2013 WL 3811369 (Mo.App. E.D.) (Appellate Brief)
Missouri Court of Appeals, Eastern District.

STATE OF MISSOURI, Respondent,

v.

Linda GARGUS, Appellant.

No. ED 99233.
July 12, 2013.

Appeal to the Missouri Court of Appeals Eastern District
From the Circuit Court of Clark County, Missouri 1st Judicial Circuit
The Honorable Gary Dial, Judge

Appellant's Brief

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*3 CONSTITUTIONAL PROVISIONS:

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***4 JURISDICTIONAL STATEMENT**

Appellant, Linda Gargus, appeals her conviction for **elder abuse** in the first degree, § **565.180.**[1] On November 13, 2012, the Honorable Gary Dial sentenced Linda to ten years in prison (11/06/12 Tr. 30; LF 239-240). Notice of appeal was timely filed on November 13, 2012, in forma pauperis (LF 241-252). This appeal does not involve any issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court; jurisdiction lies in this Court. § **477.050;** Article V, § 3, Mo. Const. (amended 1982).

***5 STATEMENT OF FACTS**

Lorraine and James Gargus lived in a mobile home in Kahoka, Missouri (09/24/12 Tr. 150, 180-181; 9/25/12 Tr. 218-219; 09/26/12 Tr. 238-239). Lorraine was diabetic (09/26/12 Tr. 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 (09/25/12 Tr. 49-50, 78-79; 09/26/12 Tr. 234-236). Lorraine did not like doctors or hospitals; she felt like they were taking her money (09/25/12 Tr. 79; 09/27/12 Tr. 64, 69-70, 89, 96-97, 102). Also, Lorraine would not let people throw things away (09/27/12 Tr. 89, 96-97, 102).

Linda Gargus (Appellant), one of Lorraine's and James' daughters, and Linda's adopted son lived in an apartment in Keokuk, Iowa (09/26/12 Tr. 241). Linda had lived in Keokuk for 20-25 years and her son went to school there (09/25/12 Tr. 88, 221-222; 09/26/12 Tr. 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 (09/25/12 Tr. 50, 91, 94, 218-219, 222-223; 09/26/12 Tr. 242; 09/27/12 Tr. 5).

Cindy Hickman, one of James and Lorraine's granddaughters, visited Lorraine in the spring of 2009 (09/25/12 Tr. 50). Linda and her son were living ***6** there at that time (09/25/12 Tr. 50). Hickman could always visit anytime she wanted (09/25/12 Tr. 50-51, 80).[2]

In October, 2009, Hickman spoke with Linda (09/25/12 Tr.51-52). Linda told her that James had cancer and was going back-and-forth to Iowa City for treatment (09/25/12 Tr. 53). Hickman offered her assistance including driving Linda's son to school (09/25/12 Tr. 54, 81-82). Linda gave no response (09/25/12 Tr. 54-55).[3]

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Linda was a certified medication technician (09/25/12 Tr. 165, 167-168; 09/26/12 Tr. 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 (09/25/12 Tr. 94-95; 09/26/12 Tr. 249-250; 09/27/12 Tr. 3). Linda tried to give Lorraine daily sponge baths and changed her clothes (09/26/12 Tr. 251; 09/27/12 Tr. 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 (09/27/12 Tr. 106).

***7** On January 20, 2010, Linda discovered that Lorraine had a bedsore on her "bottom" (09/26/12 Tr. 251-252, 254; 09/27/12 Tr. 17-18).[4] It was the size of a tennis ball (09/26/12 Tr. 19-20). Linda did not believe that the skin was open at that time (09/26/12 Tr. 19, 28). Linda told Lorraine that she should go to the hospital, but Lorraine refused to go (09/26/12 Tr. 254-255). Linda bought her a cushioned air mattress and kept turning her over on her side every hour (09/26/12 Tr. 255-256). But Lorraine was stubborn and kept rolling back over onto her back (09/26/12 Tr. 255-256).

James died on January 31, 2010 (09/25/12 Tr. 51; 09/26/12 Tr. 246). On February 2, 2010, two days after James died, Hickman showed up at Lorraine's residence (09/25/12 Tr. 44, 56; 09/26/12 Tr. 246-247). Linda was there (09/25/12 Tr. 94-95). When Hickman went inside, she noticed things "piled to the ceiling" and birdcages stacked on top of each other (09/25/12 Tr. 57). The home smelled dirty, there was garbage, and there were mice crawling everywhere (09/25/12 Tr. 57, 62).

Lorraine was covered from neck to toe with a blanket (09/25/12 Tr.62). 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 ***8** Hickman's children with Sylvia's (09/25/12 Tr. 58, 63, 64-65; 09/27/12 Tr. 45-46).

Hickman never called anyone about the conditions (09/25/12 Tr. 85). She never expressed any concern about Lorraine's health (09/26/12 Tr. 248). She did not see any reason for Lorraine to go to a doctor (09/25/12 Tr. 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 (09/25/12 Tr. 86).

James' funeral was February 5, 2010 (09/26/12 Tr. 246). According to Hickman, Linda did not want any family members to be there because she did not want to deal with them (09/25/12 Tr. 66). Linda also did not want family members notified because she did not want them to take James and Lorraine' things (09/25/12 Tr. 68). Linda did not want some family members invited to James' funeral, particularly Linda's sister Carol, who had a "falling out" with Lorraine (09/25/12 Tr. 69, 87).

Hickman thought that Lorraine should attend the funeral, but Lorraine did not want to leave the house (09/26/12 Tr. 247-248). It was cold and sleeting that day (09/26/12 Tr. 248). Linda offered to take Lorraine, but she declined the offer (09/26/12 Tr. 248). While family members were at the cemetery, some mentioned visiting Lorraine, but Linda said that she would rather they not visit (09/25/12 Tr. 70-71).

***9** Sylvia Winger, one of Lorraine's granddaughters, lived in a home next to Lorraine (09/27/12 Tr. 116). Winger and her children visited Lorraine on February 5, 2010, the day of James' funeral (09/27/12 Tr. 102-103). Lorraine was pretty alert and had a blanket on her (09/27/12 Tr. 103). Winger did not see anything indicating that something was seriously wrong with Lorraine (09/27/12 Tr. 104). Lorraine did not say that she needed any kind of medical assistance 09/27/12 Tr. 104, 107).

On February 22, 2010, emergency personnel were called by Linda to go to Lorraine's home (09/24/12 Tr. 150, 161-162, 173-174,180-181, 189). The home was filled with clutter and smelled of animal urine and feces (09/24/12 Tr. 161, 181, 184). Lorraine was on a hospital-type bed just inside the front door (09/24/12 Tr. 161). Linda said that Lorraine had bedsores, she was very weak, she was not eating, and she was diabetic (09/24/12 Tr. 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 (09/24/12 Tr. 162).

Lorraine told the emergency personnel that her "butt was on fire" or that her "rectum was burning" or "on fire" (09/24/12 Tr. 163, 170, 182, 196).They attempted to persuade her to go to the hospital, but she wanted them to leave her alone (09/24/12 Tr. 164). Lorraine did not want to be helped, and she did not want them to touch her (09/24/12 Tr. 175). Eventually, Linda was able to help persuade Lorraine to go to the hospital (09/24/12 Tr. 164, 174-175, 178-179). Emergency personnel determined that Lorraine's condition was stable and that she did not ***10** need advanced life support (09/24/12 Tr. 171, 193). It did not seem to be a life-threatening situation (09/24/12 Tr. 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 (09/24/12 Tr. 165-166, 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 (09/26/12 Tr. 261-262).

Linda asked them to look at Lorraine's foot (09/24/12 Tr. 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 (09/24/12 Tr. 69-170). 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 (09/26/12 Tr. 258; 09/27/12 Tr. 13, 52).

Lorraine was taken to the Keokuk Area Hospital (09/24/12 Tr. 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 (09/24/12 Tr. 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 ***11** bone, and she had a very large, deep decubitus ulcer [5] on her back (09/24/12 Tr. 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 (09/24/12 Tr. 205, 213, 215, 220). But Lorraine's only complaint was that her "bottom" hurt (09/24/12 Tr. 200, 209).

Dr. Neville Crenshaw treated Lorraine at the Keokuk Area Hospital (09/26/12 Tr. 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 (09/26/12 Tr. 5-6, 10, 14-15, 18, 72-73). But because of Lorraine's diabetes, she had no pain in her left leg (09/26/12 Tr. 17).

She also had a very large, pre-sacral, decubitus ulcer, just above the buttocks (09/26/12 Tr. 5-6, 10). That ulcer was a very huge, deep, gaping, infected wound (09/26/12 Tr. 12). There were also pressure ulcers on her shoulder, right hip, and right heel (09/26/12 Tr. 9-10). The ulcers would have developed for more than two days to appear as they did (09/26/12 Tr. 10).

Lorraine's white blood cell count was markedly elevated, indicating infection, and her blood culture was positive for streptococcus infection among other infections (09/26/12 Tr. 13). Lorraine was septic - bacteria had migrated into ***12** her blood stream (09/26/12 Tr.14, 47). She also had renal failure due to a kidney infection (09/26/12 Tr. 47-48, 63). Unbelievably, despite her illnesses, she was not experiencing much pain (09/26/12 Tr. 35). She improved, dramatically, with aggressive treatment, despite multiple, overwhelming illness (09/26/12 Tr. 28, 42).

Dr. Kirk Green also examined Lorraine (09/26/12 Tr. 79-80). Her left foot was down to bone and tendons (09/26/12 Tr. 99). The damage could have been caused by rodents, although it could have been caused by something else (09/26/12 Tr. 101-102, 109-111). Her left leg was no longer getting any blood supply (09/26/12 Tr. 80, 93, 95). Because the leg was essentially dead, they decided to amputate it below her left knee (09/26/12 Tr. 15-16, 99, 101, 131, 135).

Lorraine died on March 11, 2010 (09/26/12 Tr. 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 (09/26/12 Tr. 41).

Dr. Eugenio Torres performed an autopsy on Lorraine (09/26/12 Tr. 123). She had ulcers (or bedsores) on her body, some of which appeared to be caused by rodents (09/26/12 Tr. 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 (09/26/12 Tr. 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 (09/26/12 Tr. 167-170). Lorraine also ***13** 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 (09/26/12 Tr. 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 (09/26/12 Tr. 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." (09/26/12 Tr. 157). Delay of treatment hastened her death (09/26/12 Tr. 161).

After Lorraine died, Linda spoke with Hickman about Lorraine (09/25/12 Tr. 75-76). Linda told her that she did not realize how bad Lorraine was until after James died (09/25/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 230-233, 250; 09/26/12 Tr. 263-265).

***14** Sheriff Gaudette and the others inspected the home after Linda gave them permission (09/25/12 Tr. 15-17). When Sheriff Gaudette was within 10-15 feet of the residence he smelled what appeared to be rotting flesh (09/25/12 Tr. 19). When they entered the home, there were numerous cages with birds, animals, and mice in them (09/25/12 Tr. 19-20, 36, 117-118,134, 251). Some cages had feces in them (09/25/12 Tr. 34, 36, 246). There were animals roaming free inside the home - birds, reptiles, dogs, mice, a rat - 40 animals in all (09/25/12 Tr. 22, 117, 246, 251).

There was moldy, rotted food all over the kitchen (09/25/12 Tr. 22, 34). The toilet in the bathroom had waste in it; Linda said it had not worked in a couple of weeks (09/25/12 Tr. 25, 35, 248). The bed that Lorraine had slept in did not have any bedding (09/25/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 104-105, 107, 109). Linda said she was a certified nurse's aide and had worked at a nursing home (09/25/12 Tr. 105). She quit her work on January 20, 2010, to take care of her parents (09/25/12 Tr. 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 (09/25/12 Tr. 109-110). Linda ***15** said that she contacted emergency medical technicians because her mother's breathing had changed (09/25/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 111).

On February 24-25, 2010, Tim Vice, investigator of the Clark County Sheriff's Office, interviewed Linda (09/25/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 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:

***16** 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.

***17** 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).

Linda objected to Instruction No. 8 because the instruction assumed Linda had taken over care of her mother, the State added additional elements to the instruction - including an assumption or duty of care - which were not authorized by MAI-CR3d (09/27/12 Tr.145-146). The trial court overruled the objection (09/27/12 Tr. 146).

Linda moved for judgment of acquittal at the close of the evidence; her motion was overruled by the trial court (LF 146-159; 09/27/12 Tr. 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 (09/27/12 Tr. 195, 201; LF 182-183). After the jury was polled, the trial court accepted the verdicts (09/27/12 Tr. 202-203; 09/28/12 Tr. 1-2).

After the jury left the courthouse, and before the penalty phase held later that day, it was discovered that the guilty verdict form for the lesser-included offense of **elder abuse** in the third degree had also been signed by the foreperson but left in the jury room (09/28/12 Tr. 2). When the jury was polled, the court did not know about this other signed verdict form (09/28/12 Tr. 12-13).

***18** Defense counsel requested a mistrial, and noted that at about 12:15 a.m., it was brought to his attention that a signed verdict form for **elder abuse** in the third degree had been found in the jury room (09/28/12 Tr. 5, 7). Counsel argued that there were inconsistent verdicts (09/28/12 Tr. 7). Counsel noted that the general procedure in such a case was for the court to refuse to accept the verdict and give the jury a new packet, but that could not be done since the jury had already left the courthouse (09/28/12 Tr. 7-8). Counsel noted that the "proper remedy" was to bring them back in, not accept the **elder abuse** verdict because there were inconsistent verdicts (guilty of both the greater and lesser offenses of **elder abuse**), and have the jury deliberate further (09/28/12 Tr. 9). But there was also another remedy, "the only proper remedy," was to declare a mistrial on Count II (09/28/12 Tr. 9-11). Defense counsel's "only request" was for a mistrial (09/28/12 Tr. 11-12).

The trial court noted that the following had occurred. The jury announced that it had reached its verdicts at 11:54 p.m. after having started deliberations at 5:21 p.m. (09/28/12 Tr. 17). The foreperson gave the court two signed verdict forms (09/28/12 Tr. 17). The foreperson said those were the verdicts, and upon request of defense counsel, the jury was polled and each affirmed those were the verdicts (09/28/12 Tr. 17-18). Because of the late hour, the jury retired for the evening and left the courthouse at about 12:10 a.m. (09/28/12 Tr. 18). The bailiff removed the unused verdict forms and instructions from the jury room (09/28/12 Tr. 18). The trial court discovered that the foreperson had signed the verdict form ***19** for **elder abuse** in the third degree (09/28/12 Tr. 18-19). The trial court believed that the polling of the jury had cured any inconsistency (09/28/12 Tr.21). The trial court overruled the request for mistrial, and penalty phase commenced (09/28/12 Tr.21).

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 (09/28/12 Tr. 56, 58; LF 184). The trial court granted Linda the full time to file a motion for new trial (09/28/12 Tr. 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; (21) the trial court erred in overruling Linda's Motion for Judgment of Acquittal at the Close of All the Evidence; and (22) the trial court erred in overruling Linda's request for mistrial on Count II when it was learned that inconsistent verdict forms for **elder abuse** were found after the jury had been sent home for the night (LF 209-212; 224-235; 235-237).

On November 13, 2012, the trial court overruled Linda's motion for new trial and sentenced her according to the jury's recommendation (11/06/12 Tr. 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.

***20 POINTS RELIED ON**

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 State failed to prove that Linda was aware that her conduct (leaving Lorraine on the bed for long periods of time) was practically certain to cause serious physical injury to Lorraine.

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

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

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

***21** U.S. Const., Amend. XIV;

Mo. Constitution, Article I, §10;

§§ 562.011, 562.016, 565.180, 565.184; and

Rule 29.11.

***22 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 Instruction No. 8 included additional paragraphs not authorized by MAI-CR3d: 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; 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 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;

***23** Rules 28.03, 29.11, and 30.20; and

MAI-CR3d 319.50.

***24 III. The trial court erred in overruling Linda's request for a mistrial, and plainly erred in not at least sua sponte refusing to accept the jury's guilty verdict as to elder abuse in the first degree and having the jury deliberate further as to that count after Linda noted to the court that such a remedy was generally the "proper remedy," although inadequate here because the jury had left for the day, because this violated Linda's rights to due process of law and to a unanimous jury verdict as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) to the Missouri Constitution, in that after the jury returned a guilty verdict as to elder abuse in the first degree, was polled, and confirmed that such was their verdict, and was temporarily dismissed, it was discovered that the foreperson also had signed the guilty verdict form for the lesser-included offense of elder abuse in the third degree; thus, there were inconsistent verdicts (guilty of both the greater and lesser offenses of elder abuse), and a mistrial was appropriate**

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because the jury had completed its deliberation as to the guilt phase; but, at a minimum, when the jury returned for the penalty phase, the court should have resolved the inconsistency with the jury and required further deliberation until a single verdict was reached as to that count.

State v. Zimmerman, 941 S.W.2d 821 (Mo. App. W.D.1997);

State v. Peters, 855 S.W.2d 345 (Mo. banc 1993);

***25** State v. Dorsey, 706 S.W.2d 478 (Mo. App. E.D. 1986);

State v. White, 2007 WL 446606 (Minn. App. 2007);

U. S. Constitution, Amendments 6 and 14;

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

Rules 29.11 and 30.20.

*26 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 State failed to prove that Linda was aware that her conduct (leaving Lorraine on the bed for long periods of time) was practically certain to cause serious physical injury to Lorraine.

*27 Standard of Review & Preservation

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; 09/27/12 Tr. 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).**

*28 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.**

Linda's conviction could not be based on an omission

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.*

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.**

***29** 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.**

In stark contrast, in the same legislative bill wherein this crime was enacted, the legislature included the crime of **elder abuse** in the third degree which does expressly provide 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.**

No duty to act existed

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; State v. Riggs,* 2 S.W.3d 867, 870 (Mo. App. W.D. 1999) (parents have common law duty to protect their ***30** 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. 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."). [6]

Instead, the State relied upon *Jones v. United States,* 308 F.2d 307 (D.C. Cir. 1962), a case finding plain error for failing to instruct that the jury was required to find 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 (LF 112-114). The **Jones** case does not control here. Aside from the fact that it was an instructional error case involving involuntary manslaughter, Linda's relationship to Lorraine did not fall within the factual scenarios hypothesized in the **Jones** opinion. The **Jones** court noted,

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 ***31** one stands in a certain status relationship to another; [footnote omitted] [7] 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]

308 F.2d at 310.

The State here attempted to rely upon the fourth Jones scenario, situation attempted to be relied upon by the State in Linda's case was the fourth one. The State "attempted" because what the State actually included in its verdict director was this language in paragraph first: "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). The State 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.

***32** 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 (09/27/12 Tr. 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 (09/27/12 Tr. 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 (09/25/12 Tr. 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 (09/26/12 Tr. 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 (09/25/12 Tr. 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 (09/25/12 Tr. 44, 50, 56, 86; 09/26/12 Tr. 246-248). Finally, Hickman admitted that she was allowed to drop by anytime she wanted (09/25/12 Tr. 50-51, 80). This evidence does not support, and the jury never found, that Linda voluntarily assumed the care of Lorraine and so secluded Lorraine as to prevent others from rendering aid. **Jones,** 308 F.2d at 310. The State did not prove, and the jury did not find, that ***33** Linda was under an existing legal duty to take some positive action beyond what she provided for her mother. [8]

The State failed to prove that Linda was aware that her conduct was practically certain to cause serious physical injury to Lorraine

As noted above, the State had to prove that Linda knowingly caused serious physical injury to Lorraine. **§ 565.180.1.** In other words, the State had to prove beyond a reasonable doubt that Linda was aware that her conduct was practically certain to cause serious physical injury to Lorraine. **§ 562.016.3.** Specifically, it was alleged here that Linda's conduct was "leaving [Lorraine] 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).

The State failed to prove that Linda was aware that allowing Lorraine to lie on the bed for long periods of time was practically certain to cause serious physical injury to Lorraine. [9]

***34** Since 2005, Lorraine chose to be bedfast (09/25/12 Tr. 49-50, 78-79; 09/26/12 Tr. 234-236). This was years before Linda moved in with her in 2008 to help take care of her (09/25/12 Tr. 50, 91, 94, 218-219, 222-223; 09/26/12 Tr. 242; 09/27/12 Tr. 5). Lorraine's husband James helped with her care until January 20, 2010 (09/25/12 Tr. 94-95; 09/26/12 Tr. 249-250; 09/27/12

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Tr. 3). When Linda discovered a bedsore on Lorraine that was the size of a tennis ball, Linda attempted to get Lorraine to go to the hospital, but Lorraine refused (09/26/12 Tr. 19-20, 254-255). Linda tried to give Lorraine daily sponge baths and changed her clothing daily, but Lorraine would fight the sponge baths so much that Linda had to get one of Lorraine's granddaughters to help (09/26/12 Tr. 251; 09/27/12 Tr. 28, 106). Linda also bought a cushioned air mattress for Lorraine and kept turning her over on her side every hour, but Lorraine was stubborn and kept rolling back over onto her back (09/26/12 Tr. 255-256). When Hickman visited on February 2, 2010, she never expressed any concern about Lorraine's health, she did not see any reason for Lorraine to go to a doctor, and she believed that if she had ***35** attempted to get Lorraine to go to the doctor, Lorraine might have "disowned" her (09/25/12 Tr. 85-86; 09/26/12 Tr. 248). When Winger visited Lorraine on February 5, 2010, Winger did not see anything indicating that anything was seriously wrong with Lorraine, and Lorraine never said that she needed any kind of medical assistance (09/27/12 Tr. 104, 107). Even when the emergency personnel were called by Linda and arrived at the residence, Lorraine did not want to be helped or to go to the hospital, and it took Linda to help persuade her to go (09/24/12 Tr. 164, 174-175, 178-179). It did not seem to emergency personnel that it was a life-threatening situation; her condition was "stable" (09/24/13 Tr. 168, 171, 175, 193).

This evidence does not establish that Linda was aware that allowing Lorraine to lie on the bed for long periods of time, something that Lorraine had been doing since 2005, three years before Linda moved in to help her, was practically certain to cause serious physical injury to Lorraine. This is especially so given Lorraine's refusal to go to a doctor or a hospital, her failure to request assistance from any of her visitors, and the fact that Linda had to persuade her to go to the hospital even after emergency personnel had been called to the home.

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

***36 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 Instruction No. 8 included additional paragraphs not authorized by MAI-CR3d: 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; 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 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:

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 ***37** 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 ***38** disfigurement of (sic) protracted loss or impairment of the function of any part of the body.

(LF168).

In contrast to this instruction, the pattern instruction for the offense of **elder abuse** in the first degree, is:
(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).

***39** 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

As can be clearly seen, the first two paragraphs of Instruction No. 8 are not authorized by **MAI-CR3d 319.50.**

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Preservation and Standard of Review:

Linda objected to Instruction No. 8 because it assumed Linda had 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 (09/27/12 Tr.145-146). The trial court overruled the objection (09/27/12 Tr. 146). The motion for new trial included a ***40** 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).

Rule 28.03 requires a defendant to both make a specific objection during trial and raise the issue in his motion for new trial. **State v. Cooper,** 215 S.W.3d 123, 125 (Mo. banc 2007). 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.*

Analysis

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 ***41** 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] [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]

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 ***42** 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:

> 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). The way paragraph First is worded, erroneously does not require the jury to find anything. Rather, 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.

In addition, the paragraph is missing critical language used in the Jones opinion: "and so secluded the helpless person [Lorraine] as to prevent others from ***43** 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.**

Verdict-directing instructions must contain each element of the offense charged, and must require the jury to find every fact necessary to constitute the essential elements of the offenses charged. **Cooper,** 215 S.W.3d at 125-126. "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). Here, 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).

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).

***44** Here, there was a dispute as to whether 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 (09/27/12 Tr. 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 (09/27/12 Tr. 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 (09/25/12 Tr. 54-55, 81-82), Linda explained 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 (09/26/12 Tr. 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 her Lorraine and James' things (09/25/12 Tr. 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 and she never expressed any concern about Lorraine's health (09/25/12 Tr. 44, 50, 56, 86; 09/26/12 Tr. 246-248). Also, Hickman admitted that she was allowed to drop by anytime she wanted (09/25/12 Tr. 50-51, 80).

There was plain error in this case because the jury was never required to find: 1) that Linda voluntarily assumed the care of Lorraine; and 2) that Linda so secluded Lorraine so as to prevent others from rendering aid to Lorraine; in other ***45** words, the jury was not required to find that Linda breached a legal duty. **Jones,** 308 F.2d at 310-311.

Additionally, as noted in Point I of this brief, 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 statute on elder abuse in the first degree 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. The instruction did not even describe or require the jury to find what the "omitted act" was.

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.

***46 III.**

The trial court erred in overruling Linda's request for a mistrial, and plainly erred in not at least sua sponte refusing to accept the jury's guilty verdict as to elder abuse in the first degree and having the jury deliberate further as to that count after Linda noted to the court that such a remedy was generally the "proper remedy," although inadequate here because the jury had left for the day, because this violated Linda's rights to due process of law and to a unanimous jury verdict as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) to the Missouri Constitution, in that after the jury returned a guilty verdict as to elder abuse in the first degree, was polled, and confirmed that such was their verdict, and was temporarily dismissed, it was discovered that the foreperson also had signed the guilty verdict form for the lesser-included offense of elder abuse in the third degree; thus, there were inconsistent verdicts (guilty of both the greater and lesser offenses of elder abuse), and a mistrial was appropriate because the jury had completed its deliberation as to the guilt phase; but, at a minimum, when the jury returned for the penalty phase, the court should have resolved the inconsistency with the jury and required further deliberation until a single verdict was reached as to that count.

***47** According to the transcript, the jury commenced deliberation at 5:25 p.m. and reached its verdicts at 11:56 p.m., finding Linda not guilty of involuntary manslaughter but guilty of elder abuse in the first degree (09/27/12 Tr. 195, 201; LF 182-183). After the jury was polled, the trial court accepted the jury's verdicts (09/27/12 Tr. 202-203; 09/28/12 Tr. 1-2).

After the jury left the courthouse, and prior to the penalty phase held later that day, it was discovered that the guilty verdict form for the lesser-included offense of elder abuse in the third degree had also been signed by the foreperson and left in the jury room (09/28/12 Tr. 2). When the jury had been polled, neither the court nor the parties knew about this other signed verdict form (09/28/12 Tr. 12-13).

Upon learning of the second, signed verdict form for Count II, Defense counsel requested a mistrial (09/28/12 Tr. 5). He noted that at about 12:15 a.m., it was brought to his attention that a signed verdict form for elder abuse in the third degree had been found in the jury room (09/28/12 Tr. 7). Counsel argued this created inconsistent verdicts, and noted that the general procedure in such a case was for the court to refuse to accept the verdict and give the jury a new packet; but that could not be done since the jury had already left the courthouse (09/28/12 Tr. 7-8). Counsel noted that the "proper remedy" was to bring the jury back in, not accept the inconsistent elder abuse verdicts (guilty of both the greater and lesser offenses of elder abuse), and order the jury to deliberate further (09/28/12 Tr. 9).

***48** Defense counsel argued that "the only proper remedy" was to declare a mistrial on Count II since the jury had left (09/28/12 Tr. 9-11). Defense counsel's "only request" was for a mistrial (09/28/12 Tr. 11-12).

The trial court noted that the following had occurred. The jury announced that it reached its verdicts at 11:54 p.m. after having started deliberations at 5:21 p.m. (09/28/12 Tr. 17). The foreperson gave the court two signed verdict forms (09/28/12 Tr. 17). The foreperson said those were the jury's verdicts, and upon request of defense counsel, the jury was polled and each juror affirmed those were his or her verdicts (09/28/12 Tr. 17-18). Because of the late hour, the jury retired for the evening and left

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the courthouse at about 12:10 a.m. (09/28/12 Tr. 18). The bailiff removed the unused verdict forms and instructions from the jury room (09/28/12 Tr.8). The trial court discovered that the foreperson had signed the verdict form for **elder abuse** in the third degree (09/28/12 Tr. 18-19). The trial court believed that the polling of the jury had cured any inconsistency created by the two signed verdict forms (09/28/12 Tr.21). The trial court overruled Linda's request for a mistrial, and the penalty phase commenced (09/28/12 Tr.21).

The jury returned its penalty phase verdict after only 15 minutes of deliberation, and recommended the minimum sentence of 10 years in prison (09/28/12 Tr. 56, 58; LF 184).

Linda's motion for a new trial included a claim that the trial court erred in overruling her request for a mistrial on Count II after it was learned that ***49** inconsistent verdict forms for **elder abuse** had been signed by the jury foreperson (LF 235-237). This point is properly preserved for appellate review. **Rule 29.11.**

Analysis

A trial court has a duty to examine jury verdicts for defects, inconsistencies, and ambiguities. State v. Zimmerman, 941 S.W.2d 821, 824 (Mo. App. W.D.1997). The Missouri Supreme Court in State v. Peters, 855 S.W.2d 345, 348-349 (Mo. banc 1993), held that when confronted with two inconsistent verdicts, the trial court must reject them and send the jury back for further deliberation to resolve the inconsistency. A trial court errs in not taking steps to resolve a patent inconsistency before accepting a guilty verdict. State v. Dorsey, 706 S.W.2d 478, 480-481 (Mo. App. E.D. 1986).

If an obvious inconsistency and ambiguity in the verdict forms on the same charge is not cured by the trial court by returning the jury to further deliberate and correct the mistake, a defendant is prejudiced and denied his right to a fair trial. **Id.** If the jury returns inconsistent verdicts as to the same count, the trial court has a duty to resolve the inconsistency by instructing the jury to deliberate further. **Zimmerman,** 941 S.W.2d at 825.

The trial court here had a duty prior to the final discharge of the jury to refuse to accept the **elder abuse** verdict and to send the jurors back for further deliberation. **Id.** at 824. Even though the jury had left for the evening, it returned the next morning for penalty phase. Thus, there was still time to resolve the ***50** inconsistency. Although defense counsel only requested a mistrial, plain error review under **Rule 30.20** is appropriate here as to the court's failure to refuse the **elder abuse** guilty verdict and require further deliberation. Defense counsel informed the court that such was generally the "proper remedy," and, although defense counsel believed that the only way to truly cure the error was a mistrial, counsel did not refuse or object to further deliberation on the charge of **elder abuse**.

The trial court found that the polling of the jury cured any inconsistency (09/28/12 Tr.21). Linda recognizes that this Court has held that sometimes polling the jury does cure the defect of inconsistent verdict forms. **State v. McNeal,** 986 S.W.2d 176, 179 (Mo. App. E.D. 1999) (polling was sufficient where there was a signed guilty verdict form for Count V, which stated the name of the crime, and it was later discovered by some unknown means that there had been a signed not guilty verdict form for that Count that did not state the name of the crime). But the polling here did not cure the defect here because no one knew about the inconsistency at the time of the polling, and the court's polling questions to the jury were not specific enough to resolve the conflicting verdicts. "For the trial court to attempt to resolve the inconsistency without directly addressing it with the jury through further deliberations, as the trial court attempted to do here, relegates the court to trying to determine the intent of the jury as to its verdicts based upon inferences, conjecture and speculation." **Zimmerman,** 941 S.W.2d at 825.

***51** Just as in **Zimmerman,** here "at the time the trial court asked the question of the foreperson, neither it nor counsel for the parties knew about the inconsistent verdicts as to [the count].... The trial court, being unaware of the inconsistent verdicts, did not directly address both verdicts with the jury foreperson or the jurors. Thus, there was no opportunity for each juror to tell the court whether he or she agreed with the verdict in [one verdict form or the other verdict form]." *Id.* at 825-826. "[B]ecause there was no polling of the jury as to which of the inconsistent verdicts it agreed, the inconsistent verdicts remain." *Id.* at 826.

The **Zimmerman** court attached no significance to the jury's silence as to the trial court's failure to read the other verdict form in determining which verdict it intended as to the count where there were inconsistent verdicts, absent being directly questioned by the trial court as to which verdict was intended. *Id.* The **Zimmerman** court remanded for a new trial because it could not resolve two consistent verdicts once the jury had been discharged, and without further deliberation, there was no final verdict of the jury. *Id.*

In **State v. White,** 2007 WL 446606 (Minn. App. 2007), the jury foreperson signed and dated both guilty and not-guilty verdict forms on an assault count. **Id.** at *4. The jury was polled without counsel or the court apparently noticing the not-guilty verdict form. **Id.** The jurors individually affirmed that the guilty verdict on the assault count was their true verdict. Id. On appeal, White argued that the existence of contradictory verdict forms required a new trial. **Id.** The claim had not ***52** been raised before the district court, but the appellate court addressed the claim even though raised for the first time on appeal. **Id.** at *5.

The **White** court believed that, absent some evidence that the jury was aware of the contradictory verdicts, the jury polling alone was inadequate to ensure that the jury's proper verdict was returned. *Id.* at *6. The court remanded for a hearing inquiring into the jurors' awareness, if any, of the contradictory verdicts prior to the jury polling. *Id.* at *6-7.

Under the circumstances here, the appropriate remedy is to grant a new trial. **Zimmerman,** 941 S.W.2d at 826. In the alternative, this Court should remand for a hearing to inquire into the jurors' awareness, if any, of the contradictory verdicts prior to the jury polling. **White,** 2007 WL 446606, at *6-7.

*53 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) and because of the inconsistent verdict forms signed by the foreperson of the jury as to Count II (guilty verdicts for both first-degree **elder abuse** and the lesser-included offense of third-degree **elder abuse**) (Point III), this Court should reverse and remand for a new trial.

Footnotes

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 referred to first by the date followed by the page cite (e.g., the first day of trial was held on September 24, 2012, so a reference to page one of that transcript would be: (9/24/12 Tr. pg. 1).

2 Larry Hickman, Lorraine's son and Linda's half-brother, testified that Linda never refused to allow him to visit Lorraine (09/27/12 Tr. 64, 69-70).

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 (09/26/12 Tr. 244-245).

4 Linda also saw the sore the weekend before Lorraine went to the hospital on February 22, 2010 (09/27/12 Tr. 50-51).

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.

6 In fact, the verdict director did not even allege or require the jury to find what the “omitted act” was.

7 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.

8 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 (09/25/12 Tr. 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 (09/24/12 164, 174-175, 178-179).

9 If Linda had been charged with a crime involving negligence, the result might be different, depending on the charge. A person is criminally negligent when she “fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow,

and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." **§ 562.016.5.**

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.

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