STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED – MAY 23, 2012)

STATE OF RHODE ISLAND	:	
	:	
v.	:	**Case No. K1-2009-451A**
	:	
JAMES VIEIRA	:	

DECISION

(Regarding Motion to Dismiss the Indictment)

LANPHEAR, J. This matter is before the Court on the Defendant's motion for acquittal pursuant to R.I. Criminal Procedure Rule 29. Specifically, after the State presented its case in chief at a jury-waived trial, Mr. Vieira moved to dismiss the indictment against him.

Mr. Vieira has been indicted on fifteen separate counts. Each count alleges impropriety in financial dealings with Daniel Mooney or Barbara Mooney. The Mooneys were married, and each of them has passed away. The fifteen count indictment focuses on five specific sets of dates and for each of them alleges that Mr. Vieira committed three separate counts: larceny, obtaining money under false pretenses, and embezzlement. The Defendant moved to dismiss each count. In response to the motion, the State 'waived argument' on the false pretenses count, so the Court will now focus on the other counts.

Rule 29(b) is quite succinct, but our Supreme Court has promulgated the standard for its application:

> "In a jury-waived criminal proceeding, a defendant may move to dismiss in order to challenge the legal sufficiency of the evidence." State v. Harris,

871 A.2d 341, 346 (R.I. 2005) (citing State v. Silvia, 798 A.2d 419, 424 (R.I. 2002)). "In ruling on such a motion, the trial justice acts as the fact-finder." Id. (citing State v. McKone, 673 A.2d 1068, 1072 (R.I. 1996)). "In carrying out that task, the trial justice is 'required to weigh and evaluate the trial evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party.'" Id. (quoting McKone, 673 A.2d at 1072-73). "The trial justice must deny the defendant's motion to dismiss if he or she concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt." Id. (citing McKone, 673 A.2d at 1073). State v. Berroa, 6 A.3d 1095, 1099-1100 (R.I. 2010).

1.

Findings of Fact

Accordingly, the Court first makes the following findings of fact for purposes of this motion only.[1]

James Vieira, the Defendant herein, entered into a business relationship with Daniel Mooney and his wife Barbara Mooney to provide bookkeeping and accounting services for them. This relationship existed at least since 1999. Daniel Mooney was a retired officer in the United States Navy, having achieved the rank of Captain.

Captain and Mrs. Mooney lived in Rhode Island and had three adult children. Fred Mooney passed away in 1997. David Mooney lived in Cleveland, Ohio and then South Carolina. Deborah O'Brien lived in Washington D.C. but moved to Rhode Island to be closer to her parents in 1998. Although she commuted to Boston for work, she visited her parents in Hopkinton, Rhode Island each day and prepared dinners for them regularly.

In the summer of 2000, Captain and Mrs. Mooney consulted their attorney, Robert Arsenault, to update their estate documents. Oddly, James Vieira was present for

[1] Given that the trial may not be complete, these facts may be modified at a later point if the evidentiary proceedings continue.

these conferences and the signing of the new documents on August 22, 2000. The wills and trust agreements leave the couples' assets to each other (with some protection from taxation) and then to their descendants. The spouse and children were in control of the estates, being listed as the trustees, executors and attorneys in fact (Exhibits 13-16).

In the spring of 2001, Mrs. Mooney became fearful of Captain Mooney's treatment of her, and told her daughter. By then the couple were well into their eighties. Although Captain Mooney had served as a high ranking naval officer, and in other government capacities, his mathematical abilities were deteriorating by that time, and Mrs. Mooney alleged that the Captain could harm her. Even though a friend, Mr. Morningstar, had been hired to care for the Captain during the day, Mrs. Mooney dropped the Captain off at the Westerly Hospital and contacted Ms. O'Brien at work, indicating she would not care for him any longer. Ms. O'Brien then took the Captain into her own home and eventually began to receive reimbursements for his care from his funds. Mr. Vieira stayed in touch with Mrs. Mooney, and helped her manage her household and take her to appointments.

The Court reasonably infers that this arrangement left Mrs. Mooney more estranged from her family. Daniel Mooney, III was struggling with cancer in South Carolina, and Mrs. Mooney began to separate herself from Deborah O'Brien, even though Ms. O'Brien would visit, help her mother with chores, and share some meals. Although Mr. Vieira would occasionally meet with the Captain or take him to appointments, Mrs. Mooney rarely saw her husband in the year before he died. The Captain passed away in April 2004.

Apparently unbeknownst to other members of her family, Mrs. Mooney signed a general power of attorney in November 2001. Drafted by Attorney Arsenault, this document allowed the Captain or James Vieira to act on her behalf for financial matters. This document was witnessed and notarized by the attorney and was broad in scope. The attorney testified that Mr. Vieira with Mrs. Mooney had first asked for a guardianship for the Captain, but later agreed to the drafting of a power of attorney from Mrs. Mooney. Mrs. Mooney was talkative and becoming more forgetful at this time, but Attorney Arsenault tried to keep her on track. Attorney Arsenault grew to include Mr. Vieira in all of his discussions with Mrs. Mooney. It is noteworthy that the power of attorney was a general power of attorney, very broad in scope, allowing Mr. Vieira or Captain Mooney to act for Mrs. Mooney. Each could act individually and without any limitation, including banking and real estate transactions. The power was infinite in duration and would even survive "my subsequent disability or incompetence."

Also apparently unknown to others in the family, Mr. Vieira began to receive monies from the Mooneys' accounts beginning in September of 2003. In December 2003, $308,693.45 was taken from their joint Merrill Lynch account and placed in a Washington Trust savings account under the names of Barbara Mooney and James Vieira as joint owners. By the time the Captain passed away, over $414,000 had been paid to Mr. Vieira in checks or placed in accounts under his control. Of the twenty-one checks written to Mr. Vieira during this time, all appear to be signed by Barbara Mooney and there is no evidence to suggest that someone forged her very clear signature.

When the Captain passed away, Mrs. Mooney was appointed executrix of his estate. While none of the probate court documents were placed into evidence, the

financial records were still incomplete in 2004, three years after the Captain passed away. In May 2004, Barbara Mooney mentioned to Daniel Mooney III that she did not have enough money to visit him in South Carolina. The surviving children, Daniel Mooney III and Deborah O'Brien, then retained Attorney Stephen Morrissey to investigate the financial status of their father's estate. Learning that Mr. Vieira had received a power of attorney from Mrs. Mooney, Attorney Morrissey also started to investigate Mr. Vieira.

On July 13, 2004, Attorney Morrissey and Daniel Mooney III visited Barbara Mooney at her home.[2] Mother and son talked for about an hour as Mr. Mooney expressed concern about the safety of her assets. Confident that they would investigate the finances and not use her funds, she executed a document so they could investigate her assets as well. The next day a probate hearing was scheduled for Captain Mooney's estate.

Prior to the hearing, a meeting was held on the steps of the courthouse between Attorney Morrissey, Mrs. Mooney, Daniel Mooney III and Mr. Vieira. Mr. Vieira agreed to share all financial documents of the parents with Daniel Mooney III and Attorney Morrissey. Attorney Morrissey then attempted to get the records from Mr. Vieira on several occasions and was repeatedly delayed. Even when Attorney Morrissey contacted the attorney for the estate (Mr. Arsenault), records were promised in exchange for continuing a court hearing, a motion for contempt was filed, and Daniel Mooney III was appointed a co-executor, months passed without records.

In early 2005, Attorney Morrissey contacted Attorney Sheila Cooley concerning the situation, and it was agreed to request a guardianship for Mrs. Mooney. Working together, they petitioned the probate court for relief. Mr. Vieira drove Mrs. Mooney to

[2] By 2004, Mrs. Mooney had companions in her home caring for her. They were paid through Mr. Vieira.

the June 2005 hearing and during the hearing was asked to step out of the room. After the hearing Mr. Vieira could not be located, so Attorney Cooley drove Mrs. Mooney home. The probate court appointed Attorney John Payne as the temporary guardian and then as permanent guardian. Mr. Payne promptly investigated and transferred the remaining accounts to the guardianship. Several checkbook registers were delivered to Mr. Payne by Mr. Vieira after a delay. Mr. Payne soon discovered that $13,000 had been withdrawn in the past ten days, and Mr. Vieira had received about $800,000 from the Mooneys in the past five years. By the end of the summer, Mrs. Mooney was moved to an assisted living facility, and then hospitalized. She passed away several years later.

The State Police later discovered that from July 19, 2001 through June 7, 2006, Mr. Vieira had received $751,535.64 of Captain and Mrs. Mooney's monies. He not only received these monies, but the Court reasonably infers (at this point) from the significant personal properties (including valuable fine art and many EBay boxes in Mr. Vieira's possession at the time), that Mr. Vieira exerted control and used this money as his own.

No money was shown to have been transferred to Mr. Vieira after June 8, 2005, when the temporary guardianship was established for Ms. Mooney. After the summer of 2004, Mr. Vieira received money from Mrs. Mooney, only through the Washington Trust Bank accounts. Mr. Vieira withdrew money from his joint savings account. From her checking account, Mrs. Mooney signed checks that Mr. Vieira used to pay expenses. Exhibit 40.

Dr. Stephen Petteruti treated Mrs. Mooney as her general treating physician, commencing in 2002. In the summer of 2002, he noted that she had some memory problems, noting in particular her declining short-term memory retention. He also

prescribed an antidepressant because of her "family stress." Her short-term memory ability declined further through the period of treatment which ran until mid-2004. While some of Ms. Mooney's forgetfulness is mentioned in Dr. Petteruti's records, it is not until September of 2004 when he weighs the possibility of early Alzheimers, and November of 2004 when he first prescribes Aricept to slow any dementia. His notes from September read:

> She is showing up for hypertension. We also had a chat today discussing memory issues. She is highly functional in her life but has difficulty with short-term memory issues, such as medications that she requires guidance with in order to execute with full accuracy. Otherwise, she is independent in all ADLs [activities of daily living], tolerating medication without side effect. … Memory is actually improved from 2002 to 2003. Suspected then it was a stress element … (Dr. Petteruti's notes of September 9, 2004, Exhibit 19).

In 2005, the Washington Trust Company had noted the significant transactions in the Mooneys' accounts. After several bank officials discussed the situation among themselves, an officer in the Richmond branch asked Mrs. Mooney to stop by. Mrs. Mooney came into the branch with Mr. Vieira. During the conversation Mrs. Mooney talked to the banker about Mr. Vieira being her financial advisor saying "he is the best." It appears that the bank's concerns were resolved when Mr. Vieira indicated they would travel to another bank to check on a transaction.

Again, these facts are made pursuant to the requirement that the Court find facts and make reasonable inferences now, but they are subject to Mr. Vieira's opportunity to present his defense case.

2.

Credibility of Witnesses

The Court found Attorney Stephen Morrissey to be highly credible. Mr. Morrissey had been hired by the Mooneys' children to investigate the improprieties. He not only seemed to have a sharp recollection of the events, he had reviewed his notes. He focused on the questions to be sure he had given a complete and relevant response, while courteous to each examiner. Cross-examination produced more extensive answers, rather than any inconsistencies.

Likewise, the Court found Attorney Sheila Cooley to be highly credible. Ms. Cooley had been contacted by Attorney Morrissey to petition for Mrs. Mooney's guardianship. Ms. Cooley appeared very competent, answered directly, thoroughly, frankly and attempted to be cooperative throughout.

Attorney John Payne was a temporary guardian for Mrs. Mooney and was also very credible. He was thorough, responsive, helpful to the examiners, and answered directly. He did not seem to have reviewed all of his notes of the events and occasionally limited his recollection. He appropriately reflected his dislike of Mr. Vieira's slow, reluctant production of financial information.

Attorney Ann Kain served as guardian ad litem in Mrs. Mooney's guardianship action. Obviously compassionate, she drove Mrs. Mooney to a living facility for a tour, she was thoughtful and direct in her testimony, though she had a limited period of knowledge.

It is noteworthy that each of these attorneys was pleasant, courteous, cooperative and earnest. While they not only assisted Mrs. Mooney at different times, they were also

challenged with a frustrating problem in their search of what was happening to Mrs. Mooney and her funds. As they sought to be helpful to the Court during this trial, it is clear that they were also trying to assist Mrs. Mooney at different times of need. From what the Court can see, they tried to do what was appropriate and right within the bounds of the law and their respective roles, even when faced with contrived disciplinary complaints or the uncooperative, evading Mr. Vieira. While Mr. Vieira may have frustrated their efforts to assist Mrs. Mooney, they tried to do what they could, and served as distinguished, thoughtful professionals in trying circumstances.

The Court found Mr. Robert Derrick to be credible. An art dealer, he sold several items to Mr. Vieira. He appeared to have no direct interest in the outcome of this action. His testimony was simply factual and his area of knowledge was also limited. Nevertheless, he appeared courteous, helpful and frank.

While Attorney Robert Arsenault seemed cooperative and knowledgeable about his area of concentration and several meetings with his clients, his testimony gave the Court pause. The Court is unsure why he would include Mr. Vieira in broad estate-planning discussions (as noted above) and queries why he would represent Mrs. Mooney when she was becoming more adversarial with another client of his, Captain Mooney. When the family was in turmoil and considering a guardianship for Captain Mooney, Attorney Arsenault prepared a power of attorney for Mrs. Mooney without restriction. When challenged, his testimony seemed more self-serving then credible. As he may be recalled if the defense case continues, the Court will refrain from further discussion of his credibility.

Ms. Donna Williams testified as a banker in Mrs. Mooney's local branch. She was descriptive, clear and forthright, seemingly disinterested in Mrs. Mooney's affairs, and quite credible.

Ms. Lori Tellier is a civilian investigator in the Rhode Island State Police Financial Crimes Unit. She factually described the banking transactions and served to authenticate the many documents in evidence. She was highly prepared, thorough, descriptive and knowledgeable of the events. Each of the attorneys used her testimony not to contradict, but to accent different portions of the transactions. Her credibility was never significantly challenged.

Dr. Petteruti was Mrs. Mooney's treating physician. He was sharp, distinguished his answers, and was very clear. He had a precise recollection and was disinterested in Mrs. Mooney's financial affairs. On cross, he remained consistent and thorough and was not impeached. The Court found Dr. Petteruti to be highly credible.

Mr. Michael Canole is an official in the Rhode Island Department of Taxation. He was factual about which returns were filed by Mr. Vieira and for what amounts. There was no reason to question his testimony and seemed very credible.

Ms. Deborah O'Brien is the daughter of Captain and Mrs. Mooney. She was clear, thoughtful and well-spoken on direct but not as cooperative on cross. It was obvious that she returned to Rhode Island out of compassion for her parents, tried to tend to their needs, and watched their relationship falter. Clearly upset that Mr. Vieira took her parents' monies, she remained stern but quite credible throughout cross. Her testimony contained some minor inconsistencies which apparently resulted from her

strong concerns for her mother's welfare and the passage of eight years. Any inconsistencies were only on inconsequential issues.

Mr. Morningstar is a family friend who served as a caretaker for Captain Mooney as his health declined. He was consistent, seemed anxious to be accurate, and demonstrated a good deal of common sense. He had no stake in the outcome of the case. The Court found him quite credible.

Ms. Nobles was a former girlfriend of Mr. Vieira, was not pleased to be testifying, and did not care for Mr. Vieira. She described his purchases and appeared prepared, compliant, and responsive.

Mr. McMullen, a former boyfriend of Mr. Vieira's daughter, was also clear, but more cooperative and pleasant. He also described Mr. Vieira's significant purchases. Ms. Nobles and Mr. McMullen appeared credible, though their testimony is not necessarily helpful to the Court's determination of the case at this juncture.

Former State Police Sergeant Michelle Kershaw testified only to authenticate a document. The Court found her very credible.

Denise Jallow, Mr. Vieira's daughter, testified under a plea of immunity. The Court found her evasive, attempting to avoid any direct answers, and highly protective of her father. As some monies were placed into her name, she may have had a stake in the funds, but testified under a grant of immunity. At sidebar, the Court asked whether her failure to cooperate may revoke her immunity grant. The Court found her biased and less than credible.

3.

Other Issues of Fact

While the Court is readily able to deduce the above-stated findings of fact, it is important to note, at this juncture, certain findings it cannot determine. The Court cannot make findings as to Mrs. Mooney's capacity or incapacity, only the limitations of her short- term memory. Capacity is a far greater issue. Here, no medical records were produced prior to 2002. By then the general power of attorney was executed, and Mr. Vieira had begun to receive significant monies from the Mooneys. The largest financial transfer occurred in December of 2003. According to her physician, in the fall of 2003 Mrs. Mooney failed to recall that she had been injured in a fall, but her memory was refreshed by a visit one month later. In January of 2004, the physician reports that Mrs. Mooney is robust, healthy, "happy and well-adjusted." Hence, the Court concludes that although she has some indicia of dementia, she was coping with it and the issues did not seriously affect her daily routines. Even in June 2004, Dr. Petteruti notes her "memory hanging in there."

Connor v. Schlemmer, 996 A.2d 98, (R.I. 2010) was a civil action requesting that a deed and a will be declared invalid after the grantor's death. After a doctor testified that Ms. Connor was 'pleasantly confused' but had 'testamentary capacity' to understand her affairs, an advisory jury found that Ms. Connor lacked the mind and memory necessary to execute the deed. The trial court disagreed with the jury. Relying on the physician's testimony and finding that the mini-mental state exams were for screening and not diagnosis, he concluded that the plaintiff failed to prove by clear and convincing evidence that the deed was invalid. There was insufficient evidence to prove a lack of

testamentary capacity or proof of undue influence. The High Court affirmed the trial judge. The Connor case demonstrates the significant hurdles in proving a lack of capacity.[3]

Adults are presumed to have the capacity to contract in the absence of probative evidence to the contrary. See Landmark Medical Center v. Gauthier, 635 A.2d 1145, 1148 (R.I. 1994) ("In the absence of probative evidence that shows that [the defendant] was suffering from mental incapacity at the time services were rendered by [the plaintiff], a general allegation of chronic mental illness does not suffice to negate capacity."); see also McAllister v. Schettler, 521 A.2d 617, 621 (Del. Ch. 1986) ("Adults are presumed to have contractual capacity and the burden of proving otherwise rests with the party alleging incapacity."). Hence, without proof of a lack of capacity or competence, it should be presumed that Mrs. Mooney had the capacity to sign a power of attorney, signature card, withdrawal form, check or other contract.

As indicated, the probate and guardianship files for Captain and Mrs. Mooney were not introduced. This makes it challenging for the Court to determine the value of his estate, or if significant underreporting of assets was occurring in Captain Mooney's estate. Presumably, in Mrs. Mooney's guardianship files are a guardian ad litem report,

[3] Although in the context of a will contest, our High Court also spoke of the difference in capacity and personality oddities in other cases:

> The test for testamentary capacity is equally well-settled; all that is required is that, at the time of execution of the will, the testator:
>
> "[1] has sufficient mind and memory to understand the nature of the business he is engaged in when making his will; [2] has a recollection of the property he wishes to dispose of thereby; [3] knows and recalls the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, [and] their necessities[;] and [4] the manner in which he wishes to distribute his property among them." Rynn v. Rynn, 55 R.I. 310, 321, 181 A. 289, 294 (1935).
>
> "Eccentricities, peculiarities and oddities in either speech or behavior, or fixed notions and opinions upon family or financial matters will not render a person incapable of making a will***." Id. Pollard v. Hastings, 862 A.2d 770, 777-778 (R.I. 2004).

and a physician's decision making assessment tool (DMAT) as discussed in R.I.G.L. § 33-15-47, required for Mrs. Mooney's guardianship application. By law, the DMAT "reflects the proposed ward's current level of decision making ability." Sec. 33-15-2(2). Accordingly, the Court will not find or infer that Mrs. Mooney did not have the capacity or the competence to execute the power of attorney, the withdrawal slips or the checks.

Further, the Court cannot find that Mr. Vieira exerted inappropriate influence upon Mrs. Mooney to lead her to sign the general power of attorney, any withdrawal slips or any checks. The Court will not surmise whether the checks were signed in blank or after being written out by Mr. Vieira.[4] The Court should not and will not speculate that Mr. Vieira's influence overcame Mrs. Mooney's free will. Limited evidence was submitted and the State bears a high burden of proof. Apart from Mr. Vieira's continual presence around Mrs. Mooney, hiring an aide for her who was friendly to him, and being at significant, personal legal conferences (apparently with Attorney Arsenault's welcome[5]), there is nothing to demonstrate that Mrs. Mooney was strong-armed or duped by Mr. Vieira.

The Court does not ignore the tremendous amount of influence which Mr. Vieira had over Mrs. Mooney's life. He drove her to appointments with physicians and attorneys, and was included in their discussions. They trusted him, and Mrs. Mooney trusted him. Every time that Attorney Morrissey received Mrs. Mooney's cooperation or did something for her, he received a disciplinary complaint threatening his license.

[4] The authenticity of the checks was never questioned. While the State suggested the checks may have been forged or signed in blank, there was no evidence to establish that claim.

[5] It is puzzling to the Court why the attorney welcomed outsiders into private conferences with Captain and Mrs. Mooney. Estate planning documents and powers of attorneys are obviously important and, an attorney can best be assured that the client is having free discussions and making independent decisions if no one else accompanies them into attorney-client meetings.

While the Court cannot make findings of fact that Mr. Vieira wrote the complaints and had Mrs. Mooney sign them, the Court does find that Mr. Vieira took advantage of Mrs. Mooney and benefited by three quarters of a million dollars over four years. Undaunted, he purchased personal items for himself and failed to report this money as income. The Court finds that this conduct is abhorrent, deplorable, shameful, and takes advantage of some of the most hapless victims in our society. This conduct continued over years, through various transactions. Here, the conduct not only diverted the Mooney wealth, the Court finds that it assisted in tearing apart a family at a time when it deserved empathy from a family friend, not underhanded chicanery.

Whether this conduct was criminal and whether the State has met its burden for its case in chief is another matter, which is discussed more at length.

4.

Applicable Standard

Pending before the Court is Mr. Vieira's motion to dismiss, after the State has presented its case at a non-jury proceeding. State v. Berroa, supra, p. 1, set forth above, reflects the standard to be applied. Our High Court has consistently explained this Court's obligations for deciding this motion in a non-jury proceeding:

> [I]n a criminal case tried ***without*** **a jury** (such as the present case), the standards to be adhered to by the trial justice in evaluating a motion to dismiss differ markedly from those summarized in the preceding paragraph. In fulfilling his or her role as the fact-finder, the trial justice must
>
> > "weigh and evaluate the trial evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party. After so doing, if the trial justice * * * concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt, he or she denies the

> defendant's motion to dismiss and, if both sides have rested, enters decision and judgment of conviction thereon. If the evidence is not so sufficient, he or she grants the motion and dismisses the case."
> State v. Forand 958 A.2d 134, 140-141 (R.I. 2008), citing State v. McKone, 673 A.2d 1068 (R.I. 1996).

Armed with this guide, the Court must consider the evidences and draw reasonable inferences to determine if there is a sufficient basis for the case to proceed. This Court will review each count in turn.

5.

The Pending Charges[6]

A

Embezzlement and Fraudulent Conversion

Counts 3, 6, 9, 12, and 15 of the indictment charge Mr. Vieira with embezzlement and fraudulent conversion. The criminal statute states, in part:

> **Embezzlement and fraudulent conversion.**-- Every . . . person to whom any money or other property shall be entrusted for any specific purpose, and every person acting as . . . custodian, or trustee appointed by order, decree or judgment of court, or by deed, will or other instrument in writing, who shall embezzle or fraudulently convert to his or her own use, or who shall take or secrete, with intent to embezzle or fraudulently convert to his or her own use, any money or other property which shall have come into his or her possession or shall be under his or her care or charge by virtue of his or her employment or for that specific purpose or by virtue of his or her acting as . . . custodian, or trustee, . . . shall be deemed guilty of larceny . . . R.I. Gen. Laws § 11-41-3.

The statute initially focuses upon the need to show how the defendant was *entrusted with the property for a specific purpose*, as if in a fiduciary capacity or as an employee of a

[6] The Court will only address the charges pending before the Court. It is important to note that while Mr. Canole's testimony was appreciated, this is not an action for failure to pay taxes. It is not a charge for conducting an unlawful state enterprise under R.I.G.L. ch. 7-15. Such charges are not pending. The Court analyzes the case solely on the charges contained in the pending indictment.

business handling the business' funds. Here, there was no written trust or order of a court appointing Mr. Vieira to hold Captain and Mrs. Mooney's assets for a particular purpose. Recent Supreme Court decisions have focused on this issue, outlining the necessary elements:

> (1) That defendant was entrusted with the property for a specific use, (2) that he came into possession of the property in a lawful manner, often as a result of his employment, and (3) that defendant intended to appropriate and convert the property to his own use and permanently deprive that person of the use. State v. Lough, 899 A.2d 468, 470-471 (R.I. 2006); State v. Oliveira, 432 A.2d 664, 666 (R.I. 1981).

Rather than showing Defendant was *entrusted* with the Mooneys' funds for a specific purpose, Mr. Vieira was given a very broad document, a general power of attorney. The document followed a statutory form, but none of the potential limitations were checked off. Generally, a power gives someone else the authority to act as the other:

> It is a longstanding legal principle that a duly authorized agent has the power to act and bind the principal to the same extent as if the principal acted. A power of attorney provides the agent with all the rights and responsibilities of the principal as outlined in the agreement. In effect, the agent stands in the shoes of the principal. In re Estate of Capuzzi, 470 Mich. 399, 402, 684 N.W.2d 677, 679 (Mich. 2004), citations omitted.

None of the limitations contained in the statutory form were checked off. The power was durable as it remained in effect even if Mrs. Mooney was disabled or incompetent. Clearly, this document was a powerful creature.

With the potential power to make gifts to the agent himself, the general power of attorney is also quite dangerous. As the Fourth Circuit Court of Appeals has stated:

> When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney—of which outright transfers for less than value to the attorney-in-

> fact herself are the most obvious—the justification for such a flat rule is apparent. . . .
>
> Limiting authority to the letter of an instructing document is, of course, most easily and confidently done by courts where the instrument is a formal and comprehensive one, with carefully enumerated specific powers. In such cases, as the quoted *Restatement of Agency* comment indicates, courts may indulge the ingoing assumption that the document "represents the entire understanding of the parties," and specifically that the failure to enumerate a specific power, particularly one with the dangerous implications of a power to make unrestricted gifts of the principal's assets, reflects deliberate intention. Estate of Casey v. C.I.R., 948 F.2d 895, 898-899 (C.A. 4, 1991).

There is considerable risk created by a person who executes such a broad-based power of attorney.[7]

Because of the power of attorney, and Mrs. Mooney's apparent signature on the checks and withdrawal documents, this Court is prevented from concluding that Mr. Vieira was taking the money without authorization. Rather, it appears that he was authorized to do so by the documents that Mrs. Mooney signed. There was no trust agreement, and no requirement that all monies be held segregated in a special place or used for a specific thing.

Establishment of lawful possession of the property in an embezzlement case distinguishes the crime from other larceny crimes, where the property is not held in a position of trust. Here, there was no direct showing that Mr. Vieira came into possession of the monies for a specific purpose. From that element flows the other elements: that the Defendant came into possession of the property lawfully and that the Defendant intended to permanently deprive. Each of the elements focuses on the premise of the

[7] But see also Pearson v. Bozyan, 86 R.I. 311, 324-325, 134 A.2d 387 (R.I. 1957) (finding that gifts made after the testator lost his mental capacity were per se invalid, and so plaintiffs need not prove undue influence for those instruments).

crime that the crime occurred after the Defendant already had possession of the property. As Justice Kelleher once pronounced:

> The basic distinction between the two offenses [larceny and embezzlement] is that in embezzlement the property comes lawfully into the possession of the offender while in larceny the offender, instead of initially having lawful possession of the property, takes it unlawfully in the first instance thereby committing a trespass against the other's possession. 2 Wharton, Criminal Law & Procedures 508 at 182 (Anderson ed. 1957). State v. Crescenzo, 114 R.I. 242, 250, 332 A.2d 421, 427 (R.I. 1975).

It is, of course, easy to note that Mr. Vieira was in a close relationship with Mrs. Mooney. By all indications she trusted him, and grew to rely on him more when she was drifting away from the remainder of her family. Through his business relationship with Captain and Mrs. Mooney as a bookkeeper, he grew to be in charge of her caretakers, act as her driver and entrust himself to her as a legal and financial adviser. It is easy to presume that he took advantage of the relationship, particularly when he bragged to his friends as she grew more and more infirm.

Here, however, there is little evidence of their relationship—we simply don't know whether Mrs. Mooney was seeking to transfer some assets to him as a gift or to ensure that she would be allowed to reside independently in her home. She may have simply desired to live independently, or be appreciative of Mr. Vieira's regular attention to her and management of her affairs. She even discharged her husband from their home in early 2001. While each of us may have our suspicions about what was really going on, Mr. Vieira has been indicted in this criminal action. Therefore, the State is obligated to prove its case against him by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 362, 90 S. Ct. 1068, 1071 (U.S.N.Y. 1970). Handicapped by its inability to call

either the late Mrs. Mooney or the Defendant, the State has failed to meet its burden on the embezzlement and fraudulent conversion charges.

B

Obtaining Money under False Pretenses

Counts 2, 5, 8, 11, 14 of the indictment charge Mr. Vieira with obtaining money under false pretenses. The State waived argument on the motion to dismiss, yet the Court is obligated to address the vitality of these counts.

This crime is distinguished by the method in which the Defendant first came into possession of the property, that is, the State must show that Defendant obtained the money by design and with a false pretense, with the intent to cheat and defraud. Sec. 11-41-4. A recent Supreme Court decision underscores the importance of establishing the defendant's intent to cheat and defraud at the time of the taking:

> "[T]he crime is complete when the defendant intentionally uses false pretenses to induce another to alter or terminate any of that person's rights or powers concerning the money or property with the intent to cheat or defraud that person." State v. Fiorenzano, 690 A.2d 857, 859 (R.I. 1997). This Court has defined an intent to defraud as "an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate [that other person's] * * * right, obligation or power with reference to property." Id. (quoting State v. LaRoche, 683 A.2d 989, 996 (R.I. 1996)). Such intent can be inferred, and the only relevant time period is when the victim is "induced to part with his money or property." Id. at 860 (quoting [State v.] Aurgemma, 116 R.I. at 429-30, 358 A.2d at 49). An innocent or negligent misrepresentation is insufficient to convict; the defendant must intend to defraud. Id. State v. Letts, 986 A2d 1012 (R.I. 2010).

Here, Captain and Mrs. Mooney parted with their money over a period of several years. It is simply unclear when, or even if, Mr. Vieira intended to cheat or defraud. While there were questions about the writing on the withdrawal slips, checks and disciplinary

complaints, there was no expert handwriting witness, and the Court cannot infer a forgery. There was simply no showing of a design or scheme. Rather, it appears almost as probable that Mr. Vieira began by writing out checks to pay the Mooneys' bills, then arranged for regular payments to Ms. O'Brien to pay for Captain Mooney's bills, and then gradually received more and more money from Mrs. Mooney. Without any showing that the 2001 power of attorney or the December 2003 joint account opening were done with false pretenses or fraud, the State is hamstrung in proving these counts. In short, the high standard of proof for the charges of obtaining money under false pretenses has not been shown by the State.

C

Larceny

The criminal statute succinctly states:

> **Stealing as larceny**--Every person who shall steal any money, goods, or chattels, . . . , any bank bill, any certificate of any bank . . . bond, warrant, obligation, bill, or promissory note for the payment of money, or other valuable property, . . . , or any book or part of one containing an account, any receipt for money or other article paid or delivered, any adjustment or document of any kind relating to the payment of money or delivery of any article, any indenture of apprenticeship, . . . , shall be deemed guilty of larceny. R.I. Gen. Laws § 11-41-1.

Accordingly, the State must establish that the Defendant took and stole property or money, that the taking was from another person, and the Defendant did so with the specific intent of wholly and permanently depriving the owner of the property or money. The State must also establish that the property was worth over $500 to sustain a finding of felonious larceny. "Larceny is essentially a wrongful taking without right and a carrying away of another's personal property with a felonious intent to steal. State v.

Briggs, 787 A.2d 479, 487 (R.I. 2001), citations omitted. The State must therefore show, primarily, that Mr. Vieira stole and intended to steal.

Indeed, the State successfully established that Mr. Vieira received monies and that the monies were originally held by Captain and Mrs. Mooney. Apart from the limited sums designated as expenses, the monies appear to have gone to Mr. Vieira's benefit. It is the taking and stealing which stymies the State's case. As described above, while Mr. Vieira received the funds, it is not clear why, or even when. He was given a power of attorney for Mrs. Mooney's affairs, and his name was even listed as an owner of a joint account. He had a regular relationship with her. It is unclear if he received this money fraudulently, or if she knew about the payments and consented to them. There is no showing at all that she was concerned about the dwindling of her estate, except that she mentioned to her son in the summer of 2004 that she had insufficient funds to travel to see him. While it is possible that it was larceny, it was also possible that Mrs. Mooney intended her funds to be distributed to Mr. Vieira, as a gift, for estate planning, or in payment for his attention to her needs. It is simply unclear whether Mrs. Mooney consented or what she intended.

It is also unclear what Mr. Vieira's intent was. It is unknown if he had developed a plan to remove the money from Mrs. Mooney's possession without her knowing of it, by duping her, or with her full consent. Given the above-described facts,[8] it would be unreasonable to make such a broad inference. Our High Court has found it reasonable to infer that

> an unexplained, unlawful breaking and entering into a dwelling or building containing personal property during the nighttime raises an

[8] Mrs. Mooney signed checks to Mr. Vieira, opened a joint account with him, signed a power of attorney to him, and even called upon him when she received a telephone call from a bank employee.

> inference that the illegal entry was made with the intent to commit larceny. . . . This inference is based upon the common experiences of man, which recognize that people usually do not engage in this type of behavior with an innocent intent and that ordinarily the intent in such instances is to steal. State v. Johnson, 116 R.I. 449, 454-455, 358 A.2d 370, 373-374 (R.I. 1976).

It is easy to be critical of one who comes into possession of an elderly woman's funds and then makes more EBay purchases than he is capable of storing, but such conduct cannot lead a finder of fact to presume malice or intent to steal. In light of the facts established, and the proof submitted in this action, it cannot be reasonably inferred that Mr. Vieira had the intent to steal. Without some showing of Mr. Vieira's intent, or that his actions were wrongful at the time, the State has failed to establish "a wrongful taking without right and a carrying away of another's personal property with a felonious intent to steal." State v. Holley, 604 A.2d 772 (R.I. 1992) citing State v. Smith, 56 R.I. 168, 184 A. 494 (1936).

No money was shown to have been transferred to Mr. Vieira after June 8, 2005, when the temporary guardianship was established for Mrs. Mooney. Therefore, particular scrutiny is required for the period when Mrs. Mooney may have been infirm, September 9, 2004 to June of 2005.

By the summer of 2004, Mr. Vieira was receiving monies in only two ways: withdrawals from the Washington Trust Bank savings account and receiving checks from the Washington Trust Bank checking account. He had received a general, durable power of attorney from Mrs. Mooney years earlier. Starting in 2003, he was a joint owner of the savings account and therefore, an owner of the money he was withdrawing. Robinson v. Delfino, 710 A.2d 154, 161 (R.I. 1998) ("the opening of a joint bank account [with]

survivorship rights . . . is conclusive evidence of the intent to transfer to the survivor an immediate . . . ownership right").

After September 9, 2004, only eight checks were paid to Mr. Vieira from the Washington Trust checking account, totaling $2602.60. In Exhibit 40, the State detailed how each of these checks was tied to a specific expense, such as postage stamps or purchasing a vacuum cleaner. Mrs. Mooney signed each of these checks.

Accordingly, the State was unable to meet its burden in establishing any larceny by Mr. Vieira.

6.

Conclusion

The Court can easily find, from an abundance of reliable evidence, that Mr. Vieira systematically received $751,535.64 of Barbara Mooney's monies. The checks and withdrawals to the benefit of Mr. Vieira were done over four years in about one hundred separate transactions. The State sufficiently established that the money flowed through five different financial institutions, winding its way through various brokerage, savings and checking accounts to Mr. Vieira. Some of the transactions were large and bold—such as a transfer of over $300,000 from a Merrill Lynch account held by Captain and Mrs. Mooney into a joint account held by Mrs. Mooney and Mr. Vieira.[9]

The State did not demonstrate, by proof beyond a reasonable doubt, that the transfers were done without Mrs. Mooney's consent or through undue influence. It is disheartening that Mr. Vieira received Captain and Mrs. Mooney's confidence and literally paid himself with their funds. While the State was handcuffed in presenting some proof (the victims were elderly with dementia concerns and deceased before trial),

[9] All subsequent withdrawals from this account were made by Mr. Vieira.

this case reminds us all of the challenges in protecting our elders. While all defendants are, of course, entitled to a presumption of innocence unless proof beyond a reasonable doubt is presented,[10] our Legislature continues to strive to protect the less fortunate in our society.

As the State was unable to sufficiently establish larceny, embezzlement or obtaining money by false pretenses, the Defendant's motion to dismiss is granted. Judgment shall enter for the Defendant on all counts.

[10] A lower burden of proof would apply in a civil case, which is not presently before this Court.