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JURISDICTIONAL STATEMENT

Linda adopts and incorporates by reference the jurisdictional statement from her opening brief.

STATEMENT OF FACTS

Linda adopts and incorporates by reference the Statement of Facts from her opening brief. Footnote 12 of Respondent's Substitute Brief states, "A large portion of Defendant's Statement of Facts relies on Defendant's version of events, which was rejected by the jury and is in contravention of the standard of review." (Sub. Resp. Brf. at 32).

However, Linda's version of events is in the statement of facts because it is certainly relevant as to issues other than sufficiency of the evidence in determining whether other trial errors were prejudicial. Linda's defense is an important matter in this Court's determination of prejudice. *See State v. Banks*, 215 S.W.3d 118, 122 (Mo. banc 2007) ("Although in addressing the sufficiency of the evidence this Court views the evidence in the light most favorable to the State . . . it does not do so when evaluating the potential prejudice of trial error.") (citations omitted).

ARGUMENT

I. (Sufficiency of the Evidence)

A. The information filed by the State charged Linda with committing omissions and not acts.

The State argues in its Substitute Respondent's Brief that Linda's conviction was based upon voluntary acts and not omissions. (Sub. Resp. Brf. at 36-39). In making this argument, the State cites to various facts that came out at trial. However, whether these facts are best characterized as acts or omissions is irrelevant because Linda was never *charged* with committing an act.

The fifth amended information states that Linda "knowingly caused serious physical injury to Lorraine Gargus by leaving her on her bed for long periods of time in unsanitary, rodent-infested conditions, causing the [sic] her to develop gangrenous decubitus ulcers and injuries from animal bites." (LF 131). Each supposed act listed by the State is therefore irrelevant because the State is required to prove the elements of the offense it charged, not the one it might have charged." *State v. Miller*, 372 S.W.3d 455, 467 (Mo. banc 2012), citing *State v. Payne*, 250 S.W.3d 815, 818, n. 3 (Mo. App. W.D. 2008); *State v. Price*, 980 S.W.2d 143, 144 (Mo. App. E.D. 1998); *State v. Keeler*, 856 S.W.2d 928, 929 (Mo. App. S.D. 1993); *State v. Palmer*, 822 S.W.2d 536, 541 (Mo. App. S.D. 1992); and *State v. Edsall*, 781 S.W.2d 561, 564 (Mo. App. S.D. 1989).

Furthermore, the State's argument on appeal ignores that it conceded at trial that the information "contained only omissions, which is the theory of the State's case." (Tr. IV at 5). Because of this concession, and because Linda was never charged with

committing an act, this Court should reject the State's argument on appeal that Linda's conviction can be affirmed based on the notion that a juror could infer a voluntary act. (Sub. Rsp. Brf. at 39).

B. The General Assembly did not intend for the entirety of the Restatement (Second) of Torts to apply to criminal law.

In her initial brief, Linda argued based on the commentary to section 562.011 that for the State to show she breached a legal duty, the State was required to show she voluntarily assumed care of her mother, and that she "so secluded [her mother] as to prevent others from rendering aid." (Sub. App. Brf. at 29-30), quoting *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962). The State contends that it was not required to show seclusion because there is no reference to seclusion in the Restatement (Second) of Torts § 324. (Sub. Rsp. Brf. at 43, n. 14).

Counsel for Linda has been unable to find a single Missouri case that has applied the duties contained in the Restatement (Second) of Torts to criminal law. Furthermore, the State has cited no such case. Instead, the State asks this Court for the first time to apply the duties contained in the Restatement (Second) of Torts to Linda's case. (Rsp. Brf. 50).¹

¹ Notably, the State did not rely upon or even mention the Restatement (Second) of Torts at trial.

However, there is no indication the General Assembly intended for all of the duties contained in the Restatement (Second) of Torts to apply criminal offenses. Section 562.011 states that “[a] person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law.” Though it is true that the phrase “otherwise imposed by law” could theoretically be read to include the entirety of the Restatement (Second) of Torts, the official comment to § 562.011 shows this is not what the General Assembly intended. *See Groppe Co. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 57 n. 7 (Mo. App. E.D. 1981)(“Official Comments to uniform laws adopted by the legislature, though not controlling, are a persuasive aid in determining legislative intent.”), citing *Mamouljian v. St. Louis Univ.*, 732 S.W.2d 512, 516 (Mo. banc 1987).

The commentary to Section 562.011 shows the legislature found criminal liability by omission to be “difficult” from an “analytical point of view.” The General Assembly stated that “[a] concise summary of the ‘law’” could be found in *Jones v. United States*, 308 F.2d at 310. Section 562.011, Comment to 1973 Proposed Code, Subsection 4. As discussed in Linda’s initial brief, the only situation listed in *Jones* which could apply in the present case is “where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.” (App. Brf. 29).

The General Assembly did not cite or allude to the Restatement (Second) of Torts in its comment. This is significant since the *Jones* opinion was issued in 1962 and the Restatement (Second) of Torts was published in 1965. Therefore, both were available to the General Assembly when they wrote the comment in 1973. Furthermore, the

Restatement (Second) of Torts was not unknown by 1973. In fact, this Court had adopted section 323 of the Restatement (Second) of Torts in 1969 in *Stanturf v. Sipes*, 447 S.W.2d 558, 561 (Mo. 1969). Had the General Assembly meant for each duty listed in the Restatement (Second) of torts to be an act “imposed by law” for the purposes of committing a criminal offense, it would have stated so. By citing to *Jones* instead of the Restatement, the General Assembly was rejecting the Restatement’s application to criminal law.

Furthermore, the General Assembly wrote a comment to § 556.026 in the same year it wrote its comment to § 562.011. Section 556.026 states that “[n]o conduct constitutes an offense unless made so by this code or by other applicable statute.” The comment to this statute states that “the idea of the unwritten offense is repugnant to the concept of fair warning.” Section 556.026, Comment to 1973 Proposed Code.

The State suggests that the Restatement (Second) of Torts should be applicable to the criminal code despite the fact that neither § 562.011 nor its comment mention the Restatement. However, it would be illogical to conclude the General Assembly meant for this to be the result of § 562.011 when it was decrying the use of “unwritten offense[s]” at the same time. This Court should therefore reject the State’s argument that each method for incurring civil liability under the Restatement (Second) of Torts constitutes a duty to act under the criminal law.

The State also implies that the duties contained in the Restatement (Second) of Torts should be applicable to criminal offense because of § 1.010. (Sub. Rsp. Brf. at 36). However, this section is inapplicable because it only adopts the common law of England

that existed at that time. Section 1.010 does not mention adopting later advances in the law such as the Restatement (Second) of Torts.

New Jersey similarly has a statute outlining when a person can be held criminally liable for an omission. *N.J.S.A. 2C:2-1* states:

- b. liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
 - (1) The omission is expressly made sufficient by the law defining the offense;
or
 - (2) A duty to perform the omitted act is otherwise imposed by law, including but not limited to, laws such as the “Uniform Fire Safety Act,” . . . the “State Uniform Construction Code Act,” . . . or any other law intended to protect the public safety or any rule or regulation promulgated thereunder.

This statute was discussed in *State v. Lisa*, 919 A.2d 145 (App. Div. 2007). In that case, the defendant was charged with second-degree reckless manslaughter. *Id.* at 146. The State alleged that the defendant had a duty to provide emergency medical care for the victim, that he failed to provide that duty, and that this failure was the cause of the victim’s death. *Id.* at 150. The State based its grand jury instructions on several provisions of the Restatement (Second) of Torts, including §§ 314, 314A, 321, 322, and 324. *Id.* at 156-57. The defendant filed a motion to dismiss, alleging the State’s charge to the grant jury was legally deficient. *Id.* at 150.

The Superior Court determined the phrase “otherwise imposed by law” in *N.J.S.A. 2C:2-1b(2)* *could* include civil common law principles. *Id.* at 153. However, the Court

also stated that “notice” is a requirement of due process, and that “[a]s applied to the criminal law, the principle requires that ‘criminal statutes should be clear and understandable in order to achieve two goals: notice of illegality and clear standards for enforcement.’” *Id.* at 159-60 (citation and modification omitted). The Court stated, “[a]gainst this background, we conclude that *N.J.S.A. 2C:2-1b(2)*, to the extent that it seeks to incorporate principles derived from civil common law, does not provide sufficient notice to satisfy prevailing standards of constitutionally adequate procedural due process.” *Id.* at 160. The Court concluded that the principles from the sections of the Restatement (Second) of Torts cited by the State had not been unequivocally adopted in New Jersey. *Id.* However, the Court also stated that even if these principles had been adopted, they still could not be “imported into the criminal law.” *Id.* The Court stated:

But it stretches that fiction too far to put a defendant on notice that the prohibition against his conduct is to be found in emanations from a scholarly treatise that has never made its way into New Jersey substantive criminal law, and perhaps not into our civil law either. We fail to see how these civil common law principles could provide adequate notice to justify a criminal charge. A duty of care, upon which a duty to act is premised, must be so firmly established as to be beyond controversy or dispute if it is to provide presumed notice. In this case, the duty charged to the grand jury was based on amorphous concepts of the Restatement, as reflected in some civil cases, and thereby failed the fundamental test of due process notice. As his attorney argued, defendant could not have fairly “been on notice that that was the law on that evening.” It is not sufficient that defendant might be held civilly

accountable for A.R.'s death. It is his criminal responsibility that is at issue and different rules guide that determination.

Id. at 160-161 (footnote omitted). The Court therefore dismissed the indictment against the defendant. *Id.* at 161. The Supreme Court of New Jersey affirmed the Superior Court's opinion with little additional analysis in *State v. Lisa*, 945 A.2d 690 (2008).

This Court should adopt the reasoning of the New Jersey Superior Court and find that the civil duties found in the Restatement (Second) of Torts cannot be used to provide a duty to perform an omitted act for the purposes of criminal law. This is especially apparent in the present case when not even the State at trial thought to find Linda's duty to act in the Restatement (Second) of Torts. Because the comment to § 562.011 indicates the General Assembly did not intend for each duty found in the Restatement (Second) of Torts to give rise to a duty to act in the criminal law, this Court should reject the State's argument that it was not required to prove that Linda "so secluded [her mother] as to prevent others from rendering aid." *Jones v. United States*, 308 F.2d at 310.

C. Even if provisions from the Restatement (Second) of Torts *do* provide a duty to act in the criminal law, none of the provisions listed by the State provide a basis for affirming Linda's conviction.

The State argues that two different provisions of the Restatement (Second) of Torts are applicable in the present case. However, neither § 321 nor § 324 provide a basis to affirm Linda's conviction.

The State first relies on Restatement (Second) of Torts, § 321 to argue that Linda had a duty to act under the law in the present case. (Sub. Resp. Brf. at 35, 51, 54). This section states:

(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

This section is inapposite, though, because it requires an overt act on the part of the defendant. As stated previously, the State conceded in the present case that the information “contained only omissions, which is the theory of the State’s case.” (Tr. IV at 5). Furthermore, the verdict directed in the present case did not require the jury to find that Linda did an act or that she should have known the act created an unreasonable risk of causing physical harm to another. Linda’s conviction therefore cannot be affirmed under § 321.

Next, the State relies on Restatement (Second) of Torts, § 324. (Sub. Resp. Brf. at 42, 47, 49, 50, 60). This section states:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

The State cannot rely on this section to affirm Linda's conviction because it does not appear that Missouri courts have explicitly adopted it. The State seems to acknowledge this, but asks this Court to "apply the language of Section 324 of the Restatement (Second) of Torts" because comment "a" to § 323 (which this Court has adopted) states that § 324 is a special application of that rule. (Sub. Resp. Brf. at 50).

However, § 324 is different from § 323 because it applies to helping others who are helpless at the time aid is rendered. It would be reasonable, though, to adopt § 323 yet to reject § 324 because exposing a rescuer in an emergency to civil and criminal liability would actually discourage others from attempting a rescue. *See James R. Adams, From Babel to Reason: An Examination of the Duty Issue*, 31 MCGEORGE L. REV. 25, 56-57 (1999) ("In fact, an effort to render aid is discouraged by the rule that once one assists another, a duty to exercise ordinary care is created.").

Furthermore, as the General Assembly stated in its Comment to § 556.026, "the idea of the unwritten offense is repugnant to the concept of fair warning." Here, the State is asking this Court to apply a concept from the Restatement (Second) of Torts in a criminal matter when it has never been applied before even in a Missouri civil case. This is especially "repugnant" in the present case because the State did not rely on the Restatement (Second) of torts at trial, but instead only raised it for the first time on appeal.

Also, even if this Court applies § 324 to the present case, the evidence was insufficient to support it. Section 324 requires the State to show the victim is “helpless adequately to aid or protect [herself].” The State did not prove Lorraine was in such a state. The State, for instance, admits in its brief that Lorraine was able to tell the emergency personnel that her “butt was on fire,” and that her “rectum was burning.” (Sub. Rsp. Brf. at 22). The State also admits that Lorraine was “very compliant” at the hospital, and that she was “asking for help.” (Sub. Rsp. Brf. at 25). This is simply not the picture of someone who is “helpless adequately to aid or protect [herself].” The State did not prove that Lorraine was unable to call emergency personnel herself during the time when her bedsores were growing larger in size.

Furthermore, the verdict director in the present case did not require the jury to find that Lorraine was “helpless adequately to aid or protect [herself].” Instead, the verdict director only required the Jury to find that Lorraine was “unable to meet her physical and medical needs.” (LF168). The language from the verdict director does not match the language from the restatement. While Lorraine was “unable to meet her physical and medical needs,” the State failed to prove that she was also unable to adequately able to aid or protect herself. Linda’s conviction therefore cannot be affirmed under § 324.

D. The State did not prove the Linda secluded her mother so as to prevent others from rendering aid.

The State argues that it presented sufficient evidence to show that Linda secluded her mother so as to prevent others from rendering aid. The State relies on four arguments:

first, that Linda discouraged relatives from visiting Lorraine's home after her husband's funeral; next, that Linda placed a blanket over Lorraine wounds when others visited; next, that Linda refused Ms. Hickman's offer of assistance; and finally, that Linda secluded Lorraine by not taking her to the doctor. (Sub. Resp. Brf. at 47-48). However, none of these arguments support the idea that Linda secluded her mother so as to prevent others from rendering aid.

As to the funeral, it is true that Linda told family members at the funeral that she would rather they not visit. (Tr. VII at 70-71). However, the State admits that Sylvia Winger, one of Lorraine's granddaughters *did* come to visit Lorraine with her children the day of the funeral. (Sub. Resp. Brf. at 21), citing (Tr. IX at 102-103). Since people actually did come to the trailer the day of the funeral, Linda therefore did not "seclude" others from reaching Lorraine. Furthermore, Cindy Hickman visited Lorraine in the spring of 2009, and on February 2, 2010 with her two children and she did not see any reason for Lorraine to go to a doctor, and she never expressed any concern about Lorraine's health. (Tr. VII at 50, 56, 86). Ms. Hickman admitted that she was allowed to drop by anytime she wanted. (Tr. VII at 50-51, 80). Linda therefore did not seclude her mother so as to prevent others from rendering aid.

As to the blanket, this is blind speculation on the part of the State. The relevant events in the present case took place in a trailer in January and February. The emergency personnel testified that the day Linda called them to help with Lorraine, "there was a lot of snow and things on the ground that day." (Tr. VI at 165). It is therefore unsurprising that a person lying in a bed would be covered with a blanket. This "Court may 'not

supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.” *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001), citing *Bauby v. Lake*, 995 S.W.2d 10, 13 n. 1 (Mo. App. E.D. 1999). Any notion that Lorraine was covered with a blanket to prevent others from viewing her condition would be based upon unreasonable speculation.

As to refusing Ms. Hickman’s offer to help with the grandparents, it is true that Ms. Hickman offered assistance to Linda in helping with them. (TR VII at 54). This is inapposite, though, first because Ms. Hickman never actually refused the help. Instead, “[s]he didn’t say anything. She didn’t say, ‘yes,’ she didn’t say, ‘no.’ She didn’t give any response.” (TR VII at 55). Next, failing to accept help is by no means the equivalent of secluding others from providing aid. If Ms. Hickman had actually attempted to give aid, and Linda prevented her from doing so, this would be a different situation. Ms. Hickman, though, never actually attempted to give aid, despite visiting Lorraine and being able to come by whenever she wanted to. (Tr. VII at 50-51, 80).

As to not taking Lorraine to the doctor, this is certainly not evidence that Linda secluded her. Maybe this would be true had Linda moved Lorraine to a secluded area. However, the State admits that Lorraine had been bedridden since 2005, and that Linda did not move into Lorraine’s trailer until 2008. (Sub. Rsp. Brf. at 9-10). Therefore, simply leaving Lorraine in the trailer, where she would have remained had Linda not been present, is not evidence that Linda secluded Lorraine so as to prevent others from rendering aid.

The case the State primarily relies on, *Flippo v. Arkansas*, 535 S.W.2d 390 (Ark. 1975), supports the conclusion that Linda did not seclude Lorraine. The State gives the full facts of the case on pages 39-42 of its brief. The primary fact showing seclusion in that case is that the defendant assured the victim's father he was going to call an ambulance, but he waited a long amount of time to do so in an effort to conceal evidence. *Id.* at 392. This promise to call an ambulance secluded others from rendering aid because the victim's father would have called an ambulance sooner if not for the defendant's promise. There is simply nothing in the present case resembling the defendant's promise in *Flippo*. The State therefore failed to prove that Linda secluded Lorraine so as to prevent others from rendering aid.

E. The State did not prove that Linda had a “special relationship” to her mother or that she had a contractual duty to provide care to her mother.

The State argues in two long footnotes in its substitute brief that Linda's conviction should be affirmed based on a “special relationship” between Linda and her mother and on the existence of a contract for Linda to care for her mother. (Sub. Resp. Brf. at 55-56, n. 19). However, both of these arguments suffer from the same fatal flaw—neither was found by the jury to exist. Theoretically, the State could have attempted to show a duty under either of these theories at trial, but it did not. The State should not be allowed to claim that each of these theories was proven as a matter of law when it chose to raise these theories for the first time on appeal.

Furthermore, the State did *not* prove either theory at trial. As for the “special relationship,” the State has not cited a single case where an adult taking care of her elderly mother has been found to have a duty to the mother because of their relationship. Instead, the State only cited to cases involving an adult acting as a parent to a child. (Sub. Resp. Brf. at 54-55, n. 18). While the comment to § 562.011 states that failing to supply medical assistance to a close relative is a situation where a person has a duty to act, the General Assembly only cited to one case, *State v. Beach*, for this proposition. *Beach*, however, only involved a mother’s negligence toward her child. 329 S.W.2d 712, 713 (Mo. 1959). In fact, this Court reversed the defendant’s conviction in that case because the evidence was insufficient. *Id.* at 716-18. Certainly nothing in *Beach* supports the notion that any family member has a duty to give medical care to any other family member. Furthermore, “[a]lthough at common law parents have long had a duty to care for and protect their minor children . . . there is no corresponding common law obligation on adult children to protect and care for their aging parents.” *People v. Heitzman*, 9 Cal. 4th 189, 211-12 (1994)(citations omitted). This Court should therefore reject the State’s argument that Linda had a duty to act under the law based on her relationship with her mother.

As to the contractual obligation, the State merely relies on what it classified as an inference that Linda was living off of her mother’s social security benefits. (Sub. Resp. Brf. at 55, n. 19). There is simply no evidence to support this proposition. As stated earlier, this “Court may ‘not supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences.’” *Whalen*, 49 S.W.3d at 184 (Mo. banc

2001)(citation omitted). The State cites to Linda's attempting to find insurance papers after her father's death as creating a contract. (Sub. Resp. Brf. at 55-56, n. 19). The State does not explain this argument, and it is unclear how looking for insurance papers which the State asserts "did not exist" shows that Linda entered into a contract with her mother. (Sub. Resp. Brf. at 56, n. 19). If anything, this shows that there was *not* a contract.

Because the State did not prove that a contract existed, this Court should reject the State's argument that Linda had a duty to act under the law based on any contractual obligation.

II. (Instructional Error)

Appellant's opening brief made several attacks on the verdict director for elder abuse in the first degree: 1) the additional, unauthorized first paragraph was written as though its assertions were established facts and did not require a jury finding; 2) the first paragraph did not require the jury to find that Linda voluntarily assumed the care of Lorraine and so secluded Lorraine as to prevent others from rendering aid, which was required before the jury could find that Linda was under a legal duty to perform an unspecified act; and, 3) the instruction did not require the jury to find an act, required by law, that Linda had a duty to perform but failed to (Appellant's Brief at 36).

A. **Paragraph First was written as though its assertions were established facts.**

Paragraph First set out that "... Linda Gargus, by having voluntarily assumed the care of her mother, Lorraine Gargus, a person unable to meet her physical and medical needs, by moving into Lorraine Gargus' house, performing basic caregiving functions such as providing food and water, and representing to others that she was the primary caregiver for Lorraine Gargus..." (LF 168).

In Linda's opening brief, she argued that paragraph First is worded such that it erroneously does not require the jury to find anything because by using the introductory phrase, "by having," which leads into the descriptive acts, it is written as though it were established that Linda had "voluntarily assumed the care of her mother, Lorraine Gargus, a person unable to meet her physical and medical needs, by moving into Lorraine Gargus' house, performing basic caregiving functions such as providing food and water,

and representing to others that she was the primary caregiver for Lorraine Gargus” (LF 168). Linda argued that it was error to state such facts as true rather than to require the jury to make findings that: 1) Linda had a legal duty, and 2) that Linda had breached that duty.

The State argues in its substitute brief that the words “by having” were merely “extraneous words,” and that the instruction “plainly required” that jury to find what followed “by having,” particularly since later in the instruction, in the “However” paragraph, it says that the jury must find Linda not guilty of that offense “unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions.” (Sub. Resp. Brf. at 69-70).

But the way the first paragraph is worded, it really is not a proposition, it is written as a statement of fact, and while the two words “by having” might be “extraneous,” and should not have been there, they nevertheless change the meaning of the paragraph.

B. Linda potentially waived even plain error review of her claim that the verdict director lacked language requiring the jury to find she so secluded Lorraine as to prevent others from rendering aid.

At a pre-trial hearing, the State asserted that it was relying on the commentary to section 562.011 to the support the charge of elder abuse in the first degree. (Tr. IV at 8-9). The State cited to language from *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) that indicated a party has a duty to act when they have “voluntarily assumed the care of another, and so secluded the helpless person as to permit others from rendering

aid.” (Tr. IV at 9). Linda argued at the pre-trial hearing that the State could not prove that she prevented others from rendering aid. (Tr. IV at 13). The trial court reversed its earlier decision that had dismissed Count II, and it allowed the State to file a fourth amended information. (Tr. IV at 17-20). The fourth amended information required the State to show that Linda “so secluded [Lorraine] as to prevent others from rendering aid . . .” (LF 117).

After the close of the State’s evidence, Linda orally argued that the court should grant her motion for judgment of acquittal because the State had failed to prove the seclusion element. (Tr. VIII at 195). However, when asked by the trial court if she felt that seclusion was a necessary element of the crime, she stated that it was not required by law or by the statute. (Tr. VIII at 210). Instead, she asserted that the State was required to prove seclusion because that element was contained in the fourth amended information. (Tr. VIII at 210). This prompted the State to file a fifth amended information, removing the seclusion element. (Tr. VIII at 210; LF 131-132).

Because the seclusion element was removed from the information without objection, she arguably waived plain error review of her claim that the verdict director failed to require the jury to find that Linda had secluded Lorraine as to prevent others from rendering aid.

In *State v. Bolden*, this Court determined that a defendant should not be allowed to “proffer an instruction to the trial court and to complain that the trial court’s submission of that instruction to the jury is reversible error.” 371 S.W.3d 802, 806 (Mo. banc 2012). In the present case, Linda did not proffer the instruction at issue. However, she did not

object when the State filed its fifth amended information, which as discussed earlier, removed the seclusion element. (Tr. VIII at 213).

Also, “if an element is not disputed at trial, the failure to correctly instruct the jury on that element does not result in manifest injustice requiring reversal.” *State v. Bradshaw*, 26 S.W.3d 461, 473 (Mo. App. W.D. 2000)(citations omitted). The seclusion element was arguably not disputed at trial since it was taken out of the information. However, Linda did argue that the State could not prove seclusion at the pre-trial hearing, and she continued to argue for the purposes of her motion for judgment of acquittal that the State had failed to prove seclusion. (Tr. IV at 13; Tr. VIII at 210). The State was therefore on notice that it had to prove the seclusion element, and it was not removed from the information until the State had rested its case. (Tr. VIII at 213). Therefore, the seclusion element *was* contested at trial, and it should have been included in the verdict director for elder abuse in the First degree.²

C. The instruction did not require the jury to find an act, required by law, that Linda had a duty to perform but failed to.

The State argues in its substitute brief that paragraph Third of the verdict director was sufficient for the jury to find each element of elder abuse in the first degree. (Sub. Resp. Brf. at 70-71). It is true, as the State asserts, that paragraph Third describes

² As argued in Linda’s first point relied on, the State *was* required to prove that Linda so as to prevent others from rendering aid.

omissions. However, the State does not address Linda's contention that paragraph Third did not require the jury to find that Linda failed to do an act that she was required to do by law.

The verdict director, for instance, required the jury to find that Linda left Lorraine in bed "for long periods of time." (LF 168). However, it is uncontested that Lorraine had been bedridden since 2005. (Sub. Rsp. Brf. at 9-10). Leaving Lorraine in the bed therefore did not cause her serious physical injury. Instead, the verdict director should have required the jury to find that Linda had a duty to roll Lorraine over to prevent bed sores, and that Linda failed to do this. Linda testified, for instance, that she did turn Lorraine over on her side every hour, but that Lorraine was stubborn and kept rolling back over onto her back. (Tr. VIII at 255-256). Linda's defense that she attempted to move Lorraine, but that Lorraine kept moving to her back, was therefore never considered by the jury.

Similarly, the verdict director required the jury to find that Linda kept Lorraine in rodent infested conditions. (LF 168). However, the verdict director should have required the jury to find that Linda had a duty to keep the house free from rodents, and that she failed to do this. Linda testified that she did put out mouse poison and mouse traps and that she tried to cover holes in the trailer with steel wool. (Tr. IX at 40-41). Linda's defense that she attempted to remove the rodents, but that she was unable to, was therefore never considered by the jury.

Because a jury finding a legal duty and the failure to perform it is a critical element of the crime charged, the failure to instruct the jury concerning it is plain error.

Jones, 308 F.2d at 311. Linda's conviction should be reversed and her case remanded for a new trial.

CONCLUSION

Because there was insufficient evidence to convict Linda of elder abuse in the first degree, that conviction must be reversed and she should be ordered discharged (Point I). Because of the erroneous verdict director instruction (Point II), this Court should reverse and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel Buffaloe, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 6,369 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 12th day of May, 2014, electronic copies of Appellant's Substitute Reply Brief and Appendix were placed for delivery through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

/s/ Samuel Buffaloe

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