

No. 1-11-1274

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 8343
	)	
TIFFANY HOARD,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 **HELD:** On appeal from defendant's conviction for financial exploitation of an elderly person, we find: (1) defendant was proven guilty beyond a reasonable doubt; (2) issues raised regarding specific evidence presented or excluded at trial do not support defendant's claims of reversible error or ineffective assistance of counsel; (3) defendant's four-year prison sentence is not excessive; (4) a portion of the trial court's orders of restitution did not comply with certain statutory requirements; and (5) defendant was entitled to additional credit for time spent in presentence custody.

¶ 2 After a bench trial, defendant-appellant, Tiffany Hoard, was convicted of financial exploitation of an elderly person, sentenced to a four-year term of imprisonment, and ordered to

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make restitution. On appeal, defendant contends: (1) she was not proven guilty beyond a reasonable doubt; (2) the trial court improperly refused to allow testimony regarding the victim's will, and defense counsel provided ineffective assistance of counsel by failing to either introduce the will itself into evidence or make an offer of proof as to the contents of the will; (3) defense counsel provided ineffective assistance of counsel in presenting testimony that corroborated the victim's testimony and contradicted the testimony of defendant; (4) defendant's four-year prison sentence is excessive; (5) the trial court's orders of restitution did not comply with certain statutory requirements; and (6) defendant was entitled to additional credit for time spent in presentence custody. While we vacate a portion of the trial court's restitution orders, remand for further sentencing proceedings with respect to restitution, and grant defendant additional presentence custody credit, we otherwise affirm defendant's conviction and sentence.

¶ 3

#### I. BACKGROUND

¶ 4 Defendant was charged by information with 2 counts of theft and 12 counts of financial exploitation of an elderly person in violation of article 16-1.3(a) of the Criminal Code of 1961 (Criminal Code). 720 ILCS 5/16-1.3(a) (West 2008). The various counts generally alleged that, from May to September of 2009, defendant had improperly used or obtained her elderly grandmother's property, and had done so illegally and by deception. The State moved to *nolle prosequi* two counts of financial exploitation of an elderly person prior to a bench trial that commenced in December of 2010.

¶ 5 At trial, the State first presented the testimony of defendant's grandmother, Ms. Eunice Dorsey. Ms. Dorsey was born in 1918, had been retired since 1983, and suffered from glaucoma in

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her right eye that made reading documents—even those documents with large fonts—difficult to read. Ms. Dorsey had two daughters, Ms. Marsha McRoyal and Ms. Janice Redmond, and defendant was the daughter of Ms. Redmond. Until May of 2009, Ms. Dorsey lived in her own home in the Chatham neighborhood of Chicago.

¶ 6 However, on May 4, 2009, a fire was started by a contractor completing repairs to the roof of Ms. Dorsey's home. The fire left the home so seriously damaged that Ms. Dorsey was no longer able to live there, and she, therefore, moved in with her daughter, Ms. Redmond. Furthermore, the contractor was not properly insured for the work. When Ms. Dorsey filed a claim with her own insurance company, Allstate, she learned that her insurance policy did not provide enough coverage to completely repair her home. Ms. Dorsey, thereafter, decided that she would not repair her home at all, because she "didn't have that kind of money." Rather, she decided to buy another home because she wanted to live on her own. She also decided to contact a lawyer to assist in trying to recover damages from the contractor, and asked defendant to help in that regard.

¶ 7 Indeed, Ms. Dorsey testified that she trusted defendant to help both with retaining a lawyer and with "tak[ing] care of the business of the house," which included paying the taxes and other matters related to the fire. Ms. Dorsey testified that it was because of this trust that she did not read or review a number of documents that defendant had her sign in the months following the fire, as Ms. Dorsey assumed that they were related to hiring an attorney and handling matters related to the fire-damaged house. Thus, Ms. Dorsey testified that she was unaware that she had signed, at defendant's request, the following documents: (1) a power of attorney granting defendant the power to act on Ms. Dorsey's behalf; and (2) a quitclaim deed transferring ownership of the fire-damaged

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house to defendant.

¶ 8 In addition, Ms. Dorsey testified that while she did all of her own personal banking at Park National Bank, in August of 2009, defendant took her to Bank of America—defendant's bank—to open a joint bank account. Mrs. Dorsey testified that this joint account was defendant's idea, and Ms. Dorsey indicated that she thought the money in this account would be used to buy her a new home in which to live. Defendant was aware of this intended purpose. Ms. Dorsey testified that defendant gave Bank of America Ms. Redmond's address when the account was established, and that Ms. Dorsey never received any bank statements or a debit card for the joint account. The joint account was ultimately funded by two insurance claim settlement checks from Allstate, one for \$30,500 and one for \$68,064.50.

¶ 9 In September of 2009, Ms. Dorsey moved out of Ms. Redmond's home and moved in with Ms. McRoyal. Shortly thereafter, she found another home to purchase and put down a deposit on that home from her Park National Bank account. When she later attempted to access the insurance proceeds in the Bank of America joint account, she discovered that the money was no longer in that account. Ms. Dorsey testified that she had never received any benefit from the insurance proceeds, and had never authorized defendant to spend that money on personal items or expenses. Nor had she ever intended to give the insurance proceeds or the fire-damaged house to defendant as a gift. When defense counsel attempted to ask Ms. Dorsey if she had made a will in 2007 leaving all of her property and belongings to defendant, the State's relevance objection was sustained.

¶ 10 Ms. Dorsey subsequently filed suit against defendant for the return of the insurance proceeds and the fire-damaged house, but had not recovered any of those funds at the time of trial. She also

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could not make any use of the fire-damaged house because it was "tied up" with defendant's claim that it had been given to her as a gift. Ms. Dorsey reiterated that, while she did have some plans to also help Ms. McRoyal and/or defendant buy their own homes if possible, she only opened the joint account and signed the various documents because "I was trusting my—I did it, I guess because I—I just felt like I had to do things for myself and my kids, and in order to do them, I signed different instruments and I don't remember signing any instrument that gives her full control of that money or to use it for her benefits in any way."

¶ 11 Mr. Neal Washack, an Allstate senior claim representative, testified that he was the adjuster on Ms. Dorsey's insurance claim for the damage to her home. Ms. Dorsey's policy provided \$71,000 in coverage for damage to her home. After Mr. Washack conducted an inspection of the property, he informed Ms. Dorsey that this amount would not be sufficient to complete the necessary repairs. Allstate's legal department, thereafter, concluded that the contractor was not properly insured for the roofing work, and Mr. Washack then issued a final check to Ms. Dorsey in an amount just over \$68,000. This amount represented the full policy limit, less some expenses involved in securing the property after the fire. Mr. Washack did not issue the \$30,500 check, and indicated that this payment was likely made for the loss of the contents of Ms. Dorsey's home.

¶ 12 While Mr. Washack had valued Ms. Dorsey's fire-damaged house at over \$10,000 for Allstate's accounting purposes, he testified that Allstate actually "would not care" about the actual selling price of the home because Allstate does not buy houses. Finally, Mr. Washack testified that he never spoke with Ms. Dorsey after his initial meeting with her in May of 2009 when he inspected the property. Thus, with the exception of a final payment letter, all of his other correspondence and

conversations regarding the claim were with defendant.

¶ 13 After Mr. Washack testified, the State rested and defendant's motion for a judgment of acquittal was denied. Defendant began her defense by calling her aunt, Ms. McRoyal, as a witness.

¶ 14 Ms. McRoyal testified that she had participated in a number of family meetings about the damage to Ms. Dorsey's home. In those conversations, Ms. Dorsey indicated that she wanted to buy another house. Ms. McRoyal testified that she never heard Ms. Dorsey indicate that she wanted to give either the insurance proceeds or the fire-damaged house to defendant as a gift. During the questioning of Ms. McRoyal, it was made apparent that defense counsel did not interview Ms. McRoyal before she was called to testify at trial because she was reluctant to speak with him.

¶ 15 Defendant testified that Ms. Dorsey had asked her to assist with any insurance claims with respect to the fire-damaged house. However, after initial attempts to recover from the roofing contractor proved unsuccessful, Ms. Dorsey indicated to her family that she no longer wanted to deal with the fire-damaged house and was content living with Ms. Redmond. At a family meeting, Ms. Dorsey said that she would give defendant the fire-damaged house and \$71,000 in insurance proceeds to repair the property for defendant and her son, and would give the remaining \$30,000 in insurance proceeds for the contents of the fire-damaged home to Ms. McRoyal. However, Ms. Dorsey later changed her mind and decided to give defendant all the insurance proceeds because defendant would need "every penny of it to get the house fixed."

¶ 16 Defendant testified that she did not even know what quitclaim deeds were until Ms. Dorsey told her about them and defendant drafted one based upon defendant's internet research. Defendant further explained that she and Ms. Dorsey only opened the joint account after Bank of America

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refused to allow defendant to deposit the endorsed, third-party insurance checks into defendant's own account. Defendant also testified that, in early September of 2009, both she and Ms. Dorsey signed a "general agreement" which provided that Ms. Dorsey relinquished "as a gift" the insurance proceeds to defendant in order to repair the fire-damaged house "in any capacity she sees fit."

¶ 17 Nevertheless, defendant acknowledged that, in the months after the fire, she transferred nearly all of the insurance proceeds from the joint bank account to her own personal bank accounts, and that she had used additional funds from the joint account for personal expenses *via* debit card transactions. While defendant testified that some of the insurance proceeds were spent on architectural plans and other items intended to repair and refurbish the fire-damaged house, she also acknowledged that she spent considerable sums on various personal items including parking tickets, phone bills, insurance payments, and purchases from a number of retail stores. By November of 2009, when the court in Ms. Dorsey's civil case acted to stop defendant from spending any more of the insurance proceeds, there was only about "30 or so thousand left." Ultimately, defendant did not find it strange that Ms. Dorsey would give her the fire-damaged house or the insurance proceeds because, years before, Ms. Dorsey had drafted a will in which defendant was named as the sole beneficiary.

¶ 18 At the conclusion of the trial, the trial court found that the State had generally proven defendant guilty of financial exploitation of an elderly person. However, the trial court also found that the State had failed to prove defendant guilty on those counts alleging that defendant had taken more than \$100,000 from Ms. Dorsey. The trial court reasoned that, while the State had shown that defendant had improperly taken the house and insurance proceeds amounting to just under \$100,000,

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the evidence about the value of the fire-damaged house was insufficient to establish a total amount over \$100,000.

¶ 19 The trial court also refused to find defendant guilty on the two theft counts, and concluded that its findings that defendant was guilty on the remaining counts of financial exploitation of an elderly person would merge into a single conviction under count 3. That count alleged that defendant had "knowingly and by deception" obtained over \$5,000 in property from Ms. Dorsey and that Ms. Dorsey was over 80 years old. Defendant's motion to reconsider was denied and the matter proceeded to sentencing.

¶ 20 After evidence and arguments in aggravation and mitigation were presented, the trial court sentenced defendant to a term of four years' imprisonment and granted her credit for 28 days spent in presentence custody. After the State informed the trial court that just over \$41,000 was being held by the court in the civil case filed against defendant by Ms. Dorsey, two separate orders were also entered ordering defendant to pay restitution by: (1) returning the fire-damaged house to Ms. Dorsey *instanter*; and (2) repaying Ms. Dorsey the entire \$98,564.50 in insurance proceeds, with \$41,113.76 of that amount to be paid *instanter* from the "Bank of America accounts frozen in a related civil proceeding." Defendant's motion to reconsider her sentence was denied, and she has now appealed.

¶ 21

## II. ANALYSIS

¶ 22 As noted above, defendant raises a number of arguments on appeal. We address each argument in turn.

¶ 23

### A. Sufficiency of the Evidence

¶ 24 We first address defendant's challenge to the sufficiency of the evidence supporting her

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conviction for financial exploitation of an elderly person.

¶ 25 When presented with such a challenge, it is not the function of this court to retry defendant; rather, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The trier of fact's findings are entitled to great weight, given that it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). As such, a reviewing court will not substitute its judgment for that of a trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reversal is warranted only if the evidence is so improbable or unsatisfactory, it leaves a reasonable doubt regarding the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 26 Defendant was convicted of financial exploitation of an elderly person under count 3. In relevant part, and as charged in count 3, "[a] person commits the offense of financial exploitation of an elderly person \*\*\* when he or she stands in a position of trust or confidence with the elderly person \*\*\* and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person \*\*\*." 720 ILCS 5/16-1.3(a) (West 2008). Moreover, in relevant part and as charged in count 3, financial exploitation of an elderly person is a Class 1 felony "if the elderly person is 80 years old or older and the value of the property is \$5,000 or more." *Id.*

¶ 27 On appeal, defendant does not dispute the sufficiency of the evidence establishing that she stood in a position of trust or confidence with Ms. Dorsey, that she obtained control over more than \$5,000 of Ms. Dorsey's money, or that Ms. Dorsey was over 80 years of age in 2009. Rather, she

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disputes only the sufficiency of the evidence establishing that she obtained control over Ms. Dorsey's property "knowingly and by deception."

¶ 28 Defendant first contends that the term deception has been defined as to "knowingly 'create or confirm another's impression which is false and which the offender does not believe to be true.'" *People v. Reich*, 241 Ill. App. 3d 666, 670 (1993) (quoting Ill. Rev. Stat. 1987, ch. 38, par. 15-4(a), recodified at 720 ILCS 5/15-4(a) (West 2008)). Defendant then asserts that the evidence at trial did not show that she deceived Ms. Dorsey in order to convince her to sign the quitclaim deed or the general agreement, or in order to convince Ms. Dorsey to sign the documents required to open the joint bank account because: (1) there was no evidence that defendant misrepresented these documents or agreements in any way; (2) Ms. Dorsey had the opportunity, ability, and duty to learn about and understand the documents she signed; (3) Ms. Dorsey willingly signed the quitclaim deed, the general agreement, and the documents required to open the joint bank account; and (4) there were inconsistencies in Ms. Dorsey's testimony, while defendant testified consistently and credibly that Ms. Dorsey wanted to give her the fire-damaged house and the insurance proceeds. We reject defendant's arguments on these points.

¶ 29 First, we note that defendant's proposed definition of "deception" is far too narrow. Defendant was convicted under article 16-1.3 of the Criminal Code, which provides:

" 'Deception' means, in addition to its meaning as defined in Section 15-4 of this Code, a misrepresentation or concealment of material fact relating to the terms of a contract or agreement entered into with the elderly person \*\*\* or to the existing or pre-existing condition of any of the property involved in such contract or agreement; or the use or

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employment of any misrepresentation, false pretense or false promise in order to induce, encourage or solicit the elderly person \*\*\* to enter into a contract or agreement." 720 ILCS 5/16-1.3(b)(4) (West 2008).

Because article 16-1.3(b)(4) also includes the definitions contained in article 15-4 of the Criminal Code, deception also means to knowingly:

"(a) Create or confirm another's impression which is false and which the offender does not believe to be true; or

(b) Fail to correct a false impression which the offender previously has created or confirmed; or

(c) Prevent another from acquiring information pertinent to the disposition of the property involved; or

(d) Sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) Promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform." 720 ILCS 5/15-4 (West 2008).

¶ 30 We find that the evidence at trial established that defendant deceived Ms. Dorsey under this broad definition of that term.

¶ 31 Specifically, evidence was presented at trial that Ms. Dorsey, a woman over 90 years old who had just lost her home to a fire and suffered from glaucoma, had entrusted her granddaughter only

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to assist with efforts to deal with the day-to-day matters associated with the fire-damaged home, to try to collect some recovery from the roofing contractor, and to purchase Ms. Dorsey a new home with the insurance proceeds. Evidence was also presented that defendant, so entrusted by her grandmother and with Ms. Dorsey under the impression that defendant was helping with the above matters, presented to Ms. Dorsey for her signature a very broad power of attorney, a quitclaim deed granting the fire-damaged home to defendant, and a general agreement gifting nearly all the insurance proceeds to defendant. Some of these documents were drafted with a small font size, and Ms. Dorsey testified that defendant never explained any of these documents to Ms. Dorsey.

¶ 32 Furthermore, while defendant offered an explanation as to why the insurance checks needed to be deposited in a joint account, despite the fact that they were intended to be an outright gift, the trial court rejected this explanation as incredible. Indeed, and as the trial court explained, defendant's explanation—that Bank of America would not allow defendant to deposit an endorsed, third-party check into her own account—does not explain why Ms. Dorsey could not have deposited the insurance proceeds into her own account and then written defendant another check drawn on Ms. Dorsey's account.

¶ 33 Rather, the establishment of the joint account was simply further evidence of defendant's attempts to gain access to Ms. Dorsey's money by whatever means necessary. Indeed, taking all of this evidence together, we find that the State presented strong evidence of defendant's use of a false pretense in order to induce or encourage Ms. Dorsey to enter into the various agreements, which constitutes deception under the broad statutory definition. 720 ILCS 5/16-1.3(b)(4) (West 2008).

¶ 34 Moreover, the evidence at trial also established that, after defendant gave Ms. Redmond's

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address to Bank of America when the joint account was established, Ms. Dorsey never received any bank statements or a debit card for that account. Meanwhile, defendant had transferred large sums of money out of that account and had herself used a debit card associated with that account. This evidence constituted strong circumstantial evidence that defendant was improperly using the funds in the joint account for her own purposes, and was trying to conceal this fact from Ms. Dorsey. See *People v. Moore*, 394 Ill. App. 3d 361, 364 (2009) ("Circumstantial evidence is 'proof of certain facts and circumstances from which the fact finder may infer other connected facts which usually and reasonably follow from the human experience and is not limited to facts that may reasonably have alternative, innocent explanations.' ") (quoting *People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007)). As such, the State also presented strong evidence that defendant deceived Ms. Dorsey by acting to "[p]revent another from acquiring information pertinent to the disposition of the property involved." 720 ILCS 5/15-4(c) (West 2008).

¶ 35 Ultimately, we must review the evidence in the light most favorable to the State. *Evans*, 209 Ill. 2d at 209. And, to the extent that the Ms. Dorsey was found to be a more credible witness than defendant, we will not substitute our judgment for that of the trial court's on that issue. *Siguenza-Brito*, 235 Ill. 2d 213 at 224-25. In light of the standard of review, we cannot say that the evidence presented at trial was so improbable or unsatisfactory that it leaves a reasonable doubt regarding defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 36 We also briefly note that, while the record does contain copies of the quitclaim deed, the power of attorney, a signature card for the joint bank account, and the canceled insurance checks, these versions appear to have been filed in the trial court prior to trial. While the parties cite to these

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copies on appeal as representing the relevant trial exhibits, it is not entirely apparent that these copies are the actual exhibits entered into evidence at trial. Nor do they represent a complete set of all the exhibits entered into evidence. Indeed, some of the exhibits entered into evidence below—including the bank statements, the general agreement, the Allstate final payment letter, and the photos of the property—have not been included in the record in any form or fashion.

¶ 37 As the appellant in this matter, defendant had the burden to present a sufficiently complete record of the proceedings at trial, and any doubts which may arise from the incompleteness of the record will be resolved against her. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); see also *People v. Fair*, 193 Ill. 2d 256, 264 (2000) (applying *Foutch* in the context of a criminal appeal). Because a review of *all* the evidence produced at trial is impossible in light of the incomplete record on appeal, we must resolve against defendant any possible doubt with respect to the sufficiency of the evidence supporting her conviction.

¶ 38 B. Evidence of Ms. Dorsey's Will

¶ 39 Next, defendant contends: (1) the trial court improperly refused to allow defense counsel to question Ms. Dorsey about the contents of her will after sustaining the State's relevancy objection; and (2) when faced with the trial court's refusal to allow this line of questioning, defense counsel provided ineffective assistance of counsel by failing to either introduce the will itself into evidence or make an offer of proof as to the will's contents.

¶ 40 With respect to defendant's challenge to the trial court's evidentiary ruling, it is well recognized:

"It is within the trial court's discretion to decide whether evidence is relevant and

admissible. [Citation.] A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion. [Citation.] An abuse of discretion will be found only where the trial court's decision is 'arbitrary, fanciful or unreasonable' or where no reasonable man would take the trial court's view. [Citations.] Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. [Citation.] However, a trial court may reject evidence on the grounds of relevancy if the evidence is remote, uncertain or speculative. [Citation.]" *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001).

¶ 41 Defense counsel attempted to ask Ms. Dorsey about the contents of a will she had executed in 2007. Specifically, he attempted to ask Ms. Dorsey if, as defendant herself subsequently testified at trial, that will named defendant as Ms. Dorsey's sole beneficiary. The trial court sustained the State's relevancy objection, concluding that whatever Ms. Dorsey may have included in her 2007 will, was irrelevant.

¶ 42 We cannot conclude that this determination was so arbitrary, fanciful, or unreasonable, as to be an abuse of discretion. Indeed, the trial court appears to have reasonably taken the view that naming defendant as the sole beneficiary of Ms. Dorsey's will in 2007—a bequest that would only take effect upon Ms. Dorsey's death—was evidence too remote to be relevant to the issues before the court; *i.e.*, whether in 2009, and while Ms. Dorsey was still alive, had a need to support herself and wanted to buy a new home, defendant was given the fire-damaged home and the insurance proceeds by Ms. Dorsey as a gift or had obtained them by deception.

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¶ 43 Moreover, even if the trial court's evidentiary ruling was incorrect, that ruling was at most harmless error. Any error in the exclusion of admissible evidence is harmless beyond a reasonable doubt where the evidence that was excluded was duplicative or cumulative. *People v. Tabb*, 374 Ill. App. 3d 680, 690 (2007). As noted above, defendant herself was allowed to testify regarding the contents of Ms. Dorsey's will. As such, the trial court was ultimately presented with the very evidence that defendant contends was improperly excluded.

¶ 44 Nevertheless, defendant contends that the harmless-error rule should not apply because the trial court rejected her testimony about the will, and Ms. Dorsey's testimony or the introduction of the will itself into evidence would have corroborated defendant's testimony and her version of events. However, the record establishes that the trial court did not reject defendant's testimony as to what bequeaths Ms. Dorsey's will actually contained. The trial court simply found the contents of Ms. Dorsey's will to be irrelevant to the issues at trial. Additional, cumulative evidence of the contents of the will would not have made any difference to the trial court's conclusion on that issue.

¶ 45 We also reject defendant's contention that she received ineffective assistance of counsel with respect to this issue. A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010). While the defendant must establish both prongs of this two-part test, a reviewing

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court need not address counsel's alleged deficiencies if the defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 46 As discussed above, we find that the trial court properly concluded that the contents of Ms. Dorsey's will were irrelevant and properly sustained the State's relevancy objection to Ms. Dorsey's testimony on that issue. Moreover, the trial court was ultimately presented with this very evidence *via* defendant's own trial testimony. Thus, any possible failure on the part of defendant's defense counsel to properly respond to the trial court's evidentiary ruling by either introducing the will itself into evidence or making an offer of proof as to the will's contents, cannot support defendant's claim of ineffective assistance because defendant cannot establish any possible prejudice.

¶ 47 C. Testimony of Ms. McRoyal

¶ 48 In her last attack on the propriety of her conviction, defendant contends that her defense counsel provided ineffective assistance by presenting the testimony of Ms. McRoyal when: (1) she had not been interviewed prior to her testimony; (2) defense counsel had a reason to believe the Ms. McRoyal would not provide favorable testimony because defendant's version of events indicated that Ms. Dorsey reneged on a promise to give Ms. McRoyal \$30,000 of the insurance proceeds; and (3) Ms. McRoyal's testimony damaged defendant's case by providing testimony which corroborated Ms. Dorsey's trial testimony and contradicted the testimony of defendant. We disagree.

¶ 49 As an initial matter, we note that "[d]ecisions involving what evidence to present and which witnesses to call fall within the broad category of trial strategy and are not subject to a claim of ineffective assistance unless they deprive a defendant of a meaningful adversary proceeding." *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86 (citing *People v. Hamilton*, 361 Ill. App. 3d 836,

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847 (2005). Defendant has not argued, nor do we think, that the record would support a conclusion that any possible error in deciding to call Ms. McRoyal as a witness deprived defendant of a meaningful adversary proceeding.

¶ 50 Moreover, "[n]either mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *Smith*, 2012 IL App (1st) 102354, ¶ 86 (quoting *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998)). Defendant makes much of the fact that, under her version of events, defendant was ultimately given the \$30,000 in insurance proceeds that was originally to be given to Ms. McRoyal. Defendant contends that her defense counsel, therefore, had a reason to believe that Ms. McRoyal would, in effect, commit perjury and provide contrary or otherwise unfavorable testimony. Defendant, thus, contends that her defense counsel acted unreasonably by calling Ms. McRoyal as a witness without the benefit of a pretrial interview.

¶ 51 While defense counsel's decision may have proven to be a mistake and may have been handled differently by another attorney with the benefit of hindsight, we are not entirely convinced that his decision to call Ms. McRoyal as a witness constituted performance which fell below an objective standard of reasonableness. *Wheeler*, 401 Ill. App. 3d at 313. Based upon his understanding of defendant's version of events, it was perhaps objectively reasonable for defense counsel to believe that Ms. McRoyal would have provided truthful testimony corroborating defendant's version of events rather than, as defendant appears to contend on appeal, commit perjury.

¶ 52 Ultimately, we need not resolve the first prong of the *Strickland* test with respect to this particular claim of ineffective assistance of counsel, however, we conclude that defendant has failed

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to establish a reasonable probability that the trial result would have been different but for the introduction of Ms. McRoyal's testimony. *Strickland*, 466 U.S. at 687; *Edwards*, 195 Ill. 2d at 163.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 53 First, we note that the trial court did not mention Ms. McRoyal's testimony *at all* in finding defendant guilty, instead indicating that it had relied upon the other evidence presented at trial. Moreover, we find that the other evidence of defendant's guilt presented at trial was so overwhelming, that there is no reasonable probability that the result would have been different if Ms. McRoyal had not testified. *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 112 (defendant cannot demonstrate that defense counsel's purported errors prejudiced the outcome of trial where the evidence of guilt is overwhelming).

¶ 54 D. Prison Sentence

¶ 55 We next consider defendant's argument that sentencing her to four years' imprisonment was excessive, as she should have been given probation instead.

¶ 56 A trial court may consider a number of factors to fashion an appropriate sentence, including the nature of the crime, protection of the public, deterrence, punishment, and defendant's youth, rehabilitative prospects, credibility, demeanor, and character. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998); see also 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2008) (providing various statutory factors in aggravation or mitigation). The weight attributed to each factor in aggravation or mitigation depends on the particular circumstances of each case. *Kolzow*, 301 Ill. App. 3d at 8. When a defendant challenges her sentence on appeal, we generally defer to the trial court's judgment because it had the

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opportunity to observe the proceedings and is, therefore, in a better position than a reviewing court. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not substitute our judgment for that of the trial court merely because we would have weighed the sentencing factors differently. *Id.* Accordingly, we review the trial court's sentencing determination for an abuse of discretion and will reverse a sentence within the prescribed statutory limits only if it varies with "the spirit and purpose of the law" or is "manifestly disproportionate to the nature of the offense." *Id.* at 209-10.

¶ 57 Here, defendant was sentenced for her conviction of financial exploitation of an elderly person under count 3. This offense is a Class 1 felony, with a possible sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/16-1.3(a) (West 2008); 730 ILCS 5/5-4.5-30(a) (West 2008). A period of probation not exceeding four years was also an available sentencing disposition. 730 ILCS 5/5-4.5-30(a) (West 2008).

¶ 58 At the sentencing hearing, the trial court was presented with the following evidence and arguments in aggravation: (1) a victim impact statement from Ms. Dorsey, in which she described how she had been "severely impacted" by defendant's conduct; (2) the need for deterrence; (3) the fact that the defendant abused and took advantage of a position of trust as a family member of Ms. Dorsey; and (4) the fact that defendant had not shown any remorse for her actions. In mitigation, the trial court was presented with the following evidence and arguments: (1) a number of letters in support of defendant, including one from her son; (2) defendant was born without a left hand, and had begun receiving disability payments after experiencing an increasing loss of the use of her right hand; (3) Ms. Dorsey was still able to purchase a home; (4) defendant did not contemplate or cause physical harm, did not have a prior criminal record, was likely to comply with conditions of

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probation, and the circumstances surrounding her actions were unlikely to reoccur; (5) defendant's son was a good student and would suffer a hardship if defendant was imprisoned; (6) defendant had obtained some post-secondary education, planned to obtain more, and had some job prospects; and (7) the fact that in her impact statement, Ms. Dorsey asked for leniency. Defendant herself declined to address the court at the sentencing hearing.

¶ 59 The trial court, thereafter, explained that it had considered and balanced all the relevant factors in aggravation and mitigation, specifically noting the letters submitted on defendant's behalf, the fact that Ms. Dorsey herself had asked for leniency, defendant's lack of a prior criminal record, and the possibility that defendant's son would experience a hardship if defendant was imprisoned. However, the trial court also noted that defendant committed a crime against an elderly family member, she displayed no remorse for her actions, and she had also committed a crime against society. In the end, the trial court balanced the evidence in mitigation and aggravation and sentenced defendant to a four-year prison sentence, which represented the shortest possible prison sentence available for defendant's Class 1 felony conviction.

¶ 60 In light of the record, we reject defendant's assertion that this sentence was excessive and reflective of the fact that the trial court did not fully consider the evidence in mitigation or defendant's rehabilitative potential. We, therefore, find no abuse of discretion in the sentence imposed. See *People v. Prince*, 362 Ill. App. 3d 762, 778 (2005) (the trial court need not accord greater weight to the potential for rehabilitation than to other sentencing factors).

¶ 61 E. Restitution Orders

¶ 62 Next, defendant challenges the orders of restitution entered by the trial court at the sentencing

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hearing. Defendant contends that the trial court's restitution orders were improper because the trial court did not comply with certain statutory requirements to: (1) consider her ability to pay restitution; and (2) fix a specific method and time frame for the payment of restitution.

¶ 63 As defendant and the State both acknowledge, defendant did not challenge the trial court's restitution orders at the sentencing hearing or in her written motion to reconsider her sentence. A defendant generally forfeits sentencing issues when she does not object at the sentencing hearing, or include them in a written postsentence motion to reconsider. *People v. Moore*, 365 Ill. App. 3d 53, 67 (2006). Nevertheless, we will address defendant's arguments on appeal because any possible waiver or forfeiture is a limitation on the parties, not a limitation on the court. *People v. Demitro*, 406 Ill. App. 3d 954, 959 (2010).

¶ 64 The restitution orders at issue here were entered pursuant to the authority granted by article 5-5-6 of the Unified Code of Corrections. 730 ILCS 5/5-5-6 (West 2008). Among the many provisions contained in that article, the legislature has included the following requirements in subsection 5-5-6(f):

"Taking into consideration the ability of the defendant to pay, including any real or personal property or any other assets of the defendant, the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years \*\*\*, not including periods of incarceration, within which payment of restitution is to be paid in full. Complete restitution shall be paid in as short a time period as possible." 730 ILCS 5/5-5-6(f) (West 2008).

¶ 65 Here, the trial court ordered defendant to pay restitution in two separate written orders by:

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(1) returning the fire-damaged house to Ms. Dorsey *instanter*; and (2) repaying Ms. Dorsey the entire \$98,564.50 in insurance proceeds, with \$41,113.76 of that amount to be paid *instanter* from the Bank of America accounts. The report of proceedings from the sentencing hearing and the written orders themselves reflect that the trial court considered defendant's ability to pay and fixed a specific method and time of payment with respect to the immediate return of the fire-damaged house and the payment, *instanter*, of the money in the Bank of America accounts. Defendant does not make any specific challenge to this part of the trial court's orders, and we specifically affirm this portion of the restitution orders.

¶ 66 However, there is *no* indication that the trial court considered defendant's ability to pay, or fixed a specific method (*i.e.*, in a single payment or in installments) or time of payment (*i.e.*, a period of time not in excess of 5 years), with respect to the balance of the insurance proceeds defendant was ordered to repay as restitution. Indeed, the restitution orders do not account, in any way, for the fact that defendant was to be incarcerated for four years. Compliance with the requirements of article 5-5-6(f) is mandatory. *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008); *People v. Hamilton*, 198 Ill. App. 3d 108, 115 (1990); *People v. White*, 146 Ill. App. 3d 998, 1004 (1986).

¶ 67 We, therefore, vacate that portion of the restitution orders requiring defendant to repay the balance of the insurance proceeds, and remand this matter for the trial court to conduct an additional sentencing hearing. The trial court should comply with article 5-5-6(f) and consider defendant's ability to pay in setting a specific method and time period in which any additional restitution must be paid. See *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 27 (vacating sentencing order and remanding for additional proceedings due to the trial court's failure to comply with requirements of

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5-5-6(f)).

¶ 68 In so ruling, we briefly note that defendant appears to assert that the trial court's restitution orders were improper because the trial court did not generally consider defendant's ability to pay restitution in any amount whatsoever. We reject this argument. Article 5-5-6(f) "requires a court to consider the ability to pay only in conjunction with the method of payment, not in consideration of whether restitution should be ordered." *Hamilton*, 198 Ill. App. 3d at 114. Thus, article 5-5-6(f) "does not require the court to find defendant has an ability to pay before ordering restitution." *Id.*

¶ 69 F. Presentence Custody Credit

¶ 70 Finally, we address defendant's request that she be granted a total of 29 days of credit for the time she spent in presentence custody.

¶ 71 A defendant is entitled to credit against her sentence for time spent in custody prior to sentencing. 730 ILCS 5/5-4.5-100(b) (West 2010). In this case, defendant was granted a total of 28 days of such presentence credit. However, the record reflects defendant was actually in presentence custody for 29 days; *i.e.*, from the date of her arrest on April 7, 2010, until she was released on bond on April 8, 2010, and again from the date bond was revoked, March 18, 2011, up to but not including the date the mittimus was issued on April 13, 2011. See *People v. Williams*, 239 Ill. 2d 503, 509 (2011) (a defendant is not entitled to presentence credit for the day the mittimus is issued).

¶ 72 The State concedes this issue on appeal, and we concur. Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we modify the mittimus in this case to grant defendant a total of 29 days of presentence credit.

¶ 73 III. CONCLUSION

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¶ 74 For the foregoing reasons, we affirm defendant's conviction and four-year prison sentence, vacate a portion of the trial court's restitution orders, remand for further sentencing proceedings with respect only to the issue of restitution, and correct the mittimus.

¶ 75 Affirmed in part and vacated in part; mittimus corrected.

¶ 76 Cause remanded.