

NO. 2012-1777

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 97453

STATE OF OHIO
Plaintiff-Appellee

-VS-

MICHAEL DEBARTOLO
Defendant-Appellant

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

Counsel for Plaintiff-Appellee

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

MARY H. McGRATH (#0041381)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7872

Counsel for Defendant-Appellant

ROBERT L. TOBIK
CUYAHOGA COUNTY PUBLIC DEFENDER

CULLEN SWEENEY (#0077187)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
(216) 443-3672

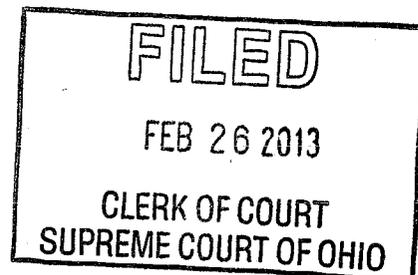
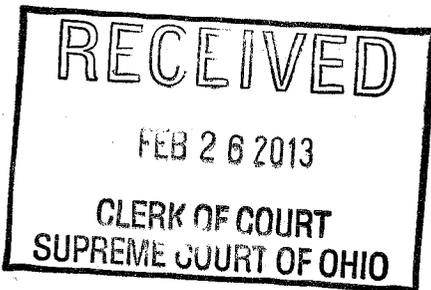


TABLE OF CONTENTS

WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE AND FACTS..... 2

LAW AND ARGUMENT 9

PROPOSITION OF LAW I:

The Discretionary Jurisdiction of the Supreme Court of Ohio is Not Warranted Where Appellant’s Claimed Errors Were Decided Upon the Specific Facts of the Case and the Well-Reasoned Application of Established Precedent.

CONCLUSION..... 15

CERTIFICATE OF SERVICE 15

WHY THIS FELONY CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant Michael DeBartolo seeks to invoke this Honorable Court's discretionary jurisdiction to review his convictions for involuntary manslaughter, failure to provide for a functionally impaired person, and theft relating to the death of his "friend," 83 year old Elizabeth Carnegie. *State v. Debartolo*, 8th Dist. No. 97453, 2012-Ohio-3449. DeBartolo's tale of providing "arguably imperfect" care to Miss Carnegie, a county coroner "struggling" with whether to declare her death a homicide, and implied claim that Miss Carnegie consented to DeBartolo's withdrawal of thousands of dollars from her bank accounts is misleading, at best. To the contrary, DeBartolo isolated Miss Carnegie, discontinued providing her with prescribed medications, failed to obtain medical care for her until she was in septic shock, respiratory failure and renal failure, and looted her bank accounts. DeBartolo is one of the worst type of predator, one who preys on the elderly.

As found by the Eighth District Court of Appeals, DeBartolo:

- convinced Miss Carnegie to move into an apartment next door to he and his roommate, Steven Kerr (*Debartolo*, 2012-Ohio-3449, ¶ 7);
- leased a \$1,4500.00 apartment, although neither he or his roommate had outside employment and did not file tax returns (*Id.*);
- blocked multiple efforts of social workers to visit Miss Carnegie, expressing "rage" at a Cleveland Clinic worker's interference and refusing to admit workers who made unannounced visits (*Id.*, ¶¶ 8-12, 18-20, 24, 29);
- monitored Miss Carnegie's telephone conversations and visits, including attending an all-female wedding shower (*Id.*, ¶ 16);
- failed to obtain treatment for Miss Carnegie after she fell, sustained broken ribs, and was in obvious pain (*Id.*, ¶¶ 24-26);
- disagreed with and overruled doctor's diagnoses, giving his own "medical opinions" about Miss Carnegies' condition (*Id.*, ¶40);
- stopped giving Miss Carnegie prescribed medication, including Dilantin for seizures (*Id.*, ¶ 75);

- failed to obtain treatment for Miss Carnegie's "blue" leg for a week, only obtaining emergency treatment when convinced by a nurse that Miss Carnegie's conditions were life threatening (*Id.*, ¶¶ 27-30);
- finally brought Miss Carnegie to the Cleveland Clinic, where she was "critically ill," "verbally unresponsive," in "septic shock," "respiratory failure," "seizures," and "acute renal failure," yet claimed Miss Carnegie chose what bracelet would go with her necklace before leaving for the Clinic (*Id.*, ¶¶ 31-33, 37);
- produced a will naming himself as Miss Carnegie's sole beneficiary (*Id.*, ¶ 43);
- produced an "agreement" indicating he loaned Miss Carnegie \$130,000.00 to purchase a condominium (*Id.*);
- withdrew funds from Miss Carnegie's accounts, including her IRA, via documentation purported to have been signed by her on a day that she was comatose (*Id.*, ¶¶ 84, 86-88), and
- deposited \$15,000.00 of Miss Carnegie's IRA funds into a new bank account under the name of "Carnegie DeBartolo," for which his roommate, Steven Kerr, was the sole signatory, and at time Miss Carnegie was in a coma (*Id.*, ¶88).

DeBartolo's legal arguments are likewise unsupported, as well as contrary to well established law. DeBartolo's primary argument is that the Eighth District's finding that Evid. R. 703 does not require the facts or data to be admitted into evidence is in conflict with the First District Court of Appeal's decision in *State v. Harrison*, No. C-920422, 1993 WL 293971. DeBartolo portrays the coroner's expert opinion as to the manner of death being a homicide as not being based on any facts or data perceived by her, nor any facts or data admitted at trial. As more fully discussed below, this is an inaccurate statement of the facts. While the written reports may not have been admitted at trial, the actual individuals who authored the reports, based on their personal knowledge, testified at trial. Also, the Eighth District rejected DeBartolo's motion to certify a conflict, finding "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)."

The State respectfully submits that leave to appeal should not be granted, as no substantial constitutional question is involved, nor is this case one of public or great general interest.

STATEMENT OF THE CASE AND THE FACTS

The Eighth District set forth a statement of the case and facts in *State v. DeBartolo*, 8th Dist. No. 97453, 2012-Ohio-3449, which the State adopts, as follows:

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.

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.

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.

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.

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.

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.

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.

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.

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."

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."

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.

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.

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."

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.

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.

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.

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."

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."

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.

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.

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.

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.

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.

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.

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.

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."

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

DeBartolo, 2012-Ohio-3449, ¶¶ 4-50.

LAW AND ARGUMENT

PROPOSITION OF LAW I:

The Discretionary Jurisdiction of the Supreme Court of Ohio is Not Warranted Where Appellant's Claimed Errors Were Decided Upon the Specific Facts of the Case and the Well-Reasoned Application of Established Precedent.

DeBartolo argues the trial court erred in permitting the coroner to offer an expert opinion that Miss Carnegie's death was a homicide when her opinion was based on facts or

data that were neither perceived by her nor admitted at trial, contrary to Evid. R. 703. DeBartolo claims the Eighth District's opinion conflicts with *State v. Harrison*, 1st Dist. No. C-920422.

DeBartolo's proposition of law portrays the coroner's expert opinion as to the manner of death being a homicide as not being based on any facts or data perceived by her, nor any facts or data admitted at trial. Not so; the facts and data relied on by the coroner were in fact admitted at trial. Moreover, the Eighth District correctly found that the coroner is under a statutory duty to examine any information relating to a death, including that from outside sources,

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.)

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.)

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.

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. Heinisch*, 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*.

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).

DeBartolo, 2012-Ohio-3449, ¶¶ 53-58.

The coroner's expert opinion was based in part on what she perceived during the autopsy, which was set forth in the verdict and protocol and admitted at trial. Further, while *DeBartolo* argues the materials the coroner relied on – police reports, witness statements, medical records, Adult Protection Services reports – were not admitted at trial, the witnesses whose information formed the bases of the reports testified at trial. Specifically, *DeBartolo* argues that the written statements of Christine Fichter, Kathleen Hendricks, Linda Schwering, Dr. Matthew Faiman, and Patricia Kunkel were not admitted at trial. Each person, however, testified at trial. Medical personnel and Adult Protective Services personnel who had personal interaction with Miss Carnegie also testified at trial as to the information that formed the basis of written reports or medical records.

As found by the Eighth District, its opinion does not conflict with *State v. Harrison*, 1st Dist. No. C-920422. The majority opinion of the First District held that the coroner failed to state a factual basis upon which he based his opinion on causation, finding:

An expert's opinion may be based on facts perceived by him or facts admitted into evidence at the trial. Evid. R. 703. Further, Evid. R. 705 states:

The expert may testify in terms of an opinion or inference and give his reasons therefor *after disclosure of the underlying facts or data*. The disclosure may be in response to a hypothetical question or otherwise. (Emphasis added.)

With these rules of evidence in mind we must examine Dr. Pfalzgraf's opinion as to the mode of death in the same manner that we examined his opinion on the medical cause of death: we must look at the foundation, the basis, and the degree of certainty of his opinion. In doing so, we conclude that Dr. Pfalzgraf did not state a factual basis upon which he based his opinion on causation in this case. Dr. Pfalzgraf testified that the aspiration of the plastic bag was due to a violent struggle and that he, in fact, determined that the cause of death was a homicide. He stated no factual basis for either of these opinions, nor was he asked to assume any facts before giving these opinions, and we reiterate that his report was not admitted into evidence at trial. While the use of hypothetical questions is now expressly made optional under Ohio's Evidence Rules, providing such hypothetical facts, especially in a deposition which is recorded prior to trial, allows the jury to test the hypothetical facts presented to the expert against the facts which have been admitted at the hearing, and if proven, do provide a proper basis for expert opinion. However, no hypothetical facts were provided to Dr. Pfalzgraf in this case.

As an alternative to the hypothetical question, the coroner need only state those facts upon which he bases his opinion. According to Weissenberger, "[a]s long as the facts are admitted into evidence prior to the rendering of the opinion, *and the expert designates the particular facts or data underlying his or her opinion before rendering the opinion*, the dictates of Rules 703 and 705 have been satisfied." (Emphasis added.) 1 Weissenberger, Ohio Evidence (1993) 15, Section 703.5. This was simply not done in this case. Thus, what can be proven from the coroner's testimony is a death, without evidence of the basis for concluding the existence of the criminal agency of another as the cause of death. See *State v. Mango, supra*. In other words, there was insufficient evidence in this case from which the jury could find that causation was proved beyond a reasonable doubt.

Harrison, *3-*4.

The First District also held that the coroner's opinion as to manner of death should have been stricken because the coroner testified that violence as the cause of the victim's asphyxia was only one possibility. As such, the Court found the coroner's expert testimony based on possibilities must be excluded as speculative. *Harrison*, * 4.

As correctly found by the Eighth District, Evid. R. 703 does not require the facts or data to be admitted into evidence. Nevertheless, the individuals who authored the reports or whose information formed the basis of the reports testified at trial. As such, the facts and data relied on by the coroner were in fact admitted at trial.

DeBartolo's remaining challenges simply seek correction of claimed errors. DeBartolo challenges the Eighth District's determination that sufficient evidence was presented to demonstrate that Miss Carnegie was a "functionally impaired person," specifically, that she was prevented from providing for her own care. DeBartolo portrays his treatment of Miss Carnegie as voluntarily choosing to "look after Elizabeth," driving his good friend because she chose not to drive. Contrary to DeBartolo's claim that the Eighth District "focused exclusively" on the lay testimony of Miss Carnegie's niece to determine whether Miss Carnegie could care for herself, the Court found that:

- Miss Carnegie's friend testified that as of September 2007, the victim could not go to the bathroom by herself (*Debartolo*, ¶ 72);
- Miss Carnegie's niece testified that by September 2007, the victim had suffered a heart attack, could neither drive nor ambulate, was driven everywhere by DeBartolo, and suffered from an illness that made her lose control of her limbs (*Id.*);
- The coroner testified that she observed a significant amount of atrophy in the victim's brain, suggesting the victim suffered from dementia (*Id.*);
- DeBartolo informed a Clinic social worker the victim required constant monitoring and that while in his care, she was almost in "assisted living," (*Id.* ¶ 34), and
- DeBartolo informed the victim's doctors he made her medical decisions and believed she did not require Dilantin, her seizure medication. Upon arrival at the emergency room, Miss Carnegie had a "subtherapeutic" level of Dilantin in her blood. (*Id.*, ¶ 75).

Based on the above, sufficient evidence was presented for the trial court to deny DeBartolo's motion for acquittal. Further, the record supports that DeBartolo recklessly failed to provide medical treatment to Miss Carnegie, resulting in her death. In addition to the facts set for above,

- DeBartolo was present for a doctor's appointment during which Miss Carnegie was instructed to continue taking Dilantin. DeBartolo admitted to overruling this medical diagnosis and discontinuing the medication one month later (*Id.*, ¶¶ 21, 40);
- DeBartolo disagreed that Miss Carnegie's leg, which had been "blue" for a week, needed emergency care, although a nurse indicated it was life threatening (*Id.* ¶¶ 27-28);
- DeBartolo later claimed Miss Carnegie's leg had only be blue for a day prior to seeking care (*Id.*, ¶ 37), and
- During the execution of a search warrant, no prescription bottles bearing Miss Carnegie's name were found that were dated after 2002 (*Id.*, ¶ 49).

Overall, the facts established that DeBartolo isolated Miss Carnegie and recklessly failed to provide medical treatment. While DeBartolo terms Miss Carnegie's blue leg a "red herring," the fact is that she was in septic shock on arrival at the hospital, and virtually comatose. Further, while DeBartolo claims he sought and obtained prescriptions for Miss Carnegie's urinary tract infections, no evidence was produced that DeBartolo actually filled the prescriptions. (See *Id.*, ¶¶ 22, 49).

Finally, DeBartolo claims the trial court erred in denying his motion for acquittal on the theft charges, as the State failed to prove he knowingly obtained money from Miss Carnegie beyond the scope of her express or implied consent. In fact, DeBartolo

- withdrew funds from Miss Carnegie's accounts, including her IRA, via documentation purported to have been signed by her on a day that she was comatose (*Id.*, ¶¶ 84, 86-88), and
- deposited \$15,000.00 of Miss Carnegie's IRA funds into a new bank account under the name of "Carnegie DeBartolo," for which his roommate, Steven

Kerr, was the sole signatory, and at time Miss Carnegie was in a coma (*Id.*, ¶188).

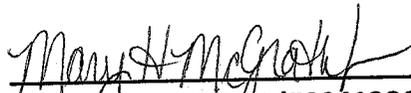
Viewed in the light most favorable to the State, the trial court did not err in denying DeBartolo's motion for acquittal.

CONCLUSION

Appellee the State of Ohio respectfully submits that Appellant Michael DeBartolo's Memorandum in Support of Jurisdiction fails to present a substantial constitutional question or an issue of public or great general interest. The Eighth District properly rejected DeBartolo's claims based on the facts of this case and the well-reasoned application of established precedent. As such, this Honorable Court's discretionary jurisdiction is not warranted.

Respectfully submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR



MARY H. McGRATH (#0041381)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction has been sent this 25th day of February, 2013, to Cullen Sweeney, assistant public defender, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney