

ORIGINAL

IN THE SUPREME COURT OF OHIO
Case No. 2012-1777

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the
MICHAEL DEBARTOLO	:	Cuyahoga County Court
Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 97453

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT

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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND
AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST**

With rising medical costs and an aging population, people increasingly rely on friends and family for support as opposed to paid caregivers. Michael DeBartolo did just that for his friend of several decades, Elizabeth Carnegie. In the months and years leading up to her death, Elizabeth's health had deteriorated due to a litany of chronic ailments. The reason 83-year old Elizabeth Carnegie had been able to manage her serious health conditions for so long was due to the regular medical treatment she received with DeBartolo's assistance. Nevertheless, when Carnegie became very ill from a chronic urinary tract infection and ultimately died 33 days after her admission to the hospital, the State prosecuted DeBartolo for manslaughter because, in its view, the help that he voluntarily provided was, in hindsight, arguably imperfect.

The jury in this case was faced with a tough decision. It had to decide whether or not 83-year old Elizabeth Carnegie's death from a bacterial infection was a homicide. Even the county coroner struggled with this question and only reached her determination that the death was a homicide after considering inadmissible out-of-court statements by Elizabeth Carnegie. While the trial court did not permit the jury to hear the inadmissible evidence relied on by the coroner, it did let the jury hear the coroner's expert opinion that Carnegie's death was a homicide—an opinion predicated upon the inadmissible evidence. So, in the end, the jury, deprived of the information most critical to the coroner's homicide determination, was forced to blindly rely on the coroner's expert opinion in convicting Michael DeBartolo of killing his friend and neighbor of over 25 years. The jury should never have been placed in this tenuous position and would not have been if the trial court had followed Ohio's evidentiary rules governing expert testimony.

When Ohio adopted its rules of evidence pertaining to expert testimony, it "diverge[d]

sharply from the federal rule.” Ohio Evid. R. 703, Staff Notes. While the federal rules of evidence permit experts to base their opinions on *inadmissible* evidence, Ohio’s rules do not. “Pursuant to [Ohio] Evid. R. 703, facts or data upon which an expert bases an opinion must be those perceived by him or admitted into evidence at the hearing.” *State v. Jones* (1984), 9 Ohio St. 3d 123. Under Ohio’s rules, if an expert needs to rely on inadmissible evidence to reach an opinion, that opinion *may not* be presented at trial. Ohio’s rule prevents experts from serving as conduits for inadmissible evidence, promotes transparency, and ensures that all expert opinions are based on evidence which jurors are themselves entitled to consider.

Based solely on the information permitted to form the basis of an expert opinion in Ohio’s Rule 703, the coroner was unable to offer an opinion on whether Carnegie’s death was attributable to criminal neglect by DeBartolo or whether Carnegie died as a result of her chronic health problems. The coroner testified that her clinical findings from the autopsy “did not alone enable [her] or make it able for [her] to determine eventually the cause and manner of the death.” Based on her examination of the decedent and her medical records, the coroner could only say that Carnegie died as a result of “pseudomonas aeruginosa sepsis” or, in layman’s terms, a bacterial infection associated with her “left ankle ulcer.” In order to reach her determination that Carnegie’s death was a homicide, the coroner reviewed and relied on inadmissible evidence including alleged out-of-court statements from Carnegie.

Contrary to the plain language of *Ohio’s* Evid. R. 703 and this Court’s decision in *Jones*, the Eighth District held that the coroner’s homicide determination was a proper expert opinion because Evid. R. 703 “does not *require* the facts or data to be admitted.” *State v. DeBartolo*, Cuyahoga App. No. 97543, ¶ 56 (emphasis in original). In response to DeBartolo’s request for reconsideration, the Eighth District offered a novel justification; namely, coroners are not bound

by Evid. R. 703 because they have a “statutory duty to arrive at a verdict as to the mode and manner of death.” (August 30, 2012 Order Denying Reconsideration). The ramifications of the Eighth District’s decision, addressed in Proposition of Law I, are profound. Based on *DeBartolo*, coroners, who testify in the most serious of criminal cases, have been relieved of any obligation to comply with the limitations of Evid. R. 703 and will be free to pick and choose between inadmissible evidence in reaching their conclusions—evidence that the jury itself will never be able to consider.

Moreover, whatever the wisdom of the Eighth District’s judicially-crafted exception, this Court should accept Proposition of Law I to address a conflict with the First District Court of Appeals’ decision in *State v. Harrison*, Hamilton App. No. C-920422, 1993 WL 293971. In *Harrison*, the First District held the trial court improperly permitted a coroner to opine that the victim’s death was a homicide as a “result of a violent struggle” when that opinion was not based on the coroner’s personal observations or evidence admitted at trial. 1993 WL 293971, *2-3. The Eighth District’s decision in this case directly conflicts with the First District’s holding that an opinion that a death is a homicide must be stricken if it is not based on facts “perceived by him, namely, his own firsthand knowledge from performing the autopsy” or facts admitted at trial. *Id.*

The instant case is significant for other reasons addressed in *DeBartolo*’s remaining propositions. In particular, this conviction sets a dangerous precedent that may actively discourage individuals from voluntarily assuming a role in the care of their elderly friends and family members. Individuals may choose to provide no help to their friends and family members to avoid the possibility of second-guessing through criminal prosecution. That cannot possibly be what the General Assembly intended with its enactment of the criminal offense of failing to provide for a functionally impaired person. By accepting this case, this Court can set clear

boundaries for determining when an individual should suffer *criminal liability* for volunteering to help someone with their medical care.

STATEMENT OF THE CASE

Elizabeth Carnegie (“Elizabeth” or “Carnegie”) died from a bacterial infection on May 14, 2008. More than two years later, the State of Ohio charged Michael DeBartolo with involuntary manslaughter (count one) and two counts of failure to provide for a functionally impaired person (counts two and three). The State also charged DeBartolo, along with co-defendant Steven Kerr, with theft of property from Carnegie over a five-year time period. DeBartolo was convicted after a jury trial and received a three-year prison sentence.

DeBartolo appealed to the Eighth District Court of Appeals. The Eighth District affirmed the convictions and denied DeBartolo’s motions to certify a conflict and for reconsideration.

STATEMENT OF FACTS

Elizabeth Carnegie and Michael DeBartolo were friends for decades and became so close over the years that Carnegie referred to DeBartolo as her “nephew.” Carnegie’s other long-time friends testified that DeBartolo was “very good” with Elizabeth, was “so kind to her,” and helped her “take care of things” that she wanted to do.¹ Because Elizabeth never liked driving, she quit driving many years ago, and would drive her “any place she wanted to go.” And, because Carnegie was not close to her family, DeBartolo also helped her manage her health conditions.

A. Elizabeth Carnegie’s medical conditions prior to April 11, 2008.

Elizabeth Carnegie was an 83-year old woman who suffered from several chronic

¹ While Elizabeth’s closest friends described her relationship with DeBartolo in very positive terms, two other people made unfounded complaints to Adult Protective Services in 2005 and 2007. In closing the second case in 2007, APS concluded that the allegations of abuse, neglect, and exploitation “were not validated,” that the allegations made about Carnegie were not true, and closed the case.

diseases. She had congestive heart failure, moderately severe chronic obstructive pulmonary disease, recurrent anemia, and an anxiety/depressive disorder. She had a history of intestinal bleeding which required blood transfusions. She had open heart surgery to replace an aortic valve in 1999 and had bypass surgery in 2005. She smoked until her heart surgery in 1999. Carnegie also suffered from chronic urinary tract infections.

With DeBartolo's assistance, Elizabeth managed these conditions and received regular medical treatment. As of her last visit with her primary care physician, Elizabeth's health conditions "appeared to be fairly well controlled."

1. Dr. Michael Felver: Elizabeth's Primary Care Physician from 2001-2007.

Dr. Felver was Elizabeth Carnegie's primary care physician for six years, from 2001 to 2007. During that time, Dr. Felver saw Elizabeth approximately three or four times a year. Carnegie also had "frequent visits" to other medical specialists to treat her various chronic health problems. According to Dr. Felver, Michael DeBartolo took Carnegie to "each and every one of her medical appointments."

In the middle of 2007, Carnegie was admitted to the hospital due to an "exacerbation of her lung disease" and what "was interpreted as new [onset] seizure activity."² While it was never confirmed that Carnegie had actually suffered a seizure, she was nonetheless prescribed Dilantin, an anti-seizure medication.

Dr. Felver testified that Carnegie received proper medical treatment during the entire time that he was her physician. He also testified that Carnegie did not suffer from a physical or mental impairment that prevented her from providing for her own care or protection.

2. Dr. Matthew Faiman

² Elizabeth had no history of seizures prior to the single suspected episode in June 2007.

Dr. Faiman took over as Elizabeth Carnegie's primary care physician in 2007. He saw her for the first time at a general checkup on November 19, 2007. During this visit, Carnegie told Dr. Faiman about her resistance to taking certain prescribed medications, including Dilantin, and her desire not to take a lot of pills. On December 12, 2007, Dr. Faiman treated Elizabeth with antibiotics for a "possible urinary tract infection." In January 2008, DeBartolo called and reported a "similar symptom set" indicating a possible urinary or bladder infection and additional antibiotics were prescribed over the phone.

Dr. Faiman opined that Carnegie was not mentally or physically impaired based on his interactions with her prior to her hospitalization. He reported that Carnegie was "very with it" and her "cognition was clear and judgment was sound." He did note that, while no testing had been done, she may have a "mild cognitive impairment" as a result of her anxiety. He testified that Carnegie was capable of caring for herself, handling her own finances, and "making decisions concerning medical treatments, living arrangements, and diet."

B. DeBartolo takes Elizabeth Carnegie to the Emergency Room on April 11, 2008.

On April 11, 2008, Michael DeBartolo called Dr. Faiman's office to set up an appointment for Elizabeth for an entirely new symptom, a "bluish-tinged limb or back of the calf." DeBartolo spoke with a nurse and told her that Elizabeth had a "blue" leg for about a week and he thought it might be phlebitis. Based on DeBartolo's description, the nurse told him that it "could be much more urgent than something [they] could deal with" so he should take Elizabeth to the emergency room for treatment. DeBartolo took Elizabeth to the Cleveland Clinic emergency room a couple hours later.

When she was admitted to the emergency room, Elizabeth was unresponsive and "critically ill." The treating physician testified that his working potential diagnoses were "septic

shock, presumed urosepsis, respiratory failure, seizures, and acute renal failure, kidney injury.” The medical staff at the Clinic noted the discoloration of Elizabeth’s leg, or ecchymosis, but disregarded it as a common age-related condition that did not require treatment.

About a week after she was admitted to the hospital, Elizabeth Carnegie developed a leg ulcer. While Carnegie received treatment for this ankle ulcer, Dr. Guzman, the treating physician, testified it was “not a priority” and was never tested for infection.

C. Elizabeth Carnegie died of an infected leg ulcer on May 2, 2008.

After being transferred to a long-term care facility on May 2, 2008, Elizabeth Carnegie died on May 14 from a bacterial infection. According to the autopsy, Elizabeth died as a result of a bacterial infection associated with her “left ankle ulcer.”

The coroner further opined that the cause of death was a “homicide” due to medical neglect. In making this determination, the coroner’s office relied on police reports, witness statements, and Adult Protective Service reports in addition to medical records. The coroner considered inadmissible hearsay in making its determination including out-of-court statements allegedly made by Elizabeth. Moreover, when she made her homicide determination, the coroner erroneously believed that Elizabeth had a severely infected ankle ulcer upon her admission to the hospital.

LAW AND ARGUMENT

Proposition of Law I: A coroner may not offer an expert opinion that the manner of a particular death was homicide when that opinion is based on facts or data that were neither perceived by her nor admitted at trial.

The trial court erred in permitting the coroner to offer an expert opinion that Elizabeth Carnegie’s death was a homicide when that opinion was based on facts or data that were neither perceived by the coroner nor admitted at trial. *See State v. Jones* (1984), 9 Ohio St. 3d 123,

syllabus (“Pursuant to Evid. R. 703, facts or data upon which an expert bases an opinion *must* be those perceived by him or admitted into evidence at the hearing.”) (emphasis added).

A coroner is “a medical expert rendering an expert opinion on a medical question.” *State v. Harrison*, Hamilton App. No. C-920422, 1993 WL 293971, *2. Thus, as with the testimony of any expert witness, the coroner may only base his or her opinion on facts or data “perceived by the expert or admitted at the hearing.” Evid. R. 703. In this case, the coroner’s testimony about the “physical and medical cause of death” was properly “based upon facts perceived by [her], namely [her] own firsthand knowledge from performing the autopsy.” *Harrison*, 1993 WL 293971, at *2. Accordingly, the trial court properly admitted the coroner’s expert opinion that Elizabeth died as a result of “pseudomonas aeruginosa sepsis” or, in layman’s terms, a bacterial infection associated with her “left ankle ulcer.”

The trial court erred, however, in permitting the coroner to further opine that the cause of death was homicide due to medical neglect. This portion of the expert opinion was improperly admitted, in violation of Evid. R. 703, because it was not based solely on facts perceived by the coroner or admitted at trial. On the contrary, the coroner’s determination of homicide due to medical neglect was based almost exclusively on witness statements, police reports, and Adult Protective Service reports that were *not* admitted at trial. Dr. Armstrong testified that her clinical findings from the autopsy “did not alone enable [her] or make it able for [her] to determine eventually the cause and manner of death.” Rather, her homicide determination was based on her review of police reports, witness statements, and Adult Protective Service reports. With respect to witness statements, she reviewed and relied upon statements from Patricia Kunkel, Christine Fichter, Kathleen Hendricks, Linda Schwering, Dr. Faiman, and social workers at the hospital. Kunkel, Fichter, and Hendricks’ police statements “relayed . . . conversations had with

[Elizabeth] Carnegie.” None of these collateral records—police reports, APS reports, Cleveland Clinic police reports, or witness statements—were admitted at trial and therefore could not form the basis of the expert opinion.

As such, the trial court erred in permitting Dr. Armstrong and Dr. Miller to offer an expert opinion on the cause of death in violation of Evid. R. 703 and DeBartolo’s due process right to a fair trial. The erroneous admission of this testimony was clearly prejudicial. In a case where the cause of death was hotly disputed, the trial court’s error improperly enabled the State to rely on multiple expert medical opinions that Elizabeth’s death was a homicide due to medical neglect. Accordingly, this Court should grant a new trial.

Proposition of Law II: An individual is not a “functionally-impaired person” merely because someone voluntarily provides care for them; individuals are functionally impaired only if they are physically or mentally incapable of caring for themselves.

The State failed to present legally sufficient evidence that Elizabeth Carnegie was a functionally impaired person, as defined by R.C. 2903.10(A). See *In re Winship* (1970), 397 U.S. 358, 364; see also *Jackson v. Virginia* (1979), 443 U.S. 307, 319. A person is “functionally impaired” if he has “a physical or mental impairment that prevents him from providing for his own care or protection or whose infirmities caused by aging prevent him from providing for his own care or protection.”

DeBartolo certainly helped his good friend Elizabeth Carnegie “take care of things.” Because Elizabeth did not like driving and choose to stop driving the 1980’s, DeBartolo took her on trips, to see friends, and to her doctor’s appointments. And while DeBartolo voluntarily choose to “look after” Elizabeth, there was no evidence that Carnegie could not care for herself due to an impairment or infirmities caused by aging. The mere fact that Elizabeth choose not to drive and DeBartolo would accompany her on her appointments and visits does not mean that

she was *incapable of caring for herself*.

Indeed, Elizabeth's primary care physicians and an Adult Protective Services social worker testified unequivocally that, while she had several chronic health problems, Elizabeth could care for herself. Both of her primary care physicians testified that Elizabeth did not suffer from a physical or mental impairment that prevented her from providing her own care and protection. According to Dr. Faiman, Carnegie was capable of caring for herself, handling her own finances, and "making decisions concerning medical treatments, living arrangements, and diet." Moreover, APS social worker Thomas Scully testified, based on his visits in September and October 2007, that Elizabeth was alert and oriented, happy and content in her apartment, and meeting all her basic needs. He testified that she was "able to walk around without any difficulty" and did not appear to have any mental impairment or limitation.

In upholding DeBartolo's conviction, the Eighth District ignored all this medical evidence and focused exclusively on the lay testimony of Carnegie's niece, who had only one brief 15-20 minute interaction with Carnegie in all of 2008. Even her testimony, however, does not provide legally sufficient evidence that Elizabeth was incapable of caring for herself.

Carnegie's ability to take care of herself stands in stark comparison to the few cases in which courts have found a person to be functionally impaired within the meaning of R.C. 2903.16. *Cf. State v. Dunville*, Clermont App. No. CA98-11-105, 1999 WL 807218, *1 (involving a person with advanced multiple sclerosis who was physically unable to get out of a chair and care for his basic needs); *State v. Davis*, Summit App. No. 21794, 2004 Ohio 3246, ¶ 28 (involving a person with permanent brain damage "with an IQ under 50 and the functioning capabilities of a four or five year old.") A person is not functionally impaired merely because they have chronic health problems and use a wheelchair on occasion. Functional impairment

requires proof that the individual is incapable of caring for themselves. And the State's case was wholly deficient on that critical element. Accordingly, DeBartolo's convictions for failure to care for a functionally impaired person and involuntary manslaughter must be reversed.

Proposition of Law III: A person recklessly fails to provide medical treatment only if the medical treatment is both inadequate and indicative of a perverse disregard of a known risk.

The "failure to provide" element in R.C. 2903.16 requires the State not only to demonstrate that DeBartolo failed to provide necessary medical treatment but also that he did so recklessly. The State must prove that DeBartolo acted with "heedless indifference to the consequences" and "perversely disregarded a known risk that his conduct" was likely to cause a certain result. R.C. 2901.22. In its Opinion Below, the Court of Appeals focused exclusively on whether the medical treatment was inadequate. It never once addressed whether DeBartolo acted with heedless indifference to the consequences of his action. If it had done so, the Eighth District would properly have reversed, on sufficiency grounds, DeBartolo's convictions for failure to provide for a functionally impaired person and for involuntary manslaughter. *See In re Winship and Jackson, supra.*

In upholding DeBartolo's conviction, the Court focused on three things: 1) Elizabeth's low levels of Dilantin; 2) The discoloration on Elizabeth's leg; and 3) DeBartolo's failure to obtain adequate treatment for Elizabeth's urinary tract infection. Opinion Below at ¶¶ 77-82.

As an initial matter, Carnegie decided to stop taking the Dilantin because of its side effects and told the doctor that she had done so. Even if this Court were to conclude that DeBartolo should have administered the Dilantin against her wishes, his failure to do so does not rise to the level of a perverse disregard of a known risk. Given that Elizabeth had no history of seizures and no confirmed diagnosis of a newly developed seizure disorder, the decision to stop

taking the anti-seizure medication, even against the advice of a doctor, does not constitute the perverse disregard of a known risk to Carnegie's medical health.

The discoloration of Elizabeth's leg, or ecchymosis, is a complete red herring. This was a common age-related condition that did not require treatment.

With respect to Elizabeth's urinary tract infection, DeBartolo sought and obtained antibiotics for this infection in December 2007 and again in January 2008. While it appears this infection resurfaced in April 2008, this hardly demonstrates a perverse disregard to this medical condition. DeBartolo sought medical treatment for Elizabeth on multiple occasions and then took her to the emergency room when her condition deteriorated. The Court of Appeals criticizes DeBartolo for driving Elizabeth to the ER himself rather than "summon[ing] an ambulance." Opinion Below at ¶ 78. And while it may have been preferable for DeBartolo to have acted quicker, the bottomline is that he did act that same day and was not "heedless[ly] indifferent to the consequences."

Proposition of Law IV: The mere fact that an individual becomes critically ill does not, by itself, constitute proof beyond a reasonable doubt that the individual's illness and eventual death was due to the reckless failure to provide medical care by a caretaker.

Even if this Court finds that DeBartolo failed to provide medical treatment for a functionally impaired person, it should nonetheless reverse the manslaughter conviction because the State did not present sufficient evidence that Elizabeth's death was caused by DeBartolo's reckless failure to provide medical treatment. *See In re Winship* and *Jackson, supra*.

There is no dispute in this case that Elizabeth Carnegie was "critically ill" when she arrived at the hospital on April 11, 2008 and no dispute that she died 33 days later from a bacterial infection in a leg ulcer that developed approximately a week after her admission. The State failed, however, to present any evidence that DeBartolo "caused" Elizabeth's death.

The State's primary theory of causation is based entirely on conjecture. In essence, the State argues that, because Elizabeth Carnegie was "critically ill" when she arrived at the emergency room, DeBartolo must have failed to provide her with adequate medical treatment. In making this argument, the State relies squarely on the coroner's testimony that Ms. Carnegie's death from an infected leg ulcer was "set in motion by *whatever* was occurring on April 10." The problem with the State's case is there is no evidence regarding the "whatever." The State did not present any evidence to suggest that DeBartolo perversely disregarded Elizabeth's health and, as a result, she ended up in the hospital. On the contrary, Elizabeth Carnegie was an 83 year-old woman with severe health problems including chronic urinary tract infections for which she repeatedly received treatment. There was simply no evidence presented regarding the progression of Elizabeth's illness prior to April 11, 2008 or that her condition was avoidable absent a reckless disregard of her health by DeBartolo.

The Due Process clause does not permit convictions to be based on "whatever." The State cannot rely on a speculative *ipso facto* theory of causation—Elizabeth was very sick and therefore DeBartolo must have been perversely disregarded her medical treatment. The State must actually prove that DeBartolo caused Elizabeth's death. This it failed to do.

Proposition of Law V: A conviction for theft "beyond the scope of the express or implied consent" cannot rest solely on the fact that property was transferred; there must be some evidence that the transfer occurred without the express or implied consent of the victim.

The State failed to present legally sufficient evidence to support a conviction for theft in excess of \$25,000. See *In re Winship* and *Jackson, supra*. DeBartolo was charged with theft in violation of R.C. 2913.02(A)(2) which requires the State to prove, in the context of this case, that DeBartolo knowingly obtained money from Carnegie "beyond the scope of [her] express or implied consent." While the State presented some evidence that DeBartolo received money from

Carnegie in the form of checks, it failed to prove that he did so “beyond the scope of [her] express or implied consent.” In its decision, the Eighth District pointed to three different aspects of the alleged theft. Mr. DeBartolo addresses each in turn.

A. Elizabeth Carnegie wrote checks to Michael DeBartolo from May 3, 2006 to January 3, 2008.

There is no dispute that Elizabeth Carnegie wrote several checks to DeBartolo from May 3, 2006 to January 3, 2008 from her Key Bank account. The State failed, however, to present any evidence that DeBartolo received these checks without and/or beyond her consent. The only evidence the State presented regarding these checks was the testimony of Jessica Toms, a purported handwriting expert. Her testimony does not establish that the checks were written without Elizabeth’s consent. Toms testified that she reached “no opinion” about who signed the checks. And, while she concluded that the content of some of the checks, including the “pay to the order, dollar amount and memo line,” was probably written by DeBartolo, that hardly establishes that DeBartolo took money without Elizabeth’s consent. Absent testimony from Elizabeth, the State cannot demonstrate that she failed to consent. This is particularly true given that the APS conducted an investigation during this time period and determined that the allegations of abuse, neglect, and exploitation were untrue and “were not validated.”

B. The ATM Transactions.

The State presented evidence that there were 56 ATM withdrawals from Elizabeth Carnegie’s Key Bank account in 2007 and 2008 for a total of \$14,500. The State failed, however, to present any evidence regarding who made these withdrawals. Even if this Court were to follow the Eighth District’s assumption that the withdrawals were made by DeBartolo, there is no evidence that the withdrawals were made without her express or implied consent. Moreover, even though some of the ATM withdrawals occurred after Elizabeth was in the

hospital, the State also bore the burden of proving that the ATM withdrawals were made without Elizabeth's "*implied consent.*" (emphasis added). This it did not do—particularly given the fact that Elizabeth, at a minimum, held DeBartolo out as having her power of attorney.

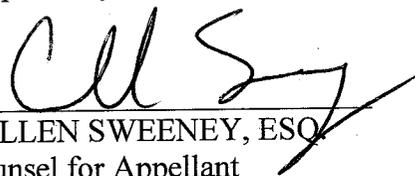
C. Morgan Stanley account.

The State also failed to present legally sufficient evidence that DeBartolo obtained the funds to Elizabeth's Morgan Stanley IRA account without her express or implied consent. As an initial matter, there was no evidence presented that DeBartolo actually received those funds. However, even if one were to assume that DeBartolo was involved in and/or received some of those funds, the State nonetheless failed to prove that he deprived Elizabeth of any property. While Elizabeth could not possibly have signed the IRA termination form on May 8, 2008, while she was in the hospital, her IRA account was not terminated until May 16, 2008, two days after she had passed away. At that point in time (and certainly by the time a check was mailed), DeBartolo was entitled to those funds as the primary beneficiary on the account.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions and issues of great general and public interest for review and reverse his convictions.

Respectfully submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered to Timothy J. McGinty, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 28 day of January, 2013.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

APPENDIX



70561916

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

MICHAEL DEBARTOLO
Defendant

Case No: CR-10-539648-A

Judge: LANCE T MASON

INDICT: 2903.04 INVOLUNTARY MANSLAUGHTER
2903.16 FAILING TO PROVIDE FOR
FUNCTIONALLY IMPAIRED PERSON
2903.16 FAILING TO PROVIDE FOR
FUNCTIONALLY IMPAIRED PERSON
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT. COUNSEL BRETT MANCINO PRESENT.
COURT REPORTER PRESENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF INVOLUNTARY MANSLAUGHTER
2903.04 A F1 AS CHARGED IN COUNT(S) 1 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FAILING TO PROVIDE FOR
FUNCTIONALLY IMPAIRED PERSON 2903.16 B F4 AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF THEFT; AGGRAVATED THEFT
2913.02 A(2) F2 AS AMENDED IN COUNT(S) 4 OF THE INDICTMENT.

COUNT(S) 2 WAS/WERE NOLLED.

DEFENDANT ADDRESSES THE COURT, PROSECUTOR ADDRESSES THE COURT, VICTIM/REP ADDRESSES THE
COURT.

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 3 YEAR(S).

ON COUNT 1, DEFENDANT IS SENTENCED TO 3 YEARS. ON COUNT 3, DEFENDANT IS SENTENCED TO 1 YEAR. ON
COUNT 4, DEFENDANT IS SENTENCED TO 2 YEARS. ALL COUNTS TO RUN CONCURRENT TO ONE ANOTHER FOR A
TOTAL OF 3 YEARS IN LCI. DEFENDANT ADVISED THAT POST RELEASE CONTROL IS APART OF THIS SENTENCE
FOR 5 YEARS MANDATORY ON COUNT 1, 3 YEARS DISCRETIONARY ON COUNT 3, AND 3 YEARS MANDATORY ON
COUNT 4.

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY FOR THE ABOVE
FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF POST RELEASE CONTROL SUPERVISION IS
IMPOSED FOLLOWING HIS/HER RELEASE FROM PRISON AND IF HE/SHE VIOLATES THAT SUPERVISION OR
CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY IMPOSE A PRISON TERM AS
PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE
OFFENDER.

COSTS WAIVED

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

CLERK ORDERED TO SEND A COPY OF THIS ORDER TO:

WARDEN, CUYAHOGA COUNTY JAIL WARDEN;

****COURT NOTIFIED DEFENDANT HAS A STAPH INFECTION THAT NEEDS TO BE TREATED.****

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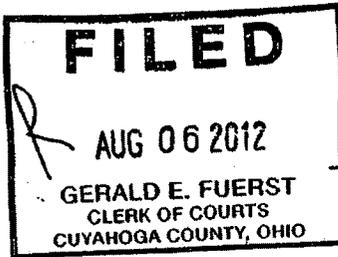
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AUG 02 2012

Court of Appeals of Ohio



EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97453

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL DEBARTOLO

A 620076

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-539648

86-12

BEFORE: Rocco, J., Cooney, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 2, 2012

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VOL 0757 PG 0499

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KENNETH A. ROCCO, J.:

{¶1} Defendant-appellant Michael DeBartolo appeals from his convictions after a jury found him guilty of involuntary manslaughter, failure to provide for a functionally impaired person, and theft.

{¶2} DeBartolo presents seven assignments of error. In his first, second, and third, he challenges the sufficiency of the evidence presented by the state to support each of his convictions. In his fourth, he claims the manifest weight of the evidence does not support his convictions. In his fifth, sixth, and seventh assignments of error, he asserts the trial court abused its discretion in making the following evidentiary rulings: (1) permitting the coroner and the coroner's deputy to testify about how they arrived at their opinion on the cause of the victim's death, (2) refusing to allow evidence that the victim gave DeBartolo her durable power of attorney ("POA"), and (3) permitting certain portions of the handwriting expert's testimony.

{¶3} After a thorough review of the extensive record in this case, this court cannot find that DeBartolo's convictions were unsupported by either insufficient evidence or the manifest weight of the evidence, and cannot declare that the trial court abused its discretion with respect to evidentiary decisions. Consequently, DeBartolo's convictions are affirmed.

{14} DeBartolo's convictions result from his relationship with the victim, Tressa Elizabeth Carnegie. The victim was 83 years old at the time of her death in May 2008. The following facts were established by the evidence the state presented.

{15} The victim met DeBartolo over twenty years prior to her death at one of the places at which she was employed during her working career. DeBartolo lived in the same Lakewood, Ohio apartment building as the victim and began providing transportation to the victim when she stopped driving. By 2003, DeBartolo accompanied the victim nearly everywhere she went.

{16} The victim had a married brother with whom she was not close and only one niece, Christine Fichter. Although the victim enjoyed her niece's company and had a few close friends, she had no husband or children of her own.

{17} In August 2004, DeBartolo moved with his roommate, Steven Kerr, to another apartment building in Lakewood. The two men leased a two-bedroom apartment on the top floor of the building that cost \$1,450.00 a month to rent. Neither man, however, seemed to have outside employment, and neither filed a tax return for that year and the years that followed.

{18} Shortly after DeBartolo moved, he convinced the victim to move into a one-bedroom apartment next door to DeBartolo's apartment. After the move,

one of the victim's close friends, Patricia Kunkel, no longer saw the victim and was unable to contact her. In the summer of 2005, Kunkel received telephone messages from the victim that raised enough concern for Kunkel to contact the Cuyahoga County Department of Adult Protective Services ("APS") and to make a report of possible neglect and/or abuse of the victim.

{¶9} In order to investigate the report, Charlene Nichols, an APS social worker, went to the victim's apartment without providing notice on August 15, 2005. DeBartolo answered the victim's door. He refused admittance to Nichols, but the victim came out into the hallway to speak briefly with the social worker. Nichols arranged another visit to take place two weeks later on August 30.

{¶10} A few days after her unannounced visit, Nichols received a letter apparently signed by the victim. The letter was dated "August 16, 2005," and indicated that Kunkel was harassing the victim by filing the APS report and that the victim had demanded of Kunkel a stop to the harassment.

{¶11} When Nichols arrived for the August 30, 2005 scheduled visit to the victim's apartment, no one answered the door. Moreover, Nichols's supervisor received a letter dated "August 30, 2005," apparently from the victim, that informed APS that she did not want its services. Nichols and another supervisor nevertheless went once more to the victim's apartment on

September 2, 2005. DeBartolo answered the door. Upon seeing them, he immediately slammed it shut.

{¶12} Nichols then sent the victim a certified letter notifying her that another visit would occur on September 30, 2005. Once again on that date, Nichols was unable to obtain any response at the victim's door or by telephoning the victim. This state of affairs prompted Nichols to obtain an order from the probate court for admittance to the victim's apartment. The visit took place on November 2, 2005 with the victim, her attorney, and DeBartolo present. Thereafter, Nichols closed the victim's APS file with the notation that the report of neglect and/or abuse remained "unclear."

{¶13} The victim held several bank accounts; she had an Individual Retirement Account ("IRA") with Morgan Stanley that she opened in 1992 and two checking accounts with KeyBank. Between October 2003 and May 2005, several checks were written from the KeyBank accounts payable to Kerr. Beginning in May 2006, several checks were written that were payable to DeBartolo and that bore a notation that they were for a "loan repayment."

{¶14} By 2007, the victim had developed a medical condition that caused her to have small seizures during which she could not control the movements of her limbs. She also had heart disease and used a wheelchair for mobility. On June 24, 2007, one of her physicians prescribed the anti-epileptic medication

known as Dilantin for her and recommended that she remain on it for at least one year.

{¶15} Despite her medical conditions, the victim continued to communicate with and to visit Fichter. DeBartolo always drove the victim to Fichter's house for these visits; Fichter never went to the victim's new apartment.

{¶16} During the summer of 2007, Fichter began to notice changes in the victim's routine. Telephone calls between the two of them seemed to be monitored by DeBartolo, who made comments "in the background" that Fichter could hear. DeBartolo always remained within sight of the victim even when she attended a wedding shower with only other women present. The victim stopped visiting Fichter's home; DeBartolo indicated part of the reason for this was because the victim occasionally was incontinent. In September 2007, although the victim attended Fichter's daughter's wedding, the victim seemed "very tired."

{¶17} That same month, Jennifer Kravec, the leasing agent for the victim's apartment building, noticed the victim "curled up" in her chair out of sight in the building's party room. The victim was "disheveled" and "crying." Kravec spoke with the victim for only a few minutes before DeBartolo appeared

to "retrieve" her. Kravec thought he seemed hurried and "irritated." Kravec reported concerns about the victim to the APS.

{¶18} APS social worker Thomas Scully investigated Kravec's concerns. Scully presented himself at the victim's door on September 17, 2007. DeBartolo answered, identified himself as the victim's "caregiver," and expressed reservations about permitting Scully to be inside "alone" with the victim. Scully deferred to DeBartolo by meeting with the victim in the hallway. Scully arranged another visit to take place on September 25, 2007.

{¶19} On that date, DeBartolo permitted Scully inside the victim's apartment. The victim was having tea. She appeared well-groomed, the apartment was neat, and DeBartolo produced an appointment book and a list of the victim's medications for Scully's review.

{¶20} On October 11, 2007, Scully returned to the victim's apartment unannounced. Once again, he could not enter; the victim came into the hallway to speak with him. Scully determined the concerns about the victim were "not validated."

{¶21} On November 19, 2007, the victim met with a new primary care physician, Dr. Matthew Faiman, for an initial assessment. DeBartolo remained in the same room with the victim during the entire visit. Faiman reviewed the victim's medical records, and agreed with her previous doctor that she should

continue taking Dilantin. Faiman also noted that the victim took 14 other medications, had a medical history that included, in addition to cerebrovascular seizure disorder, heart disease, hypertension, and gastrointestinal problems, used a wheelchair, and may have had "mild cognitive impairment."

{¶22} On December 12, 2007, DeBartolo brought the victim to Faiman's office for treatment of a urinary tract infection ("UTI"). Faiman prescribed oral antibiotics. In January 2008, DeBartolo called Faiman's office on the victim's behalf to report that she was again experiencing the symptoms of a UTI. Based on DeBartolo's representation, Faiman prescribed oral antibiotics to treat the infection without requiring an office visit.

{¶23} In late January 2008, the victim called Fichter for the last time. The tone of the conversation was "very serious." Fichter's efforts to reach the victim by telephone thereafter proved unsuccessful.

{¶24} In February 2008, Fichter left a message on the victim's answering machine stating she would call the police if she did not reach someone. DeBartolo called in response to this message; he told Fichter that the victim had fallen on Valentine's Day, injuring her ribs, but that he would bring her to Fichter's house for a visit.

{¶25} The visit occurred in March 2008 in Fichter's driveway. The victim remained in DeBartolo's car as Fichter took DeBartolo's place in the driver's

seat; the victim was "slumped," appeared to be in pain, and wanted only to go home.

{¶26} At around this time, DeBartolo called Dr. Faiman's office to request medication for the victim for "restlessness"; he did not indicate that the victim had suffered injury in a fall. DeBartolo was informed that Faiman would need to see the victim and was offered an appointment, but DeBartolo indicated that the time was inconvenient and that he would call back.

{¶27} On April 11, 2008, DeBartolo called Dr. Faiman's office at 9:26 a.m. and spoke with registered nurse Theresa Fenohr. DeBartolo reported that the victim's left leg had been "blue" for "a week," so she needed an office appointment. In describing the problem, DeBartolo denied that the victim had suffered any injury to her leg that would account for the condition.

{¶28} Fenohr told DeBartolo that the condition sounded life threatening and that he should obtain immediate emergency treatment for the victim. DeBartolo disagreed; his response was that the victim probably had only either "phlebitis" or "a clot" and did not need emergency care. Fenohr indicated those conditions also were life threatening. By the end of the conversation, Fenohr believed she had persuaded DeBartolo that the situation was extremely serious.

{¶29} That same day, at approximately 11:00 a.m., as Linda Schwering cleaned on the top floor of the victim's apartment building, she noticed the

victim's door stood open. Schwering looked in to see DeBartolo holding up the victim under her shoulders. To Schwering, the victim "looked like a rag doll"; she was limp and insensible. DeBartolo saw Schwering and told her the victim wasn't "having a good day."

{¶30} Schwering finished her duties and proceeded to the building office, where she watched the surveillance cameras' monitors. At 11:20 a.m., she saw DeBartolo, accompanied by Kerr, pushing the victim in her wheelchair out of the elevator into the garage. The victim was wearing a hat and was "slumped over." DeBartolo transferred her into his car, Kerr returned with the victim's wheelchair to the elevator, and DeBartolo drove away.

{¶31} The victim arrived at the Cleveland Clinic (the "Clinic") Emergency Department at 11:57 a.m. that morning. Michael Surratt, the nurse who attended her, found her vital signs upon arrival were "so low that everything had to be supported." The victim was "critically ill" and verbally unresponsive.

{¶32} The victim's initial diagnoses consisted of "septic shock, presumed urosepsis, respiratory failure, seizures, and acute renal failure." She was placed on a ventilator, X-rays were obtained of her legs and torso, and, on April 12, 2008, she was admitted to the intensive care unit.

{¶33} Dr. Jorge Guzman, the Clinic's intensive care physician, oversaw the victim's treatment from April 11, 2008 until May 2, 2008. He agreed with the initial diagnoses of seizure, septic shock, urosepsis, respiratory failure, and acute renal failure. Guzman never saw the victim conscious.

{¶34} On April 14, 2008, Clinic social worker Mary Beth Hyland received an assignment to the victim's case. DeBartolo's name appeared as the victim's "emergency contact" in her medical records, so Hyland telephoned DeBartolo to ask some questions. DeBartolo told Hyland that the victim was "almost in assisted living" because of the extent of the care he provided. He indicated that he cooked all her meals and helped her to dress. Hyland requested that he provide his medical POA for the victim, and arranged to meet him in the victim's room on April 16, 2008.

{¶35} Upon DeBartolo's arrival at the victim's bedside, he did not provide the medical POA. Hyland demanded explanations for the "scratches" and bruises on the victim's body. Although DeBartolo asserted the victim must have been "scratching herself," he could not explain the bruises. He stated that he was the victim's caregiver, that he and "the couple people working for him" in his real estate business cared for her so she was never alone, that he placed a "baby monitor" in her room so he could always hear her, and that he made sure her "spiritual needs" were met.

{¶36} Hyland continued to have contact with DeBartolo, and his statements proved so odd and unsatisfying as to lead Hyland to make a report about his possible exploitation or neglect of the victim to the APS. Shortly thereafter, she was removed from the victim's case.

{¶37} On April 23, 2008, as a result of Hyland's report, APS social worker Vanessa Anderson contacted DeBartolo. In response to her questions, DeBartolo claimed that he took the victim to the Clinic because he had noticed her leg was discolored "the day before," the victim was "alert" prior to the trip to the Clinic on April 11, she "determin[ed] what bracelet would go with her necklace" before they left, and she suffered a seizure on the way.

{¶38} On April 24, 2008, Clinic social worker Terrance Roncagli was assigned to the victim's case. Roncagli noted that the medical POA that DeBartolo had produced for the victim bore no notary seal. Roncagli arranged a "patient care conference" with DeBartolo to obtain information.

{¶39} At the meeting, DeBartolo stated that he was the victim's "nephew, that his mother was the [victim's] sister." He further stated that he was the victim's caregiver. Several times during the meeting, DeBartolo expressed "rage" at what he saw as Hyland's interference.

{¶40} When Roncagli brought up the subject of the victim's medications before her hospitalization, DeBartolo "expressed doubt" that her doctors had

properly diagnosed her medical conditions. Moreover, DeBartolo gave his own "medical opinions" about the victim's conditions and stated he "read somewhere" that she would do better if she were "off of" Dilantin. He told Roncagli that he had stopped giving Dilantin to the victim on December 24, 2007.

{¶41} On April 30, 2008, Anderson reported her concerns about the victim to the Lakewood Police Department. Det. James Motylewski eventually was assigned to investigate the case.

{¶42} On May 2, 2008, the Clinic discharged the victim and transferred her to a long-term care facility located at Fairview Hospital. DeBartolo arranged to drive Fichter and her daughter there for a visit.

{¶43} On the way to the hospital, DeBartolo handed Fichter an envelope that contained documents she had never previously seen. One was entitled "Last Will and Testament" of the victim and dated July 31, 2003; it indicated DeBartolo was her sole beneficiary. Another was entitled "Agreement" and dated October 28, 2005; it indicated that DeBartolo loaned the victim \$130,000.00 in 1988 for the purchase of a condominium.

{¶44} On May 14, 2008, the victim died. Dr. Erica Armstrong performed an autopsy on the victim's body the following day. Based on her examination and review of the medical records and reports she received, Armstrong

determined the cause of death was sepsis with respiratory and renal failures due to infection. Armstrong determined the manner of death as homicide.

{¶45} On that basis, Motylewski's investigation of the APS report on the victim became a homicide investigation. Motylewski learned from another witness that the rent for the victim's apartment remained current. On July 3, 2008, he executed a search warrant of the victim's apartment.

{¶46} Upon entry, Motylewski observed clothing and other indications that the apartment was in use by a man. Motylewski recovered several pieces of mail addressed to DeBartolo and Kerr.

{¶47} The legal documents Motylewski recovered as a result of the search consisted of a living will and a durable POA, both signed by the victim dated 1997, and both appointing her brother as her representative. Motylewski noted the presence of several unopened and out-of-date bank statements addressed to the victim at her former apartment; the only current statements were from credit card companies that were addressed to "T. E. Carnegie" at the victim's most recent address.

{¶48} Motylewski also recovered an appointment book in which only the months of Scully's APS investigation had several entries. Motylewski found no prescription bottles bearing the victim's name that were dated after 2002.

{¶49} Thereafter, Motylewski continued his investigation of the victim's death by contacting banking institutions, medical personnel, social workers, and friends and family. On August 31, 2010, DeBartolo ultimately was indicted with Kerr in this case on four counts, viz., one count of involuntary manslaughter, two counts of failure to provide for a functionally impaired person, and one count of theft. The state dismissed one count of failure to provide for a functionally impaired person prior to trial.

{¶50} After considering all of the evidence, the jury found DeBartolo guilty on each of the three remaining counts. DeBartolo received a prison sentence that totaled three years for his convictions. He presents seven assignments of error in this appeal, as follow; they will be addressed together when appropriate.

"I. Michael DeBartolo's conviction for failure to provide for a functionally impaired person is not supported by legally sufficient evidence as required by state and federal due process.

"II. Michael DeBartolo's conviction for involuntary manslaughter is not supported by legally sufficient evidence as required by state and federal due process.

"III. Michael DeBartolo's conviction for theft of property in excess of \$25,000 is not supported by legally sufficient evidence as required by state and federal due process.

“IV. Michael DeBartolo’s convictions are against the manifest weight of the evidence.

“V. The trial court erred in permitting the deputy coroner and coroner to opine that Elizabeth Carnegie’s death was a homicide when that opinion was not based on facts or data perceived by the expert or admitted in evidence at trial.

“VI. The trial court erred in failing to admit Elizabeth Carnegie’s durable power of attorney and in failing to permit Amanda Winters to testify about Carnegie’s statements to her about the power of attorney.

“VII. The trial court erred and violated DeBartolo’s due process rights by permitting the state to present opinion testimony from a handwriting expert that went beyond her expertise and that had minimal probative value that was substantially outweighed by the danger of unfair prejudice and misleading the jury.”

{¶51} Because DeBartolo’s fifth, sixth, and seventh assignments of error all present challenges to the admissibility of evidence, they will be addressed prior to his first four assignments of error, each of which challenges the sufficiency and manifest weight of the evidence presented in support of his convictions.

{¶52} In addressing DeBartolo’s fifth, sixth, and seventh assignments of error, this court is guided by the appropriate analysis of the issue he presents.

The Ohio Supreme Court set forth that analysis in *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 569 N.E.2d 1056 (1991), as follows:

Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. *E.g.*, *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has noted many times, the term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *E.g.*, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

{¶53} DeBartolo first claims that the trial court abused its discretion when it permitted the coroner and his assistant to explain their reason for a verdict of homicide as the manner of the victim's death, because that conclusion was based in part on information gained outside the autopsy itself. He claims the testimony violated Evid.R. 703. His claim lacks merit.

{¶54} R.C. 313.12 places the coroner under a statutory duty to investigate an unusual death. Pursuant to R.C. 313.17, the coroner's report with respect to such a death "*shall be made* from the personal observation by the coroner or his deputy of the corpse, from the statements of relatives or other

persons having any knowledge of the facts, and *from such other sources of information as are available*, or from the autopsy.” (Emphasis added.)

{¶55} Thus, the coroner also is placed under a statutory duty to examine any information relating to the death that is available, including police and APS reports and witness statements. In *State v. Jacks*, 63 Ohio App.3d 200, 578 N.E.2d 512 (8th Dist. 1989), this court noted:

It is well established that a coroner testifies as an expert witness to *assist the jury* in determining the cause of death. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27, 30, 516 N.E.2d 226, 229; Evid.R. 702. * * * . See, also, R.C. 313.19. Further, the coroner’s conclusion “as to the cause of death and the manner and mode in which the death occurred is entitled to much *weight*.” *State v. Manago* (1974), 38 Ohio St.2d 223, 227, 67 O.O.2d 291, 293, 313 N.E.2d 10, 13. (Emphasis added.)

{¶56} From the foregoing, the trial court properly determined that the coroners’ testimony was admissible; Evid.R. 703 states that the “facts or data” upon which an expert witness “bases an opinion or inference *may* be those perceived by the expert or admitted in evidence.” (Emphasis added.) The rule does not *require* the facts or data to be admitted into evidence.

{¶57} In this case, as in *Jacks*, the coroners both opined the death was a homicide, and provided the jury with the reasons for their determination. *State v. Heinish*, 50 Ohio St.3d 231, 553 N.E.2d 1026 (1990); *State v. Cohen*, 11th Dist. No. 12-011, 1988 WL 41545. The defense was free to offer evidence to rebut the coroner’s testimony, and, in fact, it did. *Vargo*.

{¶58} Based on the foregoing, the trial court neither violated Evid.R. 703 nor abused its discretion when permitting the coroners to testify as to their opinion of the manner of the victim's death based, in part, upon sources outside the autopsy itself. *State ex rel. Blair v. Balraj*, 69 Ohio St.3d 310, 631 N.E.2d 1044 (1994).

{¶59} DeBartolo also argues that the trial court abused its discretion in excluding testimony and a defense exhibit that would have shown that the victim gave DeBartolo her durable POA. A review of the record fails to support his argument.

{¶60} As to the defense witness, Amanda Winters, the testimony she was prepared to give constituted hearsay in contravention of Evid.R. 802. "Hearsay" is defined in Evid.R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial * * * offered in evidence to prove the truth of the matter asserted."

{¶61} By recounting a conversation Winters had with the victim, Winters sought to prove that, to Winters's understanding, the victim gave DeBartolo her durable POA. Because this testimony was inadmissible, the trial court properly excluded it.

{¶62} As to the document, the trial court determined that Winters could not authenticate it as required by Evid.R. 901(A). Moreover, the record reflects

the defense actually did not seek to introduce this document as an exhibit; it was proffered only to show that one of the potential defense witnesses had died by the time the state indicted DeBartolo. Therefore, the trial court did not abuse its discretion in excluding this evidence.

{¶63} DeBartolo further claims that the trial court abused its discretion in permitting state's witness Jessica Toms, who was qualified as a handwriting expert, to opine that some of the documents she reviewed contained what appeared to be attempts to copy the victim's signature. DeBartolo complains that Toms's opinion in this regard did not constitute a "recognized scientific conclusion." However, as authority for his claims, he cites only Evid.R. 403.

{¶64} Evid.R. 705 provides that an expert "may testify in terms of an opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data." Because a review of the challenged testimony reveals compliance with the foregoing rule, the trial court committed no abuse of its discretion in permitting Toms to explain her conclusion.

{¶65} DeBartolo's fifth, sixth, and seventh assignments of error, accordingly, are overruled.

{¶66} In his first, second, and third assignments of error, DeBartolo argues that none of his three convictions was supported by sufficient evidence, so the trial court improperly denied his motions for acquittal of the charges. He

asserts in his fourth assignment of error that all of his convictions are unsupported by the manifest weight of the evidence.

{¶67} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978). The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶68} In evaluating a challenge to the verdict based on the manifest weight of the evidence, on the other hand, a court sits as the "thirteenth juror," and intrudes its judgment into proceedings only that it finds to be fatally flawed through misapplication of the evidence by a jury that has "lost its way." *Id.* As the Ohio Supreme Court stated:

Weight of the evidence concerns the "inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled

to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." * * *

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶69} In *State v. Bruno*, 8th Dist. No. 84883, 2005-Ohio-1862, this court cautioned that a reviewing court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact to assess. Therefore, a reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978). Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Garrow*, 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist.1995).

{¶70} DeBartolo was convicted in Count 3 of violating R.C. 2903.16, failing to provide for a functionally impaired person. The relevant portion states:

(B) No caretaker shall recklessly fail to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service that is necessary to maintain the health or safety of the functionally impaired person when this failure results in serious physical harm to the functionally impaired person.

{¶71} Thus, the state's evidence had to show: (1) the victim was a functionally impaired individual, (2) DeBartolo was a caretaker for the victim, (3) DeBartolo recklessly failed to provide the victim with treatment or care necessary to maintain her health or safety, and (4) this failure resulted in serious physical harm to the victim. *State v. Davis*, 9th Dist. No. 21794, 2004-Ohio-3246, ¶27. Although DeBartolo argues that the state did not meet its burden with respect to these necessary elements, when viewed in a light most favorable to the state, his argument fails.

{¶72} Fichter testified that, by September 2007, the victim had suffered a heart attack, could neither drive nor ambulate, DeBartolo drove the victim everywhere, and the victim suffered from an illness that made her lose control of her limbs. Margaret Lucko indicated that, by September 2007, the victim could not go to the bathroom by herself. Armstrong testified that, during the

autopsy of the victim's body, she observed in analyzing the victim's brain a significant amount of atrophy that suggested the victim had dementia.

{¶73} DeBartolo indicated to Hyland that, prior to the victim's hospitalization, she required constant monitoring. DeBartolo also told Hyland that, in his care, the victim for all intents and purposes was "in assisted living."

{¶74} DeBartolo described himself to Scully, Roncagli, and other Clinic personnel as the victim's caregiver. Many of the witnesses who knew the victim prior to her hospitalization had not seen the victim without DeBartolo in attendance.

{¶75} DeBartolo indicated to both Dr. Faiman and Roncagli that he made medical decisions for the victim, and that he believed she did not require Dilantin. DeBartolo told the Clinic's emergency personnel that the victim stopped taking Dilantin in December 24, 2007. Armstrong testified that when the victim arrived at the emergency room, she had a "subtherapeutic" level of Dilantin in her blood. Therefore, the victim would have continued to suffer seizures. DeBartolo told the Clinic's emergency room personnel that the victim suffered a seizure on the drive to the hospital; when the victim arrived, she was already in a medically critical condition.

{¶76} DeBartolo called Dr. Faiman's office in January 2008 to request additional medication for the victim for a UTI that she apparently could not

overcome. In light of the victim's incontinence, she was prone to such an infection.

{¶77} DeBartolo also called Dr. Faiman's office on the morning of April 11, 2008; he told the nurse that the victim's leg had been "blue" for "a week," thereby indicating that he did not believe the condition required his prompt attention, in spite of the victim's history of vascular problems. Added to that, despite Fenohr's urging to get medical attention for the victim "immediately," DeBartolo waited a few hours before he drove the victim to the emergency room.

{¶78} When Schwering saw the victim at 11:00 a.m., she was already barely conscious. Even when the victim was in this condition, DeBartolo did not summon an ambulance, rather, he decided to drive the victim to the Clinic. Indeed, before they left the building, DeBartolo made sure the victim was nicely dressed and wearing a hat.

{¶79} Based upon the evidence, the trial court properly denied DeBartolo's motion for acquittal on the charge of failure to provide for a functionally impaired person. *Davis*, 9th Dist. No. 21794, 2004-Ohio-3246.

{¶80} Similarly, the state's evidence was sufficient to prove DeBartolo's failure to provide medical care for the victim led to her death, as required for a conviction for involuntary manslaughter.

{¶81} According to both the coroner and his assistant, the victim's cause of death was "psuedomonas aeruginosa sepsis with acute respiratory failure and acute renal failure due to pseudomonas aeruginosa wound infection." The coroner specifically testified that medical conditions the victim had on April 10, 2008, contributed to her death, including the "seizure disorder, urosepsis, and hypertensive atherosclerotic cardiovascular disease."

{¶82} Simply put, the coroner indicated that, by April 11, 2008, the bacteria that caused the UTI had spread in the victim's system, and that, because her pre-existing diseases compromised her resistance, her body succumbed to septic shock, which ultimately led to her death. DeBartolo, who by his own admission made medical decisions for the victim, nevertheless thought it unnecessary to take the victim to see a physician after her last appointment in December 2007.

{¶83} DeBartolo also asserts that the trial court erred in denying his motion for acquittal on the theft charge. He contends that the notations on the victim's checks demonstrated she owed him money for a loan on her purchase of a condominium, and that no evidence indicated he obtained money "beyond the scope of the express or implied consent" of the victim, as required by R.C. 2913.02(A)(2). This court disagrees.

{¶84} In a letter written to Fichter's relatives dated June 27, 2008, DeBartolo stated, "Despite an allegation by [Fichter] that [the victim] owns or owned a condominium, she has never owned one *at any time*. * * * [The victim] has no equity * * * in any real estate." (Emphasis added.) Moreover, many checks were written on the victim's checking accounts that were signed with her name and dated while she was in the Clinic in a comatose state.

{¶85} DeBartolo states in his appellate brief that "given that [he] helped [the victim] manage her affairs, it would be quite normal for him to have access to pay her bills and other expenses." The evidence presented by the state, however, showed DeBartolo's access exceeded the "normal."

{¶86} According to the bank records, beginning in July 2007, ATM withdrawals in \$100 to \$300 amounts were made from the victim's checking account two or three times per week. This activity continued after DeBartolo took the victim to the hospital. It also occurred after the victim's death. DeBartolo had the victim's unopened bank statements in his apartment.

{¶87} Moreover, on May 2, 2008, the victim, who had been unconscious since April 11, was transferred into a long-term care facility. On May 9, 2008, the institution holding the victim's ("IRA") received a form that was purportedly from the victim because it bore the signature "T. E. Carnegie." The form was dated "May 8, 2008."

{188} This document directed that the victim's IRA account was to be closed and that the balance of \$15,000 be distributed to her in the form of an check. The institution complied. On May 29, 2008, that same sum was deposited into a new account that had been opened at Fifth Third Bank on May 10, 2008 under the name "Carnegie DeBartolo." Kerr was the sole signatory on the account.

{189} Based on DeBartolo's apparent control over the victim's finances, when viewed in a light most favorable to the prosecution, a reasonable juror could find that DeBartolo used his access to the victim's account to commit theft.

{190} Accordingly, DeBartolo's first, second, and third assignments of error are overruled.

{191} DeBartolo's claim that his convictions are against the manifest weight of the evidence is also rejected. As DeBartolo does in his appellate brief, "[f]or the sake of brevity," this court "incorporates its discussion from the first three assignments of error." The jury acted within its prerogative to believe the state's evidence, because two of the defense witnesses made significant concessions in their testimony. One conceded that the victim's disabilities made her suitable for "assisted living," and another testified, without objection, that,

in his presence, the victim directed DeBartolo to "make out" one of her checks.

Davis, 9th Dist. No. 21704, 2004-Ohio-3246.

{¶92} DeBartolo's convictions are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and
SEAN C. GALLAGHER, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
97453

LOWER COURT NO.
CP CR-539648

COMMON PLEAS COURT

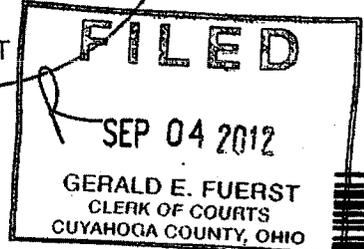
-vs-

MICHAEL DEBARTOLO

A620076

Appellant

MOTION NO. 457533



Date 08/30/12

Journal Entry

Appellant's motion to certify a conflict is denied. This court perceives no conflict between this case and the decision in State v. Harrison, 1st Dist. No. C-920422, 1993 Ohio App. LEXIS 2446 (May 12, 1993), which, at any event, predates the Ohio Supreme Court's decision in State ex rel. Blair v. Balraj, 69 Ohio St.3d 310, 631 N.E.2d 1044 (1994).



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AUG 30 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Presiding Judge COLLEEN CONWAY COONEY,
CONCURS IN JUDGMENT ONLY.

Judge SEAN C. GALLAGHER, CONCURS

[Signature]
Judge KENNETH A. ROCCO

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