IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC93937**
	)	
LINDA GARGUS,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF CLARK COUNTY, MISSOURI
1ST JUDICIAL CIRCUIT
THE HONORABLE GARY DIAL, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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TRANSFER QUESTIONS

The Eastern District's opinion presents questions of general interest and importance:

(1) Does the first-degree elder abuse statute, ***§ 565.180***, allow a prosecution for a defendant's failure to act even though the statute does not expressly provide that the failure to act constitutes first-degree elder abuse, as admitted by the Eastern District's opinion, especially where within the same legislative bill wherein that crime was enacted the legislature included the crime of third-degree elder abuse in the third degree, ***§ 565.184***, which does expressly provide that an omission to perform an act is a violation of that statute?

(2) If the first-degree elder abuse statute does allow a prosecution for a defendant's failure to act, is it enough for the State to prove and the jury to find that the defendant voluntarily assumed the care of a helpless person who was dependent upon the defendant for basic necessities, or must the State also have to prove, and the jury find, that the defendant so secluded that person as to prevent others from rendering aid, as provided in the commentaries to ***§ 562.011***, which deals with the general principles of criminal liability?

JURISDICTIONAL STATEMENT

Appellant, Linda Gargus, appeals her conviction for elder abuse in the first degree, ***§ 565.180***. On November 13, 2012, the Honorable Gary Dial sentenced Linda to the minimum sentence of ten years in prison as recommended by the jury (Tr. XI at 30; LF 239-240).[1] Notice of appeal was timely filed on November 13, 2012, in *forma pauperis* (LF 241-252). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, § 3, Mo. Const.; ***§ 477.050***. This Court thereafter granted Linda's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and ***Rule 83.03***.

[1] All further references are to RSMo 2000 unless otherwise indicated. The Record on Appeal consists of a legal file (LF), and several transcripts. Because the court reporter repaginated the transcript for each volume, the transcripts will be will be cited by "Tr." followed by the Roman numeral of the volume number and the page numbers within that volume (e.g., the first day of trial is in Volume VI, so a reference to page one of that transcript would be: (Tr. VI at pg. 1)).

STATEMENT OF FACTS

Lorraine and James Gargus lived in a mobile home in Kahoka, Missouri (Tr. VI at 150, 180-181; Tr. VII at 218-219; Tr. VIII at 238-239). Lorraine was diabetic (Tr. VIII at 12). Sometime around 2005, Lorraine decided that she would not walk anymore because she kept falling down; she chose to be confined to a couch or bed (Tr. VII at 49-50, 78-79; Tr. VIII at 234-236). Lorraine did not like doctors or hospitals; she felt like they were taking her money (Tr. VII at 79; Tr. IX at 64, 69-70, 89, 96-97, 102). Also, Lorraine would not let people throw things away (Tr. IX at 89, 96-97, 102).

Linda Gargus, one of Lorraine's and James' daughters, and Linda's adopted son lived in an apartment in Keokuk, Iowa (Tr. VIII at 241). Linda had lived in Keokuk for 20-25 years and her son went to school there (Tr. VII at 88, 221-222; Tr. VIII at 224, 242). Although Linda kept her apartment in Keokuk, in 2008, she and her son started staying full time at Lorraine and James' home to help take care of them (Tr. VII at 50, 91, 94, 218-219, 222-223; Tr. VIII at 242; Tr. IX at 5).

Cindy Hickman, one of James and Lorraine's granddaughters, visited Lorraine in the spring of 2009 (Tr. VII at 50). Linda and her son were living there at that time (Tr. VII at 50). Hickman could always visit anytime she wanted (Tr. VII at 50-51, 80).[2]

[2] Larry Hickman, Lorraine's son and Linda's half-brother, testified that Linda never refused to allow him to visit Lorraine (Tr. IX at 64, 69-70).

In October, 2009, Hickman spoke with Linda (Tr. VII at51-52). Linda told her that James had cancer and was going back-and-forth to Iowa City for treatment (Tr. VII at 53). Hickman offered her assistance including driving Linda's son to school (Tr. VII at 54, 81-82). Linda gave no response (Tr. VII at 54-55).[3]

Linda was a certified medication technician (Tr. VII at 165, 167-168; Tr. VIII at 12, 16). Up until about January 20, 2010, James helped with Lorraine, but on that day, because he was getting weaker, Linda quit her job to take care of her parents (Tr. VII at 94-95; Tr. VIII at 249-250; Tr. IX at 3). Linda tried to give Lorraine daily sponge baths and changed her clothes (Tr. VIII at 251; Tr. IX at 28). Sometimes Lorraine would fight with Linda when she tried to give Lorraine a sponge bath, so one of Lorraine's granddaughters had to help (Tr. IX at 106).

On January 20, 2010, Linda discovered that Lorraine had a bedsore on her "bottom" (Tr. VIII at 251-252, 254; Tr. IX at 17-18).[4] It was the size of a tennis ball (Tr. VIII at 19-20). Linda did not believe that the skin was open at that time (Tr. VIII at 19, 28). Linda told Lorraine that she should go to the hospital, but Lorraine refused to go (Tr. VIII at 254-255). Linda bought her a cushioned air

[3] Linda testified that Hickman only offered to help take her son to school, and she did not respond because Hickman had been having seizures, which had previously happened when Hickman had children in her car (Tr. VIII at 244-245).

[4] Linda also saw the sore the weekend before Lorraine went to the hospital on February 22, 2010 (Tr. IX at 50-51).

mattress and kept turning her over on her side every hour (Tr. VIII at 255-256). But Lorraine was stubborn and kept rolling back over onto her back (Tr. VIII at 255-256).

James died on January 31, 2010 (Tr. VII at 51; Tr. VIII at 246). On February 2, 2010, two days after James died, Hickman showed up at Lorraine's residence (Tr. VII at 44, 56; Tr. VIII at 246-247). Linda was there (Tr. VII at 94-95). When Hickman went inside, she noticed things "piled to the ceiling" and birdcages 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).

Lorraine was covered from neck to toe with a blanket (Tr. VII at62). Her eyes were matted shut, but once she opened them, she kept referring to Hickman by Hickman's younger sister's first name, Sylvia, and Lorraine confused Hickman's children with Sylvia's (Tr. VII at 58, 63, 64-65; Tr. IX at 45-46).

Hickman never called anyone about the conditions (Tr. VII at 85). She never expressed any concern about Lorraine's health (Tr. VIII at 248). She did not see any reason for Lorraine to go to a doctor (Tr. VII at 86). Lorraine was a very stubborn person, and Hickman believed that if Hickman did anything for Lorraine and there was nothing wrong with her, then Lorraine would have disowned her (Tr. VII at 86).

James' funeral was February 5, 2010 (Tr. VIII at 246). According to Hickman, Linda did not want any family members to be there because she did not want to deal with them (Tr. VII at 66). Linda also did not want family members

notified because she did not want them to take James and Lorraine's things (Tr. VII at 68). Linda did not want some family members invited to James' funeral, particularly Linda's sister Carol, who had a "falling out" with Lorraine (Tr. VII at 69, 87).

Hickman thought that Lorraine should attend the funeral, but Lorraine did not want to leave the house (Tr. VIII at 247-248). It was cold and sleeting that day (Tr. VIII at 248). Linda offered to take Lorraine, but she declined the offer (Tr. VIII at 248). While family members were at the cemetery, some mentioned visiting Lorraine, but Linda said that she would rather they not visit (Tr. VII at 70-71).

Sylvia Winger, one of Lorraine's granddaughters, lived in a home next to Lorraine (Tr. IX at 116). Winger and her children visited Lorraine on February 5, 2010, the day of James' funeral (Tr. IX at 102-103). Lorraine was pretty alert and had a blanket on her (Tr. IX at 103). Winger did not see anything indicating that something was seriously wrong with Lorraine (Tr. IX at 104). Lorraine did not say that she needed any kind of medical assistance Tr. IX at 104, 107).

On February 22, 2010, emergency personnel were called by Linda to go to Lorraine's home (Tr. VI at 150, 161-162, 173-174,180-181, 189). The home was filled with clutter and smelled of animal urine and feces (Tr. VI at 161, 181, 184). Lorraine was on a hospital-type bed just inside the front door (Tr. VI at 161). Linda said that Lorraine had bedsores, she was very weak, she was not eating, and she was diabetic (Tr. VI at 161-162, 173-174, 177, 183, 189). Linda also

mentioned that Lorraine's husband had recently died and Linda feared that Lorraine was "giving up" and no longer wanted to live (Tr. VI at 162).

Lorraine 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).They attempted to persuade her to go to the hospital, but she wanted them to leave her alone (Tr. VI at 164). Lorraine did not want to be helped, and she did not want them to touch her (Tr. VI at 175). Eventually, Linda was able to help persuade Lorraine to go to the hospital (Tr. VI at 164, 174-175, 178-179). Emergency personnel determined that Lorraine's condition was stable and that she did not need advanced life support (Tr. VI at 171, 193). It did not seem to be a life-threatening situation (Tr. VI at 168, 175).

When they were moving Lorraine from the bed to a cot to transport her, a rodent ran out from near Lorraine's buttocks area, but it was uncertain where it came from (Tr. VI at165-166, 176, 177, 185). Linda testified that when they were moving Lorraine to the stretcher, a mouse ran up Linda's leg, and she jumped; she did not see it come off the bed (Tr. VIII at 261-262).

Linda asked them to look at Lorraine's foot (Tr. VI at 169, 174).When they removed a towel or sheet covering the foot, they noticed that Lorraine's leg was black and green from the knee downward – gangrenous looking – and a very large part of the topside of one foot was gone (Tr. VI at 169-170). Linda expressed surprise when she saw the way Lorraine's leg looked; it had not looked like that when she had last seen it two days before (Tr. VIII at 258; Tr. IX at 13, 52).

Lorraine was taken to the Keokuk Area Hospital (Tr. VI at 197-198). Linda told a nurse that Lorraine had been ill, Linda had been caring for Lorraine at Lorraine's home, and that Lorraine had refused to be seen by a doctor (Tr. VI at 199, 210). Lorraine 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 ulcer[5] 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). But Lorraine's only complaint was that her "bottom" hurt (Tr. VI at 200, 209).

Dr. Neville Crenshaw treated Lorraine 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, although it could have occurred through other means (Tr. VIII at 5-6, 10, 14-15, 18, 72-73). But because of Lorraine's diabetes, she had no pain in her left leg (Tr. VIII at 17).

She also had a very large, pre-sacral, decubitus ulcer, just above the buttocks (Tr. VIII at 5-6, 10). That ulcer was a very huge, deep, gaping, infected wound (Tr. VIII at 12). There were also pressure ulcers on her shoulder, right hip,

[5] 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.

and right heel (Tr. VIII at 9-10). The ulcers would have developed for more than two days to appear as they did (Tr. VIII at 10).

Lorraine's white blood cell count was markedly elevated, indicating infection, and her blood culture was positive for streptococcus infection among other infections (Tr. VIII at 13). Lorraine was septic – bacteria had migrated into her blood stream (Tr. VIII at14, 47). She also had renal failure due to a kidney infection (Tr. VIII at 47-48, 63). Unbelievably, despite her illnesses, she was not experiencing much pain (Tr. VIII at 35). She improved, dramatically, with aggressive treatment, despite multiple, overwhelming illness (Tr. VIII at 28, 42).

Dr. Kirk Green also examined Lorraine (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, although it could have been caused by something else (Tr. VIII at 101-102, 109-111). Her left leg was no longer getting any blood supply (Tr. VIII at 80, 93, 95). Because the leg was essentially dead, they decided to amputate it below her left knee (Tr. VIII at 15-16, 99, 101, 131, 135).

Lorraine died on March 11, 2010 (Tr. VIII at 26). Dr. Crenshaw opined that if she had been taken to the hospital earlier, it "perhaps" would have made a difference; maybe a month earlier would have made a difference, but a few days earlier would not have mattered (Tr. VIII at 41).

Dr. Eugenio Torres performed an autopsy on Lorraine (Tr. VIII at 123). She 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 Lorraine 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). Lorraine also had severe coronary artery disease, an enlarged heart, fibrosis of the heart muscle, emphysema, fibrosis of the lungs, chronic bronchitis, diabetes, and one of her kidneys had shrunk (Tr. VIII at 151-152).

The cause of Lorraine'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, [Lorraine] 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).

After Lorraine died, Linda spoke with Hickman about Lorraine (Tr. VII at 75-76). Linda told her that she did not realize how bad Lorraine was until after James died (Tr. VII at 75-76).

On February 22, 2010, Clark County Sheriff Paul Gaudette and some other law enforcement officers and workers for the Department of Family Services went to Lorraine's home (Tr. VII at 11-15, 21, 113-114, 244). Just outside the residence, directly across from it, was some partially-burnt trash, including some

Depends, and the remains of a burnt mattress (Tr. VII at 18, 21, 39-40, 114-115, 132). Linda had her adopted son burn the mattress because someone at the hospital had told her that Lorraine had an infection (Tr. VII at 230-233, 250; Tr. VIII at 263-265).

Sheriff Gaudette and the others inspected the home after Linda gave them permission (Tr. VII at 15-17). When Sheriff Gaudette was within 10-15 feet of the residence he smelled what appeared to be rotting flesh (Tr. VII at 19). When they 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; Linda said it had not worked in a couple of weeks (Tr. VII at 25, 35, 248). The bed that Lorraine had slept in did not have any bedding (Tr. VII at 25). Linda said that she and her son had drug 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, Linda told Kris Chamley of the Department of Health and Senior Services that she had moved in with her parents in December of 2009 or January, 2010, and she had been their primary caregiver (Tr. VII at 104-105, 107, 109). Linda said she was a certified nurse's aide and had worked at a

nursing home (Tr. VII at 105). She quit her work on January 20, 2010, to take care of her parents (Tr. VII at 106).

Linda told Chamley that she first noticed the ulcer on Lorraine's back on January 20, 2010; it was the size of a tennis ball (Tr. VII at 109-110). Linda 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 Linda and this time she said she first noticed the ulcer on January 25, 2010, and it was the size of a grapefruit (Tr. VII at 110-111). When Chamley told Linda that because of Linda's medical knowledge she should have been able to take care of the bedsore, Linda gave no response (Tr. VII at 111).

On February 24-25, 2010, Tim Vice, investigator of the Clark County Sheriff's Office, interviewed Linda (Tr. VII at 130, 134-135, 147, 152). Linda 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).

Procedural and Evidentiary Matters

Linda was charged by fifth amended information with involuntary manslaughter, ***§ 565.024***, and elder abuse in the first degree, ***§ 565.180*** (LF 131-132). After a jury trial was held in Clark County, Missouri, Linda was found not

guilty of manslaughter but guilty of first-degree elder abuse (LF 182-183). As to that count, the verdict director required the jury to find:

INSTRUCTION NO. 8

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 of (sic) protracted loss or impairment of the function of any part of the body.

(LF 168).

Linda objected to Instruction No. 8 because the instruction assumed Linda had taken over care of her mother (Tr. IX at 145-146). She also objected that the State added additional elements to the instruction - including an assumption or duty of care - which were not authorized by MAI-CR3d (Tr. IX at 145-146). The trial court overruled the objections (Tr. IX at 146).

Linda moved for judgment of acquittal at the close of the evidence; her motion was overruled by the trial court (LF 146-159; Tr. IX at 138-141).

The jury commenced deliberation at 5:25 p.m. and reached verdicts at 11:56 p.m., finding Linda not guilty of involuntary manslaughter but guilty of elder abuse in the first degree (Tr. IX at 195, 201; LF 182-183). After the jury was polled, the trial court accepted the verdicts (Tr. IX at 202-203; Tr. X at 1-2).

After the penalty phase, the jury returned its penalty phase verdict after only 15 minutes of deliberation, and recommended the minimum sentence of 10 years in prison (Tr. X at 56, 58; LF 184). The trial court granted Linda the full time to file a motion for new trial (Tr. X at 62).

The motion for new trial, which was filed on October 23, 2012 (LF 185), included the following claims: (19) the trial court erred in overruling Linda's objection to the verdict director for Count II; and, (21) the trial court erred in overruling Linda's Motion for Judgment of Acquittal at the Close of All the Evidence (LF 209-212; 224-235).

On November 13, 2012, the trial court overruled Linda's motion for new trial and sentenced her according to the jury's recommendation (Tr. XI at 18, 30; LF 239-240). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in overruling Linda's motion for judgment of acquittal at the close of all the evidence, and in entering judgment and sentence on the jury's guilty verdict against her for elder abuse in the first degree, § 565.180, because the State did not prove her guilt beyond a reasonable doubt, thereby depriving her of her right to due process, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the State only proved, at best, that Linda failed to perform an unspecified act, and under § 562.011.4, a person is not guilty of an offense based solely upon an omission to perform an act unless (1) the law defining the offense expressly so provides, and § 565.180 does not so provide, or (2) a duty to perform the omitted act is otherwise imposed by law, which also is inapplicable here; Linda did not have an existing legal duty to perform any act for Lorraine beyond what she provided because there was no evidence that Linda secluded Lorraine so as to prevent others from rendering aid; and, the Missouri elder abuse statutory scheme shows a legislative intent that the failure to perform an act is not intended to be covered under § 565.180 but instead is criminalized under § 565.184.

Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962);

State v. Riggs, 2 S.W.3d 867 (Mo. App. W.D. 1999);

State v. Liberty, 370 S.W.3d 537 (Mo. banc 2012);

State v. Salazar, 236 S.W.3d 644 (Mo. banc 2007);

U.S. Const., Amend. XIV;

Mo. Constitution, Article I, §10;

§§ 562.011, 562.016, 565.180, 565.184; and

Rule 29.11.

II.

The trial court erred and plainly erred in submitting Instruction No. 8, the verdict-director for elder abuse in the first degree, because this instruction violated Linda's rights to due process, a properly-instructed jury, and a fair trial, as guaranteed under the 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that: 1) Instruction No. 8 included additional paragraphs not authorized by MAI-CR3d, and the additional first paragraph was written such that it did not require a jury finding - rather it was written as though its assertions were established facts; 2) the additional 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.

Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962);

State v. Cooper, 215 S.W.3d 123 (Mo. banc 2007);

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1999)

U. S. Constitution, Amendments 6 and 14;

Mo. Constitution, Article I, §§10 & 18(a);

§ 562.011;

Rules 28.03, 29.11, and 30.20; and

MAI-CR3d 319.50.

ARGUMENT

I.

The trial court erred in overruling Linda's motion for judgment of acquittal at the close of all the evidence, and in entering judgment and sentence on the jury's guilty verdict against her for elder abuse in the first degree, § 565.180, because the State did not prove her guilt beyond a reasonable doubt, thereby depriving her of her right to due process, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that the State only proved, at best, that Linda failed to perform an unspecified act, and under § 562.011.4, a person is not guilty of an offense based solely upon an omission to perform an act unless (1) the law defining the offense expressly so provides, and § 565.180 does not so provide, or (2) a duty to perform the omitted act is otherwise imposed by law, which also is inapplicable here; Linda did not have an existing legal duty to perform any act for Lorraine beyond what she provided because there was no evidence that Linda secluded Lorraine so as to prevent others from rendering aid; and, the Missouri elder abuse statutory scheme shows a legislative intent that the failure to perform an act is not intended to be covered under § 565.180 but instead is criminalized under § 565.184.

Standard of Review & Preservation

Criminal statutes may not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within their terms. ***State v. Salazar***, 236 S.W.3d 644, 646 (Mo. banc 2007). Criminal statutes must be construed strictly against the State. ***State v. Turner***, 245 S.W.3d 826, 829 (Mo. banc 2008). If there is any ambiguity in a criminal statute, this Court must resort to the rule of lenity and resolve any conflict or ambiguity in Linda's favor. ***Id***.

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which she is charged. ***In re Winship,*** 397 U.S. 358, 364 (1970).

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). 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).

This same standard of review applies when this Court reviews a motion for a judgment of acquittal. ***Botts***, 151 S.W.3d at 375.

Linda moved for judgment of acquittal after the evidence, and her motion was overruled by the trial court after extensive argument (LF 146-159; Tr. IX at 138-141). In Linda's timely motion for a new trial, she alleged, in part, that the trial court erred when it overruled her motion for judgment of acquittal at the close of the evidence (LF 224-235; claim 21). Thus, this issue is properly preserved for appeal. *See* ***Rule 29.11(d).***

Elder Abuse in the First Degree

A person commits the class A felony of elder abuse in the first degree when she *knowingly causes* serious physical injury to any person sixty years of age or older. ***§ 565.180.1***. A person acts "knowingly" (1) with respect to her conduct or to attendant circumstances when she is aware of the nature of her conduct or that those circumstances exist; or (2) with respect to a result of her conduct when she is aware that her conduct is practically certain to cause that result. ***§ 562.016.3***.

The verdict director here alleged that Linda "knowingly caused" serious physical injury to her mother (Lorraine) by "leaving her on the bed for long periods of time in unsanitary, rodent infested conditions" (LF 168).

Relevant facts

The Eastern District's opinion[6] noted the following happened. Linda voluntarily moved into her mother's home in January 2010, to help her mother (Lorraine), who had determined that she wanted to be bedbound because she was suffering from diabetes (Slip Op. at 2; Tr. VII at 49-50, 78-79, 94-95; Tr. VIII at 234-236, 249-250; Tr. IX at 3). Linda first noted a bedsore on Lorraine on January 20, 2010 (Slip Op. at 2; Tr. VIII at 251-252, 254; IX at 17-18).[7] Linda cared for the bedsore in various ways, although Lorraine resisted some of Linda's attempts to care for her (Slip Op. at 2-3; Tr. VIII at 254-256). Eventually, on February 22, 2010, Linda called emergency personnel to take Lorraine to the hospital, and the ambulance driver testified that Lorraine agreed only after Linda was able to finally convince her mother to go (Slip. Op. at 3; Tr. VI at 150, 161-162, 164, 173-175, 178-179, 180-181, 189).[8] Lorraine died because of complications (septicemia)

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[6] ***State v. Gargus***, 2013 WL 6181921 at *1-3 (Mo. App. E.D. 2013).

[7] Lorraine's husband, James, had been taking care of Lorraine until that day (Tr. VII at 94-95; VIII at 249-150; IX at 3). On that day, Linda noticed that Lorraine had a bedsore on her "bottom" that was the size of a tennis ball (Tr. VIII at 19-20, 251-252, 254; IX at 17-18). Lorraine refused Linda's request to go to the hospital (Tr. VIII at 254-255).

[8] The court's opinion omitted evidence that Linda told Lorraine that she should go to the hospital, but Lorraine refused to go (Tr. VIII at 254-255), and that State's

stemming from bedsores and gangrene to her left foot (Slip Op. at 4-5; Tr. VIII at 137-140, 157, 167-170).

Because it was Linda who ultimately called for emergency help, and it was she who was the one who was able to persuade Lorraine to go to the hospital after Lorraine told emergency personnel that she would not go to the hospital with them, in essence Linda was prosecuted for failing to act quickly enough and force Lorraine to go to the hospital against her will.

Linda's conviction could not be based on an omission

A person is not guilty of an offense unless her liability is based on conduct, which includes a voluntary act. ***§ 562.011.1.*** A "voluntary act" includes an "omission to perform an act of which the actor is physically capable." ***§ 562.011.2***. But 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***.[9]

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witness Cindy Hickman, Lorraine's granddaughter, testified that if she would have done anything for Lorraine and it turned out that there was nothing wrong with her, then Lorraine would have disowned her (Tr. VII at 86).

[9] The verdict director did not even allege or require the jury to find what the "omitted act" was.

(A) First-degree elder abuse is not defined in terms of failure to act

Missouri's elder abuse in the first degree statute is not defined in terms of failure to act; it does not expressly provide that failure to perform an act is a violation of the statute. Instead, it requires the State to prove that Linda "knowingly caused" serious physical injury to Lorraine – an action, not a failure to act. ***§ 565.180.1***. The Eastern District's opinion correctly held that ***§ 565.180*** does not expressly provide that the failure to act constitutes first-degree elder abuse (Slip Op. at 8; ***Gargus***, 2013 WL 6181921 at *4.

Similarly, the State conceded here that there was no other statute imposing a duty to perform "the omitted act," ***§ 562.011.4*** (LF 112; "The State does not rely on a statutory basis as the duty Defendant failed to meet.").

Since Missouri's elder abuse in the first degree statute does not expressly provide for violation based solely on omission, a duty to perform the omitted act must be "otherwise imposed by law." ***§ 562.011.4***; e.g., ***State v. Riggs***, 2 S.W.3d 867, 870 (Mo. App. W.D. 1999) (parents have common law duty to protect their children; thus, the defendant had a duty to act). ***§ 562.011.4*** does not elaborate on what "a duty to perform the omitted act is otherwise imposed by law" means.

(B) No duty to act was otherwise imposed by law

In this case of first impression, the Eastern District found that Linda did have a legal duty to act (Slip Op. at 8; ***Gargus***, 2013 WL 6181921 at *4-6). In

doing so, the court relied upon the commentary to ***§ 562.011*** (Slip Op. at 8-9; ***Gargus***, 2013 WL 6181921 at *4-5). As noted by the court's opinion (Slip Op. at 9; ***Gargus***, 2013 WL 6181921 at *5), the commentary cited to ***Jones v. United States***, 308 F.2d 307 (D.C. Cir. 1962) for a list of circumstance in which the failure to act may constitute a breach of a legal duty:

> There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; [footnote omitted] second, where one stands in a certain status relationship to another; [footnote omitted][10] third, where one has assumed a contractual duty to care for another; [footnote omitted] and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. [footnote omitted]

Jones, 308 F.2d at 310.

The Eastern District's opinion correctly agreed with Linda's argument that only the last of the listed situations could apply here: "where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent other from rendering aid," (Slip Op. at 9; ***Gargus***, 2013 WL 6181921 at *5). But

[10] The examples given were parent to child, husband to wife, master to apprentice, ship's master to crew and passenger, and innkeeper to inebriated customers. ***Jones***, 308 F.2d at 310, n. 9.

what the State actually included in its verdict director was this language: "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) (emphasis added). The verdict director critically omitted the rest of the ***Jones*** language, critical to the fourth scenario: "and so secluded the helpless person as to prevent others from rendering aid." ***Jones***, 308 F.2d at 310.[11] This omission was possibly because there was no evidence to support the seclusion element.

There was no evidence that Linda secluded Lorraine "as to prevent others from rendering aid." In fact, the evidence suggested the opposite. Lorraine's son testified that Linda never refused to allow him to visit Lorraine (Tr. IX at 64, 69-70). Sylvia Winger, a granddaughter, lived next door to Lorraine and helped Linda give Lorraine sponge baths; she also visited Lorraine on February 5, 2010 (Tr. IX at 102-103, 106, 116). Although another granddaughter, Cindy Hickman, testified that Linda had remained silent when she offered her assistance, including driving Linda's son to school (Tr. VII at 54-55, 81-82), Linda explained her silence. She testified that she did not respond because Hickman had been having seizures, and in the past, Hickman had a seizure when she had children in her car (Tr. VIII at

[11] See Point II of this brief concerning the erroneous verdict director.

244-245). Hickman also testified that on the day of Lorraine's husband's funeral, February 5, 2010, Linda did not want family members to be at her home because she did not want to deal with them, and because she did not want them to take Lorraine and James' things (Tr. VII at 66-69). But Hickman was allowed to visit 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; she never expressed any concern about Lorraine's health (Tr. VII at 44, 50, 56, 86; Tr. VIII at 246-248). Finally, Hickman admitted that she was allowed to drop by anytime she wanted (Tr. VII at 50-51, 80).

This evidence does not support, and the jury never found, that Linda secluded Lorraine as to prevent others from rendering aid. ***Jones***, 308 F.2d at 310.

But the Eastern District deviated from ***Jones*** and the commentary to ***§ 562.011*** and held that the State did not have to prove, and the jury was not required to find, that in order for Linda to have a legal duty to act, Linda had secluded Lorraine as to prevent others from rendering aid (Slip Op. at 9-10, 16; ***Gargus***, 2013 WL 6181921 at *6, 9). This holding erroneously deviated from ***Jones*** by, in essence, rewriting the fourth situation set out in ***Jones***, and the court's holding also ignored the Missouri legislative intent to require such a finding in such a situation since the seclusion language is specifically included within the commentary to ***§ 562.011***.

In doing so, the Eastern District's opinion relied extensively on ***State v. Shrout***, 415 S.W.3d 123 (Mo. App. S.D. 2013), an inapposite case involving a

victim who was the mentally disabled son of the charged defendant mother, even though nowhere in the opinion is it discussed, or apparently argued by the mother, whether the State had to prove seclusion once the mother voluntarily assumed care of the victim. ***Gargus***, 2013 WL 6181921 at *6; Slip Op. at 11-12). Thus, the ***Shrout*** case does not address the issue involved in this case and thus should not have been relied upon as authority by the Eastern District. The State did not prove, and the jury did not find, that Linda was under an existing legal duty to take some positive action beyond what she provided for her mother.[12]

(C) Statutory scheme shows a legislative intent that the failure to perform an act was not intended to be covered under § 565.180

The Eastern District's opinion in this case also did not address the fact, as noted in Linda's opening brief in that court, that in the same legislative bill wherein the crime of elder abuse in the first degree was enacted, the legislature included the crime of elder abuse in the third degree which *does expressly provide*

[12] It is noteworthy that even Cindy Hickman admitted that Lorraine was afraid of doctors, and testified that if she would have tried to do something for Lorraine, Lorraine would have "disowned" her (Tr. VII at 79, 86). Further, when emergency personnel arrived at the scene, Lorraine did not want to be helped and it took Linda's and the emergency personnel's combined persuasion to get her to go to the hospital (Tr. VI at 164, 174-175, 178-179).

that an omission to perform an act is a violation of the statute ("intentionally fails to provide care, goods or services," ***§ 565.184.1(4)***; "knowingly fails to act in a manner which results in a grave risk to the life body or health," ***§565.184.1(5)***).

In determining the meaning of a particular statute, it is proper to consider statutes passed in the same session of the legislature. ***State v. Liberty***, 370 S.W.3d 537, 552 (Mo. banc 2012). Here, the failure of ***§ 565.180.1*** to include any omission language while the same bill included such language in ***§ 565.184.1(4)***, shows a legislative intent that such conduct (failure to perform an act) was not intended to be covered under ***§ 565.180.*** In other words, the statutory scheme of the elder abuse statutes show that the phrase "knowingly causes" as used in ***§ 565.180*** was intended to cover something more than intentionally failing to provide care, ***§ 565.184.1(4)*** or knowingly failing to act in a manner resulting in a grave risk to the life, body or health, ***§565.184.1(5)***, which are more in line with what the State's evidence in this case showed.

Linda's conviction for elder abuse in the first degree must be reversed and she should be ordered discharged as to that offense.

II.

The trial court erred and plainly erred in submitting Instruction No. 8, the verdict-director for elder abuse in the first degree, because this instruction violated Linda's rights to due process, a properly-instructed jury, and a fair trial, as guaranteed under the 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that: 1) Instruction No. 8 included additional paragraphs not authorized by MAI-CR3d, and the additional first paragraph was written such that it did not require a jury finding - rather it was written as though its assertions were established facts; 2) the additional 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.

The verdict director for elder abuse in the first degree:

MAI-CR3d 319.50 is the pattern instruction for the offense of elder abuse in the first degree:

(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.*], 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 a substantial risk of death or that causes serious disfigurement of protracted loss or impairment of the function of any part of the body).

MAI-CR3d 319.50

The verdict director given at trial for that offense, however, did not accurately track ***MAI-CR3d 319.50***:

INSTRUCTION NO. 8

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 of (sic) protracted loss or impairment of the function of any part of the body.

(LF168).

As can be clearly seen, the first two paragraphs of Instruction No. 8 are not authorized by ***MAI-CR3d 319.50***. Also, the instruction did not require the jury to find an act, required by law, that Linda had a duty to perform but failed to perform.

Preservation:

Linda objected to Instruction No. 8 because it set forth as established fact that Linda had assumed care of her mother, and the State added additional elements to the instruction - including an assumption or duty of care - which were not authorized by MAI-CR3d (Tr. IX at 145-146):

> Instruction No. 8. We object to the submission of this particular Instruction in that it, again, it is 319.05, assuming where Linda Gargus 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.

(Tr. IX at 145-146).

The trial court overruled the objection (Tr. IX at 146). The motion for new trial included a claim that the trial court erred in overruling Linda's objection to the verdict director for Count II (LF 209-212; claim 19). The new trial motion

noted that Instruction No. 8 did not comply with MAI-CR3d, no overt acts were alleged in the instruction, and there are no exceptions allowing for insertion of "omissive acts or behavior" into the instruction as a matter of law (LF 211-212).

Standard of Review:

Verdict-directing instructions must contain each element of the offense charged and must require the jury to find every fact necessary to constitute essential elements of the offenses charged. ***State v. Cooper***, 215 S.W.3d 123, 125-126 (Mo. banc 2007). "A violation of due process arises when an instruction relieves the State of its burden of proving each and every element of the crime and allows the State to obtain a conviction without the jury deliberating on and determining any contested elements of that crime." ***Id.*** at 126, *citing* ***State v. Ferguson***, 887 S.W.2d 585, 587 (Mo. banc 1994).

Rule 28.03 requires a defendant to both make a specific objection during trial and raise the issue in his motion for new trial. ***Cooper***, 215 S.W.3d at 125. Linda did so. Thus, Linda believes that this claim of error is properly preserved for appeal. ***Rules 28.03*** and ***29.11***.

But if this Court believes that some of the grounds raised in this point were not specifically included in Linda's objection or motion for new trial, then she requests that this Court review those matters for plain error. ***Rule 30.20***; ***Cooper***, 215 S.W.3d at 125. For instructional error to rise to the level of plain error, Linda must demonstrate that the trial court so misdirected or failed to instruct the jury as

to cause manifest injustice or miscarriage of justice. ***Id***. It must be apparent to this Court that the instructional error affected the jury's verdict. ***Id***.

A verdict-directing instruction that omits an essential element rises to the level of plain error if the evidence establishing the omitted element was seriously disputed. ***Cooper***, 215 S.W.3d at 126. In determining whether the misdirection likely affected the jury's verdict, this Court will be more inclined to reverse in cases where the erroneous instruction excused the State from its burden of proof on a contested element of the crime. ***State v. Reed***, 243 S.W.3d 538, 541 (Mo. App. E.D. 2008).

Analysis

The verdict director for elder abuse in the first degree was erroneous because: 1) the additional, unauthorized first paragraph did not require a jury finding because it was written as though its assertions were established facts; 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 perform.

1) ***The first paragraph was written as though its assertions were established facts***

Paragraph first provided:

> 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

(LF 168).

This paragraph 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). 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 of Missouri in its brief in the Eastern District Court of Appeals argued 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." (Respondent's Brief at 61).

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, nevertheless they change the meaning of the paragraph.

2) The first paragraph did not require the jury to find that Linda voluntarily assumed the care of Lorraine and so secluded her 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

In drafting the verdict director for elder abuse in the first degree, it appears that the State attempted to comply with ***Jones v. United States***, 308 F.2d 307 (D.C. Cir. 1962). In ***Jones***, the defendant on appeal alleged as plain error, because there was no objection, the trial court's failure to instruct that the jury was required to find beyond a reasonable doubt, as an element of the crime, that the defendant was under a legal duty to supply food and necessities to an infant before it could find her guilty of manslaughter for failing to provide such items. ***Id***. at 310.

The ***Jones*** court noted that there were at least four situations in which the failure to act may constitute breach of a legal duty:

> One can be held criminally liable: first, where a statute imposes a duty to care for another; [footnote omitted] second, where one stands in a certain status relationship to another; [footnote omitted][13] third, where one has assumed a contractual duty to care for another; [footnote omitted] and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. [footnote omitted]

Id.

The government in ***Jones*** contended in that case that either the third or the fourth ground was applicable. ***Id***. But the ***Jones*** court reversed for a new trial because all of the four situations involved critical issues of fact which must be found by the jury. ***Id***. Because a jury finding of legal duty was a critical element of the crime charged, the failure to instruct the jury concerning it was plain error. ***Id***. at 311.

In Linda's case, the State attempted to rely upon the fourth ***Jones*** scenario, but it failed to do it correctly. Paragraph first provided:

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[13] The examples given were parent to child, husband to wife, master to apprentice, ship's master to crew and passenger, and innkeeper to inebriated customers. ***Jones***, 308 F.2d at 310, n. 9.

> 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

(LF 168).

This paragraph is missing critical language used in the ***Jones*** opinion: "and so secluded the helpless person [Lorraine] as to prevent others from rendering aid." ***Jones*** , 308 F.2d at 310. Because Instruction No. 8 omitted the ***Jones*** "secluded" language and presumed as true Linda's assumption of Lorraine's care, the jury was not required to find that a situation existed in which Linda's failure to act constituted a breach of a legal duty, as required by ***Jones***.

Here, the evidence did not prove beyond a reasonable doubt that Linda secluded Lorraine so as to prevent others from rendering aid. ***Jones***, 308 F.2d at 310. Lorraine's son testified that Linda never refused to allow him to visit Lorraine (Tr. IX at 64, 69-70). Sylvia Winger, a granddaughter, lived next door to Lorraine, helped Linda give Lorraine sponge baths, and visited Lorraine on February 5, 2010 (Tr. IX at 102-103, 106, 116). Another granddaughter, Cindy Hickman, was allowed to visit 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 44, 50, 56, 86; Tr. VIII at 246-248). Hickman admitted that she was allowed to drop by anytime she wanted (Tr. VII at 50-51, 80).

The Eastern District erroneously rejected this argument finding that "Missouri law does not require the seclusion of a helpless person in order for the duty to act to attach. Thus it was not error for the trial court to submit Instruction No. 8 to the jury without language requiring seclusion." (Slip Op. at 16; ***Gargus***, 2013 WL 6181921 at *9). But as pointed out in Linda's argument for the first point on this appeal, the Eastern District is wrong – the State was required to prove that Linda secluded Lorraine as to prevent others from rendering aid even if she had voluntarily assumed the care of Lorraine. ***Jones*** and the commentary to ***562.011*** require that the State prove and the jury find that when one has voluntarily assumed the care of another, they also have to seclude the helpless person as to prevent other from rendering aid. Under ***Jones***, which the Eastern District relied heavily upon, plain error occurred because the jury was never required to find the seclusion language. Thus, the erroneous instruction violated Linda's right to a jury determination of all elements of the offense. ***Apprendi v. New Jersey***, 530 U.S. 466 (2000); ***Jones v. United States***, 526 U.S. 227 (1999).

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

As noted in Point I, 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***.

Missouri's first-degree elder abuse statute does not expressly provide that a failure to perform an act is a violation of the statute. Since the statute does not expressly provide for violation of the law based solely on a failure to act, a duty to perform the omitted act must be "otherwise imposed by law." ***§ 562.011.4.*** Instruction No. 8 did not require the jury to find that Linda had a duty imposed by law to perform a specified act, and that she failed to do so. What duty was imposed by law upon her to perform? What specified act did she fail to do? The verdict director offers no clue, and thus the jury was not required to find either an imposed duty or an unperformed act.

Instead, Paragraph Third provides: "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." (LF 168). In essence, the paragraph alleges that Linda left her mother in bed under horrendous conditions. But leaving someone on a bed is not either a duty or an "omitted act." An omitted act would be something like not taking Lorraine for necessary medical treatment

when she had a duty to do so. The verdict director contained no language similar to this.

The first paragraph informs the jury that Linda voluntarily assumed the care of Lorraine. The second paragraph required the jury to find that Linda was physically capable of providing care for Lorraine. The third paragraph requires the jury to find that she knowingly caused serious physical injury to Lorraine by leaving her on bed for long periods of time in an unsanitary environment causing her to develop ulcers and injuries from animal bites. The fourth and fifth paragraphs required the jury to find that Lorraine was 60 years of age or older and that Linda knew it. None of these paragraphs required the jury to find that Linda had a duty imposed by law to perform an act, which she failed to perform.

Because a jury finding of 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. Not only was Linda prejudiced, but a manifest injustice has resulted. 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, Craig A. Johnston, 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, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 10,715 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

On this 31st day of March, 2014, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were delivered through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at greg.barnes@ago.mo.gov.

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