

No. SC93937

**In the
Missouri Supreme Court**

STATE OF MISSOURI,

Respondent,

v.

LINDA GARGUS,

Appellant.

Appeal from the Clark County Circuit Court
First Judicial Circuit
The Honorable Gary Dial, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Defendant was convicted following a jury trial in the Circuit Court of Clark County of elder abuse in the first degree in violation of § 565.180.¹ (Tr. IX at 195, 201-203; LF 182-183).² The court sentenced Defendant in accordance with the recommendation of the jury to 10 years in prison. (Tr. X at 56, 58; LF 184).

The sufficiency of the evidence to convict is at issue on whether there was an *actus reus* to support criminal liability. Defendant frames this issue as whether Defendant (Victim's caregiver and daughter) had or assumed a duty to perform omitted acts, while the State contends both that there was at least one act in addition to omissions, and that there was a duty to perform omitted acts. Sufficiency is also at issue on the element requiring the State to prove that Defendant was aware that her conduct was practically certain to cause serious physical injury to Victim.

¹ Defendant was acquitted of involuntary manslaughter. All statutory citations are to RSMo (2000) unless otherwise indicated.

² The transcript will be cited by "Tr." followed by the Roman numeral of the volume number and the page numbers within that volume. The legal file will be cited as "LF."

The jury found that Defendant “knowingly caused serious physical injury to [Victim] by leaving her on the bed for long periods of time in unsanitary, rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites,” which the evidence established resulted in amputation of Victim’s leg, septicemia, and death. (L.F. 168, 183; Tr. VIII at 14, 47, 157).

Viewed in the light most favorable to the verdict, the evidence and reasonable inferences therefrom at trial established the following facts:

Defendant was a Certified Nurse’s Assistant (“CNA”) and Certified Medication Technician (“CMT”) with 35 years of experience working in nursing homes; she represented to Victim’s extended family that she had quit her job to care for Victim and her late husband full-time. (Tr. VII at 165, 167-168, 224; Tr. VIII at 12, 16; Tr. IX at 12).

Defendant failed to timely seek medical treatment for: 1) a Stage IV decubitus ulcer which had eaten through Victim’s muscle tissue down to the bone on her back near the buttocks; and 2) a gangrenous leg that resulted in a rodent eating away significant chunks of her foot, which required amputation of the leg by the time Victim received care. (Tr. VI at 200, 206, Tr. VIII at 5-6, 10, 12, 14-16, 18, 72-73 80, 93, 95, 99, 101, 131, 135). The combination of these untreated wounds caused infection and bacteria to enter Victim’s bloodstream, resulting in septicemia and death. (Tr. VIII at 14, 47, 157).

Victim, a bedridden diabetic since 2005,³ lived in a mobile home in Kahoka, Missouri (Tr. VI at 150, 180-181; Tr. VII at 218-219; Tr. VIII at 12, 238-239). Victim could not walk without a high risk of falling down (Tr. VII at 49-50, 78-79; Tr. VIII at 234-236).

In 2008, Defendant moved into Victim's mobile home and became (and held herself out as) Victim's primary caregiver (Tr. VI at 199, Tr. VII at 12, 50, 91, 94, 95, 218-219, 222-223; Tr. VIII at 242; Tr. IX at 5). Victim had been bedridden and immobile for a number of years, and could not take care of her own needs for food, water, or medical care. (Tr. VII at 50).

Defendant told multiple people, including family members and investigators, that she voluntarily took on the care of Victim; Defendant represented to Victim's granddaughter, Cindy Hickman ("Cindy"), that she had been taking care of Victim from the time she got sick until the time she died, and that she had quit her job so she could take care of Victim and Defendant's father (Victim's husband). (Tr. VII at 50, 91, 94, 95). Cindy knew that Defendant had been a CNA for 35 years in two nursing homes and "knew what she was doing." (Tr. VII at 85, 224, Tr. IX at 3, 12).

³ Defendant knew that Victim was a diabetic since at least 2004 (Tr. VIII at 237). Defendant testified that Victim had oral medication for this condition (Tr. VIII at 237).

Defendant told an investigator for the Department of Health and Senior Services that she was “the primary caregiver” and that she had moved in with her parents in December 2009. (Tr. VII at 104, 109). She later said she had moved in in January 2010 (Tr. VII at 109). Defendant told Sheriff’s investigator, Tim Vice, that she had first moved in with her parents in the middle of January when her father first got sick (Tr. VII at 139).

However, when the Sheriff began investigating after Victim was hospitalized, Defendant initially denied that she was living with Victim. (Tr. VI at 15).

At trial, Defendant testified she had moved in full-time in 2008, and had previously resided there full-time temporarily when her father developed cancer in 2007 (Tr. VIII at 242). Because of her father’s cancer surgery and radiation in 2007, Victim couldn’t be there alone (Tr. VIII at 242).

During October 2009, Cindy ran into Defendant by chance at a Pizza Hut (Tr. VII at 51-52, Tr. VIII at 243). Defendant told her that Victim’s husband (Cindy’s grandfather) had cancer and was going back-and-forth to Iowa City for treatment (Tr. VII at 53). Cindy offered any assistance Defendant needed with her grandparents, or with transporting Defendant’s son to school in Keokuk, but Defendant never responded (Tr. VII at 54-55, 81-82).

On January 20, 2010, Defendant quit her job, ostensibly to take care of her parents; on this date, Defendant also admits spotting a bed sore on Victim the size of a tennis ball (Tr. VII at 85, 94-95; Tr. VIII at 249-250; Tr. IX at 3).

On January 31, 2010, Victim's husband (Defendant's father), who slept in a neighboring camper or trailer, died (Tr. VII at 51; Tr. VIII at 246).⁴ Defendant did not call Cindy or other relatives; Cindy learned of her grandfather's death by reading about it in the newspaper the next day (February 1, 2010).⁵

Cindy made an unannounced visit to Victim's trailer on February 2, 2010, and the Sheriff and social service agencies inspected the trailer after Victim was hospitalized on February 22, 2010. (Tr. VII at 11-15, 21, 44, 56, 65-66, 94-96, 113-114, 244, Tr. VIII at 246-247).

⁴ The prosecutor agreed not to tell the jury that Victim's husband (Defendant's father) was found at the Keokuk Area Hospital, without a hotline call, suffering from bed sores in the same places as Victim's, and just as severe prior to his death (Tr. VI at 22).

⁵ Defendant did not notify Cindy of her grandfather's death, despite the fact that she had her phone number, and Defendant's son had Cindy's daughter's number (Tr. VII at 55).

Defendant kept Victim's bed just inside the mobile home in a living room area approximately 7 feet by 13-14 feet,⁶ right next to multiple cages containing birds and animals, which were not kept clean and contained "hundreds" of rodents. (Tr. VI at 20, 36-37, 161, Tr. VII at 57). Victim was afraid of rodents (Tr. VI at 185, Tr. VIII at 262).

When confronted by Cindy about the "hundreds" of rodents crawling along the bottom of the bird cages right next to Victim twenty days prior to Victim's hospitalization for the rodent bite which took off a huge chunk of her gangrenous foot, Defendant claimed they were Victim's "pet mice" (Tr. VII at 58). However, Victim told emergency personnel who discovered one in the bed with her (running away from a spot near the Stage IV decubitus ulcer on her bottom and back) that she was afraid of rodents (Tr. VI at 185). Defendant admitted at trial that Victim was afraid of rodents (Tr. VIII at 262).

The room Victim was kept in was a "cluttered mess" stacked up with junk, with animal cages with animals and feces present (Tr. VI 36-37). Everything, including bird cages, was piled to the ceilings (Tr. VII at 57). Cindy could not tell the color of the carpet (Tr. VII at 57).

Rodents were also scurrying throughout the trash-infested trailer, which was in a "[t]errible[,] [d]isgusting[.]" "horrifying," "grotesque" condition. (Tr. VI

⁶ The entire trailer was approximately 28 feet in width. (Tr. VI at 21).

at 20, 22, Tr. VII at 57, 62). Mice were “everywhere, crawling through everything.” (Tr. VII at 57). The residence contained 40 animals, including cats, flying and caged birds, reptiles, lizards (which were moving around), and dogs (Tr. VII at 20, 22). Animal cages had feces and filth. (Tr. VII at 34). A rat ran in front of an investigator’s foot. (Tr. VII at 22).

The entire trailer bore an odor of rotting flesh that was “just overwhelming” from 10-15 feet outside even after Victim had been evacuated, and also smelled of human and animal urine and feces. (Tr. VI at 19). A sheriff’s department investigator became sick to his stomach from the odors, exited the house at once, and began dry heaving. (Tr. VII at 134).

The kitchen had rotted and moldy food was all over the counters; dirty dishes, rotted food and a cluttered mess were on the stovetop; and Victim’s clothes from the night she was finally taken to the hospital were found in a wash tub in the kitchen in muddy, gray, thick water with fleas coming out and a smell so strong the sheriff could not tolerate it (Tr. VI at 24, 33, 34). The kitchen cabinets had cobwebs all over (Tr. VI at 36).

The toilet had not worked in weeks; odorous, discolored feces were dried up on both sides of the bowl and there was clutter around it (Tr. VI at 25, 35). The bathroom sink and bathtub were covered in cobwebs and filth; there was a cluttered mess in the sink (Tr. VI at 25, 35). The tub was stained with brown and yellow colors (Tr. VI at 25).

The dining room had a cluttered mess and cobwebs hanging all over the ceiling (Tr. VI at 36).

When Cindy arrived unannounced with her children on February 2, 2010, to visit Victim, Defendant was coming out of her late father's adjoining camper, where he had slept; Defendant had been looking for insurance papers but couldn't find anything (Tr. VII at 44, 56 65-66, 94-96, Tr. VIII at 246-247).

When Cindy went inside Victim's trailer, she noticed things "piled to the ceiling" and bird cages stacked on top of each other (Tr. VII at 57). The home smelled dirty, there was garbage, and there were mice crawling everywhere (Tr. VII at 57, 62).

Victim was covered from neck to toe with a blanket, so Cindy did not observe Victim's wounds that day (Tr. VII at 62, 86). Cindy saw no medicines, only garbage (Tr. VII at 62, Tr. VIII at 246).⁷ Victim's eyes were matted shut, although she was eventually able to open them (Tr. VII at 63). Flies were flying around her head (Tr. VII at 63). Victim's nails were "long and dirty" and dug into the granddaughter's hand (Tr. VII at 64).

Victim did not recognize Cindy and was confused about who her grandchildren were (Tr. VII at 58, 63, 64-65; Tr. IX at 45-46). Defendant told

⁷ Cindy was not aware until afterwards that Victim wasn't taking medicine (Tr. VII at 87).

Victim in a louder than normal tone of voice, “If you keep talking crazy like that, they’re going to lock you up.” (Tr. VII at 59).

Victim expressed concern that day that Defendant wouldn’t be able to afford to pay all the bills (Tr. VII at 95).

Just as Defendant had not notified Cindy of her grandfather’s death, Defendant did not want other relatives notified either (Tr. VII at 66-69). When some nonetheless came to the funeral, Defendant told them she didn’t want them to come to the trailer to visit Victim, their grandmother, even though some of them had lived with her growing up (Tr. VII at 69-71).

Defendant began working at the Clark County Nursing Home in 1973 (Tr. VII at 165). The function of the nursing home was to “take care of older people.” (Tr. VII at 176). Defendant updated her CNA skills in 1989 (Tr. VII at 166). Defendant went on to become a Certified Medication Technician (“CMT”) in 1999. (Tr. VII at 165-167). CMTs are trained in medications and side effects and know how to give them and how to give eye drops (Tr. VII at 168). CMTs are able to reorder medications as they run out (Tr. VII at 169).

Defendant also had a certification in insulin and blood sugars, including drugs used for the treatment of diabetes (Tr. VII at 169). The nursing home used special diets for diabetics (Tr. VII at 177).

To remain a CNA at the Clark County Nursing Home, continued training was required, which always touched on infection control, abuse and neglect as

required by the State of Missouri (Tr. VII at 180, 190). Basic hygiene was covered in infection control training (Tr. VII at 191). Bedding is changed twice a week or whenever it is soiled (Tr. VII at 191); incontinent patients, or patients with some kind of a sore that was oozing, may require bedding changes more than once a day (Tr. VII at 191). If bedding is not changed regularly, there is definitely the potential for infection (Tr. VII at 191). Showers are mandated at the nursing home for infection control reasons, even if the patient does not wish to have hygienic care (Tr. VII at 194).

Other common areas of training were skin care and pressure areas (Tr. VII at 180-181). Skin should be kept clean and dry because wet skin will lacerate or break down (Tr. VII at 181).

Pressure areas are caused by lying in one position too long and not redistributing your weight, especially where there is a bone; eventually they cause tissue damage and start to break down (Tr. VII at 181). Stage 1 of tissue breakdown is detectable because the skin turns red and will not turn white when pressed on (Tr. VII at 181).

When that happens, the nursing home starts a repositioning program, supplies a softer mattress that helps relieve the pressure, and uses lotions to help with healing (Tr. VII at 181-182). Aides are taught to look for any reddened areas or bruises, potential pressure areas, during the dressing and showering process (Tr. VII at 182).

CNAs report Stage 1 pressure ulcers immediately and those interventions are put in place (Tr. VII at 183-184). Patients with even Stage 1 pressure sores should be turned a minimum of every two hours (Tr. VII at 201-202). The Clark County Nursing Home director testified that she had never had anyone under her care go from a Stage 1 to a Stage 2 pressure ulcer (Tr. VII at 185).

A Stage 2 pressure ulcer has either a blister or the first layer of skin has become open (Tr. VII at 185). Because the openness leads to a greater likelihood of infection, such ulcers must be covered and the nursing home would get treatment from a doctor (Tr. VII at 185-186, 212-213). The doctor sometimes orders antibiotics (Tr. VII at 186). At one time, CMTs and CNAs were involved in this medication process (Tr. VII at 186). CNAs are trained to be particularly vigilant if a pressure ulcer increases to a Stage 2 (Tr. VII at 213). Nutrition and hydration would be monitored more carefully because they are important factors in healing a pressure area; liquid would go from the body more quickly than in an intact skin area (Tr. VII at 213-214).

A Stage 3 pressure ulcer involves more skin and tissue loss and might get to the muscle (Tr. VII at 186-187). The progression would be faster in a diabetic because of poorer circulation (Tr. VII at 187).

The director of the Clark County Nursing Home testified that she had never experienced a Stage 1 pressure sore developing into a Stage 4 pressure sore (Tr. VII at 187). A Stage 4 “is showing bone or a tendon”; it’s “where you’re

clear to the bone.” (Tr. VII at 187). The bigger the sore, the harder it would be to treat (Tr. VII at 187). The earlier you catch it, the better the probable outcome (Tr. VII at 187). If a patient had a Stage 4 pressure ulcer in the Clark County Nursing Home, they would be sent out for medical treatment (Tr. VII at 211-212).

The nursing home provides extensive training to staff who are going to work in the Special Care Unit in Alzheimer’s or dementia (Tr. VII at 188). Such patients are often more resistant to doctors and to doing things such as bathing and eating (Tr. VII at 189-190). Alzheimer’s training was given annually (Tr. VII at 193).

CNAs cut diabetic patients’ fingernails (Tr. VII at 194). They are to report toenail problems (Tr. VII at 194-195).⁸ Long nails can cause skin tears or scratches which lead to non-healing wounds or the potential for infections (Tr. VII at 195).

⁸ Victim had long toenails and a fungal infection of the great toenail, which even a physician testified he would have referred to a podiatrist for care in a diabetic patient (Tr. VII at 194-195, Tr. VIII at 16-17, 19-20, 25). Podiatry services, as well as all other services except dental and eyeglasses, are covered by Medicare (Tr. VIII at 24).

CNAs are trained in the use of Depends or adult diapers (Tr. VII at 195-196). A patient that is totally incontinent is checked and changed every two hours (Tr. VII at 196).

Defendant thus had been trained in caring for bedsores, including turning the patients every two hours, cleansing the areas of the wound, applying ointments, and seeking help from the more highly trained professionals when they progressed beyond Stage 1 (Tr. VII at 180-187, 201-202, 211-214; Tr. IX at 19). Defendant was familiar with the urgency of dealing with diabetes and the accompanying dangers (Tr. VII at 169, 177, 194-195).

Defendant was also familiar from her nursing home work with gangrene and the odor of rotting flesh (Tr. IX at 29).

Defendant said that she bathed her mother daily and observed her body (Tr. IX at 17, 22, 28, 46, 50-51). Nonetheless, Defendant claimed she had not observed her mother's bed sore at Stage IV or her mother's gangrenous leg whose foot had been partially eaten away by a rodent, although at one point Defendant admitted seeing necrotic tissue on the bed sore (Tr. IX at 28, 53).⁹ Victim was

⁹ Defendant claimed her mother's leg was brown on the side and there was some discoloration in the toes when she was removed from the home, but claimed she didn't remember seeing "it" before (Tr. IX at 53).

also malnourished and “profoundly dehydrated” under Victim’s care. (Tr. VIII at 34, 147-148).

Defendant testified that when she moved in, her parents had “a few” animals; Defendant brought birds and a cat, along with lizards, a chinchilla, and a ferret for her son (Tr. VIII at 240). Defendant kept acquiring “a lot of animals” from people who “just kept giving them to” her (Tr. VIII at 240-241). They also bought animals (Tr. VIII at 241). There were “more and my animals” and “these animals just got out of control.” (Tr. VIII at 241). Defendant testified, “You couldn’t keep the cages cleaned out.” (Tr. VIII at 257).

Defendant claimed to give Victim daily sponge baths and to change her clothes (Tr. VIII at 251; Tr. IX at 28). Sometimes, Victim’s granddaughter, Sylvia, would be called over to help when the granddaughter lived with Defendant’s father in a neighboring trailer, but Sylvia no longer lived there during the time frame at issue (Tr. IX at 106).

Defendant testified that Victim became incontinent around the middle of January 2010 and stopped using a bedpan. (Tr. VIII at 251). Despite this, Defendant did not keep adult diapers on Defendant all the time (Tr. VIII at 252). During Cindy’s February 2 visit, Defendant told Victim in a very firm, louder than normal tone of voice, “No, I’m not gonna give you a laxative so you shit all over the place” (Tr. VII at 61).

Defendant testified she quit her job on January 20, 2010; Defendant also claimed she first discovered that Victim had a bedsore on her “bottom” on this date (Tr. VIII at 251-252, 254; Tr. IX at 17-18).¹⁰ Defendant said it was the size of a tennis ball (Tr. VIII at 19-20).

Victim’s husband’s funeral was on February 5, 2010 (Tr. VIII at 246). Defendant did not want any family members to be there (Tr. VII at 66).

Cindy thought that Victim should attend the funeral, but Defendant did not take Victim (Tr. VIII at 247-248). While family members were at the cemetery, some mentioned visiting Victim, but Defendant said that she would rather they not visit (Tr. VII at 70-71).

Sylvia Winger, one of Victim’s granddaughters who got along with Defendant, had lived for a time with Victim’s husband in a mobile home next to Victim’s and had assisted with Victim’s sponge baths when called upon, although she was no longer living there at the time of the relevant events (Tr. IX at 116). Sylvia and her children did visit Victim on February 5, 2010, the day of Victim’s husband’s funeral (Tr. IX at 102-103). Sylvia testified that Victim had a blanket on her (Tr. IX at 103).

¹⁰ Defendant also saw the sore the weekend before Victim went to the hospital on February 22, 2010, and claimed to see it every hour when she claimed she turned Victim (Tr. IX at 50-51).

On February 22, 2010, Defendant was overwhelmed and testified, “I was just getting to the point where I wanted to do what was right for her.” (Tr. VIII at 266). She finally summoned emergency personnel to Victim’s home (Tr. VI at 150, 161-162, 173-174, 180-181, 189).

When emergency personnel arrived, the home was filled with clutter and smelled of animal urine and feces (Tr. VI at 161, 181, 184). Victim was on a hospital-type bed just inside the front door (Tr. VI at 161). Defendant said that Victim had an open area on her foot, had an ulcer on her bottom, was diabetic, had scratches on her sides which she was constantly digging at with her nails, was very weak, and was not eating (Tr. VI at 161-162, 173-174, 177, 183, 189; Tr. VIII at 257). Defendant also mentioned that Victim’s husband had recently died and Defendant feared that Victim was “giving up” and no longer wanted to live (Tr. VI at 162).

Victim told the emergency personnel that her “butt was on fire” or that her “rectum was burning” or “on fire” (Tr. VI at 163, 170, 182, 196). After about 30 seconds, Victim was persuaded by emergency personnel and Defendant that she needed to go to the hospital (Tr. VI at 164, 174-175, 178-179).

When they were moving Victim from the bed to a cot to transport her, a rodent ran out from near Victim’s buttocks area (Tr. VI at 165-166, 176, 177, 185).

Defendant asked them to look at Victim's foot (Tr. VI at 169, 174). When they removed a towel or sheet covering the foot, they noticed that Victim's leg was black and green from the knee downward – gangrenous looking – and a very large part of the top side of one foot was gone (Tr. VI at 169-170).

Defendant testified that she could see her mother's feet all the time, that she had seen the foot that morning when she had bathed her, but that she had not noticed the open area; the medical testimony was that the wound took longer than that to develop (Tr. VIII at 167-170, 258-259).

Victim was taken to the Keokuk Area Hospital (Tr. VI at 197-198). Defendant told a nurse that Victim had been ill and that Defendant had been caring for Victim at Victim's home (Tr. VI at 199, 210). Victim had a lot of open sores, and one foot was missing a lot of flesh around the base of the toes – it looked as if it had been debrided down to the bone, and she had a very large, deep decubitus ulcer¹¹ on her back (Tr. VI at 200-201, 206-208, 212, 218). The ulcer was about “four-and-a half inches wide ... about three inches ...long, and then, about two to two-and-a half inches wide” with no flesh over it (Tr. VI at 205, 213, 215, 220).

¹¹ A decubitus ulcer, or bedsore, is an erosion of the skin resulting from the pressure of remaining in one position for an extended period of time.

Dr. Neville Crenshaw treated Victim at the Keokuk Area Hospital (Tr. VIII at 2, 4). There was an area on the top side of her left foot where the tissue had been removed down to the level of tendon and bone; it was consistent with a rodent debriding the wound (Tr. VIII at 5-6, 10, 14-15, 18, 72-73). Victim apparently could not feel her gangrenous leg or eaten-away portions of her foot due to diabetic neuropathy. (Tr. VIII at 17-18). All “the meat” had “been cleaned off, had been eaten off” on part of the foot (Tr. VIII at 18).

Victim also had a very large, pre-sacral, decubitus ulcer, just above the buttocks (Tr. VIII at 5-6, 10). That ulcer was a “very large,” “very, very, very deep,” “extremely malodorous,” “gaping, infected wound” (Tr. VIII at 6, 12). There were also pressure ulcers on her shoulder, right hip, and right heel (Tr. VIII at 9-10). The ulcers could not have developed in a mere two days to appear as they did (Tr. VIII at 10). The infection had eaten the skin and subcutaneous fat around the bedsore, and an investigator for the Missouri Department of Health and Senior Services (“DHSS”) testified she could see Victim’s tailbone through the basketball-sized wound. (Tr. VII at 102).

Dr. Crenshaw found that Victim’s white blood cell count was markedly elevated, indicating infection, and her blood cultures tested positive for MRSA, staph, streptococcus, and at least two other forms of infection (Tr. VIII at 13). Victim was septic – bacteria had migrated into her blood stream (Tr. VIII at 14, 47). “[H]er whole body was a massive infection.” (Tr. VIII at 14). She also had

renal failure due to a kidney infection (Tr. VIII at 47-48, 63). Victim improved dramatically with aggressive treatment despite her grave condition (Tr. VIII at 28, 42).

Dr. Kirk Green also examined Victim (Tr. VIII at 79-80). Her left foot was down to bone and tendons (Tr. VIII at 99). The damage could have been caused by rodents (Tr. VIII at 101-102, 109-111). Victim's left leg was no longer getting any blood supply (Tr. VIII at 80, 93, 95). The leg was essentially dead and Victim agreed to have it amputated below her left knee in an effort to save her life (Tr. VIII at 15-16, 99, 101, 131, 135).

The DHSS investigator also observed pressure sores that covered Victim's entire heels, in addition to gangrene from Victim's left ankle to her left knee (Tr. VII at 101-102).

The emergency room nurse testified that Victim had numerous open sores and no pulse in her left foot. (Tr. VI at 200). Victim was "very compliant," "very anxious to please and never verbalized anything in regards to not wanting to be there. She was asking for help." (Tr. VI at 199). Victim was "very anxious" and worried about whether she was doing things right and whether her caregivers were mad at her (Tr. VI at 199).

Cindy visited Victim in the hospital daily (Tr. VII at 72, 74). Cindy could smell Victim throughout the hallway (Tr. VII at 72). Victim's whole leg was exposed; every toe on one foot had bone visible (Tr. VII at 72). Cindy's mouth

about fell to the floor when she saw the “huge,” “really deep” ulcer on Victim’s bottom and back when they turned Victim to clean it; the wound had mold, and was red, yellow (from pus) and black in spots (Tr. VII at 72-73). Victim cried out in pain every day (Tr. VII at 74).

Victim died on March 11, 2010 (Tr. VIII at 26).

Dr. Eugenio Torres performed an autopsy on Victim (Tr. VIII at 123). Victim had ulcers (or bedsores) on her body, some of which appeared to be caused by rodents (Tr. VIII at 137-138). The most significant factor relating to her death was the bedsore or sacral ulcer or decubitus ulcer on her back that appeared to have been caused by Victim lying on her back for a prolonged period of time without moving (Tr. VIII at 140). Her left foot was also gangrenous, resulting in destruction of the skin and muscle tissues, and possibly of tendons and bones; the destruction would have taken several days (Tr. VIII at 167-170).

The cause of Victim’s death was multiple organ failure due to septicemia as a result of decubitus ulcers and gangrene of the left foot (Tr. VIII at 157). “In other words, [Victim] died because the ulcers on her back, the gangrene, and necrosis of the left leg, moved on to bacteria going into the blood, producing septicemia, septicemia affecting all the organs of the body. Once all the organs are affected by the septicemia, they fail you.” (Tr. VIII at 157). Delay of treatment hastened her death (Tr. VIII at 161).

On February 22, 2010 (the day Victim was taken to the hospital), Clark County Sheriff Paul Gaudette and some other law enforcement officers and workers for the Department of Family Services went to Victim's home (Tr. VII at 11-15, 21, 113-114, 244). Just outside the residence, directly across from it, was some partially-burned trash, including some Depends, and the remains of Victim's burned mattress (Tr. VII at 18, 21, 39-40, 114-115, 132). Defendant had this evidence burned the day Victim was taken to the hospital (Tr. VIII at 264-265).

Sheriff Gaudette and the others (except for a Sheriff's investigator who could not bear the odor) inspected the home after Defendant gave them permission (Tr. VII at 15-17). When Sheriff Gaudette and his investigator were within 10-15 feet of the residence, they could smell an overpowering odor, including what appeared to be rotting flesh (Tr. VII at 19). The Social Services representatives wore masks to deal with the odor (Tr. VI at 12, 19-20).

When the inspection party entered the home, there were numerous cages with birds, animals, and mice in them (Tr. VII at 19-20, 36, 117-118, 134, 251). Some cages had feces in them (Tr. VII at 34, 36, 246). There were animals roaming free inside the home – birds, reptiles, dogs, mice, a rat – 40 animals in all (Tr. VII at 22, 117, 246, 251).

There was moldy, rotted food all over the kitchen (Tr. VII at 22, 34). The toilet in the bathroom had waste in it; Defendant said it had not worked in a

couple of weeks (Tr. VII at 25, 35, 248). The bed that Victim had slept in did not have any bedding (Tr. VII at 25). Defendant said that she and her son had dragged the bedding across the street and burned it next to the road after her mother had been transported to the hospital (Tr. VII at 26).

On February 23, 2010, Defendant told Kris Chamley of the Department of Health and Senior Services that she had moved in with her parents in December 2009 or January 2010, and she had been their primary caregiver (Tr. VII at 104-105, 107, 109). Defendant said she was a certified nurse's aide and had worked at both the Clark County Nursing Home and the River Hills Nursing Home in Keokuk, Iowa (Tr. VII at 105). According to Defendant, she quit her work on January 20, 2010, to take care of her parents (Tr. VII at 106).

Defendant told Chamley that she first noticed the ulcer on Victim's back on January 20, 2010 and that it was the size of a tennis ball (Tr. VII at 109-110). Defendant said that she contacted emergency medical technicians because her mother's breathing had changed (Tr. VII at 121).

The following day, Chamley spoke again with Defendant and this time she said she first noticed the ulcer on January 25, 2010, and that it was the size of a grapefruit (Tr. VII at 110-111). When Chamley told Defendant that because of Defendant's medical knowledge she should have been able to take care of the bedsore, Defendant gave no response (Tr. VII at 111).

On February 24-25, 2010, Tim Vice, investigator of the Clark County Sheriff's Office, interviewed Defendant (Tr. VII at 130, 134-135, 147, 152). Defendant told Vice that she moved in with her parents in the middle of January when her father first got sick (Tr. VII at 139). She admitted to Vice that if she had been working at a nursing home and had seen somebody in her mother's condition, she would have contacted the head nurse (Tr. VII at 142-143, 146).

Defendant did not attend her mother's (Victim's) funeral (Tr. VII at 75).

The jury found Defendant not guilty of involuntary manslaughter, but guilty of first-degree elder abuse (LF 182-183). After the penalty phase, the jury recommended that Defendant serve 10 years in prison (Tr. X at 56, 58; LF 184). The court sentenced Defendant in accordance with the recommendation of the jury (Tr. X at 56, 58; LF 184).

ARGUMENT

I.

The evidence was sufficient to find Defendant guilty of elder abuse in the first degree because Defendant knowingly caused Victim serious physical injury by repeatedly placing and keeping the bedridden Victim on a bed in unsanitary, rodent-infested conditions created by Defendant's actions as well as omissions, causing Victim to develop gangrenous and Stage IV decubitus ulcers and injuries from animal bites, which resulted in amputation of Victim's leg and death.

Even if the case had involved only omissions, Defendant's omissions would meet the requirement of "a voluntary act" under Section 562.011.4 because: (1) Defendant assumed the duty of providing for her helpless mother's needs, held herself out as her mother's primary caretaker, and prevented others from rendering aid by keeping Victim in her private house where Defendant was the only other adult rather than seeking medical assistance; and (2) Defendant created Victim's peril and therefore had a duty to summon aid.

Defendant's first point contends that there was insufficient evidence to support Defendant's conviction for elder abuse in the first degree. Defendant contends that she was charged only with omissions rather than acts; that this was improper because she had no legal duty to Victim to provide any additional

assistance and did not prevent others from rendering aid; and that the State failed to prove that she was aware that her conduct in leaving Victim on the bed for long periods of time was practically certain to cause serious physical injury to Victim.

Defendant had worked in nursing homes for 35 years, yet did not seek timely medical treatment for her mother for a “huge,” “really deep,” “gaping,” “infected” Stage IV decubitus ulcer and a gangrenous leg which had a large part of the foot eaten off by a rodent; the leg was amputated once Victim was finally hospitalized. Victim died as the result of septicemia brought on by these injuries and the delay in seeking care.

A. Standard of Review

Appellate review of a challenge to the sufficiency to the evidence supporting a criminal conviction is limited to a determination of whether sufficient evidence was presented at trial from which a reasonable juror might have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993); *State v. Gibbs*, 306 S.W.3d 178, 181 (Mo. App. E.D. 2010). Appellate courts accept as true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregard all evidence and inferences to the

contrary. *Gibbs*, 306 S.W.3d at 181.¹² Appellate courts do not act as a “super juror” with veto powers over the conviction, but rather give great deference to the trier of fact. *Id.*; *State v. Jones*, 296 S.W.3d 506, 509-510 (Mo. App. E.D. 2009).

A person commits the crime of elder abuse in the first degree if he or she attempts to kill, knowingly causes or attempts to cause serious physical injury to any person 60 years of age or older. § 565.180.¹³

A person is not guilty of an offense unless his liability is based on conduct which **includes a** voluntary act. § 562.011.1 (emphasis added). An omission to perform an act of which the actor is physically capable is “a voluntary act”. §562.011.2(2). “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.” §562.011.4 (emphasis added).

The Comment to § 562.011 contained in V.A.M.S. notes that the statute is based on Section 2.01 of the Model Penal Code, as well as Illinois and New York

¹² 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.

¹³ All statutory citations are to RSMo (2000) unless otherwise indicated.

statutes. “The requirement is not that liability must be based upon an act, but rather upon conduct which **includes a** voluntary act.” *Id.* (emphasis added). Once “a voluntary act” is established, the liability may be based “on the entire course of conduct,” including omissions. *See*, Comment to § 562.011, V.A.M.S. (citing Comments, Model Penal Code, Tent. Draft No. 4, 119-120 (1955) (discussing a case in which a driver fails to stop as the result of unconsciousness but felt illness coming on earlier and kept driving)).

The Comment further notes that while criminal liability by omission in crimes not defined in terms of failure to act is an analytically difficult and rare situation, “the most common [of such situations] is liability for homicide (usually manslaughter) based on the failure to perform some act, **such as supplying medical assistance to a close relative.**” *Id.* (emphasis added). The Court of Appeals noted, “[t]hus, in drafting this legislation, the legislature explicitly considered the circumstances we have here, where Gargus failed to provide medical assistance to her mother.” *State v. Gargus*, No. ED99233 (Mo. App. E.D. Nov. 26, 2013), slip op. at 8.

The Comment goes on to state that a “concise summary of the ‘law’ is in *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962)[,]” which it quotes as follows:

The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country. . . .

There are at least four situations in which the failure to act may constitute breach of legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Id.

As stated by one leading commentator on criminal law: “[T]he ‘measuring stick’ [of duty] is the same in a criminal case as in the law of torts. It is the exercise of due care and caution as represented by the conduct of a reasonable person under like circumstances, and this in itself is intended to represent the same requirement whatever the case may be.” Perkins & Boyce, *Criminal Law* (3d ed. 1982) ch. 7, § 2, p. 843 (*quoted in People v. Oliver*, 210 Cal. App. 3d 138, 149, 258 Cal. Rptr. 138, 144 (1989)). Thus, the rules governing the imposition of a duty to render aid or assistance as an element of civil negligence are applicable to the imposition of a “duty” in the context of criminal negligence. *Oliver*, 258 Cal. Rptr. at 144. “The Restatement Second of Torts provides guidelines as to

the specific kinds of conduct which will require one to take affirmative action to render aid.” *Id.*, 258 Cal. Rptr. at 143.

Section 324 of the Restatement (Second) of Torts provides in part: “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. . . .” *Id.*, 258 Cal. Rptr. at 143.

Section 321 of the Restatement (Second) of Torts provides:

(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.

Id., quoted in *Oliver*, 258 Cal. Rptr. at 143.

“It should, of course, suffice, as the courts now hold, that the duty arises under some branch of the civil law. If it does, this minimal requirement is satisfied, though whether the omission constitutes an offense depends as well on many other factors.” Toll, Pennsylvania Crimes Code Annotated, § 301, at p. 60 (citing Comment, Model Penal Code § 2.01; quoted in *Pennsylvania v. Pestinikas*,

617 A.2d 1339, 1343 (Pa. 1992)). Stated another way, the existence of a duty allows an omission to become “a voluntary act” establishing the *actus reus*, but other elements of the offense must still be proven.

Duties found in common law remain in effect under Missouri statute unless altered by an act of the Missouri Legislature. § 1.010.

B. Defendant’s acts, as well as omissions, created the unsanitary, rodent-infested conditions that caused serious physical injury to Victim.

While Defendant would like this Court to believe that only her omissions were responsible for the fact that Victim’s whole body became a “massive infection” from the unsanitary, rodent-infested conditions, the “huge,” “very, very, very deep,” “gaping” “infected” Stage IV decubitus ulcer, and the gangrenous leg that had to be amputated, common sense says otherwise. The jury was entitled to infer that Defendant engaged in at least one “voluntary act” which was part of the “course of conduct” that led to these conditions, and that result.

A reasonable juror could infer from Defendant’s testimony that she acquired and brought “a lot of” animals into the trailer (versus “the few” preexisting), some of whose cages were placed right next to Victim and became infested with “hundreds” of rodents and with animal feces (which Defendant admitted she cleaned but inadequately, itself an act in the chain of conduct).

Defendant testified that when she moved in, her parents had “a few” animals; Defendant brought birds and a cat, along with lizards, a chinchilla, and a ferret for her son (Tr. VIII at 240). Defendant kept acquiring “a lot of animals” from people who “just kept giving them to” her (Tr. VIII at 240-241). They also bought animals (Tr. VIII at 241). There were “more and **my** animals” and “**these** animals just got out of control.” (Tr. VIII at 241) (emphasis added). Defendant testified, “You couldn’t keep the cages cleaned out.” (Tr. VIII at 257).

A reasonable juror could infer from Defendant’s testimony that she bathed Victim, that Victim became incontinent in January, and that the bathtub was caked with brown and yellow spots, that Defendant removed Victim from her bed, bathed her in an unhygienic bathroom, and/or then replaced her on the bed in unsanitary, rodent-infested conditions. Defendant herself claimed to have changed Victim’s mattress to an egg-crate type to deal with bedsores; thus, Defendant would have to have taken the positive act of placing Defendant in the proximity of the animals and rodents in conditions she knew to be unsanitary from her training in infection control.

A reasonable juror could infer from Cindy’s testimony that Defendant could no longer do laundry at the Keokuk house because of sewer problems, and from the Sheriff’s testimony that he found Victim’s clothing she was wearing on the night she was admitted to the hospital in a wash tub in the kitchen in “muddy, grey, thicker water” with fleas coming out, which smelled so bad that

he couldn't tolerate it, that Defendant put Victim in unhygienic clothing despite her massive, gaping, open decubitus ulcer.

A reasonable juror could infer from the "terrible," "disgusting" hygienic condition of the kitchen, with moldy food all over the counters and dirty dishes on the countertops, stove, and sink that Defendant placed leftover food and dishes there and then allowed them to grow mold. A reasonable juror could also infer that Victim's alleged reluctance to eat, malnutrition, and "profound dehydration" which reduced her resistance to infection resulted in part from one or more of these acts.

A reasonable juror could infer that not all of the clutter "to the ceilings" was preexisting when Defendant moved in in 2008, and that she contributed at least one act that created or exacerbated the unsanitary, rodent-infested conditions.

A reasonable juror could infer that Defendant (as the only non-helpless adult in the household) was responsible for performing housekeeping functions, but did so inadequately and unhygienically.

A reasonable juror could credit Defendant's testimony that, despite knowing that Victim was incontinent, she sometimes removed Victim's adult diapers without replacing them (as she knew should be done every couple of hours from her nursing-home training), realizing that she sometimes (in Defendant's words) "shit all over," exposing her "huge," "very, very, very deep,"

“gaping” decubitus ulcer to infection and additional pressure. CNAs (such as Defendant) are trained in the use of Depends or adult diapers (Tr. VII at 195-196). A patient that is totally incontinent is checked and changed every two hours (Tr. VII at 196).

In short, a reasonable juror could infer that some effort including at least one act, not merely inaction, was required to create conditions this dire for an aging, helpless diabetic with a massive decubitus ulcer and gangrenous leg to be exposed to such a horrific environment.

If the Court agrees that a reasonable juror could infer even one such voluntary act, the *actus reus* is established and all of Defendant’s omissions may be considered part of the “course of conduct” resulting in Victim’s serious physical injuries. Comment to § 562.011, V.A.M.S. Hence, the Court need not even reach the question of whether Defendant had a duty “otherwise imposed by law” to her mother.

C. Defendant assumed the duty to care for her helpless mother.

In *Flippo v. Arkansas*, 523 S.W.2d 390 (Ark. 1975), a father and son were convicted of involuntary manslaughter for failing to procure timely medical assistance for the victim of a hunting accident shot by the son. After discovering the victim with his leg nearly severed, the defendants notified a man at a nearby house, whom unbeknownst to them was the victim’s father. The defendants gave the victim’s father the location of victim and assured him they would call

an ambulance. When victim's father found victim, victim requested his father to get aid, but his father assured victim that others were calling an ambulance and stayed with him. *Id.* at 392.

Instead, defendants, who were concerned about law enforcement discovering the son had been hunting out of season, drove past numerous houses, some of which had telephones, and a café with a visible public telephone that was only 2.3 miles from the wounded man. *Id.* Defendants drove to their home, which was 12 to 14 miles away. *Id.* at 392. After reaching their residence, the father instructed his son and his friend to place the high-powered rifle with which the son had shot victim in a "shack" and replace it on the gun rack of their truck with a shotgun. *Id.* at 235-236. Only then did the father call an ambulance, which met him approximately 25 minutes later at the café which he had passed en route to his residence. *Id.* at 392.

After giving up on the defendants, victim's father left his son in the field and enlisted someone at a nearby residence to have a neighbor call an ambulance; victim's father was only away from his son about 4 minutes. *Id.* Defendant's son and his friend returned in the truck to assist victim's father in placing his son in the truck for transportation to the ambulance some 40 minutes to 1 hour and 15 minutes after the time victim's father had found victim. *Id.*

There was testimony from a pathologist that the victim could have been saved if he had been hospitalized while still conscious and that proper first aid could have saved victim. *Id.* at 392-393. Defendant's son had administered no first aid although he had won a National 4-H Safety Man Award based upon his knowledge of "all aspects of safety." *Id.* at 392.

After outlining the four situations in which the failure to act may constitute a breach of a legal duty under *Jones v. United States, supra*, the Arkansas Supreme Court held that the father voluntarily assumed the care of the victim and prevented or hindered others from rendering timely aid. *Id.* at 393-394:

The case at bar presents a classic fact situation as to the latter situation in *Jones v. United States, supra*. Mr. Flippo assured the victim's elderly father that he would call for an ambulance. The father kept vigil and delayed seeking assistance in the belief assistance would be procured promptly by appellants. In the meantime the victim, known by the appellants to be seriously wounded, was bleeding to death, asking his father not to leave him after being assured assistance was forthcoming. During this time, Mr. Flippo drove twelve to fourteen miles to reach his residence although phones were in the vicinity of the shooting. A public phone, which the appellants passed, was 2.3 miles from the scene of the tragedy. Mr. Flippo was told that the victim's leg was 'nearly blown off.'

Upon reaching his home he instructed the youths to place the rifles in a ‘shack’ and substitute a shotgun and then used his phone to call an ambulance. According to [victim’s father], after waiting in vain for prompt assistance, without (sic) four minutes he was able to have someone at a nearby residence summon aid. There was medical evidence that if help had arrived sooner or if aid had been administered at the site by appellants, it was probable that the victim would have survived. The jury could infer that Mr. Flippo’s delay caused the helpless victim to be secluded in the field awaiting the promised aid and prevented or hindered others from rendering timely aid.

Flippo, 523 S.W.2d at 393-394.

The Arkansas Supreme Court held that there was substantial evidence from which a jury could find that defendant’s son, who was hunting out of season, was criminally negligent by acting without due caution and circumspection when he fired at an object he mistakenly believed to be a deer and then failed, as charged, to discharge his duty to render aid. *Id.* at 393. The court concluded that there was substantial evidence from which the jury could find both defendants criminally negligent and therefore guilty of involuntary manslaughter. *Id.* at 394.

As noted in *People v. Oliver*, 258 Cal. Rptr. 138 (Cal. App. 1989), discussed *infra*, Section 324 of the Restatement Second of Torts provides in part: “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. . . .” Rest.2d Torts § 324 (*quoted in Oliver*, 258 Cal. Rptr. at 143).¹⁴

Viewed in the light most favorable to the verdict, in the case at bar, Defendant lived with her bedridden mother since at least 2008, and was both responsible for and held herself out as Victim's primary caregiver. Victim relied on Defendant for food, water, bathing, and treatment of her physical injuries. Victim had been bedridden and immobile for a number of years, and could not take care of her own needs for food, water, or medical care. (Tr. VII at 50).

Defendant had 35 years of experience working in nursing homes and testified she had quit her job specifically to care for her parents.¹⁵ At least one other relative (Cindy) who had offered assistance was not taken up on that offer

¹⁴ Note there is no reference to seclusion in this duty.

¹⁵ Defendant's father (Victim's husband) died on January 31, 2010. The prosecutor agreed prior to trial not to mention that Victim's husband (Defendant's father) was found at the Keokuk Hospital; that there was no hotline call; and that the husband suffered bed sores in the same places as Victim and as severe (Tr. VI at 22).

by Defendant, and believed that due to her 35 years of experience in nursing homes, Defendant “knew what she was doing.”

Once Defendant took charge of her mother, who was “helpless adequately to aid or protect” herself, she had a legal duty to do so and was responsible for the failure “to exercise reasonable care to secure the safety” of her mother “while within” her charge. Rest.2d Torts § 324; *Oliver*, 258 Cal. Rptr. at 143. No other adult was living in Victim’s home at the time to do so.

In *Oliver, supra*, the defendant left a bar with a victim she observed to be extremely drunk, drove him to her home, and allowed him to shoot heroin into his arm in her bathroom. When the victim fell to the floor unconscious, she was held to have assumed a duty to seek medical aid. *Id.*, 258 Cal. Rptr. at 144. In driving victim to her home, “she took him from a public place where others might have taken care to prevent him from injuring himself, to a private place - - her home - - where she alone could provide such care. To a certain, if limited, extent, therefore, she took charge of person unable to prevent harm to himself. Rest. 2d Torts, *op. cit. supra* § 324.)” *Id.* When victim collapsed to defendant’s floor after defendant had allowed him, without any objection on her part, to inject himself with narcotics, defendant should have known “that her conduct had contributed to creating an unreasonable risk of harm” for the victim. At that point, she owed the victim “a duty to prevent that risk from occurring by summoning aid, even if she had not previously realized that her actions would

lead to such risk” under Rest. 2d Torts § 321. *Id.* Her failure to summon any medical assistance whatsoever and to leave the victim abandoned outside, hidden from the view of others, “warranted the jury finding a breach of that duty.” *Id.*

The court found the evidence sufficient to establish the defendant’s knowledge, actual or imputed, that her failure to seek medical assistance was a legal cause of the victim’s death. *Id.* at 144-145. Appellant’s inaction constituted a substantial factor leading to the victim’s death, and therefore was a proximate cause of his death. *Id.* at 145. The court therefore affirmed defendant’s conviction for involuntary manslaughter. *Id.*

Similarly, in the case at bar, Defendant held herself out as the primary caregiver of Victim. She discouraged multiple relatives from visiting Victim, including on the date of Victim’s husband’s funeral. She tacitly refused Cindy’s offer of assistance.¹⁶ When relatives did come by for a visit, Defendant covered Victim’s wounds with a blanket. Despite voluntarily assuming the care of

¹⁶ The jury was not required to credit Defendant’s excuse proffered at trial, particularly in light of her lie to the Sheriff about living at the trailer, her inconsistent stories about when she moved in, and the conflict between her testimony about the timing of Victim’s fatal injuries and the medical testimony.

Victim, a helpless person, rather than seeking help from competent medical professionals, she prevented others from rendering aid. *See, Flippo* at 393.

As in *Flippo*, Defendant did not obtain aid for Victim until Victim could no longer be saved. Under *Flippo*, the case meets the fourth situation described in *Jones v. United States* in which the failure to act may constitute breach of legal duty. *Id.* As in *Flippo*, Defendant was aware of the severity of Victim's wounds, including both the decubitus ulcer which had eaten through both her flesh and muscle to the bone, and her rodent-eaten and gangrenous leg and foot. Defendant knew of the severity based upon her 35 years of experience in a nursing home and her daily observations of Victim during alleged baths that she gave Victim. The jury could also have found that Defendant was aware of the rotting flesh on Victim's gangrenous leg, which later required amputation; from the evidence that police officers were overpowered by the smell some 10-15 feet outside the trailer in which Defendant and Victim lived. The jury could reasonably conclude that Defendant knowingly caused Victim's serious physical injury by failing to discharge her duty to render aid to the helpless Victim whose care she had voluntarily assumed. *See, id.*

While Defendant argues that she did not "seclude" Victim from the assistance of others, the Missouri Court of Appeals for the Eastern District (as well as the trial court) in this case properly concluded that seclusion is not a required element of the duty, a view consistent with that provided for in Section

324 of the Restatement (Second) of Torts (which post-dates the *Jones* decision which conflated this duty and the duties described in Sections 326 and 327 of the Restatement not to interfere with the attempts of third parties to save a helpless victim). *See, Gargus*, slip. op. at 9-10 (citing *Flippo* and *Oliver, supra*).

Even if seclusion were required for breach of a duty assumed to care for a helpless victim, the Court of Appeals held that this requirement was satisfied. There was evidence to support that Defendant discouraged visits from other family members once she saw the ulcer on the date of Victim's husband's death (January 20, 2010) by failing to notify them of that death and discouraging visits to Victim following the husband's funeral, even by relatives raised in Victim's home. In addition, Defendant placed a blanket over Victim's wounds when others visited, thereby preventing others from offering aid. Defendant refused Cindy's offer of assistance (and her explanation for doing so need not have been believed by the jury in light of her "fibs" about living with the Victim to police, inconsistent stories about when she moved in and when she first saw the ulcer, and stories in conflict with the evidence about seeing Victim's body daily yet not noticing the Stage IV progression of the back ulcer or the gangrenous leg with the rodent-eaten foot).

Finally, as the Court of Appeals held, "by not taking Victim to the doctor for routine medical care or calling emergency services—especially considering

that Gargus, as a CNA, knew the danger Victim’s wounds presented,” Defendant “secluded her from medical help.” *Gargus*, slip op. at 10.¹⁷

As the Court of Appeals held, recent Missouri case law has not required a seclusion element in somewhat similar circumstances. In *State v. Shrout*, 415 S.W.3d (Mo. App. S.D. 2013), the Court of Appeals found that parents who assumed the duty to care for a mentally handicapped adult son owed a general duty of care and further owed a duty not to act recklessly or with criminal negligence in carrying out that duty, which they had affirmatively sought in court. *Id.* at 125. The Court rejected a claim that the parents owed no duty to the son because he was an adult where they had affirmatively sought and

¹⁷ In contravention of the standard of review, Defendant claims Victim resisted medical care. While there was some historical testimony to this effect, much of it from Defendant (although some from at least one other relative), the emergency-room nurse testified that as to these injuries, Victim was “very compliant,” “very anxious to please and never verbalized anything in regards to not wanting to be there. She was asking for help.” (Tr. VI at 199). Victim was “very anxious” and worried about whether she was doing things right and whether her caregivers were mad at her (Tr. VI at 199). In addition, the ambulance personnel testified that Victim easily agreed to go to the hospital after approximately 30 seconds of conversation (Tr. VI at 178).

received custody of the victim, and the victim “was certainly dependent upon both of the Shrouts for his basic necessities, food, clothing, shelter, and medical care[.]” *Id.* (quoting and then affirming the trial court finding). The Court found that breach of that duty supported a conviction for involuntary manslaughter where the victim died “[c]old, sick, ‘soaked in urine,’ with a bucket of excrement for his toilet” on a “urine-drenched mattress on the tarp-covered floor of a room where he was kept by his mother and her spouse.” *Id.* at 124-125. Dependency of the person for basic needs upon those who had assumed the duty of care and then breached it, without any mention of seclusion, was the basis of the holding. *See, id.*

As the Court of Appeals held in this case, “In both cases, the defendants voluntarily assumed the care of a person who was unable to care for him or herself, and the victim was wholly dependent on the defendant for food, clothing, and medical care. In both cases, the defendants claimed they owed no duty under Missouri law to care for the person in their sole custody. Here, as in Shrout, we do not find that claim persuasive.” *Gargus*, slip op. at 11. *See*, Rest.2d Torts § 324 (breach of assumed duty to helpless person does not include a seclusion element). *Cf.*, Rest.2d Torts §§ 326-327 (discussing separate or additional duty not to interfere with assistance proffered to helpless person by third parties). *See also*, *State v. Studebaker*, 66 S.W.2d 877, 881 (Mo. 1933)

(“carelessness may be so gross and wanton as to import malice” giving rise to criminal liability).

In *Bowan v. Express Medical Transporters, Inc.*, 135 S.W.3d 452 (Mo. App. E.D. 2004), Judge Rhodes Russell recognized that “our Supreme Court has adopted section 323 from the Restatement (Second) of Torts, which imposes a duty on those who voluntarily render services to another.” *Id.* at 457-458 (citing *Stanturf v. Sipes*, 447 S.W.2d 558, 561-562 (Mo. 1969)). “Our case law further supports the concept that one who acts voluntarily or otherwise to perform an act, even when there was no duty to act originally, can be held liable for the negligent performance of that act.” *Bowan*, 135 S.W.3d at 458. *See also, Martin v. Mo. Hwy. & Transportation Dept.*, 981 S.W.2d 577, 585 (Mo. App. W.D. 1998) (“Missouri law is clear that liability may be imposed upon one who is under no duty to act but does so voluntarily or gratuitously[,]” thereby “assuming such a duty”).

Comment “a” to section 323 of the Restatement (Second) of Torts observes that: “A special application of the rule stated [in section 323], to one who takes charge of another who is helpless at the time, is stated in § 324.” Rest.2d Torts § 323, Comment “a”.

Thus, this Court should apply the language of Section 324 of the Restatement (Second) of Torts, which provides that:

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.

Id.

As a subset of the previously adopted section 323, section 324 accurately sets out Missouri law as to the duty owed in the circumstances at bar, and does not contain a "seclusion" element. *See, Bowan*, 135 S.W.3d at 457-458.

Because Defendant took charge of a person who was "helpless adequately to help or protect" herself, she owed Victim a duty "otherwise imposed by law" (in the language of the statute of omissions) "to exercise reasonable care to secure the safety of the other while within the actor's charge[.]" Rest.2d Torts § 324. Thus, omissions alone could support the verdict where they constituted a breach of the assumed duty. *See*, § 562.011.4

D. Defendant created Victim's peril and had a duty to summon aid.

As previously noted, Section 321 of the Restatement (Second) of Torts provides that if an actor subsequently realizes or should realize that she has created an unreasonable risk of harm to another, even though at the time of the

act she had no reason to believe it would involve such a risk, she “is under a duty to exercise reasonable care to prevent the risk from taking effect.” *Id.*; *Oliver*, 258 Cal. Rptr. at 143.

In *Flippo v. Arkansas*, *supra*, a father and son were convicted of involuntary manslaughter for failing to procure timely medical assistance for the victim of a hunting accident shot by the son. There was testimony from a pathologist that the victim could have been saved if he had been hospitalized while still conscious and that proper first aid could have saved victim. *Id.*, 523 S.W.2d at 392-393. Defendant’s son had administered no first aid although he had won a National 4-H Safety Man Award based upon his knowledge of “all aspects of safety.” *Id.* at 392.

The Arkansas Supreme Court held that there was substantial evidence from which a jury could find that defendant’s son, who was hunting out of season, was criminally negligent by acting without due caution and circumspection when he fired at an object he mistakenly believed to be a deer and then failed, as charged, to discharge his duty to render aid. *Id.* at 393.

Similarly, in the case at bar, Defendant had a duty, once she realized that the unhygienic, rodent-infested conditions she had subjected her mother to had resulted in a serious decubitus ulcer and a gangrenous leg, even if she had not foreseen such a risk, to render or summon aid. Rest.2d Torts § 321; *Oliver*, 258 Cal. Rptr. at 143; *Flippo*, 523 S.W.2d at 393. Instead, as in *Flippo*, she dithered

with other concerns until it was too late. Despite moving into Victim's residence in 2008 and noticing, by her own admission, a decubitus ulcer the size of a tennis ball on January 20, 2010, and despite her nursing home training, she waited until February 22, when she "was just getting to the point where I wanted to do what was right for her." (Tr. VIII at 266). Moreover, the medical testimony was that the missing portion of foot was eaten off her gangrenous leg over a period of at least several days. If, as Defendant testified, she could see Defendant's leg "all the time" and bathed her daily, she could not have failed to appreciate the severity of the situation.

Because Defendant failed in her legal duty to her mother after realizing she had caused her injuries, "a voluntary act" may include "solely" omissions and the *actus reus* was established.^{18 19}

¹⁸ In addition, Defendant arguably had a "special relationship" to her mother which created a duty under the Comment and *Jones* analysis. *See*, Comment to §562.011, V.A.M.S., stating that "the most common" of the situations in which "criminal liability by omission" is found in crimes not defined in terms of failure to act "is liability for homicide (usually manslaughter) based on the failure to perform some act, **such as supplying medical assistance to a close relative.**" *Id.* (emphasis added). *Jones, supra*, describes this category of situation "in which the failure to act may constitute breach of legal duty" as

“where one stands in a certain status relationship to another[.]” *Id.*, 308 F.2d at 310. *See also, State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990) (affirming involuntary manslaughter and endangering-the-welfare-of-a-child convictions based on neglect of nutritional and medical needs of defendants’ children despite claim only omissions involved); *Johnson v. County of Los Angeles*, 143 Cal. App. 3d 298, 191 Cal. Rptr. 704 (1983) (holding police in “special relationship” with mother of arrested schizophrenic had a duty to inform her before he was released and committed suicide under Section 321 of the Restatement (Second) of Torts); *Michigan v. Thomas*, 272 N.W.2d 157 (Mich. App. 1978) (supervisor of religious training school owed duty to catatonic schizophrenic he had beaten with a rubber hose with parental permission, where he failed to summon medical care for nine days, due to *in loco parentis* relationship; involuntary manslaughter conviction affirmed). In the case at bar, the same policies of this theory are present. Defendant had voluntarily assumed a function not unlike that assumed in an *in loco parentis* situation. Defendant was responsible for meeting the nutritional, hydration, and medical needs, as well as other daily hygiene needs, of the helpless Victim, in a parent-child relationship (a “close relative” in the lexicon of the Comment to §562.011). Defendant’s failure to provide medical attention when the decedent was unable to obtain the same for herself, violated her legal duty to care for the Victim. *Id.* The fact that the roles

of parent and child may be reversed when the parent reaches an advanced age does not change the policies at issue, or the closeness of the “special relationship” where the adult child acts as the helpless parent’s caregiver.

¹⁹ In addition, Defendant arguably had an implied contract to care for her mother, which was sufficient to create a legal duty. *See, Davis v. Virginia*, 335 S.E.2d 375 (Va. 1985) (daughter who moved in with mother to care for her as a full-time occupation, rent-free, and shared in mother’s Social Security and food stamp benefits had legal duty to care for her). *See also, Jones*, 308 F.2d at 310, approved in the Comment to §562.011, holding a duty is present “where one has assumed a contractual duty to care for another.” If Defendant maintains that she did not voluntarily assume the duty of her mother’s care, she must have done so as part of an implied contract which allowed her to live in her mother’s home, rent-free. *See, id.* Defendant admitted she had quit her job on January 20, 2010, that she assumed the responsibility for the total care of her mother, and that this became her full-time occupation. Defendant thus had no source of income, and Victim expressed her concern to Cindy that Defendant would be unable to pay all the bills. Given Victim’s age, a reasonable juror could infer that Victim received Social Security benefits, which would have to support the household. The benefit of sharing in mother’s support money is sufficient consideration for an implied contract. *See, Davis, supra.* A reasonable juror could

E. There was sufficient evidence of the “knowingly caused serious physical injury” element because Defendant was aware that Victim was diabetic, that bedsores beyond Stage II required immediate attention, of the dangers of gangrene, and of the importance of sanitation in the environment of a bedridden senior with decubitus ulcers.

“The State may prove a defendant’s knowledge by direct evidence and reasonable inferences drawn from the circumstances surrounding the incident.” *State v. Davis*, 407 S.W.3d 721, 724 (Mo. App. S.D. 2013) (quoting *State v. Burrell*, 160 SW 3d 798, 802 (Mo. banc 2005)). In fact, “[d]irect proof of the required mental state (here, ‘knowingly’) is seldom available and such intent is usually inferred from circumstantial evidence.” *Davis*, 407 S.W.2d at 724-725 (quoting *State v. Abercrombie*, 694 SW2d 268, 271 (Mo. App. S.D. 1985)). “In determining whether a person knowingly created a substantial risk, we look to the totality of the circumstances.” *Davis*, 407 S.W.2d at 725 (quoting *State v. Buhr*, 169 S.W.3d 170, 177(Mo.App.W.D.2005)).

also infer a pecuniary motive from Defendant’s obsession with finding insurance papers which did not exist after her father’s death, as testified to by Cindy. Under the holding of *Davis*, there is sufficient evidence of an implied contract to supply the duty and thus the *actus reus*.

Defendant had 35 years of experience working in nursing homes as a Certified Nurse's Assistant. (Tr. IX at 12). Defendant knew that Victim was diabetic and that diabetics needed "special vigilance" (Tr. VI at 174, 200; Tr. IX at 12). Defendant testified that she "saw her [mother's] body, daily." (Tr. IX at 17). She specifically saw her bottom when she put her on the bedpan (Tr. IX at 22). Defendant had been trained in the problems of caring for seniors in the nursing home, including in the care and treatment of bedsores or pressure ulcers. (Tr. IX at 19). At one point, Defendant testified that Victim always had "necrotic tissue" covering the area of her bedsore (Tr. IX at 28). Defendant was familiar with gangrene and with the smell of rotting flesh that accompanied it from her work in nursing homes. (Tr. IX at 29). Defendant had had continuing training as a CNA at the Clark County Nursing Home, which always touched on infection control, abuse and neglect as required by the State of Missouri (Tr. VII at 180, 190). Basic hygiene was covered in infection control training (Tr. VII at 191).

The jury was entitled to credit testimony that there were no bedsores on Victim's leg when Victim's granddaughter visited in November 2009 (Tr. VI at 128-129). The Victim could not get out of bed at that time (Tr. VI at 132). At the time, Victim had no sore in the middle of her back (Tr. VI at 132).

Because there was ample testimony that Defendant, if she saw Victim's body daily as she testified, could not have missed a decubitus ulcer that

progressed to Stage 4 that was “huge,” “very, very, very deep,” “gaping” and “infected,” or the gangrene and missing portion of her foot (which was eaten off over a period of at least several days), and the odor of “rotting flesh” was overpowering even 10 to 15 feet outside the trailer, the jury could reasonably infer that Defendant (based on her training) knew of the attendant circumstances and that these appalling wounds coupled with the appalling sanitation were “practically certain” to result in serious physical injury via infection of the Stage IV ulcer or amputation of the leg. As the trial court’s remarks, cited with approval in *Shrout* to the female defendant in that case, emphasized: “Defendant Ronda Shrout had worked in a care facility before. . . . having worked in a care facility, the reasonable inference is you should know what to look for.” *Shrout*, 415 S.W.3d at 126.

Here, the evidence established that Defendant had been trained in recognizing the problems Victim had and what to do about them. She testified she observed Victim’s body every single day. The jury was entitled to reasonably infer that she knowingly caused serious physical injury by placing and leaving her in the rodent-infested, highly unsanitary conditions, resulting in gangrene and a basketball-sized, highly malodorous, multicolored, gaping decubitous ulcer which exposed her tailbone. Defendant then declined to seek or summon medical help until February 22, 2010, when she said she finally decided to do what was

right for Victim, but inferentially a time when she knew it was too late to prevent serious physical injury.

Defendant challenges no other element of the elder abuse in the first degree conviction.²⁰

Defendant's first point should be rejected.

²⁰ While Defendant contends that the lesser-included offense of elder abuse in the third degree (which was also submitted to the jury) is intended to cover these facts because 565.184.1(5) provides that a person commits that offense if he “[k]nowingly acts or knowingly fails to act in a manner which results in a grave risk to the life, body or health of a person sixty years of age or older ...,” the jury in this case found that Defendant did more than create a “grave risk” of harm—she “knowingly caused” serious physical injury and the evidence supported that verdict.

II.

The trial court neither erred nor plainly erred in submitting Instruction No. 8, the verdict director for elder abuse in the first degree, because the additional elements not contained in the MAI-CR3d instruction were required by the substantive law, and the instruction required the jury to find every factual element of the crime, including those that support the prosecution’s theory that Defendant was under a legal duty and that her omissions therefore constituted a “voluntary act” which permitted the attachment of criminal liability.

Defendant complains that the verdict director for elder abuse in the first degree included additional paragraphs not authorized by MAI-CR 3d; that the additional first paragraph designed to establish the assumption of a duty by Defendant that would permit a criminal finding that she committed a “voluntary act” by omitting to perform her duties was written in such a way that it did not require a jury finding; that the instruction did not require the jury to find that Defendant voluntarily assumed the care of Victim and so secluded her as to prevent others from rendering aid such that a legal duty attached; and that the instruction did not require the jury to find an act required by law that Defendant had a duty to perform that she failed to perform.

The verdict director, Instruction No. 8, was patterned after MAI-CR 3d 319.50, with modifications required by Section 324 of the Restatement (Second)

of Torts, which as explained in the argument under Point I, accurately captures Missouri law.

MAI-CR 3d 319.05, the verdict director for elder abuse in the first degree, provides that the jury shall be instructed as follows:

(As to Count ____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [date], in the (City) (County) of _____, State of Missouri, the defendant [*Insert one of the following. Omit brackets and number.*]

[1] attempted to (kill) (or) (cause serious physical injury to) [*name of victim*] by [*Insert means by which attempt was made, such as “shooting,” “stabbing,” etc.*] him,

[2] knowingly caused serious physical injury to [*name of victim*] by [*insert means by which injury was caused such as “shooting,” “stabbing,” etc.*] him,

and

Second that at that time [*name of victim*] was sixty years of age or older, and

Third, that defendant (knew) (or) (was aware) [*name of victim*] was sixty years of age or older,

Then you will find the defendant guilty (under Count ___) of elder abuse in the first degree (under this instruction).

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense (under this instruction).

(As used in this instruction, a person attempts to (kill) (or) (cause serious physical injury) when, with the purpose of causing that result, he does any act that is a substantial step toward causing that result. A “substantial step” is conduct that is strongly corroborative of the firmness of the actor’s purpose to cause that result.)

(As used in this instruction, the term “serious physical injury” means physical injury that creates substantial risk of death or that cause serious disfigurement or protracted loss or impairment of the function of any part of the body.)

MAI-CR3d 319.50.

Instruction No. 8 provided:

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that between December 1, 2009, and February 22, 2010, in the County of Clark, State of Missouri, the Defendant, 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, and

Second, that she was physically capable of providing care for her mother, Lorraine Gargus, and

Third, that she knowingly caused serious physical injury to Lorraine Gargus by leaving her on the bed for long periods of time in unsanitary, rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites, and

Fourth, that at that time Lorraine Gargus was sixty years of age or older, and

Fifth, that defendant knew Lorraine Gargus was sixty years of age or older,

then you will find the defendant guilty under Count II of elder abuse in the first degree under this instruction.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense under this instruction.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes

serious disfigurement or protracted loss or impairment of the function of any part of the body.

(L.F. 168) (emphasis added).

A. Defendant failed to preserve the objections made on appeal except as to the inclusion of additional paragraphs not authorized by MAI-CR 3d.

At trial, defense counsel made only the following objection to the instruction:

Instruction No. 8. We object to the submission of this particular Instruction in that it, again, it is 319.05, assuming where [Defendant] assumes the care of her mother. Again, this is going to a duty of care, and cited by 565.011 subsection 4. Again, we do not believe the State has any authority that they can cite, statutorily or otherwise, and we believe it permissively adds something to the statutes.

In addition, Your Honor, it does not comport with the MAI, Missouri Approved Instructions, pattern instructions, not only because the State's attempting to edit it to form it - - to show an assumption of care, or duty of care, but also, that the State has added additional elements into this instruction, where they do not exist, and there is no - - there are no notes on use, or case law that suggests, that it can be modified in this way. Therefore, we object to the Instruction entirely.

And, Your Honor, I believe that those are all the objections I have.

(Tr. IX at 145-146).

Defendant's motion for new trial asserted that Notes on Use to MAI-CR 3d 304.02 provide the format for modifications to verdict director instructions, but that format supports the State here. *See*, MAI-CR 3d 304.02 (which provides that additional required elements should be listed in the instruction as was done in this case).

B. Defendant has waived all claims other than the claim that the Instruction did not track MAI.

Because Defendant offers different complaints on appeal than the objection he made at trial, his claim is not preserved and has been waived. An appellant is bound by the issues raised and arguments made in the lower court and may not raise new and totally different arguments on appeal. *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999). "No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

C. Standard of Review

This Court reviews preserved claims of instructional error *de novo*. *State v. Pennell*, 399 S.W.3d 81, 92 (Mo. App. E.D. 2013). If there is an applicable

MAI-CR instruction, that instruction form shall be used to the exclusion of any other instruction. Rule 70.02(b). To reverse a jury verdict for instructional error, the party challenging the instruction must show that it misled, misdirected, or confused the jury, and that prejudice resulted from the instruction. *Pennell*, 399 S.W.3d at 92. If a jury instruction does not follow an applicable MAI, the Court presumes such errors prejudice the defendant unless it is clearly established that no prejudice occurred. *Id.*

Defendant in the alternative, seeks plain error review under Rule 30.20.

Rule 30.20 provides, in pertinent part, that “plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted.” Rule 30.20. “The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review.” *State v. Collins*, 290 S.W.3d 736, 743-44 (Mo. App. E.D. 2009).

Plain error review is used sparingly and is limited to those cases where there is a clear demonstration of manifest injustice or miscarriage of justice. Claims of plain error are reviewed under a two-prong standard. In the first prong, we determine whether there is, indeed, plain error, which is error that is evident, obvious, and clear. If so, then we look to the second prong of the analysis, which considers whether a manifest injustice or miscarriage of justice has, indeed, occurred as a result of the error. A

criminal defendant seeking plain error review bears the burden of showing that plain error occurred and that it resulted in the manifest injustice or miscarriage of justice. The outcome of plain error review depends heavily on the specific facts and circumstances of each case.

State v. Ray, 407 S.W.3d 162, 170 (Mo. App. E.D. 2013).

For instructional error to rise to the level of plain error, a defendant must demonstrate that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice; it must be apparent to this Court that the instructional error affected the jury's verdict. *State v. Cooper*, 215 S.W.3d 123, 125 (Mo. banc 2007). The defendant bears the burden of showing that an alleged error has produced such a manifest injustice. *State v. Isa*, 850 S.W.2d 876, 884 (Mo. banc 1993). Mere allegations of error and prejudice will not suffice. *Id.*

D. No error, plain or otherwise

In *McNamee v. Garner*, 624 S.W.2d 867 (Mo. App. E.D. 1981), this Court held that instructions not in MAI "shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." *Id.* at 868 (quoting Rule 70.02(e)). The ultimate test for such instructions is whether they follow the substantive law and can be readily understood. *Id.* Defendant has made no claim at any time, including on this

appeal, that the instruction could not be readily understood; she contends only that the instruction did not follow the substantive law.

The Court of Appeals correctly found no error, plain or otherwise, in the unpreserved claims (not included in the objection at trial or in the Motion for New Trial, LF 209-212) that the instruction presumed but did not require the jury to find that Defendant assumed the care of Victim and omitted any reference to secluding Victim to preventing others from rendering aid.

The Court of Appeals found that the plain language of Instruction No. 8 stated in relevant part:

[I]f you find and believe from the evidence beyond a reasonable doubt:

First, that between December 1, 2009, and February 22, 2010, in the County of Clark, State of Missouri, the Defendant, 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, and

...

Third, that she knowingly caused serious physical injury to Lorraine Gargus by leaving her on the bed for long periods of time in unsanitary,

rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites,

...

then you will find the defendant guilty under Count II of elder abuse in the first degree under this instruction.

Gargus, slip op. at 16.

The Court of Appeals held that because each paragraph listed facts the jury must “find and believe from the evidence[,]” the use of the phrase, “by having” in the first paragraph did not create a presumption of fact, but rather indicated a list of facts the jury must find. *Id.*

Even if the verdict director is viewed as containing two extraneous words in paragraph first, it plainly required the jury to find that Defendant “voluntarily assumed the care of her mother, Lorraine Gargus, a person unable to met her physical and medical needs, by moving into Lorraine Gargus’ house, performing basic care giving functions such as providing food and water, and representing to others that she was the primary care giver for Lorraine Gargus [.]” (L.F. 168). These were precisely the facts required to be found to establish that Defendant had voluntarily assumed the duty of care and then failed to render aid to a helpless person. *See*, Rest.2d Torts § 324. Moreover, the Instruction required the jury to acquit “unless you find and believe from the

evidence beyond a reasonable doubt each and all of these propositions,” so it did require factual findings in paragraph first (L.F. 168).

The second paragraph of the Instruction required the jury to find “that [Defendant] was physically capable of providing care for her mother, Lorraine Gargus [.]” (L.F. 168). This precisely tracks the language of § 562.011.2(2), which Defendant relied upon to argue that the State failed to charge a “voluntary act”. The jury was required to find this fact in order to find that Defendant’s omission was in fact a “voluntary act” under Missouri statute and therefore the paragraph was proper.

Defendant’s unpreserved claim that there should have been a reference to seclusion is in conflict with Missouri law, which has adopted section 323 of the Restatement (Second) of Torts, of which section 324 is a special case—the language of the duty so provided does not require seclusion, as pointed out in the argument under Point I. Thus, as the Court of Appeals held, there was no error, plain or otherwise, in not including it.

Defendant’s claim that the instruction did not require the jury to find an act required by law that Defendant had a duty to perform but failed to perform is belied by paragraph third, which required the jury to find that Defendant knowingly caused serious physical injury to the Victim “by leaving her on the bed for long periods of time in unsanitary, rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites[.]” While

Defendant claims these are omissions rather than acts, the argument in Point I makes it plain that criminal liability may attach for omissions and the paragraph accurately describes the behavior by which Defendant knowingly caused serious physical injury, as the instruction specifies.

Because the instruction was based upon MAI, as required to be modified by substantive law and accurately tracked the substantive law, there is no error, plain or otherwise.²¹ *See*, MAI-CR3d 304.02 (which provides that additional required elements should be listed in the instruction as was done in this case).

Defendant's second point should be rejected.

²¹ Defendant does not contend that the Instruction could not be readily understood.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 15,984 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and
2. That a copy of this notification was sent through the eFiling system on this 1st day of May, 2014, to:

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