[Cite as *State v. Hanusosky*, 2009-Ohio-3409.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-065**
- vs -	:	
LISA H. HANUSOSKY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000153.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Lisa H. Hanusosky, appeals the judgment of the Lake County Court of Common Pleas affirming the verdict rendered by the jury. We affirm the judgment of the trial court.

{¶2} This case emanates from a power of attorney that designated Hanusosky and Wadsworth Brewester as attorneys-in-fact to conduct business on behalf of Lucile

New. Mr. Brewester, an 87-year-old gentleman, was the brother of Ms. New. Hanusosky had been caring for Mr. Brewester and was Mr. Brewester's attorney-in-fact.

{¶3} After the death of her husband, Ms. New moved to Ohio and began living with her brother. The relationship between Hanusosky and Ms. New began November 24, 2005. A checking account was opened in the names of Ms. New and Mr. Brewester on November 25, 2005. On November 29, 2005, a power of attorney was prepared designating Hanusosky and Mr. Brewester as Ms. New's attorneys-in-fact. Hanusosky then admitted Ms. New into Cozy Acres, a retirement home, on December 5, 2005.

{¶4} On December 30, 2005, Hanusosky used the power of attorney to transfer Ms. New's 2002 Nissan Sentra into her name.

{¶5} Beginning in January 2006, Hanusosky began writing a series of checks drawn on Ms. New's checking account. In February 2006, Hanusosky began writing checks on Ms. New's checking account for Hanusosky's personal expenses. Approximately 30 checks were written on Ms. New's checking account between January 2006 and June 2006.

{¶6} Eventually, Ms. New's daughter, Janice Kucera, became suspicious of Hanusosky and began to investigate said transactions. Ms. Kucera requested Hanusosky to provide her with copies of Ms. New's bank statements; Hanusosky did not respond. In June 2006, Kucera traveled to Ohio and eventually procured an account summary of Ms. New's checking account.

{¶7} Kucera contacted the Madison Township Police Department. Sergeant Brown met with Ms. New to determine whether "her money [in the checking account] had been spent properly." At trial, Sergeant Brown testified that his "impression was

[Ms. New] didn't know what happened to her money or her car." After meeting Ms. New, Sergeant Brown met Hanusosky at the police station. At the station, Hanusosky and Sergeant Brown went through each check written on Ms. New's account. In total, Hanusosky admitted to writing ten checks on Ms. New's account for her own personal expenses, one of which was issued to the Lake County Treasurer in the amount of $2,704.67, the amount owed for the first half of Hanusosky's property taxes. The ten checks totaled $5,762.66.

{¶8} Hanusosky asserted that Ms. New gave her permission to write the ten checks in question and to use the funds in her checking account for Hanusosky's personal use.

{¶9} Hanusosky was charged with four counts, including: two counts of theft from an elderly person, felonies of the third degree; one count of theft of a motor vehicle, a felony of the fourth degree; and one count of forgery, a felony of the third degree.

{¶10} Hanusosky asserted her right to a jury trial and, on February 21, 2008, the jury returned a verdict of guilty on one count of lesser-included theft from an elderly person, a felony of the fourth degree; one count of theft from an elderly person, a felony of the fourth degree; and one count of lesser-included forgery, a fifth-degree felony. The jury found Hanusosky not guilty of theft of a motor vehicle.

{¶11} Hanusosky was sentenced to serve a prison term of 12 months on each conviction. Each term was ordered to be served concurrent to the others, for a total term of 12 months imprisonment. Hanusosky was also ordered to pay restitution in the amount of $5,762.66.

{¶12} Hanusosky filed a timely notice of appeal and as her first assignment of error asserts:

{¶13} "The trial court violated the defendant-appellant's rights to due process and fair trial as guaranteed by the state and federal constitution when it overruled defense objections to irrelevant testimony related to the mental capacity of the alleged victim, failed to strike said testimony and overruled the defense motion for a mistrial or a curative instruction."

{¶14} Under her first assignment of error, Hanusosky presents two issues for our review. First, Hanusosky claims "[t]he trial court erred in overruling defense objections to the irrelevant testimony regarding the alleged victim's mental capacity, in failing to strike the testimony and in denying the defense motion for a mistrial or a curative instruction after learning from the [s]tate that it was not asserting the victim lacked the capacity to give consent."

{¶15} Second, Hanusosky maintains "[t]he trial court abused its discretion by permitting the testimony regarding the alleged victim's mental condition even though Evidence Rule 404(A)(2) prohibits the prosecution from introducing this testimony."

{¶16} At the outset, we recognize that a "trial court has broad discretion in the admission and exclusion of evidence." *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. The trial court's decision on whether to admit or exclude evidence will be upheld absent an abuse of discretion. *Shull v. Itani*, 11th Dist. No. 2002-L-163, 2004-Ohio-1155, at ¶39. "'The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d

217, 219. A judgment will not be reversed on appeal unless the trial court has abused its discretion and a party has been materially prejudiced. *Davis v. Killing*, 171 Ohio App.3d 400, 2007-Ohio-2303, at ¶11. (Citation omitted.)

{¶17} Hanusosky maintains the testimony of Paul and Delia New, Ms. New's nephew and his wife, was irrelevant. Specifically, Hanusosky objects to the fact that Paul and Delia New were permitted to testify to Ms. New's mental capacity and deteriorating living conditions in 2004. We disagree with Hanusosky's assertion.

{¶18} "All relevant evidence is admissible, except as otherwise provided by [federal and state law.]" Evid.R. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Nevertheless, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Also, it is within the trial court's discretion to exclude relevant evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B).

{¶19} Hanusosky was charged with two counts of theft, in violation of R.C. 2913.02(A)(2), which states:

{¶20} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶21} "***

{¶22} "(2) Beyond the scope of the *express* or *implied* consent of the owner or person authorized to give consent." (Emphasis added.)

{¶23} As stated, Ms. New executed a power of attorney designating Hanusosky and Mr. Brewester as co-attorneys-in-fact. The facts, circumstances, and surroundings relating to Ms. New's mental faculties both prior to and subsequent to the execution of the power of attorney were relevant evidence for the jury to determine whether Hanusosky exceeded the scope of Ms. New's express or implied consent. "Although mere confusion and the infirmities of old age are not of themselves determinative of an incapacity to transact one's business, they are competent proof of capability to understand the nature of the transaction and the ability of one to protect his own interests." *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164.

{¶24} Paul and Delia New testified to specific instances demonstrating Ms. New's general confusion during the time period leading up to the execution of the power of attorney at issue. For example, Ms. New was unable to properly administer her ailing husband's medication; she was unaware of the location of places she previously had visited; and she inquired whether people were still living, although she had previously known they were deceased. Delia New testified that she believed Ms. New was not capable of handling her personal finances. In fact, Paul New testified that in 2004 and prior to Ms. New returning to Ohio, Ms. New was receiving assistance with her finances.

{¶25} In addition, we find this evidence relevant for the jury to evaluate whether Hanusosky exceeded the scope of Ms. New's express or implied consent. We recognize this evidence concerns the time period directly prior to the execution of the power of attorney; however, it demonstrates Ms. New's immediate need for assistance

with her financial affairs upon returning to Ohio. Moreover, as noted by the trial court, evidence of Ms. New's state of mind was relevant since it allowed the jurors to understand "who Mrs. Hanusosky was dealing with." Further, the mental faculties of an individual are relevant when a power of attorney is at issue.

{¶26} Moreover, a review of the record reveals some discrepancy regarding the applicability of R.C. 2913.73, "Evidence of victim's lack of capacity to give consent." During the discussions of Hanusosky's Crim.R. 29 motion and after its case-in-chief, the state declared that it did not believe R.C. 2913.73 was applicable to the instant case. After discussion, the trial court concluded that both parties agreed R.C. 2913.73 was inapplicable and, ultimately, the proposed jury instruction was not given. Regardless of the applicability of R.C. 2913.73, we have held the testimony elicited from Paul and Delia New was relevant to the case sub judice. Therefore, this argument as advocated by Hanusosky is without merit.

{¶27} Based on the record, we hold that the trial court did not abuse its discretion in finding such testimony relevant pursuant to Evid.R. 401 and not excluded pursuant to Evid.R. 403(A).

{¶28} Under Hanusosky's second argument, she maintains that Ms. New's mental condition was improperly admitted under Evid.R. 404(A)(2), since defense counsel never set the requisite foundation that would allow the state to offer this testimony as rebuttal evidence.

{¶29} The state contends that evidence of Ms. New's mental capacity does not fall under the general prohibition of character evidence under Evid.R. 404(A) and, therefore, Hanusosky's argument is without merit. We agree.

{¶30} Evid.R. 404(A) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ***." Evid.R. 404(A)(2) provides, in pertinent part:

{¶31} "(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, *** is admissible ***.

{¶32} "Character is defined as the 'aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes.' Black's Law Dictionary 232 (6th ed. Rev. 1990)." *Montana v. Eklund* (1994), 264 Mont. 420, 429, 872 P.2d 323, 329. We find that evidence of Ms. New's diminished mental condition does not fall within the definition of character evidence under Evid.R. 404. Ms. New's mental capacity is a characteristic of her being; it is not a moral quality, such as the veracity of an individual. In addition, testimony was presented at trial that Ms. New had been diagnosed with Alzheimer's disease. Certainly, one's medical diagnosis is not character evidence under Evid.R. 404. Therefore, this argument is without merit.

{¶33} Hanusosky's second assignment of error states:

{¶34} "The defendant-appellant's due process rights and rights to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution were violated by prosecutorial misconduct."

{¶35} Under this assignment of error, Hanusosky first argues the prosecutor elicited testimony relating to Ms. New's mental difficulties and life history even though it

was irrelevant to Hanusosky's charges. Second, Hanusosky maintains the prosecutor introduced testimony relating to the victim's lack of capacity to give consent, pursuant to R.C. 2913.73, which was inapplicable to the instant case. Third, Hanusosky asserts the prosecutor engaged in misconduct when he asked Paul New if Ms. New was present in the courtroom.

{¶36} We note that "prosecutorial misconduct will not be a ground for error unless the defendant is denied a fair trial." *State v. David*, 11th Dist. No. 2005-L-109, 2006-Ohio-3772, at ¶66. (Citation omitted.) Under this inquiry, we must first determine whether the prosecutor's comments were improper and, then, whether they prejudicially affected Hanusosky's substantial rights. *State v. Justice*, 2d Dist. No. 21375, 2006-Ohio-5965, at ¶31. (Citations omitted.) As previously noted, testimony regarding Ms. New's mental difficulties and the events leading to the signing of the power of attorney was relevant in the instant case. For example, the testimony regarding, inter alia, Ms. New's financial problems, deplorable living conditions, confusion, and depression demonstrated Ms. New's need for immediate assistance with her financial affairs and, thus, the execution of the power of attorney.

{¶37} Furthermore, a review of the record reveals it was the trial court, not the state, who stated R.C. 2913.73 may be applicable to the case. Thereafter, the state filed, on the second day of trial, a proposed jury instruction addressing R.C. 2913.73. However, the state made it clear that it was proceeding only under R.C. 2913.02(A)(2).

{¶38} As to the prosecutor asking Paul New if Ms. New was present in the courtroom, a review of the record reveals the trial court sustained Hanusosky's

objection to Ms. New's identification. Thereafter, the following conversation occurred at the bench:

{¶39} "[Hanusosky's counsel]: We object to having her in the courtroom. I mean she is going to testify, she is not going to testify; either competent or not competent.

{¶40} "The Court: Nobody made a motion for a separation of witnesses here.

{¶41} "[Hanusosky's counsel]: We will make that now if possible. I didn't think they would wheel her in here.

{¶42} "***

{¶43} "The Court: *** I am going to grant the motion for a separation of witnesses then as well. ***."

{¶44} As demonstrated by the record, a motion for separation of witnesses was not made prior to trial. In fact, it was not until Paul New identified Ms. New that Hanusosky made a motion to separate the witnesses, which was granted by the trial court. As such, we cannot say the results of the trial would have been different without this perceived error.

{¶45} Hanusosky's second assignment of error is without merit.

{¶46} As her third assignment of error, Hanusosky states:

{¶47} "The trial court committed reversible error when it gave a power of attorney fiduciary relationship instruction over the objections of the defendant-appellant in violation of the defendant-appellant's rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶48} At trial, the court instructed the jury as to the definition of power of attorney and further explained the duties of an agent in a fiduciary relationship. Hanusosky maintains that the proposed instructions were not relevant or appropriate to the instant case.

{¶49} "Generally, the trial court should give requested instructions if they are a correct statement of the law applicable to the facts in the case." *Zappola v. Leibinger*, 8th Dist. Nos. 86038 and 86102, 2006-Ohio-2207, at ¶86, citing *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. The court gave the following instructions:

{¶50} "A power of attorney may be defined as a written authorization to an agent to perform specified acts on behalf of her principal. It is an agent created by a formal instrument in writing and for most purposes is not required, although certain acts must be authorized by such written power. Under a power of attorney, or when a power of attorney is exercised, a fiduciary relationship exists between the principal and the agent.

{¶51} "A fiduciary relationship imposes a duty on the agent that the agent, within the limits of the agency, deal fairly and honestly with her principal and imposes the responsibility to disclose any conflicts between the principal's interest and the agent's interest, which might make the agent act in her own best interest at the expense or detriment of the principal."

{¶52} This court will review the giving of jury instructions under an abuse of discretion standard. *State v. Martens* (1993), 90 Ohio App.3d 338, 343. "If the jury instruction incorrectly stated the law, then a *de novo* review must be performed to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party's substantial rights." *Humphrey v. Belmont*

(Sept. 24, 1998), 7th Dist. No. 95 BA 51, 1998 Ohio App. LEXIS 4573, at *5-6. (Citation omitted.)

{¶53} In this case, the trial court did not abuse its discretion, since the above jury instructions were applicable to the facts in the case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d at 591. (Citation omitted.) Furthermore, the trial court's instructions were correct statements of the law and, therefore, we will not perform a de novo review.

{¶54} "'A power of attorney is a written instrument authorizing an agent, known as an "attorney in fact," to perform specific acts on the principal's behalf.'" *Estate of Niemi v. Niemi*, 11th Dist. No. 2008-T-0082, 2009-Ohio-2090, at ¶37. (Citations omitted.) Further, as the Supreme Court of Ohio has stated, "[t]he relationship of principal and agent is generally held to be fiduciary in nature." *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440.

{¶55} We find Hanusosky's argument that she was not aware of the existence of the fiduciary relationship to be without merit. Hanusosky was one of Ms. New's attorneys-in-fact and thus, by execution of the power of attorney, a fiduciary relationship was established. Furthermore, a review of the record reveals that Attorney Geoffrey W. Weaver explained to the jury the fiduciary relationship inherent in a power of attorney. As noted by the trial court:

{¶56} "One thing we did have in the case, wasn't expected, Mr. Weaver explained what [a fiduciary relationship] is. Quite frankly, did a nice job in describing what that is. So there is evidence of it, what it is."

{¶57} Based on the foregoing, Hanusosky's third assignment of error is without merit.

{¶58} As her fourth assignment of error, Hanusosky alleges:

{¶59} "The trial court erred to the prejudice of the defendant-appellant when it denied her motion for acquittal made pursuant to Crim.R. 29(A)."

{¶60} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury's verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, at ¶11. A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503, citing *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-15.

{¶61} As previously stated, Hanusosky was charged with two counts of theft, in violation of R.C. 2913.02(A)(2). At issue was whether Hanusosky, with purpose to deprive Ms. New, knowingly obtained or exerted control over Ms. New's property beyond the scope of her express *or* implied consent. As to the issue of consent, the jury was instructed as follows:

{¶62} "Consent may be either express or implied. Express consent is determined by the written or spoken words of the persons involved. Implied consent is determined by the facts and circumstances which surround those involved, including their words and acts, from which you may infer that consent was given to the Defendant."

{¶63} Hanusosky does not deny that she obtained and used Ms. New's funds for her own personal use; however, she maintains that she did so with Ms. New's consent.

Hanusosky further argues the state "failed to prove either that [Ms.] New did not give consent to *** Hanusosky or that *** Hanusosky used these funds beyond the scope of [Ms.] New's express or implied consent."

{¶64} "'(A) general, durable power of attorney does not authorize attorneys-in-fact to transfer the principal's property to themselves or to others, unless the power of attorney explicitly confers this power. An attorney-in-fact may not make gratuitous transfers of the principal's assets unless the power of attorney from which the power is derived expressly and unambiguously grants the authority to do so.'" *Estate of Niemi v. Niemi*, 2009-Ohio-2090, at ¶37. (Citations omitted.)

{¶65} Upon review of the record, we find that Hanusosky's convictions for theft are supported by ample evidence. First, the power of attorney at issue specifically designated Hanusosky and Mr. Brewester as co-attorneys-in-fact. Although one provision of the power of attorney granted the attorneys-in-fact "[t]o draw and endorse checks on any commercial account or withdraw from any savings account or accounts in [Ms. New's] name ***[,]" the power of attorney required Hanusosky and Mr. Brewester to act together. Further, while the power of attorney also granted the attorneys-in-fact to "make gifts, grants or other transfers without consideration" this provision was limited to "the benefit of any one or more of [Ms. New's] descendants, [Ms. New's] spouse, or a charitable institution which [she had] previously supported ***." As previously stated, Hanusosky was not a descendant of Ms. New.

{¶66} The jury also heard testimony from Attorney Geoffrey W. Weaver, who testified to the following:

{¶67} "A. It is a Durable Power of attorney wherein Lucile New – no – yes, appointed Wadsworth Brewester and Lisa Hanusosky as her attorneys-in-fact.

{¶68} "Q. Now, aside from appointing Wadsworth Brewester and Lisa Hanusosky as her attorneys-in-fact, there is a phrase that follows the name Lisa Hanusosky, that phrase is 'acting together'?

{¶69} "A. Yes.

{¶70} "Q. What is the significance of that phrase?

{¶71} "A. That means that not anyone but – for Wadsworth and Lisa to use this power of attorney both of them have to conduct transactions together. In the case of the checks, should mean both have signed it and anything else that they did on behalf of Lucile New, both of them should have participated in that transaction."

{¶72} Further, Hanusosky alleges the state failed to establish that Ms. New did not give Hanusosky consent outside the power of attorney to use Ms. New's funds for her own personal use. While the state did not present direct evidence that Ms. New permitted Hanusosky to use her funds for Hanusosky's personal use, we note the Supreme Court of Ohio has held that "'circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof.'" *State v. Biros* (1997), 78 Ohio St.3d 426, 447, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus.

{¶73} The jury heard testimony relating to Ms. New's limited income and her need for assistance with her finances. Additionally, testimony was elicited from Paul and Delia New as to Hanusosky's reaction when they requested $81 for an art class for Ms. New, an activity she enjoyed. Both Paul and Delia New testified that when they

asked Hanusosky for the money for participation in the art class, Hanusosky would not enroll Ms. New, stating it was too expensive. On the other hand, Hanusosky admitted to writing checks in the amount of $5,762.66 for her own personal use.

{¶74} Sergeant Brown testified that when he met Ms. New during the investigation, his impression was that Ms. New did not "know what happened to her money or her car."

{¶75} Evidence was also adduced that Hanusosky obtained a power of attorney within days of meeting Ms. New. Thereafter, Ms. New was placed into Cozy Acres, a retirement home. Within one month of placing Ms. New in Cozy Acres, Hanusosky transferred Ms. New's vehicle into her name using the power of attorney. Then, Hanusosky began writing checks on Ms. New's account for her own personal use, spending $5,762.66 of Ms. New's funds within approximately five months.

{¶76} Hanusosky maintains that "Ms. New's implied consent may be found in the fact that [she] was not receiving any compensation for the aid that she was providing to New." To support this argument, Hanusosky cites *State v. Pifer*, 3d Dist. No. 10-04-10, 2004-Ohio-6492. However, upon review, we find *Pifer* to be inapposite to the instant situation.

{¶77} In *State v. Pifer*, supra, evidence was presented at trial that Pifer was to be compensated $750 per week for performing caretaker services to Ms. Peak. Id. at ¶3. During an investigation, it was revealed that Pifer tendered three checks to a furniture rental and retail store for a total of approximately $1,000. Id. at ¶4, ¶8. Pifer was indicted on three counts of theft in violation of R.C. 2913.02(A)(2) and (3). Id. at ¶6. At trial, Pifer testified on her own behalf stating that Ms. Peak had authorized her to

write the three checks in question; two of the checks were used to pay off her account and were part of her wages, and the third check was used to purchase Ms. Peak a recliner. Id. at ¶10. Evidence was also presented documenting Ms. Peak's payments to Pifer. Id. at ¶26. The *Pifer* court stated:

{¶78} "Upon a close review of the record, we find there to be a clear discrepancy as to whether Pifer was entitled to the funds in counts one and three as wages. Accordingly, pursuant to *State v. Bratton*, 3d Dist. Nos. 1-03-18, 1-03-19, 2004-Ohio-187, if Pifer was entitled to, or reasonably believed that she was entitled to the funds in counts one and three as wages, then, in light of the record before us, we find there the evidence is insufficient to support a conviction for theft." Id. at ¶22.

{¶79} In the instant case, no evidence was presented that Ms. New agreed to pay for Hanusosky's services. In fact, there was no evidence presented that would lead us to believe that Hanusosky had a reasonable belief that she was entitled to any compensation. Therefore, we find this argument to be without merit.

{¶80} Under this assignment of error, Hanusosky also maintains the trial court erred in failing to grant her Crim.R. 29 motion regarding the charge of forgery, in violation of R.C. 2913.31, which provides, in relevant part:

{¶81} "(A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶82} "***

{¶83} "(2) Forge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been

executed at a time or place with terms different from what in fact was the case, or to be a copy of an original when no such original existed[.]"

{¶84} Hanusosky asserts the evidence at trial demonstrated that she did not commit forgery but, instead, was ignorant as to the proper way to execute a power of attorney. We disagree.

{¶85} Evidence was presented at trial that a joint checking account was opened at Sky Bank in the name of Mr. Brewester and Ms. New on November 25, 2005. The power of attorney at issue was executed on November 29, 2005. Hanusosky began writing checks for her personal use on the account on February 6, 2006. Instead of signing the checks as Ms. New's power of attorney, Hanusosky signed Ms. New's signature on all of the checks written on the Sky Bank account, which were admitted into evidence at trial. Although Hanusosky alleges she was unaware of the proper method to sign a check when using a power of attorney, the transfer of motor vehicle documentation was an exhibit at trial and, notably, she signed it designating herself as Ms. New's power of attorney.

{¶86} The state presented sufficient evidence for a trier of fact to find that Hanusosky committed the offenses of theft and forgery, and Hanusosky's fourth assignment of error is without merit.

{¶87} Hanusosky further maintains, as her fifth assignment of error:

{¶88} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶89} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶90} "'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.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶91} Under her fifth assignment of error, Hanusosky asserts the state failed to present any evidence to indicate that Ms. New did not grant consent to Hanusosky to write checks for her personal use. Further, as to the forgery charge, Hanusosky maintains the state failed to establish the requisite mens rea. However, such arguments are inappropriate as they do not relate to the weight of the evidence, but the sufficiency of the evidence.

{¶92} Hanusosky further points to discrepancies in the record regarding Ms. New's mental state and the events leading to the signing of the power of attorney at issue. For example: the testimony of Paul New and Janice Kucera conflict as to whether Ms. New was able to handle the finances; the owner of Cozy Acres testified that although Ms. New had been diagnosed with Alzheimer's disease, she believed Ms. New was able to provide consent to take her medication; and Attorney Weaver testified that he believed Ms. New had the mental capacity to revoke her power of attorney. However, we recognize that the weight to be given to the evidence and the credibility of witnesses are primarily matters for the trier of fact to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶93} Further, "[t]he trier of fact is free to believe or disbelieve all or any of the testimony. *** The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *** Consequently, although an appellate court must act as a 'thirteenth juror' when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. ***" *State v. Sevilla*, 10th Dist. No. 06AP-954, 2007-Ohio-2789, at ¶13. (Internal citations omitted.)

{¶94} Therefore, after reviewing the record and weighing the evidence and all reasonable inferences, we cannot conclude the jury lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.

{¶95} For the reasons stated in the opinion of this court, Hanusosky's assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.