2014 WL 2106605 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, Plaintiff - Appellee,

v.

Filip M. CRUZ, Defendant- Appellant.

No. 2013-P-1552.
April 1, 2014.

On Appeal from a Judgment of the Trial Court of the Commonwealth Superior Court Department, Bristol Division

**Brief of Filip M. Cruz Defendant- Appellant**

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## II. STATEMENT OF THE CASE

### A. INTRODUCTION

This is an appeal filed by the defendant-appellant, Filip M. Cruz (hereinafter referred to as “the defendant”) from a conviction of the defendant by a trial jury in the Trial Court of the Commonwealth, Superior Court Department, Bristol Division, Docket No.: BRCR2011-00847 (the “Trial Court”),following a trial between the plaintiff-appellee, Commonwealth of Massachusetts, represented by the Bristol District Attorney's Office (hereinafter referred to as “the Commonwealth”) and the defendant. (RA7-11) [1] .

***2** The defendant was convicted on an indictment containing two counts alleging violations of the provisions of G.L. c. 265 §13K:

BRCR2011-00847-1 alleges that the defendant "being a caretaker of Olivia Cruz, an **elder** or person with a disability, wantonly or recklessly permit[ted] serious bodily injury to such **elder** or person with a disability", in violation of the provisions of G.L. c. 265 §13K(e) (RA. 17).

BRCR2011-00847-2 alleges that the defendant "being a caretaker of Olivia Cruz, an **elder** or person with a disability, wantonly or recklessly commit[ted] or permit[ted] another to commit **abuse**, neglect or mistreatment upon such **elder** or person with a disability", in violation of the provisions of G.L. c. 265 §13K(d 1/2) (RA. 18).

B. STATEMENT OF PROCEDURAL HISTORY

The defendant was arrested by officers of the Fall River Police Department on or about September 28, 2010 and arraigned before a justice of the Fall River District Court on complaint no.: 1032CR005869, alleging, in two counts, violations of G.L. c. 265 §13K(d) (count 1) and G.L. c. 265 §13K(e)(count 2). (RA. 12-13).

While the case was progressing in the Fall River District Court (RA.14-16), the defendant was indicted, in July of 2011, by a Bristol County Grand Jury in a two count indictment alleging violations of G.L. c. 265 §13K(e)(BRCR2011-00847-1) and G.L. c. 265 §13K(d 1/2) ***3** (BRCR2011-00847-2). (RA. 17-18).

On or about August 27, 2012, this case was called for trial in the Bristol Superior Court before the Honorable D. Lloyd Macdonald (RA. 7-11). A trial jury was empaneled and this case was tried.

On or about August 30, 2012, a jury verdict of guilty was returned on both counts of the indictment (RA. 9).

The defendant's bail was revoked and he was held at the Bristol County House of Correction pending sentencing on September 12, 2012 (RA. 9).

On September 18, 2012, the defendant was sentenced by the Court (Macdonald, J.) to a term of commitment of not more than 10 years nor less than 9 years to the state prison at Cedar Junction on Indictment BRCR2011-00847-1. On Indictment BRCR2011-00847-2, the defendant was sentenced to a term of probation for ten years to commence from and after his release from incarceration on BRCR2011-00847-1(RA. 9-10, See also RA. 19).

On September 21, 2012, the defendant through counsel filed his Notice of Appeal (RA.4). This case was docketed in this Honorable Court on October 1, 2013 (RA.160-161).

***4** III. STATEMENT OF FACTS

Evidence presented to the jury at the trial of this case consisted of the following:

1. The defendant lived with his parents Antonio Cruz and Olivia Cruz at 41 Douglas Street in Fall River, MA. (RA. 27, 107-109).

2. On or about September 5, 2010, Bristol **Elder** Services received a complaint regarding alleged **abuse** of the defendant's mother, Olivia Cruz. (RA. 106-108).

3. A "protective service worker", Dionne Wesley was assigned to investigate this complaint and, on or about September 9, 2010 Ms. Wesley met with the Cruz family at 41 Douglas Street, Fall River, MA. (RA. 106-108).

4. Ms. Wesley testified at trial that she spoke with the defendant regarding Olivia Cruz's care and was allegedly informed that the defendant provides the care for his mother (RA. 108), which care includes bathing his mother, dressing his mother, and feeding his mother (RA. 108, 117).

5. Ms. Wesley testified that the defendant would "take her out of the recliner and put her on the commode which was right next to the recliner, and ***5** be with her and help her that way". (RA. 110).

6. The defendant stated he would sponge bathe her daily (RA. 110, 117) and would do everything for her including preparing her meals (RA. 117), bathing her daily, dressing her, shopping, etc. (RA. 108-111).

7. Mr. Cruz "presented fine" to Ms. Wesley (RA. 112).

8. Ms. Wesley found Olivia Cruz in no distress and detected no foul smells, either emanating from the apartment or from Mrs. Cruz (RA. 115).

9. In the apartment, Ms. Wesley did note health care products (RA. 116) present for the care of Olivia Cruz and, although the apartment was messy and cluttered (RA. 118),she observed that the commode available for Mrs. Cruz's use was clean and there were no foul odors or evidence of urine or feces stains (RA. 118).

10. Ms. Wesley learned that Mrs. Cruz refused to go for medical appointments (RA. 115, 120, 122), a point corroborated by Mrs. Cruz's sister-in-law, (RA. 38) during her testimony.

11. In speaking with Antonio Cruz, Ms. Wesley was advised that the defendant did a good job taking care of his parents and that the information ***6** provided to Ms. Wesley was correct (RA. 122).

12. After Ms. Wesley's inspection of the Cruz household, she saw nothing which would require immediate intervention by her agency or any other agency (RA. 120). She saw no hazardous or dangerous conditions that would require intervention, including medical care (RA. 121).

13. On September 28, 2010, paramedics with the Fall River Fire Department were called to 41 Douglas Street, Fall River, MA., allegedly for a stroke victim (RA. 41).

14. These paramedics found Mrs. Cruz sitting in a recliner. She was allegedly extremely lethargic (RA. 44) and incoherent (RA. 45).

15. The defendant was observed to be in an animated condition, urging the paramedics to hurry and get his mother to the hospital. (RA. 41-42).

16. Mr. Cruz's animated state irritated the paramedics (RA. 42-43). Nevertheless, Mrs. Cruz was transported to St. Anne's Hospital where she was treated by John Arcuri, MA., an emergency room physician, and Daniel Eardley, MD., a surgeon.

17. Mrs. Cruz was found to be in acute distress, suffering from "very large necrotic gangrenous ***7** areas that extended primarily over the right hip and buttocks area into the peritoneal area, perivaginal and around the perirectal area, rather large and foul smelling and gangrenous" (RA. 64).

18. Dr. Eardley conducted "extensive debriedment", which involved cutting away "non-viable or dead tissue basically to decrease the entire bioburden of the wound" (RA. 65).

19. From the information obtained by Dr. Eardley, Mrs. Cruz had not sought medical attention for her medical condition (RA. 72).

20. Although the development of decubitus ulcers afflicting Mrs. Cruz may have developed over a period of approximately six weeks (RA. 70), the more immediate problem of septic shock developed over the preceding 24 hours (RA. 74-75).

21. Nevertheless, despite this surgical intervention as well as the medical care administered to Mrs. Cruz, she died on September 28, 2010 (RA. 47-77).

22. Contributing factors to Mrs. Cruz's death was atherosclerotic and hypertensive cardiovascular disease (RA.91), a prior myocardial infarction (RA. 92), atherosclerosis of the aorta and coronary vessels, (RA. 93), necrosclerosis ***8** (RA.93), obesity (RA. 93 and diabetes (RA. 53).

23. However, the primary cause of death was septic shock, of a duration of several days or a week (RA. 94).

## IV. ARGUMENT

**1.Whether the Commonwealth failed to sustain its burden to produce facts sufficient to submit this case to a jury on the two counts of the Indictment in this case.**

BRCR2011-00847-1 alleges a violation of G.L. c. 265 §13K(e) which provides:

> Whoever, being a caretaker of an **elder** or person with a disability, wantonly or recklessly permits serious bodily injury to such **elder** or person with a disability or wantonly or recklessly permits another to commit an assault and battery upon such **elder** or person with a disability which assault and battery causes serious, bodily injury, shall be punished by imprisonment in the state prison for not more than ten years or by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than ten thousand dollars or by both such fine and imprisonment.

BRCR2011-00847-2 alleges a violation of G.L. c. 265 §13K(d 1/2) which provides:

> Whoever, being a caretaker of an **elder** or person with a disability, wantonly or recklessly commits or permits another to commit **abuse**, neglect or mistreatment upon such **elder** or person with a disability, shall be punished by imprisonment in the state prison for not more than 3 years, or imprisonment in the house of correction for not more than 2 1/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

Except for the allegation in G.L. c. 265 §13K(e) that the defendant wantonly or recklessly permitted or ***9** wantonly or recklessly permitted another to cause *serious* bodily injury, both statutes are exactly the same. The only difference between the two statutes is the allegation that the perpetrator's conduct resulted in *serious* bodily injury, a degree of “bodily injury” not alleged in G.L. c. 265 §13K(d 1/2).

In the case at bar, the defendant is alleged to have permitted his mother to sustain serious bodily injury because he wantonly or recklessly failed to properly care for her and to treat decubitus ulcers which formed on her buttocks, causing sepsis and ultimately resulting in her death.

The defendant asserts, in this appeal, that the Commonwealth failed to prove sufficient evidence that the defendant violated all of the necessary elements of the two statutes to permit this case to be placed in the hands of the jury.

At the close of the Commonwealth's case, (RA.20) at the close of the defendant's case (RA. 21), and upon return the jury verdict of guilty (RA. 22), the defendant timely filed with the Superior Court, a motion for a required finding pursuant to the provisions of Rule 25 of the Massachusetts Rules of Criminal Procedure. The defendant maintains, through ***10** these motions and in this appeal, that the Commonwealth failed to prove that the defendant wantonly or recklessly caused serious bodily injury to his mother or wantonly or recklessly permitted another to commit an assault and battery, to his mother which assault and battery caused serious bodily injury.

There is no dispute in this case that the defendant was the son of Olivia Cruz and that he lived in the same house with his mother, Olivia, and his father, Antonio.

There is also no dispute that the defendant cared for his mother in this case by bathing her and changing the “chux” or the disposable pad on which Mr. Cruz sat (RA. 102,104,106-124).

The defendant also fed his mother, powdered her, and provided care for her to the best of his ability (RA. 106-124).

However, the Commonwealth alleges that the care the defended rendered to his mother amounted to wanton and reckless conduct which caused serious bodily injury.

In order to sustain a conviction on the Indictment charging a violation of G.L. c. 265 § 13K (e), the Commonwealth must prove the following beyond a ***11** reasonable doubt:
FIRST: That Filip Cruz was the caretaker of Olivia Cruz. “Caretaker” is defined as a person with responsibility for the physical care of an **elder**, which responsibility may arise as the result of a family relationship [2], or by a fiduciary duty imposed by law [3], or by a voluntary [4] or contractual duty [5] undertaken on behalf of such **elder**. A person may be found to be a ***12** caretaker under this section only if a reasonable person would believe that such person's failure to fulfill such responsibility would adversely affect the physical health of such **elder**;

SECOND: That Olivia Cruz was a person sixty years of age or older;
THIRD: That Filip Cruz wantonly or recklessly permitted serious bodily injury to Olivia Cruz. Serious bodily injury is defined as bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.

Wanton or reckless conduct is defined as intentional conduct involving a high degree of likelihood that substantial harm will result to another. *Commonwealth v. Welansky,* 316 Mass. 383, 399, 55 N.E. 2d 910 (1944). Proof of recklessness requires more than a mistake of judgment or even gross negligence. *Commonwealth v. Michaud,* 389 Mass. 491, 499, 451 N.E. 2d 396, 400(1983). As a general rule, the requirement of wanton or reckless conduct may be satisfied by either the commission of an intentional act or an intentional omission where there is a duty to act. ***13** *Commonwealth v. Pugh,* 462 Mass. 482, 496, 969 N.E. 2d 672, 685 (2012).

In order to sustain a conviction on the indictment charging a violation of G.L. c. 265 § 13K (d 1/2), the Commonwealth must prove the following beyond a reasonable doubt:
FIRST: That Filip Cruz was the caretaker of Olivia Cruz. “Caretaker” is defined as a person with responsibility for the physical care of an **elder**, which responsibility may arise as the result of a family relationship [see footnote 3], or by a fiduciary duty imposed by law [see footnote 4], or by a voluntary [see footnote 5] or contractual duty [see footnote 6] undertaken on behalf of such **elder**. A person may be found to be a caretaker under this section only if a reasonable person would believe that such person's failure to fulfill such responsibility would adversely affect the physical health of such **elder**;

SECOND: That Olivia Cruz was a person sixty years of age or older;

THIRD: That Filip Cruz wantonly or recklessly permitted bodily injury to Olivia Cruz. Bodily injury is defined as a substantial impairment of the physical condition, including but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any ***14** internal organ, or any injury which occurs as a result of repeated harm to any bodily function or organ including human skin.

The definitions of "wanton or reckless" conduct are the same as the definitions previously discussed in this brief with regard to G.L. c. 265 § 13K (e).

It is not alleged, by any witness who testified in this case that the defendant assaulted his mother or that he permitted another to assault his mother. The medical examiner who testified, Dr. William Zane affirmatively confirmed that none of Mrs. Cruz's injuries or conditions were caused by an assault or by a physical assault which resulted in trauma(RA. 89).

The medical evidence suggested that Mrs. Cruz developed decubitus ulcers which developed over a period of approximately six weeks (RA. 70). The more immediate and life threatening problem of septic shock developed over the preceding 24 hours (RA. 74-75). Nevertheless, despite surgical intervention as well as the emergency medical care administered to Mrs. Cruz, she died on September 28, 2010.

Factors contributing to Mrs. Cruz's death was atherosclerotic and hypertensive cardiovascular disease (RA.91), a prior myocardial infarction (RA. 92), ***15** atherosclerosis of the aorta and coronary vessels, (RA. 93), necrosclerosis (RA. 93), obesity (RA. 93) and diabetes (RA.53). Nevertheless, the primary cause of death was septic shock, of a duration of several days or a week (RA. 94).

Although the defendant, as Mrs. Cruz's son, was caring for his mother to the best of his ability, he was not the only person in the household who could be determined to be her caretaker. Antonio Cruz lived in the same household as his wife and contributed to the care she received.

Furthermore, complicating the situation is the fact that Mrs. Cruz was not incompetent and therefore was also cognizant of the care she was receiving. She refused medical care or transport to a medical facility. (RA. 38, 115, 120, 122).

Therefore, both the defendant and Antonio Cruz were available to care for Olivia Cruz, an **elderly** woman with considerable medical conditions whose apparent wish was to stay in her home. Unfortunately, Mrs. Cruz's refusal to seek medical care or permit medical professionals to examine her and guide her home care left those services to her husband and to her son, two individuals who did not have,medical training.

***16** However, the defendant, being the younger and the more physically capable, cared for his mother to the best of his abilities. He prepared her meals, bathed her daily, treated her ulcerations with talcum powder and cream, and provided the best care he could render given the level of his knowledge of his mother's physical condition.

But when her condition deteriorated to the point where she was barely responsive, the defendant called for help, believing his mother was having a stroke.

This was not a situation, as the Commonwealth alleged, of a person who let his mother "rot to death in a chair" (RA 27). Filip Cruz did, to the best of his ability and understanding of the care of an **elderly** person with the medical problems his mother had, care for his mother on a daily basis.

In a hospital setting, such as an intensive care unit, patients who are sedentary are moved frequently to prevent the onset of decubitus ulcers. (RA 53). The primary cause of these ulcers involve the breakdown of the skin, which can occur in a time period as short as a couple of hours (RA. 52).

But Mrs. Cruz was not in a medical facility receiving intensive care from trained medical ***17** professionals. She was at home, living with her husband and her son in the setting that she wanted. As stated previously, she chose to remain at home. She did not want to be removed to a medical facility. Faced with this situation, the person most capable to provide care for Mrs. Cruz was the defendant, who did so to the best of his ability, as a layman without medical training.

Noted by investigators was "Gold Bond powder" (RA. 98,100), a medicated powder used by Mr. Cruz to treat his mother's ulcers; underpads ("chux"), both unused and soiled, indicating that the defendant was attentive to the fact that his mother was defecating and urinating in her chair, so he had a supply of clean pads (RA. 3-35) to put beneath her to provide a sanitary environment for her, and soiled pads (RA. 100-102), indicating that the defendant frequently removed the soiled pads, once again, to provide a clean seat for his mother.

Additionally, medication was observed (RA. 104-105) in the apartment, although investigators did not collect them to exhibit at trial. This is unfortunate, but understandable since the investigators were collecting evidence sought to convict the defendant, not vindicate him.

***18** Mrs. Cruz was not left alone for days on end, neglected by her son, the only person capable of providing care for her. Mrs. Cruz received the best care her son was capable of giving. And when she became incoherent, and therefore unable to protest and resist medical intervention which, in this case, involved transportation to an emergency department, the defendant called for an ambulance, believing that his mother had a stroke(RA. 100).

Only approximately three weeks prior to her death, Mrs. Cruz was visited by a "protective social worker" from Bristol **Elder** Services (RA. 106-108). The worker, Dionne Wesley, found the home to be a bit messy but found no hazardous conditions which required intervention from any protective service (RA 112-120). Further, Ms. Wesley found Mrs. Cruz to be well cared for by her son and not in need of medical intervention. Since the onset of sepsis was relatively quick (RA. 74-75), it cannot be said that the defendant caused his mother to fester in effluence and disease for days on end. To his layman's knowledge, she developed a rash which he cared for to the best of his abilities until he believed she suffered a stroke, at which time he called an ambulance.

***19** It may be said that the defendant should have overruled his mother's refusal and forced her to seek medical attention, especially when evidence of a rash began to appear on her buttocks. Possibly he should have educated himself on the care of immobile, **elderly** patients. Maybe he should have sought the assistance of trained professionals to render care to his mother. However Mrs. Cruz did not wish to be moved. She wanted to spend the remainder of her days at home, with her family. It is to be remembered that regardless of their ages, Mrs. Cruz was still the defendant's mother and he desired to respect the wishes of his mother.

However, no matter how negligent the defendant may have appeared based on the evidence presented to the jury in this case, maybe even grossly negligent, there is no evidence that his conduct amounted to wanton or reckless conduct. The Commonwealth presented no credible evidence of intentional conduct by the defendant involving a high degree of likelihood that substantial harm will result to the defendant's mother. *Commonwealth v. Welansky*, supra. As proof of recklessness requires more than a mistake of judgment or even gross negligence. *Commonwealth v. Michaud*, supra, the Commonwealth failed to produce sufficient ***20** evidence to convict the defendant.

At the close of the Commonwealth's case (RA. 20), at the close of the defendant's case (RA. 21), and after the return of the jury verdicts of guilty (RA.22), the defendant timely filed motions for a required finding of not guilty. The Court (Macdonald,

J.) denied these motions, which test the sufficiency of the evidence presented to the jury, after consideration of the evidence and arguments of counsel (RA. 128-129).

"In reviewing the denial of a required finding of not guilty, we review the evidence introduced up to the time the Commonwealth rested its case to determine whether the evidence, viewed in the light most favorable to the Commonwealth, was sufficient for a reasonable jury to infer the existence of each essential element of the crime charged, beyond a reasonable doubt. *Commonwealth v. Kelley*, 370 Mass. 147, 150, 346 N.E. 2d 368 (1976). See *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E. 2d 370 (1979). No essential element of the crime may be left to a jury's conjecture, surmise, or guesswork. *Commonwealth v. Kelley*, 359 Mass. 77, 88, 268 N.E. 2d 132 (1971)." *Commonwealth v. Rivera*, 460 Mass. 139, 141, 949 N.E. 2d 916, 918 (2011).

***21** The defendant asserts, that the Commonwealth failed to produce sufficient evidence, viewed in the light most favorable to the Commonwealth, that the defendant was the sole caretaker, exclusively charged with the responsibility to care for his mother. Antonio Cruz, the defendant's father and the husband of Olivia Cruz, also met the definition of a caretaker, as defined by G.L. c. 265 §13K(a). Consequently, to the extent that the defendant stands accused of wantonly or recklessly committing or permitting **abuse**, neglect, or mistreatment of Olivia Cruz, or wantonly or recklessly committing or permitting serious bodily injury to Olivia Cruz, the defendant's father, present at all times at home, was in a position to, if not act to prevent injury to his wife, contact medical assistance for his wife. His lack of action stands to prove that the existence of a grave illness was not as apparent to a layman not trained in the care of the **elderly**. If his wife's condition was as apparent as the Commonwealth contends, would not Mrs. Cruz's husband call for medical help?

Furthermore, although it may be argued that the defendant should have recognized the advanced stage of ulceration present in his mother's buttocks, no ***22** evidence exists that the defendant's intentional conduct involved a high degree of likelihood that substantial harm will result to his mother.

Even viewing the credible evidence presented by the Commonwealth in the light most favorable to the Commonwealth, the defendant asserts that the Commonwealth failed to produce sufficient proof for a reasonable jury to infer the existence of each essential element of the crime charged, beyond a reasonable doubt

**2. Whether the trial judge erred in sentencing the defendant on both counts of the Indictment in this case as G.L. c. 265 §13K(d 1/2) is a lesser included offense of G.L. c. 265 §13K(e) and therefore duplicative.**

G.L. 265 §13K(e) provides the following:

> Whoever, being a caretaker of an **elder** or person with a disability, wantonly or recklessly permits serious bodily injury to such **elder** or person with a disability or wantonly or recklessly permits another to commit an assault and battery upon such **elder** or person with a disability which assault and battery causes serious bodily injury, shall be punished by imprisonment in the state prison for not more than ten years or by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than ten thousand dollars or by both such fine and imprisonment.

G.L. c. 265 §13K(d 1/2) provides the following:

> Whoever, being a caretaker of an **elder** or person with a disability, wantonly or recklessly commits or permits another to commit **abuse**, neglect or mistreatment upon such **elder** or person with a disability, shall be punished by imprisonment in the state prison for not more than 3 years, or imprisonment in the house of correction for not more than 2 years, or by a fine of ***23** not more than $5,000, or by both such fine and imprisonment.

Except with regard to the sentence each statute carries, the elements of 265 §13K(e) and the elements of G.L. c. 265 §13K(d 1/2) are the same, except that G.L. c. 265 §13K(e) contains the element of "serious bodily injury", which G.L. c. 265 §13K(d 1/2) does not. Instead, G.L. c. 265 §13K(d 1/2) contains the element of "**abuse**, neglect or mistreatment" which G.L. c. 265 §13K(e) does not. However, the elements of "**abuse**, neglect or mistreatment", as defined in the statute are a lesser standard than the element of "serious bodily injury" contained G.L. c. 265 §13K(e) and therefore duplicative.

G.L. c. 265 § 13K defines "**abuse**" as "physical contact which either harms or creates a substantial likelihood of harm". "Mistreatment" is defined as "the use of medications or treatments, isolation, or physical or chemical restraints which harms or creates a substantial likelihood of harm". Finally, "neglect" is defined as "the failure to provide treatment or services necessary to maintain health and safety and which either harms or creates a substantial likelihood of harm".

"Serious bodily injury" is defined as "bodily ***24** injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death".

"**Abuse**, neglect or mistreatment" as defined by G.L. c. 265 §13K describe actual harm or the substantial likelihood of harm caused to an **elder** or person with a disability by a caretaker, while G.L. c. 265 §13K(e) describes certain types of serious injury that have been actually inflicted on an **elder** or person with a disability. The differences are differences of degree, not indistinguishable types of injuries unique to G.L. c. 265 §13K(d 1/2) or G.L. c. 265 §13K(e).

G.L. c. 265 §13K(d 1/2) describes lesser types of harm inflicted upon or may be inflicted upon an **elder** or person with a disability by a caretaker, while G.L. c. 265 §13K(e) describes certain types of harm actually inflicted upon an **elder** or person with a disability by a caretaker. The differences are ones of degree, not of substance.

"A 'lesser included offense is one which is necessarily accomplished on the commission of the greater crime.' *Commonwealth v. Porro*, 458 Mass. 526, 531, 939 N.E. 2d 1157 (2010), quoting Commonwealth v. D'Amour, 428 Mass. 725, 748 704 N.E. 2d 1166 (1999). ***25** When comparing the two crimes, we consider the elements of the crimes rather than the facts of any particular case. *Commonwealth v. Vick*, 454 Mass. 418, 431 910 N.E. 2d 339 (2009), and cases cited. 'A crime is a lesser-included offense of another crime if each of its elements is also an element of the other crime.' *Commonwealth v. Ogden O.*, 448 Mass. 798, 808, 864 N.E. 2d 13 (2007), quoting *Commonwealth v. Perry*, 391 Mass. 808, 813, 464 N.E. 2d 389 (1984).

When statutory crimes can be violated in multiple ways, comparison of their elements must focus on the specific variations that the defendant is alleged to have committed. For example, if a greater offense contains two independent theories of liability, it is sufficient that a lesser offense be subsumed within the particular theory that was alleged. See *Commonwealth v. Ogden O.*, supra (assault and battery by means of a dangerous weapon is lesser included offense of mayhem [second theory]); *Commonwealth v. Dixon*, 34 Mass. App. Ct. 653, 655-657, 614 N.E. 2d 1027 (1993) (considering whether assault and battery is lesser included offense of attempted murder by strangling, G.L. c. 265, §16, same statute as attempted murder by poisoning or drowning). Conversely, when a lesser offense contains ***26** an element that can be satisfied in multiple ways, and the purportedly greater offense can be satisfied in only one of those ways, the former is still included within the latter. Any person who violates the greater offense will still always violate the lesser offense. As we have stated in another context, '[A]lternative methods of establishing a required element are not distinct 'theories' of how the crime may be committed, but are merely similar, equivalent types of conduct any one (or more) of which will suffice to prove a single element.' *Commonwealth v. Santos*, 440 Mass. 281, 289, 797 N.E. 2d 1191 (2003) (explaining rule of juror unanimity)." *Commonwealth v. Roderiques*, 462 Mass. 415, 420-421, 968 N.E. 2d 908, 915 (2012).

In the case at bar, comparison of the elements of G.L. 265 §13K(e) and G.L. c. 265 §13K(d 1/2) yields the same conclusions reached by the Supreme Judicial Court in *Commonwealth v. Roderiques*, id. in its comparison of the elements G.L. c. 265, § 13J(b), second par. and G.L. c. 265, 13J (b), fourth par., two sections of a statute which have elements similar to the case at bar.

G.L. 265 §13K(e) and G.L. c. 265 §13K(d 1/2) both require as a first element that the proscribed conduct be caused by a caretaker, defined in both sections as a ***27** person "with responsibility for the care of an **elder** or a person with a disability". The protected person is the same, an "**elder** or a person with a disability". Furthermore, the caretaker is responsible for his or her own conduct as well as the conduct of another person who commits the proscribed conduct. Finally, the standard is the same, "wanton or reckless" conduct.

The difference in both sections of the statute is that G.L. c. 265 §13K(d 1/2) punishes a caretaker who commits (or permits to be committed) "**abuse**, neglect, or mistreatment" while G.L. 265 §13K(e) punishes a caretaker who permits (or permits another to commit) serious bodily injury. The differences, as discussed earlier, are differences of degree, not differences of substance.

The conduct, **abuse**, neglect, or mistreatment, all describe certain risks which results in "harm" or a "substantial likelihood of harm". "Serious bodily injury" is the physical injury that results from the risks of harm identified in G.L. c. 265 §13K(d 1/2).

The analysis in the case at bar follows the analysis by the Supreme Judicial Court of G.L. c. 265, §13J(b) in *Commonwealth v. Roderiques*, supra at 423,968 N.E. 2d 916: "[t]he third element of §13J(b), ***28** fourth par., substantial bodily injury, necessarily includes the second element of §13L, substantial risk of serious bodily injury or sexual **abuse** [footnote omitted]. The occurrence of an injury presupposes that a risk of injury has been created. Stated differently, in the former case the risk of injury has come to fruition in the form of an actual injury. See *Commonwealth v. Porro*, 458 Mass. 526, 533, 939 N.E. 2d 1157 (2010) (assault as attempted battery is "clearly" lesser included offense of intentional assault and battery, because only additional element in latter is completion by actual touching); *Commonwealth v. Martin*, 425 Mass. 718, 722, 683 N.E. 2d 280 (1997). It is true that, in §13L, this element can be satisfied through an alternative means, namely through creating a substantial risk of sexual **abuse** of a child. Nevertheless, this alternative means is not required for violation of §13L and does not prevent §13L from being a lesser included offense. See *Commonwealth v. Santos*, supra at 289, 797 N.E. 2d 1191".

Similarly the risk of injury identified in the definitions of **abuse**, neglect, or mistreatment come to fruition in the actual injury identified in the definition of "serious bodily injury".

***29** Both sections of G.L. c. 265 §13K were submitted to the jury and resulted in convictions (RA. 9).

At the sentencing hearing, counsel for the defendant requested that the defendant be sentenced on only one section of G.L. c. 265 §13K, as the convictions of both sections of G.L. c. 265 §13K are duplicative (RA. 154).

"The double jeopardy clause of the Fifth Amendment to the United States Constitution and Massachusetts common law protect defendants against the imposition of multiple punishments for the same offense. *Commonwealth v. Vick*, 454 Mass. 418, 433 n. 15, 910 N.E. 2d 339 (2009). The 'double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the double jeopardy clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.' *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed. 2d 187 (1997) [footnote omitted]. See *Commonwealth v. Alvarez*, 413 Mass. 224, 231, 596 N.E. 2d 325 (1992)(Legislature has 'broad power to define crimes' and therefore to impose ***30** multiple punishments for the same criminal conduct). The Fifth Amendment prohibits the courts from 'prescribing greater punishment than the legislature intended.' *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983). *See Commonwealth v. Suero*, 465 Mass. 215, 221 987 N.E. 2d 1199 (2013). Where the Legislature has not stated its intent to impose multiple punishment for the same criminal conduct, we utilize the elements test set forth in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871), to determine whether the Legislature intended to punish the same conduct under multiple statutory offenses. [footnote omitted] *Commonwealth v. Jones*, 382 Mass. 387, 393, 416 N.E. 2d 502 (1981). If such legislative intent cannot be discerned, the convictions are duplicative, and where a defendant has been sentenced on duplicative convictions, one of them must be vacated. See id." *Commonwealth v. Rivas*, 466 Mass. 184, 187-188, 993 N.E. 2d 698, 702-703 (2013).

The defendant in this case has been sentenced on G.L. c. 265 §13K(d 1/2 )on which he was convicted, and the defendant was sentenced on G.L. c. 265 §13K(e), on which he was also convicted. G.L. c. 265 §13K(d a lesser included offense of G.L. c. 265 §13K(e) and thus ***31** both counts of BRCR2011-00847 are duplicative. Defendant therefore respectfully requests that the sentences imposed on both counts of this Indictment be vacated and that the matter be remanded to the Trial Court for appropriate sentencing considerations.

## V. CONCLUSION

The defendant respectfully requests that this Honorable Court reverse the convictions of the defendant in this case on both counts of Indictment and remand this case back to the Trial Court for a new trial on Indictment BRCR2011-00847.

In the alternative, the defendant respectfully requests that this Honorable Court vacate the sentences imposed in this case and remand this case back to the Trial Court to dismiss BRCR2011-00847-2 as a lesser included offense of BRCR2011-00847-1 and further order that the defendant be re-sentenced on BRCR2011-00847-1.

Footnotes

1 All references to the Record Appendix, filed herewith shall be designated as “RA” with the appropriate page or pages set forth thereafter.

2 It may be inferred that a husband, wife, son, daughter, brother, sister, or other relative of an **elder** is a caretaker if the person has provided primary and substantial assistance for the physical care of the **elder** as would lead a reasonable person to believe that failure to provide such care would adversely affect the physical health of the **elder**.

3 It may be inferred that the following persons are caretakers of an **elder** to the extent that they are legally required to apply the assets of the estate of the **elder** to provide the necessities essential for the physical health of the **elder**: (i) a guardian of the person or assets of an **elder**; (ii) the conservator of an **elder**, appointed by the probate court pursuant to chapter two hundred and one; and (iii) an attorney-in-fact holding a power of attorney or durable power of attorney pursuant to chapter two hundred and one B.

4 It may be inferred that a person who has voluntarily assumed responsibility for providing primary and substantial assistance for the physical care of an **elder** is a caretaker if the person's conduct would lead a reasonable person to believe that failure to provide such care would adversely affect the physical health of the **elder**, and at least one of the following criteria is met: (i) the person is living in the household of the **elder**, or present in the household on a regular basis; or (ii) the person would have reason to believe, as a result of the actions, statements, or behavior of the **elder**, that he is being relied upon for providing primary and substantial assistance for physical care.

5 It may be inferred that a person who receives monetary or personal benefit or gain as a result of a bargained-for agreement to be responsible for providing primary and substantial assistance for the physical care of an **elder** is a caretaker.

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