2013 WL 5590410 (Mo.App. E.D.) (Appellate Brief)
Missouri Court of Appeals, Eastern District.

STATE OF MISSOURI, Respondent,

v.

Linda GARGUS, Appellant.

No. ED99233.
September 27, 2013.

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

Respondent's Brief

Chris Koster, Attorney General.

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***6 STATEMENT OF FACTS**

Defendant was convicted following a jury trial in the Circuit Court of Clark County of **elder abuse** in the first degree in violation of § 565.180. [1] (Tr. IX at 195, 201-203; LF 182-183). [2] The court sentenced Defendant in accordance with the recommendation of the jury to 10 years in prison. (Tr. X at 56, 58; LF 184).

The sufficiency of the evidence to convict is at issue as to whether there was an *actus reus* to support criminal liability - i.e., whether Defendant (Victim's caregiver and daughter) had or assumed a duty to perform omitted acts--and as to whether the State proved that Defendant was aware that her conduct was practically certain to cause serious physical injury to Victim.

The jury found that Defendant "knowingly caused serious physical injury to [Victim] by leaving her on the bed for long periods of time in unsanitary, rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites," which resulted in amputation and death. (L.F. 168, 183).

***7** Defendant was a Certified Nurse's Assistant ("CNA") and Certified Medication Technician ("CMT") with 35 years of experience working in nursing homes; she represented to Victim's extended family that she had quit her job to care for Victim and her late husband full-time. (Tr. VII at 165, 167-168, 224; Tr. VIII at 12, 16; Tr. IX at 12). Defendant failed to timely seek medical treatment for: 1) a Stage 4 decubitus ulcer which had eaten through Victim's muscle tissue on her back; and 2) a gangrenous leg that resulted in a rodent eating away significant chunks of her foot, which required amputation of the leg by the time Victim received care. (Tr. VI at 200, 206, Tr. VIII at 5-6, 10, 12, 14-16, 18, 72-73 80, 93, 95, 99, 101, 131, 135). The combination of these untreated wounds caused infection and bacteria to enter Victim's blood stream, resulting in septicemia and death. (Tr. VIII at 14, 47, 157).

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

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

In 2008, Defendant moved into Victim's mobile home and became (and held herself out as) Victim's primary caregiver (Tr. VI at 199, Tr. VII at 12, 50, 91, 94, 95, 218-219, 222-223; Tr. VIII at 242; Tr. IX at 5). Victim had been ***8** bedridden and immobile for a number of years, and could not take care of her own needs for food, water, or medical care. (Tr. VII at 50).

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

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

Defendant told an investigator for the Department of Health and Senior Services that she was "the primary caregiver" and that she had moved in with her parents in December 2009. (Tr. VII at 104). Defendant told Sheriffs investigator, Tim Vice, that she had first moved in with her parents in the middle of January when her father first got sick (Tr. VII at 139).

At trial, Defendant testified she had moved in full-time in 2008, and had previously resided there full-time temporarily when her father developed cancer ***9** in 2007 (Tr. VIII at 242). Because of her father's cancer surgery and radiation in 2007, Victim could't be there alone (Tr. VIII at 242).

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

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

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

On January 31, 2010, Victim's husband (Defendant's father), who slept in a neighboring camper or trailer, died (Tr. VII at 51; Tr. VIII at 246).[3] Defendant ***10** did not call Cindy or other relatives; Cindy learned of her grandfather's death by reading about it in the newspaper the next day (February 1, 2010).[4]

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

Defendant kept Victim's bed just inside the mobile home in a living room area approximately 7 feet by 13-14 feet,[5] right next to multiple cages containing birds and animals, which were not kept clean and contained "hundreds" of rodents. (Tr. VI at 20, 36-37, 161, Tr. VII at 57). Victim was afraid of rodents (Tr. VI at 185, Tr. VIII at 262).

When confronted by Cindy about the “hundreds” of rodents crawling along the bottom of the bird cages right next to Victim twenty days prior to Victim's hospitalization for the rodent bite which took off a huge chunk of her gangrenous foot, Defendant claimed they were Victim's “pet mice” (Tr. VII at 58). However, Victim told emergency personnel who discovered one in the bed ***11** with her (running away from a spot near the Stage 4 decubitus ulcer on her bottom and back) that she was afraid of rodents (Tr. VI at 185). Defendant admitted at trial that Victim was afraid of rodents (Tr. VIII at 262).

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

Rodents were also scurrying throughout the trash-infested trailer, which was in a “[t]errible[,] [d]isgusting[,]” “horrifying,” “grotesque” condition. (Tr. VI at 20, 22, Tr. VII at 57, 62). Mice were “everywhere, crawling through everything.” (Tr. VII at 57). The residence contained 40 animals, including cats, flying and caged birds, reptiles, lizards which were moving around, and dogs (Tr. VI at 20, 22). Animal cages had feces and filth. (Tr. VI at 34). A rat ran in front of an investigator's foot. (Tr. VI at 22).

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

The kitchen had rotted and moldy food all over the counters; dirty dishes, rotted food and a cluttered mess were on the stovetop; and Victim's clothes from ***12** the night she was finally taken to the hospital were found in a wash tub in the kitchen in muddy, gray, thick water with fleas coming out and a smell so strong the sheriff could not tolerate it (Tr. VI at 24, 33, 34). The kitchen cabinets had cobwebs all over (Tr. VI at 36).

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

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

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

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

Victim was covered from neck to toe with a blanket, so Cindy did not observe Victim's wounds that day (Tr. VII at 62, 86). Cindy saw no medicines, ***13** only garbage (Tr. VII at 62, Tr. VIII at 246).[6] Victim's eyes were matted shut, although she was eventually able to open them (Tr. VII at 63). Flies were flying around her head (Tr. VII at 63). Victim's nails were “long and dirty” and dug into the granddaughter's hand (Tr. VII at 64).

Victim did not recognize Cindy and was confused about who her grandchildren were (Tr. VII at 58, 63, 64-65; Tr. IX at 45-46). Defendant told Victim in a louder than normal tone of voice, “If you keep talking crazy like that, they're going to lock you up.” (Tr. VII at 59).

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

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

Defendant began working at the Clark County Nursing Home in 1973 (Tr. VII at 165). The function of the nursing home was to "take care of older people." (Tr. VII at 176). Defendant updated her CNA skills in 1989 (Tr. VII at 166). ***14** Defendant went on to become a Certified Medication Technician ("CMT") in 1999. (Tr. VII at 165-167). CMTs are trained in medications and side effects and know how to give them and how to give eye drops (Tr. VII at 168). CMTs are able to reorder medications as they run out (Tr. VII at 169). Defendant also had a certification in insulin and blood sugars, including drugs used for the treatment of diabetes (Tr. VII at 169). The nursing home used special diets for diabetics (Tr. VII at 177).

To remain a CNA at the Clark County Nursing Home, continued training was required, which always touched on infection control, **abuse** and neglect as required by the State of Missouri (Tr. VII at 180, 190). Basic hygiene was covered in infection control training (Tr. VII at 191). Bedding is changed if it becomes soiled or twice a week (Tr. VII at 191); incontinent patients, or patients with some kind of a sore that was oozing, may require bedding changes more than once a day (Tr. VII at 191). If bedding is not changed regularly, there is definitely the potential for infection (Tr. VII at 191). Showers are mandated at the nursing home for infection control reasons, even if the patient does not wish to have hygienic care (Tr. VII at 194).

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

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

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

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

A Stage 2 pressure ulcer has either a blister or the first layer of skin has become open (Tr. VII at 185). Because the openness leads to a greater likelihood of infection, such ulcers must be covered and the nursing home would get treatment from a doctor (Tr. VII at 185-186, 212-213). The doctor sometimes orders antibiotics (Tr. VII at 186). At one time, CMTs and CNAs were involved in this medication process (Tr. VII at 186). CNAs are trained to be particularly ***16** vigilant if a pressure ulcer increases to a Stage 2 (Tr. VII at 213). Nutrition and hydration would be monitored more carefully because they are important factors in healing a pressure area; liquid would go from the body more quickly than in an intact skin area (Tr. VII at 213-214).

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

The director of the Clark County Nursing Home testified that she had never experienced a Stage 1 pressure sore developing into a Stage 4 pressure sore (Tr. VII at 187). A Stage 4 "is showing bone or a tendon"; it's "where you're clear to the bone." (Tr. VII at 187). The bigger the sore, the harder it would be to treat (Tr. VII at 187). The earlier you catch it, the better the probable

outcome (Tr. VII at 187). If a patient had a Stage 4 pressure ulcer in the Clark County Nursing Home, they would be sent out for medical treatment (Tr. VII at 211-212).

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

***17** CNAs cut diabetic patients' fingernails (Tr. VII at 194). They are to report toenail problems (Tr. VII at 194-195). [7] Long nails can cause skin tears or scratches which lead to non-healing wounds or the potential for infections (Tr. VII at 195).

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

Defendant thus had been trained in caring for bedsores, including turning the patients every two hours, cleansing the areas of the wound, applying ointments, and seeking help from the more highly trained professionals when they progressed beyond Stage 1. Defendant was familiar with the urgency of dealing with diabetes and the accompanying dangers. Defendant was familiar with the odor of rotting flesh. Defendant said she bathed her mother daily and observed her body. Nonetheless, Defendant claimed she had not observed her mother's Stage IV bedsore or gangrenous leg whose foot had been largely eaten ***18** away by a rodent. Victim was also malnourished and "profoundly dehydrated" under Victim's care. (Tr. VIII at 34, 147-148).

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

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

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

***19** Defendant testified she quit her job on January 20, 2010; Defendant also claimed she first discovered that Victim had a bedsore on her "bottom" on this date (Tr. VIII at 251-252, 254; Tr. IX at 17-18). [8] Defendant said it was the size of a tennis ball (Tr. VIII at 19-20).

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

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

Sylvia Winger, one of Victim's granddaughters who got along with Defendant, had lived for a time with Victim's husband in a mobile home next to Victim's and had assisted with Victim's sponge baths when called upon (Tr. IX at 116). Sylvia and her children did visit Victim on February 5, 2010, the day of Victim's husband's funeral (Tr. IX at 102-103). Sylvia testified that Victim had a blanket on her (Tr. IX at 103).

On February 22, 2010, Defendant was overwhelmed and testified, "I was just getting to the point where I wanted to do what was right for her." (Tr. VIII ***20** at 266). She finally summoned emergency personnel to Victim's home (Tr. VI at 150, 161-162, 173-174,180-181, 189).

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

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

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

Defendant asked them to look at Victim's foot (Tr. VI at 169, 174). When they removed a towel or sheet covering the foot, they noticed that Victim's leg ***21** was black and green from the knee downward - gangrenous looking - and a very large part of the top side of one foot was gone (Tr. VI at 169-170).

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

Victim was taken to the Keokuk Area Hospital (Tr. VI at 197-198). Defendant told a nurse that Victim had been ill and that Defendant had been caring for Victim at Victim's home (Tr. VI at 199, 210). Victim had a lot of open sores, and one foot was missing a lot of flesh around the base of the toes - it looked as if it had been debrided down to the bone, and she had a very large, deep decubitus ulcer [9] 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).

Dr. Neville Crenshaw treated Victim at the Keokuk Area Hospital (Tr. VIII at 2, 4). There was an area on the top side of her left foot where the tissue had been removed down to the level of tendon and bone; it was consistent with a

***22** rodent debriding the wound (Tr. VIII at 5-6, 10, 14-15, 18, 72-73). Victim apparently could not feel her gangrenous leg or eaten-away portions of her foot due to diabetic neuropathy. (Tr. VIII at 17-18). All "the meat" had "been cleaned off, had been eaten off" on part of the foot (Tr. VIII at 18).

Victim also had a very large, pre-sacral, decubitus ulcer, just above the buttocks (Tr. VIII at 5-6, 10). That ulcer was a "very large," "very, very, very deep," "extremely malodorous," "gaping, infected wound" (Tr. VIII at 6, 12). There were also pressure ulcers on her shoulder, right hip, and right heel (Tr. VIII at 9-10). The ulcers could not have developed in a mere two days to appear as they did (Tr. VIII at 10).

Victim'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). Victim was septic - bacteria had migrated into her blood stream (Tr. VIII at 14, 47). "[H]er whole body was a massive infection." (Tr. VIII at 14). She also had renal failure due to a kidney infection (Tr. VIII at 47-48, 63). Victim improved, dramatically with aggressive treatment despite her grave condition (Tr. VIII at 28, 42).

Dr. Kirk Green also examined Victim (Tr. VIII at 79-80). Her left foot was down to bone and tendons (Tr. VIII at 99). The damage could have been caused by rodents (Tr. VIII at 101-102, 109-111). Victim's left leg was no longer getting any blood supply (Tr. VIII at 80, 93, 95). The leg was essentially dead and ***23** Victim agreed to have it amputated it below her left knee in an effort to save her life (Tr. VIII at 15-16, 99, 101, 131, 135).

Cindy visited Victim in the hospital daily (Tr. VII at 72, 74). Cindy could smell Victim throughout the hallway (Tr. VII at 72). Victim's whole leg was exposed; every toe on one foot had bone visible (Tr. VII at 72). Cindy's mouth about fell to the floor when she saw the "huge," "really deep" ulcer on Victim's bottom and back when they turned Victim to clean it; the wound had mold, and was red, yellow (from pus) and black in spots (Tr. VII at 72-73). Victim cried out in pain every day (Tr. VII at 74).

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

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

The cause of Victim's death was multiple organ failure due to septicemia as a result of decubitus ulcers and gangrene of the left foot (Tr. VIII at 157). "In other words, [Victim] died because the ulcers on her back, the gangrene, and ***24** necrosis of the left leg, moved on to bacteria going into the blood, producing septicemia, septicemia affecting all the organs of the body. Once all the organs are affected by the septicemia, they fail you." (Tr. VIII at 157). Delay of treatment hastened her death (Tr. VIII at 161).

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

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

When the inspection party entered the home, there were numerous cages with birds, animals, and mice in them (Tr. VII at 19-20, 36, 117-118,134, 251). Some cages had feces in them (Tr. VII at 34, 36, 246). There were animals ***25** roaming free inside the home - birds, reptiles, dogs, mice, a rat - 40 animals in all (Tr. VII at 22, 117, 246, 251).

There was moldy, rotted food all over the kitchen (Tr. VII at 22, 34). The toilet in the bathroom had waste in it; Defendant said it had not worked in a couple of weeks (Tr. VII at 25, 35, 248). The bed that Victim had slept in did not have any bedding (Tr. VII at 25). Defendant said that she and her son had dragged the bedding across the street and burned it next to the road after her mother had been transported to the hospital (Tr. VII at 26).

On February 23, 2010, Defendant told Kris Chamley of the Department of Health and Senior Services that she had moved in with her parents in December of 2009 or January 2010, and she had been their primary caregiver (Tr. VII at 104-105, 107,

109). Defendant said she was a certified nurse's aide and had worked at both the Clark County Nursing Home and the River Hills Nursing Home in Keokuk, Iowa (Tr. VII at 105). According to Defendant, she quit her work on January 20, 2010, to take care of her parents (Tr. VII at 106).

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

The following day, Chamley spoke again with Defendant and this time she said she first noticed the ulcer on January 25, 2010, and that it was the size of a ***26** grapefruit (Tr. VII at 110-111). When Chamley told Defendant that because of Defendant's medical knowledge she should have been able to take care of the bedsore, Defendant gave no response (Tr. VII at 111).

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

Defendant did not attend her mother, the Victim's funeral (Tr. VII at 75). The jury found Defendant not guilty of involuntary manslaughter, but guilty of first-degree **elder abuse** (LF 182-183). After the penalty phase, the jury recommended that Defendant serve 10 years in prison (Tr. X at 56, 58; LF 184). The court sentenced Defendant in accordance with the recommendation of the jury (Tr. X at 56, 58; LF 184).

***27 ARGUMENT**

I. The evidence was sufficient to find Defendant guilty of elder abuse in the first degree because Defendant knowingly caused Victim serious physical injury by repeatedly placing and keeping the bedridden Victim on a bed in unsanitary, rodent-infested conditions created by Defendant's actions as well as omissions, causing her to develop gangrenous and Stage 4 decubitus ulcers and injuries from animal bites, which resulted in amputation of Victim's leg and death.

Even if the case had involved only omissions, Defendant's omissions would meet the requirement of "a voluntary act" under § 562.011.4 because: (1) Defendant created Victim's peril and therefore had a duty to summon aid; (2) Defendant assumed the duty of providing for her helpless mother's needs, held herself out as her mother's primary caretaker, and prevented others from rendering aid by keeping Victim in her private house where Defendant was the only other adult rather than seeking medical assistance; (3) Defendant had a "special relationship" as a close relative of her helpless mother; and (4) Defendant had an implied contract allowing her to live in her mother's home expense-free after accepting sole responsibility for Victim's care as a full-time occupation.

***28** Defendant's first point contends that there was insufficient evidence to support Defendant's conviction for **elder abuse** in the first degree. Defendant contends that she was charged only with omissions rather than acts; that this was improper because she had no legal duty to Victim to provide any additional assistance and did not prevent others from rendering aid; and that the State failed to prove that she was aware that her conduct in leaving Victim on the bed for long periods of time was practically certain to cause serious physical injury to Victim.

Defendant had worked in nursing homes for 35 years, yet did not seek timely medical treatment for her mother for a "huge," "really deep," "gaping," "infected" Stage 4 decubitus ulcer and a gangrenous leg which had a large part of the foot eaten off by a rodent; the leg was amputated once Victim was finally hospitalized. Victim died as the result of septicemia brought on by these injuries and the delay in seeking care.

A. Standard of Review

Appellate review of a challenge to the sufficiency to the evidence supporting a criminal conviction is limited to a determination of whether sufficient evidence was presented at trial from which a reasonable juror might have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993); *State v. Gibbs*, 306 S.W.3d 178, 181 (Mo. App. E.D. 2010). Appellate courts accept as ***29** true all of the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregard all evidence and inferences to the contrary. *Gibbs*, 306 S.W.3d at 181. [10] Appellate courts do not act as a "super juror" with veto powers over the conviction, but rather give great deference to the trier of fact. *Id.; State v. Jones*, 296 S.W.3d 506, 509-510 (Mo. App. E.D. 2009).

A person commits the crime of **elder abuse** in the first degree if he attempts to kill, knowingly causes or attempts to cause serious physical injury to any person 60 years of age or older. § 565.180. [11]

A person is not guilty of an offense unless his liability is based on conduct which **includes a** voluntary act. § 562.011.1 (emphasis added). An omission to perform an act of which the actor is physically capable is "a voluntary act". § 562.011.2(2). "A person is not guilty of an offense based **solely** upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." § 562.011.4 (emphasis added).

***30** The Comment to § 562.011 contained in V.A.M.S. notes that the statute is based on Section 2.01 of the Model Penal Code, as well as Illinois and New York statutes. "The requirement is not that liability must be based upon an act, but rather upon conduct which **includes a** voluntary act." *Id.* (emphasis added). Once "a voluntary act" is established, the liability may be based "on the entire course of conduct," including omissions. *See*, Comment to § 562.011, V.A.M.S. (citing Comments, Model Penal Code, Tent. Draft No. 4, 119-120 (1955) (discussing case in which driver fails to stop as the result of unconsciousness but felt illness coming on earlier and kept driving)).

The Comment further notes that while criminal liability by omission in crimes not defined in terms of failure to act is an analytically difficult and rare situation, "the most common [of such situations] is liability for homicide (usually manslaughter) based on the failure to perform some act, **such as supplying medical assistance to a close relative.**" *Id.* (emphasis added)

The Comment goes on to state that a "concise summary of the 'law' is in *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962):
The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country....

There are at least four situations in which the failure to act may constitute breach of legal duty. One can be held criminally liable: first, ***31** where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Id.

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

Second of Torts provides guidelines as to the specific kinds of conduct which will require one to take affirmative action to render aid." *Id.*, 210 Cal. App. 3d at 147, 258 Cal. Rptr. at 143.

Section 321 of the Restatement Second of Torts provides:
***32** (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

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

Id., quoted in Oliver, 210 Cal. App. 3d at 147-148; 258 Cal. Rptr. at 143.

Section 324 of the Restatement Second of Torts provides in part: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge...." *Id.*, 210 Cal. App. 3d at 148, 258 Cal. Rptr. at 143.

"It should, of course, suffice, as the courts now hold, that the duty arises under some branch of the civil law. If it does, this minimal requirement is satisfied, though whether the omission constitutes an offense depends as well on many other factors." Toll, Pennsylvania Crimes Code Annotated, § 301, at p. 60 (citing Comment, Model Penal Code § 2.01; *quoted in Pennsylvania v. Pestinikas*, 617 A.2d 1339, 1343 (Pa. 1992)). Stated another way, the existence of a duty allows an omission to become "a voluntary act" establishing the actus reus, but other elements of the offense must still be proven.

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

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

While Defendant would like this Court to believe that only her omissions were responsible for the fact that Defendant's whole body became a "massive infection" from the unsanitary, rodent-infested conditions, the "huge," "very, very, very deep," "gaping" "infected" Stage 4 decubitus ulcer, and the gangrenous leg that had to be amputated, common sense says otherwise. The jury was entitled to infer that Defendant engaged in at least one "voluntary act" which was part of the "course of conduct" that led to these conditions, and that result.

A reasonable juror could infer from Defendant's testimony that she acquired and brought "a lot of animals into the trailer (versus "the few" preexisting), some of whose cages were placed right next to Victim and became infested with "hundreds" of rodents and with animal feces (which Defendant admitted she cleaned but inadequately, itself an act in the chain of conduct). A reasonable juror could infer from Defendant's testimony that she bathed Victim, that Victim became incontinent in January, and that the bathtub was caked with brown and yellow spots, that Defendant removed Victim from her bed, ***34** bathed her in an unhygienic bathroom, and/or then replaced her on the bed in unsanitary, rodent-infested conditions.

A reasonable juror could infer from Cindy's testimony that Defendant could no longer do laundry at the Keokuk house because of sewer problems, and from the Sheriffs testimony that he found Victim's clothing she was wearing on the night she was admitted to the hospital in a wash tub in the kitchen in "muddy, grey, thicker water" with fleas coming out, which smelled so bad that he couldn't tolerate it, that Defendant put Victim in unhygienic clothing despite her massive, gaping, open decubitus ulcer.

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

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

***35** A reasonable juror could infer that Defendant was responsible for, and at least attempted to perform housekeeping functions, but did so inadequately and unhygienically.

A reasonable juror could credit Defendant's testimony that, despite knowing that Victim was incontinent, she sometimes removed Victim's adult diapers without replacing them, realizing that she sometimes (in Defendant's words) "shit all over," exposing her "huge," "very, very, very deep," "gaping" decubitus ulcer to infection and additional pressure.

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

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

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

As previously noted, Section 321 of the Restatement Second of Torts provides that if an actor subsequently realizes or should realize that she has ***36** created an unreasonable risk of harm to another, even though at the time of the act she had no reason to believe it would involve such a risk, she "is under a duty to exercise reasonable care to prevent the risk from taking effect." *Id; Oliver*, 258 Cal. Rptr. at 143.

In *Flippo v. Arkansas*, 523 S.W.2d 390 (Ark. 1975), a father and son were convicted of involuntary manslaughter for failing to procure timely medical assistance for the victim of a hunting accident shot by the son. After discovering the victim with his leg nearly severed, the defendants notified a man at a nearby house, whom unbeknownst to them was the victim's father. The defendants gave the victim's father the location of victim and assured him they would call an ambulance. When victim's father found victim, victim requested his father to get aid, but his father assured victim that others were calling an ambulance and stayed with him. *Id.* at 392.

Instead, defendants, who were concerned about law enforcement discovering the son had been hunting out of season, drove past numerous houses, some of which had telephones, and a cafe with a visible public telephone that was only 2.3 miles from the wounded man. *Id.* Defendants drove to their home, which was 12 to 14 miles away. *Id.* at 392. After reaching their residence, defendant father instructed his son and his friend to place the high-powered rifle with which the son had shot victim in a "shack" and replace it on the gun rack of their truck with a shotgun. *Id.* at 235-236. Only then did defendant father call ***37** an ambulance, which met him approximately 25 minutes later at the cafe which he had passed en route to his residence. *Id.* at 392.

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

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

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

Similarly, in the case at bar, Defendant had a duty, once she realized that the unhygienic, rodent-infested conditions she had subjected her mother to had ***38** resulted in a serious, decubitus ulcer and a gangrenous leg, even if she had not foreseen such a risk, to render or summon aid. Rest.2d Torts § 321; *Oliver,* 258 Cal. Rptr. at 143; *Flippo,* 523 S.W.2d at 393. Instead, as in *Flippo,* she dithered with other concerns until it was too late. Despite moving into Victim's residence in 2008 and noticing, by her own admission, a decubitus ulcer the size of a tennis ball on January 20, 2010, and despite her nursing home training, she waited until February 22, when she "was just getting to the point where I wanted to do what was right for her." (Tr. VIII at 266). Moreover, the medical testimony was that the missing foot was eaten off her gangrenous leg over a period of at least several days. If, as Defendant testified, she could see Defendant's leg "all the time" and bathed her, she could not have failed to appreciate the severity of the situation.

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

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

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

***39** The case at bar presents a classic fact situation as to the latter situation in *Jones v. United States,* supra. Mr. Flippo assured the victim's **elderly** father that he would call for an ambulance. The father kept vigil and delayed seeking assistance in the belief assistance would be procured promptly by appellants. In the meantime the victim, known by the appellants to be seriously wounded, was bleeding to death, asking his father not to leave him after being assured assistance was forthcoming. During this time, Mr. Flippo drove twelve to fourteen miles to reach his residence although phone were in the vicinity of the shooting. A public phone, which the appellants passed, was 2.3 miles from the scene of the tragedy. Mr. Flippo was told that the victim's leg was 'nearly blown off.' Upon reaching his home he instructed the youths to place the rifles in a 'shack' and substitute a shotgun and then used his phone to call an ambulance. According to [victim's father], after waiting in vain for prompt assistance, without (sic) four minutes he was able to have someone at a nearby residence summon aid. There was medical evidence that if help had arrived sooner or if aid had been administered at the site by appellants, it was probable that the victim would have survived. The jury could infer that Mr. Flippo's delay caused the helpless victim to be secluded in the field awaiting the promised aid and prevented or hindered others from rendering timely aid. ***40** *Flippo,* 523 S.W.2d at 393-394. The court concluded that there was substantial evidence from which the jury could find both defendants criminally negligent and therefore guilty of involuntary manslaughter. Id. at 394.

As noted in *Oliver, supra,* Section 324 of the Restatement Second of Torts provides in part: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge..." Rest.2d Torts § 324 (*quoted in Oliver,* 258 Cal. Rptr. at 143).

Viewed in the light most favorable to the verdict, in the case at bar, Defendant lived with her bedridden mother since at least 2008, and was both reasonable for and held herself out as Victim's primary caregiver. Victim relied on Defendant for food, water, bathing, and treatment of her physical injuries.

Defendant had 35 years of experience working in nursing homes and testified she had quit her job specifically to care for her parents. [12] At least one ***41** other relative (Cindy) who had offered assistance was not taken up on that offer by Defendant, and believed that due to her 35 years of experience in nursing homes, Defendant "knew what she was doing."

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

In *Oliver*, *supra*, the defendant left a bar with a victim she observed to be extremely drunk, drove him to her home, and allowed him to shoot heroin into his arm in her bathroom. When the victim fell to the floor unconscious, she was held to have assumed a duty to seek medical aid. *Id.*, 258 Cal. Rptr. at 144. In driving victim to her home, "she took him from a public place where others might have taken care to prevent him from injuring himself, to a private place - her home - - where she alone could provide such care. To a certain, if limited, extent, therefore, she took charge of person unable to prevent harm to himself. (Rest. 2d Torts, *op. cit. supra* § 324.)" *Id.* When victim collapsed to defendant's floor after defendant had allowed him, without any objection on her part, to inject himself with narcotics, defendant should have known "that her conduct had contributed to creating an unreasonable risk of harm" for the victim. At that point, she owed the victim "a duty to prevent that risk from occurring from ***42** summoning aid, even if she had not previously realized that her actions would lead to such risk" under Rest. 2d Torts § 321. *Id.* Her failure to summon any medical assistance whatsoever and to leave the victim abandoned outside, hidden from the view of others, "warranted the jury finding a breach of that duty." *Id.*

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

Similarly, in the case at bar, Defendant held herself out as the primary caregiver of Victim. She discouraged multiple relatives from visiting Victim, including on the date of Victim's husband's funeral. She tacitly refused Cindy's offer of assistance. [13] When relatives did come by for a visit, Defendant covered Victim's wounds with a blanket. Despite voluntarily assuming the care of ***43** Victim, a helpless person, rather than seeking help from competent medical professionals, she prevented others from rendering aid. *See*, *Flippo* at 393.

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

E. Defendant had a "special relationship" which created a duty to her mother.

The Comment to §562.011, V.A.M.S., states that "the most common" of the situations in which "criminal liability by omission" is found in crimes not defined in terms of failure to act "is liability for homicide (usually manslaughter) based ***44** on the failure to perform some act, **such as supplying medical assistance to a close relative.**" *Id.* (emphasis added). *Jones, supra*, describes this category of situation "in which the failure to act may constitute breach of legal duty" as "where one stands in a certain status relationship to another[.]" *Id.*, 308 F.2d at 310.

Missouri and other cases repeatedly apply this doctrine in cases in which a parent neglects the medical or other basic needs of his or her child. The trial court, for example, cited *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990), wherein our Supreme Court upheld involuntary manslaughter and endangering the welfare of a child convictions of a husband and wife.

In *Mahurin*, paramedics discovered a non-breathing baby inside their home, who later died. Inside, police found filth, dirty diapers and debris, along with two small children and an infant. The infant lay on a bed next to two bottles, one of which contained curdled formula. *Id.* at 842. The infant was unresponsive and stared into space. *Id.* His twin brother, who died, was extremely emaciated, having lost all of his body fat; his eyes were sunken, he was dehydrated, and he suffered bronchial pneumonia caused by his malnourished condition. *Id.* The surviving twin had lost all of his fat reserves and was "skin and bones." *Id.* Evidence at trial showed the surviving victim was suffering from starvation and that the twin who died perished of malnutrition. *Id.*

***45** On appeal, the defendants contended that the State had not identified any specific statutory legal duty that made their omissions to act a violation of the child endangerment statute. *Id.* at 843. The defense further argued, as Defendant does here, that the child endangerment statute permits only affirmative acts and that an omission cannot be deemed criminal unless specially proscribed by statute. *Id.*

Our Supreme Court rejected this claim. The Court held that a person acts knowingly "(1) with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or (2) with a respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result." § 562.016.3, RSMo (1986); *Mahurin*, 799 S.W.2d at 844. Both parents had been given information on infant care when they left the hospital after the twins' birth. *Id.* Based on the physical appearance of the infants as described by examining physicians, it was reasonably certain that the defendants should have recognized the grave condition of the twins. *Id.* A person commits the crime of involuntary manslaughter if he or she recklessly causes another person's death. *Id.* A person commits child endangerment who "knowingly acts in a manner that creates a substantial risk to the life, body or health of a child...." *Id.* The Court held that both these standards were met. *Id.*

***46** However, the "special relationship" category is not limited to parents taking care of their children. In *Johnson v. County of Los Angeles*, 143 Cal. App. 3d 298, 191 Cal. Rptr. 704 (1983), the court applied the principles of Section 321 of the Restatement Second of Torts to find that a "special relationship" existed between arresting officers and a paranoid schizophrenic with suicidal tendencies whom the sheriffs officers had arrested (the decedent), as well as between the officers and the wife and daughter of the decedent, which gave rise to a duty to warn the wife and daughter before releasing the decedent. *See, California v. Oliver*, 258 Cal. Rptr. at 143. Sheriff's officers had arrested the decedent for driving on the wrong side of the freeway in an attempt to commit suicide. *Id.* Shortly thereafter, the wife of the decedent informed the officers that the decedent was a paranoid schizophrenic who required immediate medication to correct his suicidal tendencies. *Id.* The decedent was subsequently released from custody without notice to his wife or daughter, and two days later he committed suicide. *Id.* The trial court dismissed a civil suit for failure to state a cause of action, but the Court of Appeals reversed. *Id.* The alleged facts of a special relationship between the sheriff's officers and the decedent, as well as the wife and daughter, gave rise to a duty to warn the wife and daughter before releasing decedent. *Id.* Because the wife and daughter depended upon the sheriff's officers for protection against the very eventuality that occurred, and the sheriff's officers gave them assurances and instructions not to interfere, the ***47** sheriffs officers had increased the risk of suicide upon the unexpected and unsupervised release of the decedent. *Johnson*, 143 Cal. App. 3d at 311; *Oliver*, 258 Cal. Rpetr. at 143.

Similarly, in the case at bar, Victim depended upon Defendant for protection against the very eventuality that occurred, particularly in light of her 35 years of experience working in nursing homes treating the problems of bedridden senior citizens, including decubitus ulcers and gangrene. *See, id.* Defendant's creation of an unreasonable risk of harm by repeatedly placing and leaving Victim on a bed in the living room for long periods of time in unsanitary, rodent-infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites, which resulted in amputation of the leg and death was a violation of her duty, and sufficed to provide the *actus reus* and meet the element of the statute requiring that Defendant knowingly caused serious physical injury to Victim. *See, id.*

In *Michigan v. Thomas,* 272 N.W.2d 157 (Mich. App. 1978), the supervisor of a religious training school, with the permission of his parents, disciplined a 19-year-old catatonic schizophrenic by beating him with a rubber hose, eventually resulting in his death after the defendant failed to seek medical treatment for the victim in the intervening nine days. *Id.* at 159. The Michigan Court of Appeals held that involuntary manslaughter may be based on the failure to perform a legal duty. *Id.* at 160. The defendant was in the position of ***48** authority over the victim and had directly and voluntarily assumed a parental function and stood in a position of *in loco parentis* over victim. *Id.* "Under such circumstances, defendant's beating of the victim coupled with his failure to provide medical attention, when decedent was unable to obtain same himself, violated defendant's legal duty to care for the victim. The elements of involuntary manslaughter were adequately established." *Id.*

In the case at bar, the same policies of this theory are present. Defendant had voluntarily assumed a function not unlike that assumed in an *in loco parentis* situation. Defendant was responsible for meeting the nutritional, hydration, and medical needs, as well as other daily hygiene needs, of the helpless Victim, in a parent-child relationship (a "close relative" in the lexicon of the Comment to §562.011). Defendant's failure to provide medical attention when the decedent was unable to obtain the same for herself, violated her legal duty to care for the Victim. *Id.* This was sufficient to constitute a "voluntary act" by which a reasonable jury could conclude that Defendant knowingly caused serious physical injury to the Victim. [14] The fact that the roles of parent and ***49** child may be reversed when the parent reaches an advanced age does not change the policies at issue, or the closeness of the "special relationship."

Because Defendant was both in a special relationship with Victim and voluntarily assumed the care of Victim in a private home in which no others but a child resided and thereby excluded others from rendering assistance, Defendant's omission in rendering aid became a "voluntary act" under § 562.011.2(2) ("[a]n omission to perform an act of which the actor is physically capable") and supplied the *actus reus* for the offense.

F. In the alternative, Defendant had a legal duty by implied contract to care for Victim.

A third category in which omissive acts are sufficient to "solely" establish the *actus reus* described in *Jones* and approved in the Comment to §562.011 is present "where one has assumed a contractual duty to care for another." *Jones,* 308 F.2d at 310.

In *Davis v. Virginia,* 335 S.E.2d 375 (Va. 1985), the Virginia Supreme Court addressed the question of whether a daughter who moved in with her mother was under a legal duty to care for her mother, an issue of first impression there, as here. *Id.* at 378. While the defendant claimed she had at most a moral duty, the Virginia Supreme Court did not agree. The Court held:

> The evidence makes clear that [daughter] accepted sole responsibility for the total care of [mother]. This became her full-time occupation. In return, ***50** [mother] allowed [daughter] to live in her home expense free and shared with [daughter] her income from social security. Additionally, [mother] authorized daughter to act as her food stamp representative, and for this [daughter] received food stamp benefits in her own right. From this uncontroverted evidence, the trial court reasonably could find the existence of an implied contract. Clearly, [daughter] was more than a mere volunteer; she had a legal duty, not merely a moral one, to care for her mother.

Id.

If in fact Defendant maintains that she did not voluntarily assume the duty of her mother's care, she must have done so as part of an implied contract which allowed her to life rent-free. *See, id.* Defendant admitted she had quit her job on January 20, 2010, that she assumed the responsibility for the total care of her mother, and that this became her full-time occupation. Defendant thus had no source of income, and Victim expressed her concern to Cindy that Defendant would be unable to pay all the bills. Given Victim's age, a reasonable juror could infer that Victim received Social Security benefits, which would have to support the household. While there is no evidence concerning food stamps, the benefit of sharing in mother's support money is sufficient consideration for an implied contract and, if indeed the household was eligible for food stamps, Defendant would presumably share in the food she prepared. A reasonable juror could also ***51** infer a pecuniary motive from Defendant's obsession with finding insurance papers which did not exist after her father's death, as testified to by Cindy. Under the holding of *Davis*, there is sufficient evidence of an implied contract to supply the duty and thus the *actus reus*.

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

"The State may prove a defendant's knowledge by direct evidence and reasonable inferences drawn from the circumstances surrounding the incident." *State v. Davis*, No. SD32127 (Mo. App. S.D. Sept. 16, 2013),slip op. at 5 (quoting *State v. Burrell*, 160 SW 3d 798, 802 (Mo. banc 2005)). In fact, "[d]irect proof of the required mental state (here, 'knowingly') is seldom available and such intent is usually inferred from circumstantial evidence." *Davis*, slip op. at 5 (quoting *State v. Abercrombie*, 694 SW2d 268, 271 (Mo. App. S.D. 1985)). "In determining whether a person knowingly created a substantial risk, we look to the totality of the circumstances." *Davis*, slip op. at 5 (quoting *State v. Buhr*, 169 SW3d 170, 177(Mo.App.W.D.2005)).

Defendant had 35 years of experience working in nursing homes as a Certified Nurse's Assistant. (Tr. IX at 12). Defendant knew that Victim was ***52** diabetic and that diabetics needed "special vigilance" (Tr. VI at 174, 200; Tr. IX at 12). Defendant testified that she "saw her [mother's] body, daily." (Tr. IX at 17). She specifically saw her bottom when she put her on the bedpan (Tr. IX at 22). Defendant had been trained in the problems of caring for seniors in the nursing home, including in the care and treatment of bedsores or pressure ulcers. (Tr. IX at 19). At one point, Defendant testified that Victim always had "necrotic tissue" covering the area of her bedsore (Tr. IX at 28). Defendant was familiar with gangrene and with the smell of rotting flesh that accompanied it from her work in nursin homes (Tr IX at 29)

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

Because there was ample testimony that Defendant, if she saw Victim's body daily as she testified, could not have missed a decubitus ulcer that progressed to Stage 4 that was "huge," "very, very, very deep," "gaping" and "infected," or the gangrene and missing portion of her foot (which was eaten off over a period of at least several days), and the odor of "rotting flesh" was overpowering even 10 to 15 feet outside the trailer, the jury could reasonably infer that Defendant (based on her training) knew of the attendant circumstances and that these appalling wounds coupled with the appalling ***53** sanitation were "practically certain" to result in serious physical injury via infection of the Stage 4 ulcer or amputation of the leg.

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

Defendant's first point should be rejected.

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

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

The verdict director, Instruction No. 8, was patterned after MAI-CR3d 319.50, with modifications required by ***55** *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962), a case the Comment to § 562.011, V.A.M.S. holds contains a concise summary of the law. Section 562.011.2(2), Comment to 1973 Proposed Code at 2.

MAI-CR3d 319.05, the verdict director for **elder abuse** in the first degree, provides that the jury shall be instructed as follows: (As to Count ___, if) (If) you find and believe from the evidence beyond a reasonable doubt:

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

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

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

and

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

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

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

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

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

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

MAI-CR3d 319.50.

Instruction No. 8 provided:
As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that between December 1, 2009, and February 22, 2010, in the County of Clark, State of Missouri, the Defendant, Linda Gargus, by having voluntarily assumed the care of her mother, Lorraine Gargus, a ***57** 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 ***58** serious disfigurement or protracted loss or impairment of the function of any part of the body.

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

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

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

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

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

***59** (Tr. IX at 145-146).

Defendant's motion for new trial noted that notes on use to MAI-CR3d 304.02 provide the format for modifications to verdict director instructions, but that format supports the State here. *See,* MAI-CR3d 304.02 (which provides that additional required elements should be listed in the instruction as was done in this case).

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

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

C. Standard of Review

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

***60** Rule 30.20 provides, in pertinent part, that "plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted." Rule 30.20. "The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review." *State v. Collins,* 290 S.W.3d 736, 743-44 (Mo. App. E.D. 2009). "In determining whether to exercise our discretion under the plain error rule, we look to determine whether on the face of the defendant's claim substantial grounds exist for believing the trial court committed a 'plain error' which resulted in manifest injustice or a miscarriage of justice." *Id.* at 744. If so, the court exercises its discretion to review defendant's claim to determine whether the manifest injustice or miscarriage of justice actually occurred. *State v. Kennedy,* 107 S.W.3d 306, 312-313 (Mo. App. W.D. 2003). Plain errors are evident, obvious, and clear based on the facts and circumstances of the case. *State v. Louis* 103 S.W.3d 861 864 (Mo. App. E.D. 2003).

The defendant bears the burden of showing that an alleged error has produced such a manifest injustice. *State v. Isa,* 850 S.W.2d 876, 884 (Mo.banc 1993). Mere allegations of error and prejudice will not suffice. *Id.*

D. No error, plain or otherwise

In *McNamee v. Garner,* 624 S.W.2d 867 (Mo. App. E.D. 1981), this Court held that instructions not in MAI "shall be simple, brief, impartial, free from ***61** argument, and shall not submit to the jury or require findings of detailed evidentiary facts." *Id.* at 868 (quoting Rule 70.02(e)). The ultimate test for such instructions is whether they follow the substantive law and can be readily understood. *Id.*

While the verdict director appears to contain two extraneous words in paragraph first, it plainly required the jury to find that Defendant "voluntarily assumed the care of her mother, Lorraine Gargus, a person unable to met her physical and medical needs, by moving into Lorraine Gargus' house, performing basic care giving functions such as providing food and water, and representing to others that she was the primary care giver for Lorraine Gargus [.]" (L.F. 168). These were precisely the facts required to be found to establish that Defendant had voluntarily assumed the duty of care and then failed to render aid to a helpless person who was left in a position where she was unable to be aided by others. *See, Jones* at 310. Moreover, the Instruction required the jury to acquit "unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions," so it did require factual findings in paragraph first (L.F. 168).

The second paragraph of the Instruction required the jury to find "that [Defendant] was physically capable of providing care for her mother, Lorraine Gargus [.]" (L.F. 168). This precisely tracks the language of § 562.011.2(2), which Defendant relied

upon to argue that the State failed to charge a ***62** "voluntary act". The jury was required to find this fact in order to find that Defendant's omission was in fact a "voluntary act" under Missouri statute and therefore the paragraph was proper.

Defendant does not complain about the description of the manner in which Defendant knowingly caused serious physical injury to the Victim "by leaving her on the bed for long periods of time in unsanitary, rodent infested conditions, causing her to develop gangrenous ulcers and injuries from animal bites," nor does Defendant complain about the remainder of the instruction.

Because the instruction was based upon MAI, as required to be modified by substantive law and accurately tracked the substantive law, there is no error, plain or otherwise. [15]

Defendant's second point should be rejected.

***63 III. The trial court did not err in overruling Defendant's request for a mistrial or plainly err in failing to retroactively reject the jury's guilty verdict as to elder abuse in the first degree the day after it had already accepted the verdict in order to have the jury deliberate further as to that count because the jury returned a guilty verdict as to elder abuse in the first degree, was polled, and confirmed that was its verdict. The additional piece of paper later found in the jury room containing a signature of the foreperson on the discarded verdict form for the lesser-included offense of elder abuse in the third degree is of no legal significance once the jury is polled and confirms its verdict.**

Defendant's final point contends that the court should have granted a mistrial and plainly erred in not retroactively refusing to accept the jury's guilty as to **elder abuse** in the first degree and ordering further deliberations on the grounds that after the jury returned its guilty verdict to **elder abuse** in the first degree and confirmed it after being polled. After the jury had left, the court sent the bailiff to return paperwork the jury left behind in the jury room for its files. The jury had left behind the verdict form for **elder abuse** in the third degree, which had been signed by the foreperson.

Defendant concedes that he requested no relief at trial other than a mistrial and did not request further deliberations (perhaps because it was clear ***64** what the jury's verdict was and asking them the same question for the third time would not have resulted in a favorable answer for Defendant).

In *State v. McNeal*, 986 S.W.2d 176 (Mo. App. E.D. 1999), this Court held that the trial court can resolve inconsistencies or ambiguities by returning the jury to further deliberations or by polling the jury. *Id.* at 179.

In *State v. Zimmerman*, 941 S.W.2d 821 (Mo. App. W.D. 1997), a case cited by both sides at trial, a case in which the Court found that the jury had returned inconsistent verdicts, the Court found that merely asking the foreperson if the verdicts as read were in fact its verdicts was not tantamount to polling the jury where other jurors had allegedly shaken their heads affirmatively but no record was made of the same. *Id.* at 825-826.

By contrast, in the case at bar, the trial court did poll the entire jury and each juror announced that the verdict as read was its verdict.

This Court should therefore follow the holding of *McNeal*, in which the verdict form read by the clerk found the Defendant guilty. *Id.* at 179. After the verdicts were read, the clerk polled the jurors individually, specifically asking each one if the verdicts that had just been read were his or her verdicts. *Id.* Each juror responded affirmatively. *Id.* This Court held, "We find that the trial court was not required to return the verdict forms to the jury for further deliberations because the trial court cured the defect in the verdict forms by polling the jury." *Id.*

***65** In *McNeal*, it was clear from the record that the clerk of the trial court did not receive the not guilty verdict form on that count from the jury at the time the guilty verdict was read by the clerk. *Id.* at 179 n.2. The clerk read the jury forms she received

and only one form was read for that count, as in the case at bar. *Id.* It was not clear when or how the trial court received the second verdict form. *Id.*

Here, only one verdict form was returned and that verdict form was read. *See, id.* The other verdict form was found, in essence discarded and left behind in the jury room. Because any defect in the verdict forms was cured by polling of the jury, the court was not required to return the verdict forms to the jury for further deliberations. *McNeal,* 986 S.W.2d at 179.

Defendants final point should be rejected.

*66 CONCLUSION

Defendant's conviction and sentence should be affirmed.

Footnotes

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

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

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

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

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

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

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

8 Defendant also saw the sore the weekend before Victim went to the hospital on February 22, 2010 (Tr. IX at 50-51).

9 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.

10 A large portion of Defendant's Statement of Facts relies on Defendant's version of events, which was rejected by the jury and is in contravention of the standard of review.

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

12 Defendant's father (Victim's husband) died on January 31, 2010. The prosecutor agreed prior to trial not to mention that Victim's husband (Defendant's father) was found at the Keokuk Hospital; that there was not hotline call; and that the husband suffered bed sores in the same places as Victim and as severe (Tr. VI at 22).

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

14 The fact that the charge is different is legally irrelevant to the question of whether a legal duty had been assumed that could render an omission a “voluntary act,” which was the issue in both cases.

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

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