence.

¶ 2 In September 2009, a jury found defendant, Sandra Gayle, guilty of financial exploitation of a person with a disability (720 ILCS 5/16-1.3(a) (West 2004)) and of financial

exploitation of the elderly (720 ILCS 5/16-1.3(a) (West 2004)). The trial court sentenced defendant to concurrent terms of four years' imprisonment on each offense and ordered her to pay a $1,000 fine and court costs from bond. Defendant appeals, arguing (1) the State failed to prove her guilty of both offenses beyond a reasonable doubt; (2) the trial court improperly gave the jury an instruction that did not require a finding on all the elements of the financial-exploitation-of-a-person-with-a-disability offense; (3) her constitutional rights were violated when a hearsay statement was introduced without defense counsel's objection; and (4) she is entitled to a $5-per-day credit for time spent in custody before sentencing. We agree only with defendant's last argument–an argument conceded by the State. We affirm as modified and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In December 2007, defendant was charged with four counts of financial exploitation, allegedly occurring between November 2004 and April 2007. In two of the counts, the State alleged defendant committed the offense of financial exploitation of the elderly, in that defendant, while standing in a position of trust and confidence with Dr. Esther Cheatle, a person over the age of 80, knowingly used Dr. Cheatle's assets, valued at an amount exceeding $5,000, by: (1) exerting undue influence on Dr. Cheatle and (2) breaching her fiduciary duty as her power of attorney to Dr. Cheatle (720 ILCS 5/16-1.3(a) (West 2004)). The State also charged defendant with two counts of financial exploitation of a person with a disability, in that defendant, while standing in a position of trust and confidence with Dr. Cheatle, a person with a disability, knowingly and illegally used Dr. Cheatle's assets, at an amount exceeding $100,000, by (1) exerting undue influence on Dr. Cheatle, and (2) breaching her fiduciary duty to Dr.

Cheatle while functioning as her caretaker and power of attorney (720 ILCS 5/16-1.3(a) (West 2004)).

¶ 5 In a September 2009 jury trial, the State presented the testimony from a number of witnesses, including a psychiatrist who interviewed both Dr. Cheatle and defendant, and Dr. Cheatle's financial advisor, lawyer, and physician.

¶ 6 Dr. Stacey Smith, a physician and psychiatrist, testified she had been asked to perform a psychiatric evaluation of Dr. Cheatle and evaluate her competency, particularly in regards to her financial affairs. In June 2007, Dr. Smith interviewed Dr. Cheatle, defendant, and Ciara James, who also provided at-home nursing care to Dr. Cheatle.

¶ 7 Dr. Smith described Dr. Cheatle as elderly and very thin. Her clothing was clean. Dr. Cheatle sat in a wheelchair. She sat "very hunched over" and had "to lift her head *** to talk." Dr. Cheatle reported her age as 91, and she stated she owned a home, which she valued at approximately $90,000. Dr. Cheatle reported accumulated assets of $2.5 million. Dr. Cheatle knew the reason for the interview.

¶ 8 According to Dr. Smith, Dr. Cheatle also told Dr. Smith about her stockbroker, Craig Schermerhorn. Dr. Cheatle stated she was not sure Schermerhorn was competent and believed he was not acting in her interest. She described him as "a villain and a manipulator." Dr. Cheatle believed Schermerhorn reported her as incompetent to block her move to another state, because he would lose her account. Dr. Cheatle was also concerned other institutions, including a bank and her church, were trying to control her money. Dr. Cheatle knew Kevin McDermott had been appointed as a temporary guardian for her.

¶ 9 Dr. Smith testified Dr. Cheatle told her she met defendant in a nursing home

following her heart attack. Dr. Cheatle also told her defendant had been paying Dr. Cheatle's bills. Defendant wrote the checks, and Dr. Cheatle signed them. Defendant had asked Dr. Cheatle to sign blank checks, but Dr. Cheatle refused. Dr. Cheatle told Dr. Smith she paid defendant $1,344. Dr. Cheatle did not provide the time interval, but Dr. Smith had believed defendant's pay was $1,344 per month. Dr. Cheatle had difficulty keeping track of things.

¶ 10 Dr. Smith testified Dr. Cheatle said her will had been changed several times. She "felt pushed around" and did not know the specifics of her will. Dr. Smith asked Dr. Cheatle whether she had "given any gifts of any note in the last two to three years." Dr. Cheatle reported she gave $43,000 to defendant's daughter to pay off college debts. Dr. Cheatle also gave "a variety of financial gifts in $12,000 increments to a variety of relatives of [defendant's] extended family." Some gifts were made to another daughter of defendant and two children of that daughter, who resided in Arizona. Dr. Cheatle testified she gave $12,000 to someone named Randy, who lived in Florida. Dr. Cheatle also stated she was not getting this right. She called herself generous and said she had been giving financial gifts for 30 years. When Dr. Smith asked Dr. Cheatle to be more specific about those gifts, Dr. Cheatle spoke of two small gifts between $1,000 and $2,000.

¶ 11 Dr. Smith testified Dr. Cheatle could not remember what was happening with her estate. Dr. Cheatle lived on social-security checks automatically deposited into her account. Occasionally, Dr. Cheatle asked her broker to sell some stock when she needed additional income.

¶ 12 Dr. Smith testified, before the interview, defendant identified Ciara James as a friend. During the interview, Dr. Cheatle denied James was her friend. Dr. Cheatle called James

"the dumbest woman I have ever met on earth." Dr. Cheatle believed James was in her home to spy on her.

¶ 13 Dr. Smith asked Dr. Cheatle about her medications. Dr. Cheatle, a physician, was unable to name all of her medications. Defendant told Dr. Smith she would provide a list of the medications, but she did not do so.

¶ 14 Dr. Smith testified Dr. Cheatle "had numerous paranoid themes towards individuals." For example, Dr. Smith highlighed Dr. Cheatle's statements "a series of individuals with whom she had long-standing relationships were now not working in her best interest, only after her money, trying to manipulate her." Dr. Smith identified the following facts that undermined Dr. Cheatle's performance on the mental-status examination:

> "[H]er flagrant lack of grasp of the details of what was happening in her financial life and her admittance that she was confused and didn't quite know what was in her will ***."

Dr. Smith testified, when she asked Dr. Cheatle about the total amount she believed she had given to defendant's family, Dr. Cheatle first answered $20,000, only minutes after Dr. Cheatle told Dr. Smith she made numerous $12,000 gifts to defendant's relatives. Dr. Smith was concerned about this, as Dr. Cheatle identified 7 to 10 or more individuals to whom she gave $12,000, but believed she only given a total of $20,000 to defendant's family. Dr. Smith concluded Dr. Cheatle clearly had difficulties managing or thinking through her affairs. After Dr. Smith pointed out to Dr. Cheatle the multiple $12,000 gifts and asked Dr. Cheatle if she was certain about her answer, Dr. Cheatle said she had given, at most, $80,000.

¶ 15 Dr. Smith testified she also spoke with defendant for approximately 40 minutes.

Defendant told Dr. Smith she earned $1,344 per week working for Dr. Cheatle. Defendant indicated concern Dr. Cheatle's attorney, Roger Rutherford, "would not represent [Dr. Cheatle] with enough enthusiasm and rigor." Defendant called Rutherford, "lovely but passive." Defendant stated Dr. Cheatle's church coerced Dr. Cheatle into signing her estate over to it. Defendant had seen Dr. Cheatle's will and stated Dr. Cheatle redid her will. Defendant told Dr. Smith, "we did all of that." Dr. Cheatle did not want to give any money to the church, but defendant convinced her to give the church "a fixed amount." Defendant said Dr. Cheatle wanted the rest to go to defendant and her family. Defendant said she told Dr. Cheatle's accountant, attorney, and stockbroker she "didn't want to be part of this," referring to Dr. Cheatle's will.

¶ 16 According to Dr. Smith, defendant told her the gifts began in 2006. Defendant stated Dr. Cheatle had a history of giving money to individuals for educational purposes. Defendant reported Dr. Cheatle's stockbroker suggested an alternative financial arrangement "that might be smarter or better to do," but Dr. Cheatle believed the broker was suggesting the alternative to increase his commission. Defendant told Dr. Smith the broker was "a psychopath and a sociopath." Defendant reported the broker was "in cahoots" with the accountant.

¶ 17 Dr. Smith testified defendant told her about the purchase of a white sedan defendant "used for her clients." Defendant gifted the car to a relative and then purchased the specially adapted van for Dr. Cheatle. Dr. Smith identified as significant the fact that as defendant described the purchase, defendant used the term "buying it for us." Dr. Smith stated the employer-employee relationship was blurred. The title of the van was in defendant's name.

¶ 18 Dr. Smith testified defendant told her she alone had received $335,000 from Dr.

Cheatle in 2006. Defendant indicated Dr. Cheatle "had a sizeable estate." Dr. Smith believed defendant understood the estate would be benefitted by giving monies, and defendant was thus "very accommodating in assisting with that gifting to various members of her extended family in the belief that she would not be harming the estate financially and, if anything, perhaps [be] providing some tax advantages."

¶ 19 Dr. Smith testified defendant asserted Dr. Cheatle "was entirely competent" and had no trouble with her memory. Defendant believed others were trying to declare Dr. Cheatle incompetent for their own financial benefit.

¶ 20 Dr. Smith testified she reached a diagnosis, and determined Dr. Cheatle probably suffered early dementia. Dr. Smith believed Dr. Cheatle had "some dependent personality features." Dr. Cheatle also had "severe obvious osteoarthritis." Dr. Smith testified there were no surviving family members and, in the prior three years, Dr. Cheatle had been "cut off from other sources of support," including friends and the church. Dr. Smith also testified, "[t]here were obvious difficulties with the estate and then also her need for 24-hour care given her state of physical debility."

¶ 21 When asked about her conclusions regarding Dr. Cheatle's and defendant's relationship, Dr. Smith called Dr. Cheatle "highly vulnerable." Dr. Smith also testified to the following:

> "Well, I want to stress that Dr. Cheatle was so frail and so physically deteriorated that she would be completely dependent on anyone who would be tending to her. So left to her own devices, I think she would have—she would quickly perish because I don't

> think she could meet her very basic needs. *** [T]his is important background. She is completely dependent on her caretaker. And my impression was that [defendant] was indeed very kind to Dr. Cheatle, probably doting, meeting her every need. And so, you know, in one sense what family would not want such a caretaker for their loved one? But it is also important to realize how—again, how frail and dependent and needy Dr. Cheatle was. So, I believe Dr. Cheatle became progressively more dependent and in need of the attentions and support of [defendant] in what I would consider an unhealthy and pathologic fashion."

Dr. Smith believed defendant's and Dr. Cheatle's relationship was predatory.

¶ 22 On cross-examination, Dr. Smith testified regarding documents she reviewed in reaching her conclusions regarding Dr. Cheatle. One was a letter to Dr. Cheatle's attorney, Rutherford, in which Dr. Cheatle wrote the following: "I want full restoration of my life and [defendant] as full guardian." Dr. Smith read another letter, dated May 2007 and signed in typed form, by "Esther L. Cheatle," in which it stated defendant had given Dr. Cheatle her life back. According to that same letter, before defendant's arrival, Dr. Cheatle had not eaten properly and her house had not been cleaned in three years. The Lincoln automobile was used to take Dr. Cheatle places, and the van replaced the Lincoln. The letter also stated Dr. Cheatle wanted to use her tax credit to make gifts for education to allow "my family" to enjoy their gifts "while I am living." Dr. Smith also testified regarding a document dated June 2, 2007, addressed to Dr. Smith from Dr. Cheatle, which stated the following: "I also received thank-you notes and phone

calls from her children and grandchildren. Nothing could have been more beautiful. And now the broker has torn my world apart and crushed my hopes and dreams for my future. Please help me."

¶ 23 Dr. Smith testified Dr. Cheatle stated she and defendant went to lots of places, and defendant drove the van. Dr. Cheatle also described how she severed her ties to her church. Dr. Cheatle became infuriated when "they" told her private business at the church council. Dr. Cheatle said a woman from the church visited her weekly to ensure the church would inherit her money.

¶ 24 Also on cross-examination, Dr. Smith testified regarding her conversations with James and defendant. James described defendant "as attentive and caring toward Dr. Cheatle." James did not suspect neglect or abuse. Dr. Smith testified, when defendant spoke to her about the will, defendant stated "we became a family."

¶ 25 Dr. Smith testified Dr. Cheatle's "brain was not working right." Dr. Smith could not say whether the dementia could improve. She opined Dr. Cheatle needed a medical workup to determine the cause of the dementia.

¶ 26 Dr. Randy Western testified he was Dr. Cheatle's primary-care doctor for approximately six years. Dr. Western testified, in January 2004, Dr. Cheatle was in the hospital after a fall in her driveway. For her recuperation, Dr. Cheatle went to an extended-care facility. To allow Dr. Cheatle to return home, Dr. Cheatle hired nursing care.

¶ 27 Dr. Western testified he saw Dr. Cheatle again in his office in January 2007. Dr. Cheatle was accompanied by a caretaker named "Gayle." Dr. Western testified Dr. Cheatle reported some frequency of urination and bladder-control issues. Dr. Cheatle appeared "very

fragile." Dr. Western asked Dr. Cheatle questions. Dr. Cheatle responded to some of the questions but "a lot of times" would turn to her caretaker to have the caretaker assist in answering. Calling that behavior unusual for Dr. Cheatle, Dr. Western was concerned about her overall health. He wanted to make adjustments in Dr. Cheatle's medicines and look into whether she was having mental difficulties on top of her physical problems. A follow-up appointment was set. Dr. Western testified that appointment was not kept and neither were four other appointments that were later set.

¶ 28 Craig Schermerhorn, a financial planner, testified he met Dr. Cheatle in 1980, when she attended an investment seminar. Dr. Cheatle decided to open an investment account with him, and that account remained open. Schermerhorn testified they "were social." Schermerhorn was the executor in Dr. Cheatle's 2001 will.

¶ 29 Schermerhorn testified Dr. Cheatle had been very attentive to her investments. Periodically, Dr. Cheatle and Schermerhorn met. She "had a very good knowledge of what she had." Schermerhorn testified, when Dr. Cheatle first invested in 1980, she invested somewhere between $150,000 and $200,000. Dr. Cheatle was conservative. She bought tax-free bonds and stocks that "had a good long-range growth potential." At the end of 2003, Dr. Cheatle's investments exceeded $2.4 million. Between 1980 and 2004, Dr. Cheatle did not liquidate any large amounts of her assets, except for two gifts totaling $30,000 to her ex-husband.

¶ 30 Schermerhorn testified the management of Dr. Cheatle's estate began to change in 2004 when Dr. Cheatle began to be assisted by defendant. Defendant participated in the discourse regarding Dr. Cheatle's investments. While it is usual for caretakers to attend meetings with his clients, Schermerhorn had not before had a caretaker participate in the conferences. As

time passed, Dr. Cheatle did not continue participating as she had before. Dr. Cheatle began to "back out," and his access to her became more limited.

¶ 31 Schermerhorn identified a letter dated August 30, 2006, from Rutherford Law Offices, requesting he pay several sums of money to various people. He was directed to set up accounts for two people with $12,000 each and to make $12,000 gifts to four others. Schermerhorn was also told to pay almost $85,000 toward student loans for Amanda Logsdon, defendant's daughter, and to pay defendant approximately $100,000.

¶ 32 Schermerhorn testified, in response to this letter he called Rutherford. The request "seemed terribly out of character," and he was shocked. Ultimately, Schermerhorn "[i]n general," complied with Rutherford's letter. The funds were issued to Illini Bank. Schermerhorn set up two Section 529 plans (26 USC, §529 (2006)), for funding the college education for two of defendant's grandchildren. Although the letter specified $12,000 for each grandchild, the amounts were changed to $30,000. Those accounts continued to exist.

¶ 33 Schermerhorn then identified a March 2007 letter to him. Schermerhorn believed defendant brought the letter to his office. Dr. Cheatle's signature is on the top of the letter. According to the letter, Schermerhorn was to make 2 gifts of $30,000 each to the existing Section 529 college-funding accounts. The letter also specified $12,000 gifts to Annette Barrett, Bob Andrew Logsdon, and four others. The letter further directed Schermerhorn to pay defendant $525,000.

¶ 34 Schermerhorn testified this document prompted discussions with Dr. Cheatle in his office. Defendant was also present. He wanted to ascertain whether Dr. Cheatle was capable of handling her affairs. He asked Dr. Cheatle directly how much money she thought she had.

Dr. Cheatle said, "$40,000." He asked a similar question, "What do you think all of your money is worth if you add it all up at this time?" She responded, "$60,000." In March 2007, Dr. Cheatle's net worth was approximately $2.5 million. Schermerhorn knew Dr. Cheatle was not competent to make the gifts set forth in the March 2007 letter.

¶ 35 Schermerhorn testified he had not before encountered this situation. He was directed by his employer not to pay the amounts until it could be determined what to do next. Schermerhorn attempted to meet with defendant and Dr. Cheatle at Dr. Cheatle's home three times. He was thwarted each time. Ultimately, he contacted Senior Services.

¶ 36 Schermerhorn testified he was concerned whether the depletions would impact Dr. Cheatle's ability to live out her remaining days in her home. The quarterly withdrawals for Dr. Cheatle's care were approximately $40,000. Schermerhorn estimated, if the gifts were restricted to only $200,000 per year, Dr. Cheatle would be penniless in under six years.

¶ 37 Schermerhorn testified, since November 2007, his access to Dr. Cheatle changed. He was able to see her, but while Dr. Cheatle was in defendant's care, Schermerhorn did not believe he ever met with Dr. Cheatle alone.

¶ 38 On cross-examination, Schermerhorn testified, when he called to speak with Dr. Cheatle, defendant would state, ""I have power of attorney and you can talk to me." When he insisted, Schermerhorn was accommodated a couple of times, but it became increasingly difficult to get through to Dr. Cheatle. Schermerhorn testified, after he received the March 2007 request, he contacted Dr. Cheatle's accountant about the letter. The accountant thought it was unusual, but basically believed it was not their business unless Dr. Cheatle would not be able to maintain her standard of living with the remaining assets.

¶ 39 Schermerhorn testified, when the March 2007 request was made to him, defendant mentioned she felt it would help Dr. Cheatle with her estate-tax concerns because it would lower her estate taxes and use up her lifetime exclusion. Schermerhorn found defendant's comment "borderline bizarre." Schermerhorn testified people did not solve estate problems by giving all of their assets away. In addition, Schermerhorn believed, at that time, Dr. Cheatle's assets were going to a charity, so there were no estate-tax problems.

¶ 40 On redirect and re-cross examination, Schermerhorn testified, as of the date of his testimony, Dr. Cheatle's assets were valued at roughly $1,650,000. It had decreased in part due to the 2008 stock-market plunge, but was increasing with the stock market, despite the depletions necessary for Dr. Cheatle's 24-hour nursing care.

¶ 41 Roger Rutherford, an attorney, testified Dr. Cheatle first contacted him in November 2004. She called Rutherford, wanting to revise her will. In December 2004, Rutherford and Dr. Cheatle met at his office. Defendant brought Dr. Cheatle. At this first meeting, defendant remained in the room. Defendant participated in some of the discussions.

¶ 42 Rutherford testified, at that first meeting, Dr. Cheatle had some specific suggestions. She wanted Rutherford to prepare a will with new powers of attorney for her health care and for her property, as well as a durable power of attorney, which did not require a doctor certification of mental incompetence to become effective. Rutherford testified the only beneficiary in the 2001 will was Dr. Cheatle's church, First United Methodist Church. Dr. Cheatle wanted to revise the will to give 75% of her assets to defendant, 15% to her church, 5% to her friend Alma Liebman, and 5% to Ann Cleve. Defendant "was to be the first agent on the power of attorney on all of the documents." Dr. Cheatle was insistent she wanted these terms.

Rutherford testified defendant did not express any concern or hesitation about being the power of attorney and beneficiary. The will was executed on December 7, 2004. Rutherford testified he did not recall any discussions about any other gifts at that time.

¶ 43 Rutherford testified, in 2006, he was contacted again about gifting. He was asked what was permissible on an annual basis as far as gift-tax exclusions. Rutherford told defendant and Dr. Cheatle each person could receive $12,000 per year without the filing of a gift-tax return. Rutherford also remembered some discussion with defendant and Dr. Cheatle about purchasing a minivan and having it wheelchair-equipped. Rutherford believed defendant was more involved in that conversation because she was the driver.

¶ 44 Rutherford testified, later in 2006, Dr. Cheatle contacted him about revising her will again. Rutherford learned Dr. Cheatle wanted to remove the two individual beneficiaries and reduce the amount of the bequest to the church to a specific amount, $100,000. Dr. Cheatle also wanted to give two cemetery plots to the church and donate her puppet collection to the Illinois State Museum. The balance would go to defendant. If defendant predeceased Dr. Cheatle, the balance of the estate was to be divided among certain relatives of defendant. To discuss the proposed revisions, both defendant and Dr. Cheatle met with Rutherford at his office. Rutherford testified he tried to discuss the issue with Dr. Cheatle outside defendant's presence, asking defendant to leave. Defendant responded, saying Dr. Cheatle needed her to stay in the room and be involved in the discussion. Feeling he had done his due diligence, Rutherford made the requested changes. The will was executed in July 2006. Defendant did not indicate any concern or hesitation about the increased bequest to her.

¶ 45 Rutherford testified regarding the August 2006 letter he wrote to Schermerhorn

requesting gifts. Rutherford recalled there were some substantial gifts in that letter. Rutherford was unable to discuss the issue with Dr. Cheatle outside defendant's presence. Dr. Cheatle indicated she wanted to make the gifts. Defendant was not only present, but also actively involved during the discussion regarding the gifts. Rutherford testified he believed this was the meeting where Dr. Cheatle sat in her wheelchair and defendant stood behind her and stroked her hair.

¶ 46 Rutherford testified, sometime in 2007, he became aware Dr. Cheatle's physician found her unable to manage her assets. He learned a petition had been filed with the court for the appointment of a guardian and Kevin McDermott had been appointed temporary guardian. Rutherford testified he had discussions with Dr. Cheatle about the petition. Initially, Dr. Cheatle had some reservations. Dr. Cheatle sought Rutherford's advice on finding someone to give her a second opinion. Rutherford believed defendant participated in some discussions, but after defendant was removed as Dr. Cheatle's caregiver, Rutherford was able to speak with Dr. Cheatle independently. Because Dr. Cheatle did not want to deal with anyone local, Rutherford helped obtain names of St. Louis-area physicians. Dr. Cheatle decided Dr. Smith would be the individual who could evaluate her ability to manage her affairs.

¶ 47 Rutherford testified he, on several occasions, discussed with Dr. Cheatle the results of Dr. Smith's report. Defendant was present and "had been scrutinizing that report and that document very carefully." According to Rutherford, Dr. Cheatle was still concerned and felt like she was in control of her own situation, "but it was becoming increasingly apparent she was more vulnerable, either physically or emotionally, than she would like to believe she was."

¶ 48 Rutherford testified, at Dr. Cheatle's request, he set up a full work up with Dr.

Zec, who was not a medical practitioner, but had a doctorate degree and worked in the Alzheimer's area. Dr. Zec's conclusions were similar to those of Dr. Smith. Dr. Cheatle again had concerns about the results and was frustrated by the process. Dr. Cheatle, however, seemed to be coming to the conclusion she may have to accept the fact she would have a guardian.

¶ 49 Rutherford testified, in June 2008, Dr. Cheatle went to court to establish she had the testamentary capacity to change her will. She had to establish to the court she knew the nature and extent of her property. Dr. Cheatle also needed to identify who her heirs were and to be able to formulate a plan regarding the disposition of assets at her death. The court concluded Dr. Cheatle had the testamentary capacity to make a new will. In the courtroom, in June 2008, Dr. Cheatle indicated she wanted to remove defendant from her will. The bulk of her assets were to be given to charitable beneficiaries.

¶ 50 On cross-examination, Rutherford testified Dr. Cheatle was more passive when she was in defendant's presence. Rutherford testified on occasion elderly individuals would rely upon their caregivers. When Dr. Cheatle came to his office, she would often come with handwritten notes regarding her wishes. When Rutherford thought the gifts were inappropriate, he agonized about the situation. According to Rutherford, if one acted too soon, authorities would not act. Rutherford testified he was thus a little cautious but was concerned about what was developing. In August 2006, Rutherford came to the conclusion it was not time to call the authorities.

¶ 51 Rutherford testified, in 2004, when he first began working with Dr. Cheatle, he believed the gift-tax exemption was $675,000. The exemption existing at the time of his testimony was $3.5 million. Rutherford testified, in 2004, he thought he told Dr. Cheatle she

would be exposed to some federal estate tax in the event of her death and that drove her to have further discussions regarding gifting.

¶ 52 Kathy Jackson, a banker, testified she had been employed at Illini Bank. Jackson testified she provided records regarding Dr. Cheatle's accounts. In 2002, only one deposit was made from the A.G. Edwards account. The deposit was in the amount of $3,382.59. In 2003, one deposit, for approximately $3,000, was made from the A.G. Edwards account. In 2004, the total amount of deposits from A.G. Edwards exceeded $100,000. In 2005, the total deposits from A.G. Edwards to that account amounted to almost $150,000. In 2006, the A.G. Edwards deposits exceeded $490,000. The total deposits from A.G. Edwards during the period of January 1, 2007, through April 2007, when all activity in the Illini Bank account stopped, was $127,000.

¶ 53 Kathy Nash, a financial assistant for Wells Fargo Advisors, formerly A.G. Edwards, testified she worked with Schermerhorn. Nash testified she met Dr. Cheatle when she started working for Schermerhorn. At least three to four times a year, Dr. Cheatle would visit Schermerhorn's office. Nash testified, in the 1980s and 1990s, Dr. Cheatle was "quite intelligent and in control."

¶ 54 Nash testified about the Section 529 college accounts set up for defendant's grandchildren, Ethan Logsdon and Gabriel Logsdon. The accounts were set up with $30,000 each for the children's college education. Nash testified, from Ethan's account, a total of $17,750 had been withdrawn. Over $20,000 had been withdrawn from Gabriel's account.

¶ 55 Mike Hart, owner of an auto body and towing business, testified he met with defendant in July 2005 regarding work to be done on a white 1998 Lincoln Towne Car. Defendant paid the $3,200 bill for the body work with a $3,200 check from Dr. Cheatle's

account. Hart's business performed over $700 worth of work on the Towne Car in August 2005, which defendant paid for with another check from Dr. Cheatle's account.

¶ 56 Eliot Lewis, employed at an automobile dealership, testified he sold a 2006 Pontiac Grand Prix in February 2007 to defendant. Defendant purchased the vehicle for Annette Barrett. The purchase price for the Pontiac was $14,995. Lewis testified there was a trade-in involved, for which $1,895 was paid. Two checks were used to purchase the vehicle. Defendant paid for a portion from her own account. A check for $12,000 was written from Dr. Cheatle's account. Dr. Cheatle was not present during the above mentioned transaction. The $12,000 check was signed by Dr. Cheatle.

¶ 57 Ann Cleve testified she worked as the director of Christian education at First United Methodist Church from 1987 until April 2009. Cleve testified she had known Dr. Cheatle since the late 1980s or early 1990s. After Dr. Cheatle became a member of the church, Cleve invited Dr. Cheatle to help in ministry and the two decided to do a puppet ministry, for which Dr. Cheatle became the director. Dr. Cheatle continued in this role until she physically became unable to do so.

¶ 58 Cleve testified, in the 1990s and early 2000s, she visited Dr. Cheatle almost weekly at her home. Cleve testified "as [Dr. Cheatle] got older and she was more *** disabled, [she] started going to see her." Cleve would do the things Dr. Cheatle asked her to do. Cleve testified the visiting nurses initially did not provide 24-hour care. After the visiting nurses indicated 24-hour care was necessary, it was decided they would contact Hands Across Illinois about acquiring that care. Hands Across Illinois sent defendant for an interview. The interview occurred in Dr. Cheatle's kitchen. Dr. Cheatle hired defendant to be a 24-hour live-in caretaker.

¶ 59 Cleve testified, after defendant was hired, she continued to visit with Dr. Cheatle. Defendant would visit with them. They would talk about church. At that time, Dr. Cheatle was no longer attending church. Defendant told Cleve it was because it was harder for Dr. Cheatle to move. Cleve testified Candace Debowery was one of her colleagues. She had asked Debowery to do extra cleaning in Dr. Cheatle's home.

¶ 60 Cleve testified she no longer saw Dr. Cheatle. Dr. Cheatle had asked Cleve not to visit her any more.

¶ 61 On cross-examination, Cleve testified, before defendant moved into Dr. Cheatle's home, Dr. Cheatle's house needed cleaning and some basic repairs. There was also an issue regarding mine subsidence. The home was very dirty. After defendant moved into Dr. Cheatle's residence, the condition of the home improved dramatically. The home was clean and better organized. Defendant was taking care of the repairs as well.

¶ 62 Maria Wells, a landscaper, testified she did landscaping work at Dr. Cheatle's home in 2006. Defendant also asked Wells to do some landscaping work at Lamplighter Condominiums. Wells asked defendant how she should bill the work done at Dr. Cheatle's residence and the work at Lamplighter. Defendant told Wells to put the work on one bill. The total amount for the work was approximately $5,000. Defendant paid for the work from the checking account in Dr. Cheatle's and defendant's name.

¶ 63 On cross-examination, when asked if she had any knowledge about whether defendant paid Dr. Cheatle for the work done, Wells testified defendant simply told Wells not to worry about it because she and Dr. Cheatle had an understanding.

¶ 64 Candace Debowery, owner of a cleaning business, testified she became employed

by Dr. Cheatle in May 2004. Cleve contacted her and asked her to go to Dr. Cheatle's residence for an interview. Defendant was present during the interview. Debowery was to report to defendant for her duties. When Debowery first started, she worked four hours every other week. Dr. Cheatle resided in a brick ranch that had three bedrooms and three bathrooms, with a basement. Dr. Cheatle and defendant lived in the home. In the spring of 2006, Debowery was asked to work as often as she was available.

¶ 65 Debowery testified, in addition to cleaning Dr. Cheatle's residence, Debowery also cleaned at Lamplighter Condominiums, where defendant owned a condominium. At Lamplighter, Debowery performed janitorial work. She cleaned defendant's condominium and the common areas. Between March and October 2006, when they could do outside work, Debowery, defendant, and Dr. Cheatle were at Lamplighter frequently. Debowery spent more time at Lamplighter than at defendant's residence. Between October 2006 and the spring of 2007, Debowery occasionally went to Lamplighter to clean defendant's unfurnished condominium. Debowery testified she was paid for her work at Dr. Cheatle's residence and at Lamplighter through checks from Dr. Cheatle's checking account.

¶ 66 Debowery testified a nurse named Ciara James also treated Dr. Cheatle. In the beginning of James's employment, defendant and Dr. Cheatle believed James was a spy and asked her to stay in the living room. James had to use the basement restroom.

¶ 67 Debowery testified she learned in April 2007 that McDermott had been appointed as guardian for Dr. Cheatle. Debowery testified, that day, she arrived at work to find two people from the Illinois Department of Aging at Dr. Cheatle's house. The two individuals were speaking to Dr. Cheatle in a bedroom. Debowery walked to the bedroom and offered assistance.

Debowery returned to the kitchen. Defendant was in the kitchen. Debowery and defendant were both shocked. Defendant turned to Debowery and said, "Just when I thought I could get ahead."

¶ 68 Debowery continued to work for Dr. Cheatle. Debowery testified she received financial gifts from Dr. Cheatle in the form of Christmas bonuses. In the first year, Debowery's bonus was $75. Each year after that, the bonus was $250.

¶ 69 On cross-examination, Debowery testified regarding the April 2007 visit from Senior Services. Dr. Cheatle was angry the individuals from the Department of Aging arrived at her house. Debowery testified she believed defendant would reimburse Dr. Cheatle for the work Debowery did at Lamplighter. Debowery testified, other than the time the individuals from the Department of Aging were at her house, Dr. Cheatle was happy and fine.

¶ 70 Ciara James, a nurse, testified she worked for a home health-care agency in 2007. She was placed in Dr. Cheatle's home at the end of May 2007. When James arrived at Dr. Cheatle's home the first day, defendant told James to sit in the living room and stay there and to use the basement bathroom if necessary. When James worked, she worked from eight a.m. to four p.m. On a typical workday, James sat in the living room and read a book in the dark. During that time, Dr. Cheatle and defendant were at the kitchen table. Dr. Cheatle would sleep or watch television. Defendant would be going over financial records. Dr. Cheatle did not speak as they sat there. James testified she did not help with Dr. Cheatle's nutritional needs. Defendant would not let James do anything for her. James was not allowed to talk to either one of them. Defendant told James Dr. Cheatle was not allowed to have lunch, because if she ate too close to breakfast, she would get sick. This pattern went on for approximately three months.

¶ 71 According to James, after about three months passed and when Dr. Cheatle and

defendant were saying things like James was a spy for the State, James went to speak to defendant. James told defendant she knew they did not want her there and James did not want to be there, but they should all try to get along. After this exchange, James was allowed into the kitchen. Defendant realized she was not a spy. James was allowed to talk with them.

¶ 72 James testified defendant told her about the situation. Defendant said she was accused of embezzling almost $1 million, but defendant and Dr. Cheatle agreed it was only about $60,000.

¶ 73 James testified she went with defendant and Dr. Cheatle to St. Louis in June 2007 for Dr. Cheatle's psychiatric evaluation. James also accompanied Dr. Cheatle to Dr. Zek's office. Defendant did not go to Dr. Zek's office with them. Before James and Dr. Cheatle left for Dr. Zek's office, defendant "prompted" Dr. Cheatle on questions she may be asked. When Dr. Cheatle returned from the visit, Dr. Cheatle was very upset. Defendant asked what questions were asked and what answers Dr. Cheatle gave.

¶ 74 James testified defendant told her about a house defendant was "flipping" in Vandalia, Illinois. Defendant said Dr. Cheatle helped with it and, when the house sold, they would split the money. Defendant also told James Dr. Cheatle had given defendant's two young grandsons $12,000. James said the children were five or six years old. Defendant also told James Dr. Cheatle paid defendant's daughter's student loans and gifted money to her children in Arizona. Defendant told James her children would pay back the gifts, except for the gifts to the grandchildren. James testified she accompanied Dr. Cheatle and defendant on shopping trips to the Salvation Army. These trips would last four to five hours. Dr. Cheatle primarily bought her clothing there.

¶ 75 James testified she was present when defendant was arrested in November 2007. According to James, defendant called her to tell her not to let anyone harass Dr. Cheatle and insure Dr. Cheatle "does not tell anybody anything as far as state workers, lawyers, officers, anybody who might want to interview her." James testified, when she began working for Dr. Cheatle, defendant told her McDermott was an evil man who was trying to be Dr. Cheatle's guardian.

¶ 76 James testified she once was present when Dr. Cheatle was on the telephone at the kitchen table. Defendant was there, too. Dr. Cheatle would put down the phone and defendant would prompt her on what to answer. Defendant would write down questions she wanted Dr. Cheatle to ask or answers she wanted Dr. Cheatle to give.

¶ 77 James testified her relationship with Dr. Cheatle changed after defendant left the residence. James testified Dr. Cheatle and she were very close after that. Dr. Cheatle "became very happy." James took her wherever she wanted to go. Dr. Cheatle got lunch every day. Dr. Cheatle was able to sit in her chair. Dr. Cheatle gained about 20 to 25 pounds in James's care.

¶ 78 James testified the day after defendant was arrested, Dr. Cheatle asked her if she could see all of her bank and stock statements. Debowery was present at that time. Debowery and James got everything they could find and gave it to Dr. Cheatle. They then left the room to allow Dr. Cheatle to look over her documents. After looking at her documents, Dr. Cheatle pushed them onto the floor and began crying.

¶ 79 On cross-examination, James testified, when she met with Dr. Smith, she told Dr. Smith defendant was attentive and caring toward Dr. Cheatle. James testified she told Dr. Zek that Dr. Cheatle was smart and did not forget anything and she was not like any other 91 year old

she had been around. James testified, during the visits to the Salvation Army, Dr. Cheatle would look at items during the first half hour, and then she would fall asleep.

¶ 80 Kevin McDermott, an attorney, testified he had been the Sangamon County guardian since 2006. As the public guardian, McDermott testified he is "a last stop" for those without family or friends to take care of them. McDermott testified he oversaw both financial and personal affairs. At that time, McDermott testified he had 10 active guardianships.

¶ 81 McDermott testified, in April 2007, he learned about Dr. Cheatle's situation. He began an investigation. He contacted A.G. Edwards and Senior Services. After he decided to get involved, he filed documents in the circuit court seeking temporary guardianship over Dr. Cheatle. The court granted him guardianship for 60 days. McDermott, at the time of his testimony, had permanent guardianship over Dr. Cheatle.

¶ 82 McDermott testified, after he was appointed guardian, he first went to Illini Bank, because he learned that was where the most vulnerable funds belonging to Dr. Cheatle were held. McDermott closed the account immediately and transferred the money to a new account, over which he had control. Next, he contacted the Illinois State Police to help with the investigation. He continued to work with Illini Bank to secure the accounts and to work with A.G. Edwards. Concerned about Dr. Cheatle's health, he also contacted a service for nursing care and that service sent James to Dr. Cheatle's residence.

¶ 83 McDermott testified, in 2002 and 2003, Dr. Cheatle was receiving her income from social security and the state university retirement system. These amounts totaled about $2,700. Dr. Cheatle essentially lived off that amount. In those years, Dr. Cheatle spent approximately $35,000 per year. McDermott testified, in 2004, Dr. Cheatle's expenditures were roughly

$125,000. In 2006, her expenditures were $491,000. McDermott testified, in 2003, Dr. Cheatle wrote approximately 130 checks. In 2006, 460 checks were written on her account. Some of the checks were written as gifts to others.

¶ 84 McDermott testified he met Dr. Cheatle, he believed, on the day James started working for her. Defendant was present for the meeting.

¶ 85 McDermott testified he visited Dr. Cheatle personally two or three times each month. McDermott testified he and Dr. Cheatle had "a very good relationship." He received input from the nursing staff and Debowery at least two to four times each week. At time of his testimony, he indicated Dr. Cheatle needed 24-hour care. This care cost approximately $3,500 per week. McDermott paid all of Dr. Cheatle's bills. McDermott testified Dr. Cheatle's other expenses were approximately what they were in 2002 or 2003.

¶ 86 Exhibits entered into evidence by the estate included Illini Bank records. These records were submitted to prove, among other things, defendant, in February 2006, signed her name as power of attorney to obtain 3 cashier's checks, totaling almost $50,000, from Dr. Cheatle's account.

¶ 87 On defendant's behalf, four witnesses testified. Robert testified he was married to Amanda, defendant's daughter. Robert met Dr. Cheatle when defendant and Dr. Cheatle went to Ohio to visit them, and the two visited Ohio 9 or 10 times, including holidays and birthdays. Robert called defendant and Dr. Cheatle best friends. Ethan and Gabriel, his sons, knew Dr. Cheatle as "their buddy." Dr. Cheatle performed puppet shows for the boys. At the time of his testimony, Robert's sons were ages six and nine. Robert and his family celebrated Dr. Cheatle's ninety-first birthday with her. They even had a professional photograph taken with Dr. Cheatle.

They were grateful for all she had done.

¶ 88 Robert testified Dr. Cheatle helped his family "a lot." Dr. Cheatle paid off his wife's student loans. Amanda was a mechanical engineer and a nurse. The student-loan issue arose after Amanda and defendant were talking about it in one part of the living room. Dr. Cheatle was in another part. Dr. Cheatle said she wanted to help the family. Nothing more was said at that time.

¶ 89 Robert testified, a month or two later, Dr. Cheatle's broker or lawyer contacted Amanda for her student-loan information. Amanda later received a payoff notice. Amanda sent a letter thanking Dr. Cheatle for her generosity. Dr. Cheatle also put $30,000 for each of the boys' accounts. Robert testified the boys' accounts had only about $2,500 in them at that time. According to Robert, the stock-market crash resulted in losses to the accounts. Robert testified, about that same time, the Honda plant he worked for announced it would shut down and Amanda "also went off work." They got behind in their bills and had to withdraw the money. Defendant did not know about the withdrawals.

¶ 90 On cross-examination, Robert testified he did not receive money from Dr. Cheatle; he "received a cancelled check" for $12,000. Robert testified, while they were eating dinner during the last visit, Dr. Cheatle asked defendant, "why [do] we keep driving this far and why don't we move here?" At that time, they were not in the process of selling Dr. Cheatle's house.

¶ 91 Alma Liebman, a member of First United Methodist Church, testified she met Dr. Cheatle "[m]any years ago." Since that time, Liebman and Dr. Cheatle "kind of" became friends. Liebman testified Dr. Cheatle "was such a strange lady." When Liebman first met Dr. Cheatle,

Dr. Cheatle was taking a photograph of a shadow the elevator was making against a wall. Liebman testified Dr. Cheatle "wasn't my kind of person at all, really."

¶ 92 Liebman testified she invited Dr. Cheatle to her home "lots of times". Dr. Cheatle did not have a family. Dr. Cheatle liked to eat, and Liebman liked to cook, so Dr. Cheatle went to Liebman's house "a lot." Liebman had family picnics at her house four times a year, and Dr. Cheatle went to each one. Liebman testified Dr. Cheatle would not do anything to help with the clean up. Dr. Cheatle would go to the picnic, eat, and leave. When family members talked about Dr. Cheatle, they called her bad names. After defendant became involved in Dr. Cheatle's life, Liebman's family noticed a difference in Dr. Cheatle. They observed Dr. Cheatle "even laughed." Liebman testified Dr. Cheatle was so different.

¶ 93 Liebman testified about a conversation she had with Dr. Cheatle in Dr. Cheatle's kitchen. Dr. Cheatle told Liebman she was giving money to defendant's grandchildren. Dr. Cheatle asked Liebman if Liebman's grandchildren would like to have some money to go to college, too. Liebman declined the offer.

¶ 94 Liebman testified, in December 2007, when Liebman went to visit Dr. Cheatle, she was met at the door by a very nice woman who said Liebman was not permitted to visit Dr. Cheatle any longer. Liebman testified she went a second time with flowers and cookies. Another woman opened the door and told Liebman she could not enter the house. They took the cookies, though. Liebman then got a letter from Dr. Cheatle's attorney, explaining they were protecting Dr. Cheatle. Liebman testified she missed Dr. Cheatle terribly. She wrote to her every week, even though she was prohibited from doing so.

¶ 95 Shirley Reynolds, owner of Hands Across Illinois, testified her business provided

home care for the elderly. Reynolds testified she referred caregivers to clients, and the clients would interview potential caregivers. In January 2004, Anne Cleve contacted her about finding a caregiver for Dr. Cheatle. Reynolds testified defendant's name came to mind because she was from Springfield and had provided care for two individuals: one for a year and a half, and the other for over 2 1/2 years. Reynolds testified, in regard to both defendant's earlier employers, she had received very good reports about defendant.

¶ 96 Reynolds testified she visited Dr. Cheatle at her home two or three months after defendant began working there. When Reynolds arrived, Dr. Cheatle was not in a wheelchair. Reynolds and Dr. Cheatle shared an interest in Beanie Babies. They would go to thrift stores and buy them together. Sometimes the shopping trips would last all day. Dr. Cheatle enjoyed the shopping. She pushed her own cart. Dr. Cheatle chose the items she wanted to purchase. Dr. Cheatle seemed happy, healthy, clean, and independent. Reynolds testified defendant did exactly what Dr. Cheatle wanted her to do. Dr. Cheatle was in control. Reynolds was not aware of the gifting until about two or three months before defendant's arrest. Reynolds would not have a problem with sending defendant to provide care for another elderly person.

¶ 97 Annette Barrett testified she met defendant in 1997 and they were friends. They met when both were in a battered women's shelter. Barrett testified she knew Dr. Cheatle. Sometimes Barrett accompanied them on their outings. Barrett testified she first met Dr. Cheatle at a birthday party defendant threw for Dr. Cheatle. Barrett testified she always tried to talk to Dr. Cheatle because Barrett liked elderly people. Barrett attempted to be kind to her.

¶ 98 Barrett testified that in early 2007, her own financial situation was difficult. She had a car that was having some problems. Ultimately, Dr. Cheatle told Barrett she wanted to

help her. After looking at a few vehicles, Barrett decided to purchase a used 2006 Pontiac Grand Prix. Dr. Cheatle, who sat in the van, nodded her approval of the purchase. Barrett understood Dr. Cheatle was making a partial payment and defendant made a partial payment. Dr. Cheatle put $12,000 toward the car. Defendant paid $4,000 or $4,500.

¶ 99 On cross-examination, Barrett testified she did not drive defendant anywhere in her Pontiac. She had not seen Dr. Cheatle since November 2007 and did not communicate with her. Barrett did not know she was on a list to receive another $12,000 in March 2007.

¶ 100 The jury found defendant guilty of both offenses. In November 2009, defendant was sentenced to concurrent terms of four years' imprisonment on both offenses. Defendant was also ordered to pay $400,000 in restitution and a $1,000 fine. Defendant was given credit for one day previously served.

¶ 101 This appeal followed.

¶ 102 II. ANALYSIS

¶ 103 A. Reasonable Doubt

¶ 104 Defendant first argues the State failed to prove her guilty of both offenses beyond a reasonable doubt. Defendant maintains the State failed to offer sufficient proof on one of the elements: defendant exerted undue influence on Dr. Cheatle.

¶ 105 The State responds the financial-exploitation offenses can be proved with proof of undue influence *or* proof defendant breached a fiduciary duty to Dr. Cheatle. According to the State, defendant was charged with four counts: financial exploitation of an elderly person and a person with a disability using both the undue-influence allegation *and* the breach-of-fiduciary-duty allegation. The State maintains, even if this court were to find the evidence of undue

influence insufficient, the convictions may be upheld on the evidence defendant, as Dr. Cheatle's power of attorney, breached her fiduciary duty.

¶ 106 When a defendant challenges the sufficiency of the evidence of his or her criminal conviction, our task is to consider the evidence "in the light most favorable to the prosecution" and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." People v. Ward, 215 Ill. 2d 317, 322, 830 N.E.2d 556, 559 (2005). In satisfying this task, we carefully examine the record, "while giving due consideration to the fact that the court and jury saw and heard the witnesses." People v. Smith, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). We will reverse a conviction only when the evidence is so unreasonable, improbable, or unsatisfactory it justifies a finding of reasonable doubt. Smith, 185 Ill. 2d at 542, 708 N.E.2d at 370.

¶ 107 Section 16-1.3(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/16-1.3(a) (West 2008)) sets forth the financial exploitation of an elderly person or a person with a disability offenses:

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

> person with a disability includes, but is not limited to, the misappropriation of those assets or resources by *undue influence, breach of a fiduciary relationship*, fraud, deception, extortion, *or* use of the assets or resources contrary to law." (Emphasis added.)

The jury instructions indicate the jury was told, consistent with the charges against defendant, it could find the illegal-use-of-assets element satisfied if it found proved either undue influence or a breach of a fiduciary relationship.

¶ 108 We agree with the State's conclusion. Even if we were to accept defendant's argument undue influence was not established, the convictions may be upheld if there was sufficient evidence defendant misappropriated assets by the breach of a fiduciary relationship. The record, however, supports the conviction on either ground.

¶ 109 In making her undue-influence argument, defendant contends undue influence is defined as "any improper *** urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460, 448 N.E.2d 872, 875 (1983) (quoting *Powell v. Bechtel*, 340 Ill. 330, 338, 172 N.E. 765, 768 (1930)). Our supreme court has held "[t]he exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason." *In re Estate of Hoover*, 155 Ill. 2d 402, 411-12, 615 N.E.2d 736, 740 (1993). "Proof of undue influence may be wholly inferential and circumstantial." Hoover, 155 Ill. 2d at 412, 615 N.E.2d at 740.

¶ 110 Considering the evidence in the light most favorable to the prosecution, there is

ample evidence from which any rational jury could have found defendant misappropriated Dr. Cheatle's assets through the use of undue influence. The evidence establishes Dr. Cheatle was in her late 80s and early 90s during the time of defendant's involvement. Dr. Smith's testimony shows Dr. Cheatle was frail and dependent on her caretaker. Dr. Smith concluded Dr. Cheatle, in her condition, was "highly vulnerable." Defendant provided 24-hour care to Dr. Cheatle for 2 1/2 years. During defendant's and Dr. Cheatle's relationship, which Dr. Smith called "unhealthy and pathologic," Dr. Cheatle abandoned her decades-long conservative approach in giving to begin giving away sizable chunks of her estate to defendant and defendant's family. Dr. Cheatle's new approach would have left her penniless in a short time. Dr. Cheatle no longer understood the assets in her estate or the amounts she was giving away. A reasonable and likely inference is that undue influence was used.

¶ 111 The evidence also supports the conclusion any rational jury could have found defendant misappropriated Dr. Cheatle's assets through a breach of fiduciary relationship. The evidence shows defendant was Dr. Cheatle's power of attorney. "[O]ne who holds a power of attorney *** is a fiduciary as a matter of law." Matter of Estate of DeJarnette, 286 Ill. App. 3d 1082, 1088, 677 N.E.2d 1024, 1029 (1997). As Dr. Cheatle's power of attorney, defendant had the duty to "use due care to act for the benefit" of Dr. Cheatle. 755 ILCS 45/2-7 (West 2008). The evidence shows defendant did not use due care to act for Dr. Cheatle's benefit. The "gifting" was increasing at an alarming rate. Defendant's actions were depleting Dr. Cheatle's assets and, at that rate, would have forced Dr. Cheatle from her home. In addition, the evidence shows defendant, in using Dr. Cheatle's assets for buying a friend a vehicle, for cleaning her own condominium, and for withdrawing large amounts in cashier's checks, was not acting on Dr.

Cheatle's behalf, but on her own.

¶ 112 B. Jury Instructions

¶ 113 Defendant next argues the trial court erred in giving a jury instruction that allowed the jury to convict her of financial exploitation of a person with a disability without a finding on all necessary elements of the offense. Defendant contends, between November 2004 and April 2007, the financial-exploitation-of-a-person-with-a-disability offense required proof that the disability was permanent. Defendant concludes the modified jury instruction defining disability did not include the word "permanent." Defendant concedes she forfeited the issue by not raising it in a posttrial motion but maintains it should considered as plain error.

¶ 114 The State argues defendant did not challenge the jury instruction on this ground. Before the trial court, according to the State, defendant only argued the nonmodified jury instruction (see 2 Illinois Pattern Jury Instructions, Criminal, No. 13.35 B, at 86 (4th ed. 2000)) was better at defining a disabled person. The State concedes the error in the jury instruction but maintains the plain-error doctrine does not apply.

¶ 115 Both parties agree this issue was forfeited. We may review it only if the plain-error doctrine applies. Our inquiry under the plain-error doctrine begins with the question of whether there was error. *People v. Owens*, 372 Ill. App. 3d 616, 620, 874 N.E.2d 116, 118 (2007).

¶ 116 During the time period relevant to the offense, November 2004 through April 2007, section 16-1.3(b)(2) of the Code defined "person with a disability" as "a person who suffers from a permanent physical or mental impairment resulting from disease, injury, functional disorder or congenital condition that impairs the individual's mental or physical ability to

independently manage his or her property or financial resources, or both." (Emphasis added.) 720 ILCS 5/16-1.3(b)(1) (West 2006) (emphasis added). The word "permanent" was removed from the statutory definition as of January 1, 2009. See Pub. Act 95–798, § 5 (eff. Jan. 1, 2009) (2008 Ill. Laws 1299, 1300). The jury instructions in defendant's case followed the latter definition. The jury was improperly instructed on the definition of disability.

¶ 117 Once error is found, the plain-error doctrine permits appellate review of that error when (1) "the evidence is closely balanced," or (2) the "error is so serious *** it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." People v. Bannister, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008). Defendant has the burden of establishing plain error; if she is unable to do so, "the 'procedural default must be honored.' " Bannister, 232 Ill. 2d at 65, 902 N.E.2d at 580-81 (quoting People v. Keene, 169 Ill. 2d 1, 17, 660 N.E.2d 901, 910 (1995)).

¶ 118 We find the evidence is not closely balanced. The evidence strongly weighs against defendant. The evidence shows Dr. Cheatle was frail and vulnerable; defendant had 24-hour access to her; long-time friends had been pushed out of Dr. Cheatle's life; defendant actively participated in meetings with Dr. Cheatle's stockbroker and attorney; defendant paid for repairs to her own home and vehicle using Dr. Cheatle's checking account; and Dr. Cheatle, who had previously been conservative in her giving practices, changed course and began giving substantial sums of money to defendant and defendant's relatives, potentially threatening her ability to live in her home.

¶ 119 We turn to the question whether the error is so serious it affected the fairness of defendant's trial or challenged the integrity of the judicial process. "[A]n omitted jury instruction

constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." People v. Hopp, 209 Ill. 2d 1, 12, 805 N.E.2d 1190, 1197 (2004). "Before considering whether the omission in this case severely threatened the fairness of defendant's trial, we must answer two preliminary questions. First, what would a correct instruction have told the jury? Second, what was the essential disputed issue in this case?" Hopp, 209 Ill. 2d at 12, 805 N.E.2d at 1197.

¶ 120 A correct jury instruction would have asked the jury to find the physical disability was permanent. It was not disputed Dr. Cheatle was disabled. There was also no issue of whether her physical disability was permanent. Given the evidence before the jury, there is no doubt Dr. Cheatle's disability was permanent. Dr. Cheatle's 24-hour care began after a 2004 hospital stay. The care was necessary to allow her to return home. Defendant began providing Dr. Cheatle 24-hour care near that time. Dr. Smith's testimony shows, in 2007, Dr. Cheatle was 91 years old and Dr. Cheatle suffered "severe obvious osteoarthritis." The 24-hour care was required due to Dr. Cheatle's "state of physical debility." The 24-hour care continued through defendant's employment and through the September 2009 trial, when Dr. Cheatle would have been at least 93. The evidence more than sufficiently established Dr. Cheatle's physical disability was permanent, and it was not a contested issue of the case. The fairness of defendant's trial was not threatened.

¶ 121 We further find the case defendant cites, People v. Ogunsola, 87 Ill. 2d 216, 223, 429 N.E.2d 861, 865 (1981), distinguishable. In Ogunsola, the defendant was charged with deceptive practices and the jury was not instructed of the intent-to-defraud element. Ogunsola,

87 Ill. 2d at 218, 429 N.E.2d at 862. As stated in Hopp, in Ogunsola, "the principal contested issue relevant to defendant's culpability was whether he intended to defraud *** 'fundamental fairness required that the jury be instructed' it had to find intent to defraud." Hopp, 209 Ill. 2d at 8, 805 N.E.2d at 1195 (quoting Ogunsola, 87 Ill. 2d at 223, 429 N.E.2d at 865).

¶ 122 The plain-error doctrine does not apply. Defendant's forfeiture stands.

¶ 123 C. Defendant's Sixth-Amendment Rights

¶ 124 Defendant next argues her constitutional rights to confront and cross-examine her accuser and to the effective assistance of counsel were denied when Rutherford testified Dr. Cheatle said defendant "stole money from her." Defendant cites the following testimony from the transcript, which occurred after Rutherford testified regarding Dr. Cheatle's refusal to see Liebman:

> "Q. Do you know—was there any sort of similar request with regard to contact by [defendant]?
>
> A. Yes. Doctor—as I mentioned, [defendant] had been a very close companion of her for a period from—I am thinking December of 2003 is my understanding—until such time as she was no longer involved with her care-giving on a 24/7 basis. But, after that, Dr. Cheatle on her own volition had come to the conclusion that she didn't want anything to do with [defendant]. She said—and I think it is an exact quote, 'She stole money from .' And the testimony in that transcript was very convincing that she didn't want to have anything to do with [defendant] from that point

forward, and that's why she wanted her removed from her will and she was very emphatic about that."

¶ 125 Defendant acknowledges, however, "[c]onfrontation errors do not automatically warrant reversal." People v. McClanahan, 191 Ill. 2d 127, 139, 729 N.E.2d 470, 477 (2000). Defendant maintains the harmless-error doctrine applies.

¶ 126 We disagree the harmless-error doctrine applies here. No objection was made before the trial court. In this situation, the plain-error analysis applies. See People v. Roberson, 401 Ill. App. 3d 758, 763, 927 N.E.2d 1277, 1282 (2010) ("A plain-error analysis applies where the defendant fails to make a timely objection in the trial court, while a harmless-error analysis applies where the defendant timely objects to the error.").

¶ 127 We begin by considering whether error occurred. See *Owens*, 372 Ill. App. 3d at 620, 874 N.E.2d at 118. In making her argument, defendant heavily relies on the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). Defendant maintains Crawford establishes a testimonial statement made by a witness who does not testify is inadmissible, unless that witness is unavailable and defendant had an earlier opportunity to cross-examine that witness, even if the statement falls within a traditional hearsay exception. Crawford, 541 U.S. at 51.

¶ 128 The Supreme Court of Illinois recently considered Crawford's interpretation of the sixth amendment in People v. Williams, 238 Ill. 2d 125, 939 N.E.2d 268 (2010). In Williams, the court observed that "[t]he sixth amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him.' " Williams, 238 Ill. 2d at 142, 939 N.E.2d at 277 (quoting U.S. Const., amend. VI). Interpreting Crawford,

the Williams court concluded "the confrontation clause does not bar the admission of testimonial statements that are admitted for purposes other than proving the truth of the matter asserted." Williams, 238 Ill. 2d at 142, 939 N.E.2d at 277 (quoting Crawford, 541 U.S. at 59 n.9).

¶ 129 The State argues the statement was not offered to prove defendant stole money from Dr. Cheatle. We agree. The statement was offered to explain why Dr. Cheatle no longer wanted to have contact with defendant and why she changed her will. Under Williams, the confrontation clause is not implicated.

¶ 130 Even if defendant could establish the confrontation clause was violated in these circumstances, defendant could not establish plain error. The evidence in this case is not closely balanced. In addition, the alleged "error" is not "so serious *** it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." Bannister, 232 Ill. 2d at 65, 902 N.E.2d at 580. The statement is redundant to all of the evidence in the case that shows defendant stole from Dr. Cheatle. It was also redundant to the surrounding testimony that already showed Dr. Cheatle believed defendant had wronged her. James testified Dr. Cheatle cried upon reviewing her financial documents after defendant's arrest; and Dr. Cheatle excluded defendant from her will and life.

¶ 131 Defendant cannot establish plain error. The procedural default stands. See Bannister, 232 Ill. 2d at 65, 902 N.E.2d at 580-81.

¶ 132 Defendant further argues defense counsel's failure to object to this testimony as hearsay denied her the effective assistance of counsel. Defendant maintains counsel's failure was objectively unreasonable and extremely prejudicial as it "was the only direct indication presented at trial that Dr. Cheatle's free will was subverted."

¶ 133 This argument fails. Hearsay is "an out-of-court statement offered to prove the truth of the matter asserted." People v. Shaw, 386 Ill. App. 3d 704, 714, 898 N.E.2d 755, 761 (2008) (quoting People v. Sullivan, 366 Ill. App. 3d 770, 779, 853 N.E.2d 754, 763 (2006)). We have already determined the statement was not offered to prove defendant committed the financial-exploitation offenses. It is not hearsay. Counsel cannot be ineffective for failing to make a meritless hearsay argument.

¶ 134 D. Sentence Credit

¶ 135 According to section 110-14 of the Code of Criminal Procedure of 1963, anyone "incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14 (West 2008). Defendant maintains she is entitled one day of credit under this section. The State agrees with defendant. We remand this case and direct the trial court to amend its judgment order to grant defendant a $5 credit against her $1,000 fine.

¶ 136 III. CONCLUSION

¶ 137 For the stated reasons, we affirm the trial court's judgment. With respect to the issue of $5/day credit for time served, we remand with directions the trial court to amend its sentencing judgment to award defendant $5 credit against the $1,000 fine imposed. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 138 Affirmed as modified and cause remanded with directions.