

NOTICE
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2013 IL App (4th) 120591-U
NOS. 4-12-0591, 4-12-0592 cons.

FILED
March 19, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
ROBERT T. FORD,)	Nos. 08CF1261
Defendant-Appellant.)	11CF814
)	
)	Honorable
)	April Troemper,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The financial exploitation of the elderly statute does not violate substantive due process.

- ¶ 2 The trial court did not err in denying defendant's motion for a bill of particulars.

- ¶ 3 The trial court did not err in instructing the jury on the applicable law.

- ¶ 4 The trial court's note to the jury resulted in no prejudice to defendant.

- ¶ 5 The State's evidence was sufficient to find defendant guilty beyond a reasonable doubt.

- ¶ 6 In December 2011, a jury found defendant, Robert T. Ford, guilty of financial exploitation of the elderly. In February 2012, the trial court sentenced him to probation. The

court also ordered him to pay restitution.

¶ 7 On appeal, defendant argues (1) the financial exploitation of the elderly statute is unconstitutional, (2) the trial court erred in denying his motion for a bill of particulars, (3) the jury instructions failed to explain the applicable law, (4) the court improperly communicated with the jury during deliberations, and (5) the State's evidence failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 8 I. BACKGROUND

¶ 9 A. Case No. 08-CF-1261 (No. 4-12-0592)

¶ 10 In December 2008, a grand jury indicted defendant on three counts of financial exploitation of the elderly (720 ILCS 5/16-1.3 (West 2004)), alleging he, standing in a position of trust and confidence with Patricia Ford, a person with a disability, age 83, obtained by deception and misappropriated property of Patricia Ford, being United States currency, valued in excess of \$100,000 (count I), \$15,000 (count II), and \$5,000 (count III). Defendant pleaded not guilty.

¶ 11 In January 2011, defendant filed a motion for bill of particulars. The motion noted Patricia Ford is defendant's mother, and they were owners of various joint checking accounts and funds to provide for her personal needs. Defendant sought an itemized list of her property obtained by him and the specific deceptive acts employed by him to obtain the property.

¶ 12 In May 2011, the State filed a response to the motion for bill of particulars. The State argued the charge specified the particulars of the offense sufficiently to enable defendant to prepare his defense. Further, the State argued defendant was not entitled to a bill of particulars. In addition, the State provided defendant a letter indicating its case centered on (1) the transaction in which defendant sold Patricia's condominium and (2) the monthly deposits into defen-

dant's account from Patricia's account.

¶ 13 In May 2011, the trial court conducted a hearing on the motion. The court noted the State made an oral motion requesting the "deception" language be deleted from the three counts of the indictment and stating it planned to proceed on the allegation that defendant illegally used the assets and resources through misappropriation of Patricia's property. The court denied the motion for bill of particulars, finding defendant had received sufficient notice of the allegations against him.

¶ 14 In August 2011, defendant filed a motion to dismiss, arguing the amended indictment failed to allege any mental state on his part, punished potentially innocent conduct, and violated his right to due process. The State acknowledged the indictment omitted the word "knowingly" and thus was legally insufficient. The State moved to have the indictment dismissed, which the trial court granted.

¶ 15 B. Case No. 11-CF-814 (No. 4-12-0591)

¶ 16 In September 2011, a grand jury indicted defendant on two counts of financial exploitation of the elderly (720 ILCS 5/16-1.3 (West 2004)). Count I alleged defendant, standing in a position of trust and confidence with Patricia Ford, age 83, knowingly obtained and illegally used her assets, being United States currency valued in excess of \$100,000, between January 2004 and October 2008. Count II alleged contained identical language but valued the funds in excess of \$5,000. Defendant pleaded not guilty.

¶ 17 In December 2011, defendant's jury trial commenced. Janet Stivers, Patricia's niece and defendant's cousin, testified she and her sister, Kay Schlosser, obtained guardianship over Patricia in 2008 or 2009. At that time, Patricia resided at St. Joseph's Home, a nursing

home. After the guardianship was established, Patricia's retirement benefits from AT&T and her social security checks were deposited into an account that went to pay the nursing home.

¶ 18 Sister Judith Morris, formerly the administrator at St. Joseph's, testified Patricia became a resident in March 2005. Morris stated payment would come from Patricia's long-term care nursing insurance and social security. Between March 2005 and July 2007, Morris talked with defendant over the phone regarding problems with payment of Patricia's charges. Defendant told her payments would be made once Patricia's condominium was sold. Morris stated St. Joseph's did not receive money from the sale.

¶ 19 Mary Margaret Giesing, the bookkeeper at St. Joseph's from July 1998 to March 2008, testified Patricia became a resident in March 2005. In 2006, she sent bills to defendant with notations that payment was in arrears. In July 2007, a \$46,000 debt was written off as uncollectible. From July 2007 through June 2008, Patricia's account was in arrears every month.

¶ 20 On cross-examination, Giesing testified to an assignment of benefits from Patricia's insurance provider in May 2007. The insurance originally went to defendant, but after the change, the insurance payments went directly to St. Joseph's. On redirect examination, Giesing testified the insurance payments did not cover the entire debt. She also testified some of the outstanding debt was written off by St. Joseph's as charity.

¶ 21 Denise Hartley, a bookkeeper at St. Joseph's, testified none of the debts incurred on Patricia's account were paid by defendant between March 2008 and October 2008. Instead, the only payments made came from her insurance. Hartley did not receive any response from defendant between March 2008 and October 2008.

¶ 22 Rita Gerstung, a credit recovery officer at Heartland Credit Union, testified

defendant and Patricia opened a joint account in August 2000. The statements showed deposits made from Patricia's social security and her pension. Kathy Jackson, a vice president at Marine Bank, testified to an account owned by defendant, Darcy Ford, and Trisha Ford.

¶ 23 Susan Jackson, an account supervisor with the Illinois State Police, testified she prepared a spreadsheet as to the activity in Patricia's account. She then testified to various transactions. For example, on January 4, 2005, automatic deposits were made into Patricia's Heartland account. The next day, the money was transferred to defendant's Heartland account. This same activity took place through July 2007. In October 2007, the activity changed as funds transferred into defendant's Heartland account were withdrawn and deposited into defendant's Marine account. This activity continued through October 2008. Jackson testified the funds withdrawn from Patricia's account and deposited into defendant's account exceeded \$100,000.

¶ 24 After the State rested, defense counsel moved for a directed verdict, arguing the State failed to present any evidence of deception, intimidation, or improper conduct by defendant. Counsel argued defendant had a right to use the money as he was a joint tenant. Counsel also argued the statute punished a significant amount of wholly innocent conduct and was therefore unconstitutional. The trial court denied the motion.

¶ 25 Via stipulation, attorney David Reid testified he met with defendant and Patricia in September 2000 for purposes of establishing a power of attorney. At that time, it was clear to Reid that Patricia wanted defendant to assume control over her financial affairs. Defendant presented three character witnesses who testified to his reputation, integrity, honesty, and good character.

¶ 26 Defendant testified he was 61 years old and had been the general manager of

Ringling Brothers Circus for the previous 4 1/2 years. He stated his job is "100 percent travel." Prior to his employment with the circus, defendant worked for a truck rental business for five years. Prior to that, he was in the Army National Guard for 20 years.

¶ 27 Defendant testified he is married with four adult children. He is an only child. He had a joint account with Patricia established in 2000. Sometime thereafter, the power of attorney was executed. Patricia's wish was to go to St. Joseph's for her long-term care, and defendant indicated he would take care of it. Defendant stated her insurance was a four-year policy that lasted until March 2009. At the time Patricia entered St. Joseph's, defendant's financial condition was "not very good." In July 2007, defendant agreed to have Patricia's insurance checks sent directly to St. Joseph's because he was not "doing a very good job of managing" the account as payments had been "too sporadic." During a discussion with Morris, defendant told her he could no longer afford the expenses for his mother.

¶ 28 Defendant knew he would need additional funds each month once Patricia's insurance ran out so he found a job with the circus. Defendant testified he used some of the money to pay down his debt and to live on. He stated the sale of Patricia's condominium resulted in \$20,000 in proceeds. He sent \$5,000 to St. Joseph's and put the rest in a stock account.

¶ 29 On cross-examination, defendant testified he transferred money out of Patricia's account into his own to protect the money from being taken by his son. Defendant used money from Patricia's account for his own benefit. He stated that from July 2007 onward, St. Joseph's did not tell him any bills were overdue.

¶ 30 Following closing arguments and during the reading of jury instructions, the trial court believed there was an error in the instructions. The prosecutor agreed, and the court

indicated modifications would need to be made. After the jury left to deliberate and after further discussion, the prosecutor indicated the instructions were correct. The court then stated it would "just send it back to the jury in its current form" and "indicate that no additional instructions need to be modified and they are to consider them as they were read." The court sent a handwritten note to the jury indicating it was "to consider the jury instructions in their *current form and as read in open court*. No further modifications need to be made." (Emphasis in original.). The jury found defendant guilty on both counts.

¶ 31 In January 2012, defendant filed a motion for a new trial, raising issues pertaining to the bill of particulars, the jury instructions, the trial court's note to the jury, and the sufficiency of the State's evidence. In February 2012, the court denied the motion.

¶ 32 The trial court sentenced defendant to two years of probation and ordered him to pay restitution. In March 2012, the court conducted a restitution hearing. In May 2012, the court ordered defendant to pay restitution in the amount of \$41,651.12 to Patricia and \$73,189.61 to St. Joseph's. The court ordered the restitution be paid within five years. In June 2012, the court denied defendant's motion to reconsider. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. Financial Exploitation of the Elderly Statute

¶ 35 Defendant argues the financial exploitation of the elderly statute violates the substantive due-process provisions of the United States and Illinois Constitutions. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. We disagree.

¶ 36 "All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a

constitutional violation. [Citation.] If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity." *People v. Greco*, 204 Ill. 2d 400, 406, 790 N.E.2d 846, 851 (2003). Whether a statute is constitutional involves a question of law, and our review is *de novo*. *People v. McCarty*, 223 Ill. 2d 109, 135, 858 N.E.2d 15, 32 (2006).

¶ 37 "When legislation does not affect a fundamental constitutional right, the test for determining whether it complies with substantive due process requirements is the rational basis test." *People v. Carpenter*, 228 Ill. 2d 250, 267, 888 N.E.2d 105, 116 (2008). "A statute attacked on due-process grounds will be upheld so long as it (1) bears a reasonable relationship to the public interest sought to be protected and (2) the means employed are a reasonable method of achieving the desired objective." *People v. Willner*, 392 Ill. App. 3d 121, 124, 924 N.E.2d 1029, 1031 (2009).

¶ 38 The legislature has broad discretion in establishing penalties for criminal offenses, but the State's police power "is subject to the constitutional requirement that a person may not be deprived of liberty without due process of law." *People v. Reed*, 148 Ill. 2d 1, 11, 591 N.E.2d 455, 459 (1992). Our supreme court has held "a statute violates the due process clauses of both the Illinois and United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." *People v. Madrigal*, 241 Ill. 2d 463, 467, 948 N.E.2d 591, 594 (2011). "Innocent conduct" has been determined to mean "conduct not germane to the harm identified by the legislature, in that the conduct was wholly unrelated to the legislature's purpose in enacting the law." *People v. Hollins*, 2012 IL 112754, ¶ 28, 971 N.E.2d 504, 512.

¶ 39 Section 16-1.3(a) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/16-

1.3(a) (West 2004)) provides, in part, as follows:

"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 *** or illegally uses the assets or resources of an elderly person ***. The illegal use of the assets or resources of an elderly person *** includes, but is not limited to, the misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law."

¶ 40 Defendant argues the offense of financial exploitation of the elderly violates due process because it subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge. While noting the laudable goal of protecting the elderly from theft, defendant contends the purpose and goal of the statute "cannot be to criminalize all aspects of the financial management and control of an elderly person's estate." Under the State's theory, and despite Patricia's intent to allow defendant to control her financial decisions, defendant argues "he became subject to criminal prosecution if those decisions were deemed incorrect." Defendant argues "an intentional decision to defraud must be required and proven."

¶ 41 Defendant cites our supreme court's decision in *Madrigal* in support of his argument. In that case, the supreme court considered the constitutionality of section 16G-5(a)(7)

of the identity theft statute (720 ILCS 5/16G-15(a)(7) (West 2008)). *Madrigal*, 241 Ill. 2d at 466, 948 N.E.2d at 593. Under the identity theft statute, a person will be found to have committed identity theft when he or she knowingly does anything proscribed by the various subsections. 720 ILCS 5/16G-15(a)(1) to (a)(7) (West 2008). The first five subsections required the additional element of criminal intent or knowledge. *Madrigal*, 241 Ill. 2d at 470, 948 N.E.2d at 595. Subsection (a)(7), the subsection that applied in that case, stated a person will be found to have committed identity theft when he knowingly

" 'uses any personal identification information or personal identification document of another for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person, without the prior express permission of that person.' " (Emphasis omitted.) *Madrigal*, 241 Ill. 2d at 470, 948 N.E.2d at 595 (quoting 720 ILCS 5/16G-15(a)(7) (West 2008)).

¶ 42 The supreme court found subsection (a)(7) "clearly does not require criminal intent, criminal knowledge, or a criminal purpose in order to subject one to a felony conviction and punishment." *Madrigal*, 241 Ill. 2d at 470-71, 948 N.E.2d at 596. Without a culpable mental state, subsection (a)(7) could "potentially punish as a felony a wide array of wholly innocent conduct *** [which] could uncover numerous records of actions taken, communications made or received, or other activities or transactions of that person." *Madrigal*, 241 Ill. 2d at 471-72, 948 N.E.2d at 596. Because subsection (a)(7) potentially punished a significant amount of wholly innocent conduct not related to the statute's purpose, the court found it was not a rational

way of addressing the issue of identity theft. *Madrigal*, 241 Ill. 2d at 473, 948 N.E.2d at 597.

¶ 43 In contrast to the identity theft statute, the financial exploitation of the elderly statute requires more than mere knowledge to be found guilty of the offense. The statute requires a defendant knowingly use the assets or resources of an elderly person illegally. 720 ILCS 5/16-1.3(a) (West 2004). The illegal use of the assets can include misappropriation of the assets by a breach of a fiduciary relationship. 720 ILCS 5/16-1.3(a) (West 2004). The statute does not subject wholly innocent conduct to criminal penalty. Had the statute criminalized the knowing possession of an elderly person's assets and nothing else, wholly innocent conduct would be encompassed in the language. Here, however, the statute requires misappropriation of assets.

¶ 44 The General Assembly sought to protect the elderly from breaches of trust and confidence, and defendant fails to establish the statute does not distinguish between "misappropriation" and acts legitimately undertaken through a power of attorney. We find the statute does not deprive defendant of his due-process rights.

¶ 45 B. Motion for a Bill of Particulars

¶ 46 Defendant argues the trial court's denial of his motion for a bill of particulars denied him the ability to prepare and present an appropriate defense. We disagree.

¶ 47 When an indictment fails to specify the particulars of the offense to enable the defendant to prepare his defense, "the court may, on written motion of the defendant, require the State's Attorney to furnish the defendant with a Bill of Particulars." 725 ILCS 5/111-6 (West 2010).

"The purpose of a bill of particulars is to give the defendant notice of the charge and to inform the defendant of the particular transac-

tions in question, thus enabling preparation of a defense. [Citation.] There is no need for a bill of particulars when the indictment sufficiently informs the defendant of the charged offense. [Citation.] A trial court's decision on a motion for a bill of particulars is reviewed for abuse of discretion. [Citation.] An abuse of discretion will be found only when the trial court's decision is arbitrary and no reasonable person would adopt the view of the court."

People v. Woodrum, 223 Ill. 2d 286, 301-02, 860 N.E.2d 259, 270-71 (2006).

¶ 48 According to section 16-1.3(a) of the Criminal Code (720 ILCS 5/16-1.3(a) (West 2004)), 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 *** or illegally uses the assets or resources of an elderly person ***." The illegal use of assets or resources can include "the misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law." 720 ILCS 5/16-1.3(a) (West 2004).

¶ 49 In the case *sub judice*, the original indictment (case No. 08-CF-1261) alleged defendant, standing in a position of trust and confidence with Patricia, a person with a disability, age 83, obtained by deception and misappropriated her property, being United States currency, valued in excess of \$100,000 (count I), \$15,000 (count II), and \$5,000 (count III) between the dates of January 2004 and October 2008. We note the subsequent indictment (case No. 11-CF-

814) dropped the "deception" language, added the words "knowingly obtained and illegally used the assets of Patricia Ford," and centered on two values—\$100,000 (count I) and \$5,000 (count II).

¶ 50 Defendant filed a motion for a bill of particulars, claiming the language "by deception and misappropriated property" are legal conclusions that failed to provide him with specific information to allow him to adequately prepare his defense. Defendant sought an itemized list of Patricia's property obtained by him and the specific deceptive acts employed by him to obtain the property.

¶ 51 The State responded, arguing the indictment sufficiently charged defendant in accordance with the applicable statutory provisions. The State also claimed the discovery tendered specified the means by which Patricia's funds were misappropriated. The State also provided a letter indicating its case centered on the sale of Patricia's condominium and the direct monthly deposits into Patricia's account, the withdrawals from that account, and the corresponding deposits into defendant's account from January 1, 2004, through October 31, 2008. The State included a spreadsheet of "questionable withdrawals/transactions" from 2004 to 2008.

¶ 52 The trial court noted the "voluminous discovery" provided by the State, including 2,000 pages of documentation from St. Joseph's. The court concluded defendant received sufficient notice of the allegations against him and denied the motion for a bill of particulars.

¶ 53 We believe the charges in this case informed defendant of the nature and elements of the charged offense. The charges set forth the name of the victim, the amount allegedly misappropriated, and the time period when the alleged misappropriation took place. Moreover, the State indicated its focus would be on the sale of Patricia's condominium and the withdrawals

from her account and subsequent deposits into defendant's account. Thus, defendant had sufficient notice of the transactions so he could prepare his defense at trial.

¶ 54 Defendant argues the State's charges alleged he misappropriated money over which he had ownership, based on his power of attorney and joint account with Patricia. "[A] presumption of donative intent attendant to survivorship joint tenancies is conclusive unless clear and convincing evidence of a lack of donative intent is shown." *In re Estate of Harms*, 236 Ill. App. 3d 630, 639, 603 N.E.2d 37, 44 (1992). However, a "presumption of fraud attaches to gifts made to one who stands as a fiduciary to the donor." *Harms*, 236 Ill. App. 3d at 639, 603 N.E.2d at 44. This court has noted the conflicting presumptions cancel each other out. *Harms*, 236 Ill. App. 3d at 640, 603 N.E.2d at 44.

¶ 55 Defendant also argues the restitution order exemplified the difficulty he faced in preparing his defense. After a hearing, the trial court found defendant paid \$6,628.08 over and above the funds his mother received in 2005. He was also credited \$242.79 for 2006. Defendant contends he was expending Patricia's funds in an appropriate manner for a minimum of 24 of the alleged 58 months set forth in the charges.

¶ 56 We find defendant's focus on the restitution order irrelevant here. Defendant offered exhibits and testimony at the restitution hearing in an effort to recreate the amounts spent for Patricia's benefit. The trial court noted defendant did not provide this documentation at trial and presumed he did so "so as to avoid possible self-incrimination." Thus, defendant had the information necessary to prepare his defense at trial. Accordingly, the court did not abuse its discretion in denying defendant's motion for a bill of particulars.

¶ 57 C. Jury Instructions

¶ 58 Defendant argues he was denied due process by the jury instructions that failed to fully and fairly explain the applicable law on the offense. We disagree.

¶ 59 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). Generally, the decision to give certain jury instructions rests with the trial court, and that decision will not be reversed on appeal absent an abuse of that discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 150, 919 N.E.2d 843, 872 (2009). However, "the issue of whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936, 939 (2006).

¶ 60 At trial, the trial court instructed the jury that, to sustain the offense of financial exploitation of the elderly, the State had to prove, in part, that defendant knowingly obtained control and illegally used Patricia's assets. The court refused defendant's tendered instruction that the State prove defendant intended to permanently deprive Patricia of the use, benefit, or possession of that property as set forth by Illinois Pattern Jury Instructions, Criminal, No. 13.36 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 13.36). While the statute once required evidence of an intent to permanently deprive the victim, that language was deleted in 2004. See Pub. Act 93-301 § 10 (eff. Jan. 1, 2004) (amending 725 ILCS 5/16-1.3(a)). Defendant argues the court erred in not giving IPI Criminal 4th No. 13.36, which still contains the "intent to permanently deprive" language.

¶ 61 "Where there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction." *People v.*

Hudson, 222 Ill. 2d 392, 400, 856 N.E.2d 1078, 1082 (2006). When a pattern jury instruction has not been revised to track the language of an amended statute, the trial court must use a modified IPI instruction. *Bannister*, 232 Ill. 2d at 83, 902 N.E.2d at 591. Here, the State's non-IPI instruction on the offense of financial exploitation of the elderly paralleled the language of the statute in force at the time of the offenses. Thus, the trial court appropriately instructed the jury on the applicable and current law.

¶ 62 In similar fashion, defendant argues the trial court instructed the jury with a non-IPI instruction that read, "The illegal use of the assets or resources of an elderly person includes, but is not limited to, the misappropriation of those assets or resources or breach of fiduciary relationship." See 720 ILCS 5/16-1.3(a) (West 2004). However, this instruction tracks the language of the applicable statute as well. We find no abuse of discretion.

¶ 63 Defendant argues the trial court erred in including the legal definition of "fiduciary." Defendant's only argument is that "all breaches of fiduciary duty are not crimes." However, defendant has not shown the court instructed the jury that all breaches are criminal. Defendant's argument fails to establish an abuse of discretion on the court's part.

¶ 64 Defendant also argues the trial court erred in refusing to instruct the jury on the legal relationship created by a joint tenancy. We have already noted the presumption of donative intent is canceled out when the purported gift is made to one who stands as a fiduciary to the donor. Defendant failed to show the law provided for a presumption of donative intent each time Patricia's pension and social security funds were credited to their joint account while he was her fiduciary. We find no abuse of discretion.

¶ 65 D. Jury Communication

¶ 66 Defendant argues he was denied due process when the trial court improperly communicated with the jury during deliberations. We disagree.

"A criminal defendant has a constitutional right to appear and participate in person and by counsel at all proceedings involving his substantial rights. [Citations.] A communication between the judge and the jury following the jury's retiring to deliberate, except one held in open court and in the defendant's presence, deprives the defendant of his constitutional rights. [Citations.] A jury verdict, however, will not be set aside where it is apparent that no harm or prejudice resulted from an *ex parte* communication. [Citations.] The State has the burden of proving that any error in the *ex parte* response is harmless beyond a reasonable doubt." *People v. Klinier*, 185 Ill. 2d 81, 162, 705 N.E.2d 850, 890-91 (1998).

¶ 67 At the conclusion of closing arguments, the trial court read the instructions to the jury and observed what it believed was an error in one of those instructions. The court advised the jury it would receive a copy of the instructions after one modification. After the jury had left the courtroom and upon further discussion with the attorneys, the court determined no modification was necessary. The court then stated as follows:

"All right, then. Then we'll just send it back to the jury in its current form and we'll indicate that no additional instructions need to be modified and they are to consider them as they were read."

The prosecutor and defense counsel offered their thanks to the court. A short time later, the court stated it would "prepare a note that the jury is just to consider the instructions in its current form and no modifications were made." Neither counsel responded to that statement. The record shows a handwritten note signed by the judge, which stated as follows:

"The jury is to consider the jury instructions in their *current form and as read in open court*. No further modifications need to be made." (Emphasis in original.)

¶ 68 In his posttrial motion, defendant objected to this "*ex parte*" communication. Defendant argued the note was submitted to the jury without consultation with the State or defendant. At the hearing on the motion, both the prosecutor and defense counsel indicated they were unaware the court sent the note to the jury. The court indicated it took the matter "very seriously" and reviewed the transcript with the attorneys. The court stated it made clear that it was going to indicate to the jury that the instructions would remain in their current form and no modification was necessary.

¶ 69 Initially, we note this is not a situation where a jury sends out a question during deliberations and the trial court offers a response without consulting the attorneys in the presence of the accused. The trial court was clear that it was going to prepare a note that would indicate to the jury that it was to consider the instructions in their current form and no modifications to the instructions read would be made. Defense counsel did not object to this procedure. While the better practice would have been for the court to present the attorneys with the proposed note to determine if anyone objected, the practice utilized here was harmless. The court's written note tracked its oral recitation. We find no prejudice.

¶ 70

E. Sufficiency of the Evidence

¶ 71 Defendant argues the State's evidence failed to establish his guilt of the offense of financial exploitation of the elderly. We disagree.

¶ 72 "When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)).

The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009).

"[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 73 Here, the State was required to prove defendant knowingly misappropriated Patricia's assets through breach of a fiduciary relationship. 720 ILCS 5/16-1.3(a) (West 2004).

"A defendant's mental state is ordinarily proved circumstantially by inferences reasonably drawn from the evidence." *People v. Jones*, 376 Ill. App. 3d 372, 383, 876 N.E.2d 15, 25 (2007).

¶ 74 Sister Judith Morris testified Patricia became a resident at St. Joseph's in March 2005, and the arrangement was for the nursing home to be paid from her long-term care insurance and her social security. The account soon fell behind in payment. Defendant told Morris that payments would be made once Patricia's condominium was sold, but Morris was

unaware the residence was sold and did not receive any money from the sale.

¶ 75 Mary Giesing testified she sent bills to defendant with notations that payment was in arrears. In July 2007, the debt to the nursing home was \$46,000. The long-term care insurance benefits were assigned to the nursing home because defendant had failed to turn over the proceeds each month. The insurance never covered the entire debt.

¶ 76 Rita Gerstung testified defendant and Patricia opened a joint account at Heartland Credit Union in August 2000. The statements showed deposits from Patricia's social security and pension. Defendant opened his own account at Heartland in September 2004. The evidence showed defendant withdrew money from the joint account and deposited it in his own account. The amounts were usually between \$1,700 or \$1,900 and lasted from September 2004 to October 2008. The amounts totaled \$89,384.69 from Patricia's pension and social security that defendant withdrew and placed into his own account. Defendant also deposited \$19,679.50 into his Heartland account in February 2006 after the sale of Patricia's condominium. Susan Jackson testified to the transactions made to the joint account. Shortly after automatic deposits were made, the money would be transferred to defendant's Heartland account.

¶ 77 Defendant testified his financial condition was "not very good" when Patricia entered the nursing home. In July 2007, he agreed to have her insurance checks sent directly to St. Joseph's because his payments had been "too sporadic." Defendant also admitted some of the money in the joint account was used to pay down his debt and also for him to live on. Defendant stated he deposited the \$19,679.50 check from the sale of Patricia's condominium into his own account. Defendant testified he transferred the funds out of the joint account to protect them from his son.

¶ 78 Based on the testimony and evidence, a rational trier of fact could conclude each of defendant's withdrawals from the joint account into his own account, along with the deposit of the condominium sale proceeds into his own account, amounted to the misappropriation of Patricia's assets by a breach of the fiduciary relationship. The jury could have disbelieved defendant's claim that he was trying to protect Patricia's retirement income from his son. Further, the jury could have concluded the withdrawals were not gifts but knowing breaches of the fiduciary relationship benefitting defendant to Patricia's detriment. Accordingly, the jury could have concluded defendant committed the offense of financial exploitation of the elderly beyond a reasonable doubt.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 81 Affirmed.