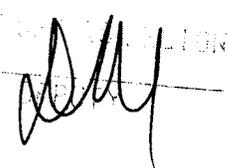


COURT OF APPEALS
DIVISION II
COUNCIL 14 P112-51
STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 38429-9-II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES KOCH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 07-1-00469-5

BRIEF OF RESPONDENT

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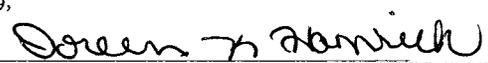
SERVICE	Mr. Gregory C. Link Washington Appellate Project 1511 Third Avenue, Suite 701 Seattle, Washington 98101	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: July 14, 2009, at Port Angeles, WA 
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I. COUNTER-STATEMENT OF THE ISSUES

1. Did the trial court's entry of two convictions for manslaughter and criminal mistreatment violate the Defendant's right against double jeopardy when the Legislature intended to punish both offenses separately?
2. Did the trial court err when it entered the Defendant's conviction for second degree manslaughter after sufficient evidence supported each element of the offense?
3. Did the trial court err when it entered the Defendant's conviction for first degree criminal mistreatment after sufficient evidence supported each charged alternative and every element of the offense?
4. Did the trial court err when it refused to give the Defendant's proposed instruction that was not an accurate or complete statement of the law?

II. STATEMENT OF THE CASE¹

A. FACTS

In 2007, the victim, Lloyd Koch (Lloyd),² was 86 years-old living with diabetes and high blood pressure. 2 Record of Proceedings

¹ The trial in *State v. Koch*, No. 07-1-00469-5, lasted six days and produced eight volumes of recorded proceedings. The State refers to the Record of Proceedings (RP) as follows:

August 26, 2008 = 1RP	September 3, 2008 = 5RP
August 27, 2008 = 2RP	September 4, 2008 = 6RP
August 28, 2008 = 3RP	October 2, 2008 = 7RP
September 2, 2008 = 4RP	October 6, 2008 = 8RP

² Because the Victim and the Defendant share the same last name, the State often refers to both individuals by their first names. No disrespect is intended.

(RP) at 147-48. According to his physician, Lloyd was in reasonably good shape during his last medical check-up in February 2007. 2RP at 148. However, by June 2007, Lloyd depended on the care and assistance of others. 2RP at 26.

In June 2007, the Defendant, James Koch (James) was serving a jail sentence on an unrelated matter. See 2RP at 30. James sought a furlough to tend to his ailing father. 2RP at 26. In a letter to the Superior Court, James expressed his fear that his father would pass away before his jail sentence concluded. 2RP at 30. James said a furlough was necessary because (1) his father was “95% bedridden,” (2) his father desired that he become “his power of attorney,” (3) his father required home-care, and (3) his father counted on him to perform various responsibilities. 2RP at 29-31. The Superior Court granted a one week furlough, allowing James to tend to his father’s immediate needs. 2RP at 32.

In August 2007, James completed his jail sentence and moved-in with his father. Clerk’s Papers (CP) To Be Determined (TBD) [James Koch Interview (10/12/2007)] at 2-3, 8, 13, 20.³ Lloyd never designated

³ At trial, the jury listened to a recording of James Koch’s interview with Detective Jason Viada that occurred on October 12, 2007. 3RP at 164-65; See also Exhibit 19. The Record of Proceedings did not transcribe the interview. 3RP at 165. In the appendix of this brief, the State has provided a copy of the interview transcript to ensure that a complete record is before the Court.

James as his power of attorney, but James sought to make good on his pledge to care for his father. CP TBD at 9-12. James assumed this obligation because his siblings were either unwilling or unable to tend to their father's needs. CP TBD at 9-10, 12. See also 2RP at 30; 3RP at 38, 126, 130; 5RP at 53-54.

By August 2007 and October 2007, Lloyd depended on James to prepare his meals, wash his laundry, schedule his medical appointments, and pay his property taxes. CP TBD at 8-10, 16. James also assumed responsibility for his father's hygiene. CP TBD at 24-25.

James recognized that he needed "outside help" to ensure that his father received the appropriate level of care. CP TBD at 9, 30-31; 2RP at 31. He arranged for "Meals on Wheels" to deliver food parcels to the Koch residence every Thursday. CP TBD at 15. He also tried to contact a hospice center. CP TBD at 18. However, James never arranged for any hospice center or social service agency to serve as his father's primary caregiver. See CP TBD at 18.

On October 5, 2007, Lloyd sat in his recliner and soiled himself. CP TBD at 10, 17-18. Whether due to embarrassment or poor health, Lloyd never got up from his chair. CP TBD at 10. He remained in his

chair for five or six days, repeatedly urinating and defecating on himself.⁴ CP TBD at 10, 17-18, 20.

James was aware that his father had soiled himself when he first sat down in his chair. CP TBD at 10. While James knew that adults who soiled themselves require immediate assistance, he waited until the fifth or sixth day before he sought to address his father's poor hygiene. CP TBD at 18, 20, 24-25.

On October 11, 2007, James arranged for John Echezaretta (Echezaretta) and Brian Emmons (Emmons) to help him clean his father. 2RP at 37. When Echezaretta and Emmons arrived, they noticed that the smell of urine and feces filled the residence, and that a puddle of urine surrounded Lloyd's chair. 2RP at 38. James, Echezaretta, and Emmons prepared a bucket of warm water and sponged Lloyd down the best they could. 2RP at 38, 40-42; CP TBD at 30. Lloyd never resisted and actually tried to facilitate the cleaning. 2RP at 40-42.

The bath was an arduous process. Fresh and dried feces covered the tops of Lloyd's thighs and legs. 2RP at 40. Lloyd's back, thighs, and legs were red and blistered. 2RP at 40. Maggots covered Lloyd's feet.

⁴ At trial, witness testimony varied as to the length of time that Lloyd Koch sat in the chair (2-6 days). Rose Gloyd testified that her father sat in his chair for only two days. 5RP at 53. However, all other witnesses testified that Lloyd was confined to his chair for five or six days. See *e.g.*, CP TBD at 14; 6R at 14. The trial court found that Lloyd Koch sat in the chair for five days. 8RP at 24.

2RP at 40. Despite the efforts of the three men, they were unable to remove all the feces from his body. 2RP at 40.

After the bath, James did not seek medical assistance for his father. While James assured Emmons that he would contact a hospice center the following day, Emmons believed that Lloyd required immediate medical attention. 2RP at 42-44. Thus, he called 911 shortly after leaving the Koch residence. 2RP at 42-44, CP TBD at 18.

Both paramedics and law enforcement responded to Emmons's report. 2RP at 63. Only after paramedics and law enforcement contacted James, did he invite emergency personnel to examine his father. 2RP at 174. Emergency personnel found Lloyd in a very weak condition: thin, pale, and with cold, clammy skin. 2RP at 66. Paramedics observed that Lloyd's clothing was saturated with urine and interstitial fluid, that his feet were obviously swollen, that his toenails were long and unhealthy, and that there were visible necrotic⁵ sores on his body. 2RP at 67-68. Further examination revealed that Lloyd's glucose levels were well beyond a safe level for a diabetic. 2RP at 70. Paramedics quickly determined that Lloyd required immediate hospital care. 2RP at 70. Lloyd did not resist as the paramedics who transferred him to the hospital. 2RP at 70.

At the hospital, medical personnel tended to Lloyd's skin irritation, lesions, and decubitus ulcers that were on his tailbone, thighs, shins, calves, and genitals. 2RP at 86, 120. Despite Lloyd's previous bath, hospital staff removed fresh and dried stool from his body and found maggots on his feet and genitals. 2RP 102-103. Physicians ordered that Lloyd receive immediate and continuous fluids due to his extreme dehydration. 2RP at 123-24. At no point did Lloyd resist the care he received from medical professionals during the week he resided in the hospital. 2RP at 113.

On October 12, 2007, James Koch met with law enforcement and gave his account of the events that led to his father's hospitalization. CP TBD at 1-32. During the interview James admitted that he was responsible for his father's hygiene and medical care. CP TBD at 8-10, 24-25. James could not explain why he procrastinated as he watched his father's condition deteriorate rapidly. CP TBD at 21-24. However, James also told law enforcement that he made several attempts to clean his father, but that his father had refused these efforts. CP TBD at 21-24, 27, 30.

On October 18, 2007, Lloyd Koch died of congestive heart failure, a consequence of the 35 pounds he gained via the fluid

⁵ "Necrotic" means dead or rotten tissue. 2RP at 68.

replacement to treat his severe dehydration. 2RP 147; 4RP at 84. According to the pathologist, re-hydration was necessary to restore blood pressure to Lloyd's vital organs and the appropriate fluid content to his cells. 4RP at 84-85. Unfortunately, Lloyd's heart could not handle the stress of pumping the extra fluid throughout his weakened body. 4RP at 86.

B. PROCEDURAL HISTORY

The State charged James Koch with first degree manslaughter and first degree criminal mistreatment.⁶ CP 110 at 1-2. With respect to the criminal mistreatment, the State alleged that James (1) was a person entrusted with the physical custody of another dependent person, (2) was a person who had assumed the responsibility to provide the basic necessities of life, or (3) was a person employed to provide a dependent person with the basic necessities of life. CP 110 at 2.

On August 26, 2008, the case proceeded to a jury trial. 1RP at 7. At trial, multiple witnesses testified to the facts outlined above. In addition, the jury heard from James's two sisters: Shirley Kreaman (Kreaman) and Rose Gloyd (Gloyd).

⁶ The State also charged James Koch with 10 counts of forgery. CP 110 at 2-6. However, the trial court ultimately dismissed the forgery counts. 6RP at 35.

Kreaman and Gloyd testified that their father was a proud, stubborn man, who often resisted the assistance of others. 3RP at 33, 40, 53-55, 64-65; 76; 5RP 18-19, 29, 33-34, 36, 59. However, Kreaman did say that she could coax him into accepting a bath and to change his clothes. 3RP at 34, 367-37, 42-43, 48-51. Kreaman also stated that her father had accepted her as a co-signor on his bank account, but that she never actually helped him to pay bills. 3RP at 61-62. Gloyd, too, affirmed that her father occasionally accepted her own limited assistance, but asserted that he generally accepted care only from her brother. 5RP at 20, 5RP at 42-44. While Kreaman and Gloyd wanted Adult Protective Services (APS) to assume care responsibilities for their father, 3RP at 53; 5RP at 61, both acknowledged that their brother served as their father's primary caregiver. 3RP at 78; 5RP at 49.

The pathologist, Dr. Sealove, testified regarding Lloyd Koch's numerous sores and extreme dehydration. Dr. Sealove stated that the blisters that formed on Lloyd's back, buttocks, knees, and legs were the result of an irritant – the prolonged contact with urine and feces. 4RP at 103. In addition, Dr. Sealove explained that Lloyd became increasingly dehydrated for the five or six days that he sat confined to the chair. 4RP at 91. First, Lloyd did not receive sufficient fluids during the period in question. 4RP at 87-89. Second, Lloyd was losing fluid through the

pressure sores that he suffered on account of sitting in the same position for multiple days in a row. 4RP at 87-89. Finally, Lloyd continued to lose fluids via his constant need to urinate -- his body's response to increasing blood sugar levels and local infection. 4RP at 87-91. Dr. Sealove opined that had Lloyd received medical care within the first 48 hours after his first bout with incontinence, his chances of survival would have been greatly improved. 4RP 92-93.

At the conclusion of the evidence, the Defense requested a proposed instruction that cited *In Re Colyer*, 99 Wn.2d 114, 743, 660 P.2d 738 (1983). CP 51; 6RP at 8. The proposed instructions stated:

It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

CP 51. The trial court refused to provide the instruction, reasoning that it was not a complete statement of the law. 6RP at 8. The court explained:

The law -- the case [defense counsel] cite[s] sort of has a whole bunch of exceptions to this general rule, that it may well be proper to force medical care on someone who is not competent or able, and gets us into a whole bunch of issues that I think would be inappropriately raised. That is why I'm not going to give that instruction.

6RP at 8. Defense counsel never objected, nor took exception to the trial court's ruling. See 6RP at 8, 37. The trial court advised defense counsel that its ruling did not prohibit him from arguing that Lloyd was his own

decision maker and that his son could not use force to override his father's wishes. 6RP at 8.

In closing arguments, the State argued that there was evidence to support a conviction for first degree manslaughter and first degree criminal mistreatment. In addition, the State highlighted the evidence that it believed supported each of the charged alternatives of criminal mistreatment. 6RP at 47-48. Defense counsel argued that James did everything in his power, without employing unlawful physical force, to care for his father in the final weeks of his life. See 6RP at 51-59. The State reviewed defense counsels arguments and focused the jury's attention on the evidence that contradicted the claims that Lloyd refused care efforts. See 6RP at 69-75.

Ultimately, the jury found the defendant guilty of second degree manslaughter and first degree criminal mistreatment. CP 55, 56. The trial court entered judgment on both counts and sentenced James to 41 months on Count I, and 29 months on Count II. 8RP at 30-31; CP 7. The trial court ordered the two sentences to run concurrently and entered a finding that the two offenses comprised the same criminal conduct. 8RP at 31, CP 7. James Koch appeals.

///

III. ARGUMENT

A. THE CONVICTIONS FOR MANSLAUGHTER AND CRIMINAL MISTREATMENT DID NOT VIOLATE THE RULE AGAINST DOUBLE JEOPARDY.

James Koch argues that his conviction for manslaughter and criminal mistreatment violates the rule against double jeopardy. See Appellant's Brief at 20-26. This Court should find that this argument fails because the Legislature intended to treat the two crimes as separate, distinct offenses.

The Fifth Amendment and Article 1 § 9 of the Washington State Constitution protect criminal defendants from multiple punishments for the same offense. *State v. Freeman*, 153 Wn.2d 765, 768, 108 P.3d 753 (2005); *State v. Calle*, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). Double jeopardy concerns exist when multiple convictions arise out of the same course of conduct, despite the fact that the trial court may have imposed concurrent sentences. *Freeman*, 153 Wn.2d at 768; *Calle*, 125 Wn.2d at 775. Trial courts may not enter multiple convictions for the same offense without offending double jeopardy. *Freeman*, 153 Wn.2d at 770. However, “[w]here a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes

constitute the same offense.” *Freeman*, 153 Wn.2d at 770 (quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Appellate courts review double jeopardy claims *de novo*. *Freeman*, 153 Wn.2d at 770.

The Legislature has the power to define an offense and assign the appropriate punishment for the proscribed conduct. *Freeman*, 153 Wn.2d at 771; *Calle*, 125 Wn.2d at 776. In some instances, the Legislature explicitly allows for multiple punishments when a defendant’s acts violate more than one criminal statute. *Calle*, 125 Wn.2d at 776. Whether the punishment a trial court imposed violates double jeopardy depends on what punishments the Legislature authorized. *Calle*, 125 Wn.2d at 776. Thus, double jeopardy turns on whether the Legislature intended to punish the criminal conduct as separate crimes or to punish the conduct as a single, “higher” felony. *Freeman*, 153 Wn.2d at 768. Double jeopardy does not exist if the Legislature authorized cumulative punishments for crimes resulting from the same criminal conduct. *See Freeman*, 153 Wn.2d at 771.

The Washington Supreme Court has enunciated a four-part test to determine whether the Legislature, expressly or implicitly, intended to

punish crimes separately.⁷ See *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). First, appellate courts must review the statutes' language to determine if the Legislature expressly authorized separate punishments. *Freeman*, 153 Wn.2d at 772, 776. Second, when the statutory language is unclear, the appellate courts apply the "same evidence" test.⁸ *Freeman*, 153 Wn.2d at 772, 776. Under the "same evidence" test, appellate courts asks whether one offense includes an element not included in the other; and whether proof of one offense would be insufficient to warrant a conviction upon the other. *Calle*, 125 Wn.2d at 777. If this is true, then the appellate courts may presume that the crimes are not the same for double jeopardy purposes. *Calle*, 125 Wn.2d at 777. Third, if applicable, this Court may use the merger doctrine to determine legislative intent, even if two crimes have formally different elements. *Freeman*, 153 Wn.2d at 772. When the degree of one offense is raised by conduct that the Legislature separately criminalized, the appellate courts may presume the Legislature intended to punish both

⁷ Mr. Koch repeatedly states that Washington's double jeopardy analysis is flawed and does not comport with United States Supreme Court jurisprudence. See Appellant's Brief at 21-24. The State notes that the cases Mr. Koch says are flawed remain good law and mirror the analysis in the United States Supreme Court's seminal cases addressing double jeopardy issues.

⁸ This test is also known as the "same elements" test or the *Blockburger* test, which the United States Supreme Court announced in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L. Ed. 306 (1932). *Orange*, 152 Wn.2d at 816.

offenses via the sentence for the greater crime. *Freeman*, 153 Wn.2d at 772. Finally, if the two convictions appear to be for the same offense, or for charges that merge, the appellate courts must determine whether there is an independent purpose or effect for each offense. *Freeman*, 153 Wn.2d at 773. If such an independent purpose or effect exists, the trial court may punish the conduct as separate offenses without violating double jeopardy. *Freeman*, 153 Wn.2d at 773.

The State contends that the Legislature intended to treat manslaughter and criminal mistreatment as two distinct crimes and to punish the two offenses separately. However, should this Court find that the two convictions violated double jeopardy, the appropriate remedy is to vacate the conviction that served to prove the other crime.

- 1.) The manslaughter and criminal mistreatment statutes do not expressly allow, nor disallow multiple punishments.

Appellate courts begin with the statutory language when examining whether the Legislature intended to authorize multiple punishments for violations of the manslaughter and criminal mistreatment statutes.⁹ *Freeman*, 153 Wn.2d at 773; *Calle*, 125 Wn.2d at 776. If the statutes explicitly authorize separate punishments, then

⁹ See e.g., RCW 9A.52.050, which expressly authorizes cumulative punishment for crimes committed during the commission of a burglary.

separate convictions do not offend double jeopardy. *Freeman*, 153 Wn.2d at 773; *Calle*, 125 Wn.2d at 776.

RCW 9A.32.060(1)(a) states “[a] person is guilty of manslaughter in the first degree when he recklessly causes the death of another person.” RCW 9A.32.070(1) states “[a] person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person.” RCW 9A.42.020(a) reads:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Neither the manslaughter, nor the criminal mistreatment statute expressly allows or disallows multiple punishments for a single act. Thus, this Court must turn to statutory construction and apply the “same evidence” test.

2.) While manslaughter and criminal mistreatment might be the same “in law,” this is not dispositive of legislative intent.

Mr. Koch argues that his convictions, as the State charged and proved, for second degree manslaughter and first degree criminal

mistreatment violate double jeopardy under the “same evidence” test. See Appellant’s Brief at 20. This Court should hold that while manslaughter and criminal negligence may be the same “in law” in the instant case, this is not dispositive of legislative intent.

When legislative intent is not clear, the appellate courts apply the “same evidence” test. The “same evidence” test is a rule of statutory construction designed to determine legislative intent. *Freeman*, 153 Wn.2d at 776 (citing *Garrett v. United States*, 471 U.S. 773, 778-79, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985)). Under this framework, appellate courts presume that the Legislature did not intend to punish criminal conduct twice when the evidence required to support one conviction would be sufficient to warrant the other conviction. *Freeman*, 153 Wn.2d at 776 (citing *Orange*, 152 Wn.2d at 820). However, if the crimes, as charged and proved, are the same in law and in fact, they may still be punished separately if this is the Legislature’s clear intent. *Freeman*, 153 Wn.2d at 777 (citing *Blockburger*, 284 U.S. at 304).

In the abstract, the two offenses are not the same “in law” because they have different elements. *Compare* RCW 9A.32.060, .070 and RCW 9A.42.020. However, to prove manslaughter, the State needed to establish that Mr. Koch’s conduct (*i.e.*, that he withheld the basic necessities of life), caused his ailing father’s death. Additionally, because

a child normally is not required to care for his or her dependent parent, the State had to prove that Mr. Koch had a statutory duty to care for his father. Thus, the deputy prosecutor had to prove (1) the father was a “dependent person,” and (2) the requisite legal relationship existed between the son and father. Here, manslaughter was criminal mistreatment with the additional element of death. *See Brown v. Ohio*, 432 U.S. 161, 167, 97 S.Ct 221, 53 L.Ed.2d 187 (1977). *See also Orange*, 152 Wn.2d at 820.

While second degree manslaughter requires criminal negligence and first degree manslaughter requires recklessness, the evidence to support the conviction for manslaughter was sufficient to warrant a conviction upon the criminal mistreatment. This is possible that Mr. Koch knew his conduct (*i.e.* withholding the basic necessities of life and allowing his father to waste away in his own excrement) would likely result in great bodily harm, but failed to be aware that death was also possible. *See* 7RP at 10.

Under the “same evidence” test, State concedes that manslaughter and criminal mistreatment are the same “in fact” (*i.e.*, arising from the week Mr. Koch withheld the basic necessities from his dependent father). Additionally, the State concedes that the two crimes are the same “in law” (*i.e.*, evidence to support the conviction for

manslaughter is sufficient to warrant a conviction for criminal mistreatment. However, this is not dispositive of the question of whether the two crimes constitute the same offense. “Although the result of this [“same evidence”] test is presumed to be the legislature’s intent, it is not controlling where there is clear evidence of contrary legislative intent.” *Freeman*, 153 Wn.2d at 777 (quoting *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003)). Thus, this Court must continue with the *Freeman* analysis.

3.) The merger doctrine does not apply in the present case.

The “merger doctrine” is another means used to determine whether the Legislature has authorized multiple punishments. *Freeman*, 153 Wn.2d at 377. The doctrine applies only where the Legislature has clearly indicated that to prove a particular degree of crime (*e.g.*, first degree rape), the State must prove (1) that a Defendant committed the particular crime (*e.g.*, rape), and (2) that the crime was accomplished via another act that is designated as a crime elsewhere in the criminal code (*e.g.*, assault or kidnapping). *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). Unlike first degree rape, the Legislature does not require the State to prove a particular degree of manslaughter via the commission of another felony. *Compare* RCW 9A.44.040 and RCW

9A.32.060, .070. Because criminal mistreatment is not required to elevate the degree of manslaughter, the merger doctrine does not apply.

Even were the merger doctrine to apply, there is no violation of double jeopardy. This Court should find that both convictions are allowed to stand because the legislative purpose for criminalizing the conduct or the harm associated with each crime is unique. *State v. Vermillion*, 112 Wn. App. 844, 859-60, 51 P.3d 188 (2002), *rev. denied*. 148 Wn.2d 1022 (2003); *Calle* 125 Wn.2d at 780 (the crimes of rape and incest address two separate evils and, therefore, a single act of intercourse can violate both statutes).

4.) The Legislature intended to treat manslaughter and criminal mistreatment separately.

Appellate courts presume that the Legislature intends that each offense be punished separately. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (citing *State v. Gohl*, 109 Wn. App. 817, 821, 37 P.3d 293 (2001), *review denied*, 146 Wn.2d 1012 (2002)). An indicator of legislative intent is whether the crimes address separate evils. *Vermillion*, 112 Wn. App. at 859-60. In the present case, the independent statutory schemes and different purposes underlying each statute suggests that the Legislature intended to allow separate punishments

when a Defendant commits both manslaughter and criminal mistreatment.

Manslaughter and criminal mistreatment statutes are located in different chapters of the criminal code. The criminal mistreatment chapter, 9A.42 RCW, is designed to protect the most vulnerable members of society (children and dependent persons) from abuse and neglect. *See* RCW 9A.42.005. The Legislature assigned manslaughter to the chapter entitled “homicide,” 9A.32 RCW, which clearly proscribes the killing of any human being. The fact that the statutes address separate evils indicates that the Legislature intended to punish each offense separately.

In the present case, Lloyd Koch received inhumane treatment from the individual he trusted most to provide life’s basic necessities. Mr. Koch left his father to sit in his own excrement for five to six days. CP TBD at 18, 20, 24-25. As a result of this treatment, Lloyd Koch’s skin was literally rotting and he became extremely dehydrated. 2RP at 68, 86, 120; 4RP at 91, 103. Ultimately Lloyd Koch died due to the abuse and neglect he received. 2RP 147; 4RP at 84. It is not the intent of the Legislature to excuse the appalling care that Mr. Koch offered his ailing and dependent father in the final week of his life. What best effectuates the legislative intent behind the criminal code is to punish

Mr. Koch for his actual conduct; in this case, manslaughter and criminal mistreatment.

This conclusion comports with the principles underlying the Sentencing Reform Act (SRA). These paramount purposes include the following:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history.
- (2) Promote respect for the law by providing punishment that is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public.

RCW 9.94A.010. To find that the Legislature did not intend multiple punishments for manslaughter and criminal mistreatment would frustrate these very important objectives. This Court should hold that Mr. Koch's two convictions for second degree manslaughter and first degree criminal mistreatment do not offend the rule against double jeopardy.

- 5.) The Legislature validates the concept of multiple convictions arising out of the same criminal act.

Finally, it is important to highlight that the Legislature actually validates the concept of multiple convictions that arise out of the same criminal act. *See* RCW 9.94.A.589(1)(a); *Calle*, 125 Wn.2d at 781

(applying RCW 9.94A.400¹⁰). RCW 9.94A.589(1)(a) requires the trial court to count multiple current offenses that encompass the same criminal conduct as one crime when determining the defendant's offender score. The Legislature defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Sentences imposed under this subsection are to be served concurrently. As the Washington Supreme Court noted, "it seems clear that the legislative plan accepts the possibility that a single act may result in multiple convictions, and simply limits the consequences of such convictions." *Calle*, 125 Wn.2d at 781-82.

In the present case, the trial court found that Mr. Koch's crimes of manslaughter and criminal mistreatment encompassed the "same criminal conduct" and imposed concurrent sentences. 8RP at 31. The trial court adhered to its legislative directive. There was no error and no violation of the rule against double jeopardy.

This Court should find that the Legislature intended to treat conduct that violates RCW 9A.32.070 and RCW 9A.42.020 as separate offenses, and it should hold that the double jeopardy clause does not prevent Mr. Koch's convictions for both manslaughter and criminal

¹⁰ The Legislature recodified RCW 9.94A.400 as RCW 9.94A.589. Laws of

mistreatment. However, should this Court hold that the entry for both convictions offends the rule against double jeopardy, it should affirm the manslaughter conviction and vacate only the criminal mistreatment conviction.

B. SUFFICIENT EVIDENCE SUPPORTS THE
CONVICTION FOR SECOND DEGREE
MANSLAUGHTER.

Mr. Koch claims that there is insufficient evidence to support his conviction for manslaughter. See Appellant's Brief at 7-16. This Court should find this argument is without merit.

Due process requires the State to produce sufficient evidence to prove, beyond a reasonable doubt, every essential element of the crime charged. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *State v. Mitchell*, 149 Wn. App. 716, 721, 205 P.3d 920 (2009). Evidence is sufficient to support a conviction only if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *Mitchell*, 149 Wn. App. at 721.

Washington 2001, ch. 10, § 6.

Under a sufficiency of the evidence standard, this Court draws all reasonable inferences from the evidence in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining the sufficiency of the evidence, this Court considers circumstantial evidence as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Finally, this Court defers to the fact finder on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

1. There is sufficient evidence to support each element of second degree manslaughter.

A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person. RCW 9A.32.070(1). A person acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(d). "When a statute provides that criminal negligence suffices to establish an element of an offense, such element

also is established if a person acts intentionally, knowingly, or recklessly.” RCW 9A.08.010(2). This Court should find that there is sufficient evidence to support each element of second degree manslaughter.

(a) The Defendant had a statutory duty to provide care.

In the present case, Mr. Koch breached the duty of care that he owed to his father, and this breach caused his father’s death. Generally, one person is not under a legal compulsion to aid another, but most states recognize a parent’s or a guardian’s duty to provide medical care to his or her children or dependents. *See State v. Williams*, 4 Wn. App. 908, 915, 484 P.2d 1167 (1971). *See also State v. Morgan*, 86 Wn. App. 74, 82, 936 P.2d 20 (1997) (Schultheis, A.C.J., concurring). In Washington, this duty is codified in part under RCW 9A.42.020, *infra*, making it a crime to recklessly withhold medical care from a child or dependent person after the defendant has assumed the responsibility to provide said care. *See Morgan*, 86 Wn. App. at 82.

Ordinarily, an adult is a competent person with the capacity to understand his or her own medical condition and to seek or reject medical attention. However, an adult may become so incapacitated and helpless as to assume the condition of a newborn. *See State v. Mally*, 139

Mont. 599, 609, 366 P.2d 868 (1961). The Legislature has noted that there is a significant need to protect dependent persons from the abuse and neglect of their care providers. *See* RCW 9A.42.005. Thus, Washington law imposes criminal penalties on those who are guilty of said abuse and neglect. *See* RCW 9A.42.005; RCW 9A.42.020(1).

Here, Mr. Koch assumed a duty to provide his father with the basic necessities of life under RCW 9A.42.020(1). The evidence shows that he requested a furlough to tend to his father who was gravely ill, 95 percent bed ridden, required home-care, and needed someone to assume powers of attorney. 2RP at 29-32. Mr. Koch admitted that he was the primary caregiver to his father: preparing meals, arranging medical appointments, and maintaining his father's hygiene. CP TBD at 8-11, 24-25. Mr. Koch's sisters confirmed that their brother had assumed responsibility for their father's care. 3RP at 78; 5RP at 49. This Court should find that there is sufficient evidence that Mr. Koch assumed the responsibility to provide the basic necessities of life to his father under RCW 9A.42.020(1).

(b) The Defendant's conduct was criminally negligent.

Mr. Koch engaged in criminal negligence when he withheld the basic necessities of life from his dependent father. Under Washington law:

[a] person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1)(d). The “basic necessities of life” include medical treatment, medication, and hygiene. RCW 9A.42.010(1).

The facts show that Mr. Koch failed to appreciate the gravity of his father’s deteriorating health when he withheld the basic necessities from his father for five or six days. While Lloyd Koch wasted away in his recliner, his ankles became visibly swollen, his skin blistered, and necrotic tissue appeared on his body. *See e.g.*, 2RP at 40, 86, 120. In addition, maggots were seen crawling on his feet. 2RP at 40. These are obvious signs of failing health. Nonetheless Mr. Koch failed to summon medical aid or address his father’s hygiene needs. *See e.g.*, CP TBD at 18, 20, 24-25. This conduct was clearly negligent in light of the known fact that Mr. Koch already knew that his father was in poor health. 2RP at 26, 29-31.

Mr. Koch’s actions grossly departed from what a reasonable person would exercise in the same situation as evidenced by Brian Emmons’s conduct. Emmons observed the same signs that Mr. Koch had witnessed for several days. 2RP at 42-44. Thus, he phoned 911 after he

left the Koch residence, recognizing that Lloyd Koch was in need of medical attention. 2RP at 42-44. This Court should find that there is sufficient evidence to support the element that Mr. Koch conduct was criminally negligent. *See* RCW 9A.08.010(1)(d).

(c) *The Defendant's conduct caused the death of the victim.*

Lloyd Koch died as a result of his son's criminal negligence. Because Mr. Koch allowed his father to waste away in unsanitary conditions, his conduct exacerbated his father's diabetic condition – resulting in extreme dehydration. 4RP 87-91. When medical professionals rescued Lloyd Koch from the inhumane treatment, it was imperative that they replace the fluids he lost over the week he spent confined in his chair. 2RP at 123-24. Lloyd was so dehydrated that he gained 35 pounds via fluid replacement. 4RP at 84. Unfortunately, Lloyd died of congestive heart failure due to the fact that his weakened heart could not withstand the re-hydration process. 4RP at 86. This Court should find that there is sufficient evidence to support the element that Mr. Koch's criminal negligence caused the death of his father.

This Court should hold that there is sufficient evidence to support each element of second degree manslaughter. The State respectfully requests that this Court affirm Mr. Koch's conviction for manslaughter.

2. The Defendant's claim that the evidence is insufficient to support his manslaughter conviction is unpersuasive.

Mr. Koch argues that he did not have a duty to provide the basic necessities to his ailing father. In support of his position, Koch claims that no “special relationship” existed between he and his father because (1) his father received meals from “Meals on Wheels”; (2) his sisters were “regularly” involved in his father’s care; (3) his own incarceration prevented him from serving as primary caregiver; (4) his father resisted assistance from others; and (5) his father never granted legal authority to any of his children to make health care decisions for him. See Appellant’s Brief at 11-12. This Court should find these assertions are unpersuasive and that they lack evidentiary support.

First, the fact that “Meals on Wheels” occasionally delivered food parcels to the Koch residence did not absolve Mr. Koch of his duty to care for his father. Rather, this fact highlights Lloyd Koch’s dependence. In the present case, “Meals on Wheels” only delivered food to the Koch residence once a week. CP TBD at 15. Mr. Koch was still required to prepare and serve his father’s meals. CP TBD at 8-11, 24-25. There is nothing in the record to contradict the fact that Mr. Koch was his father’s primary caregiver, as he never transferred his responsibility to an outside social service organization. See CP TBD at 18.

Second, the record shows that neither sister assumed the primary role to provide their ailing father with the basic necessities of life. Kreaman testified that her father “had pretty much handed the reins over to [James Koch].” 3RP at 78. While Gloyd claimed that there was no formal division of responsibilities, she affirmed that her brother was her father’s primary caregiver. 5RP at 20, 49. Furthermore, the record reflects that Gloyd was physically unable to care for her father. CP TBD at 10; 3RP at 126, 130; 5RP at 53-54.

Mr. Koch cites twenty pages of testimony, in which he claims Kreaman’s testimony established that his sisters were involved in their father’s care. See Appellant’s Brief (citing 3RP at 34-53). This citation addresses only three visits that Kreaman paid her father before the faithful week he sat down in his recliner. The first two visits occurred in August 2007, during which she encouraged her father to change his clothes, gave him a sponge bath, and considered trimming her father’s nails. See 3RP at 34, 36-37, 42-43, 48-51. The last visit occurred on or about October 1, 2007. 3RP at 47. However, the purpose of this last visit was never explained. See 3RP at 47.

The record does show that both Kreaman and Gloyd had brief interactions with Adult Protective Services (APS), but neither made a sustained or serious commitment to seek APS services for their father.

See 3RP at 53; 5RP at 37-38. While Kreaman was a co-signer on her father's account, she testified that she never helped her father to pay his bills. 3RP at 61-62. This Court should find that the record shows that the two sisters largely abdicated any responsibility in caring for their father.

Third, Mr. Koch's prior incarceration did not prohibit him from assuming a duty of care under 9A.42 RCW. Mr. Koch sought a furlough from jail in June 2007 for the sole purpose to care for his father. 2RP at 26. After Mr. Koch served the remainder of his jail sentence in August 2007, he returned to his father's residence to care for his father. CP TBD at 8-11. From August to October, Mr. Koch lived with his father and assumed the responsibility of providing him life's basic necessities. CP TBD at 8-11; 3RP at 78; 5RP at 49. This Court should find that Mr. Koch assumed a duty to care for his father in the course of these two months.

Fourth, the record is replete with references that Lloyd Koch never resisted efforts to clean him or provide medical treatment between October 5 and October 18, 2007. Emmons testified that Lloyd Koch did not fight the bath that Mr. Koch finally provided with the assistance of his two friends. 2RP at 40-42. In fact, Emmons said Lloyd Koch tried to facilitate the cleaning. 2RP at 40-42. At the hospital, where Lloyd Koch received care for nearly a week before he died, he never refused medical

treatment. 2RP at 113. While Kreaman testified that her father was a proud, private man who often resisted the assistance of others, the record reflects that her father would comply with her efforts to bathe him. 3RP at 35. Furthermore, Gloyd testified that her father was most receptive to her brother's efforts to render care. 5RP at 20, 49. This Court should find that Lloyd Koch did not consciously or rationally refuse assistance in the last two weeks of his life.

Finally, RCW 9A.42.020 does not require a formal grant of legal authority for a care provider to be liable under the statute. Mr. Koch argues against the duty to provide care, claiming (1) that none of the Lloyd Koch's children could unilaterally make a decision for their father which he opposed; and (2) that there is no evidence that the Lloyd Koch placed his son in a position in which he alone controlled his father. See Appellant's Brief at 12.

Mr. Koch fails to recognize that RCW 9A.42.020 imposes a legal duty in the absence of a grant of formal legal authority. In fact, the Legislature sought to expand liability to those individuals who take affirmative steps to provide the basic necessities of life to adults and, thereby, induce a reasonable reliance that such care will continue. *See*

Final Bill Report ESHB 1080¹¹, Senate Bill Report ESHB 1080¹², House Bill Report ESHB 1080¹³. Additionally, congressional committees passed the current law after hearing testimony regarding cases markedly similar to the instant case. *See* House Criminal Justice and Corrections Committee, January 27, 2005.¹⁴ The statute does not require a formal designation made by the victim. RCW 9A.42.020 merely requires a defendant to voluntarily assume affirmative steps to provide the basic necessities of life, which induced reliance on the part of the victim.

Here, Mr. Koch was the primary caregiver to his ailing father. CP TBD at 24-25; 3RP at 78; 5RP at 20, 49. Lloyd Koch relied on his son in all areas of his life. CP TBD at 8-11, 24-25. In his last days, the senior Koch grew dependent on said care and could no longer maintain his own hygiene without assistance. *See* 2RP at 40-42; 3RP at 35. This Court should find that Mr. Koch assumed a legal obligation to provide care to his father under RCW 9A.42.020.

¹¹<http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House%20Final/1080-S.FBR.pdf>

¹²<http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate/1080-S.SBR.pdf>

¹³<http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House/1080-S.HBR.pdf>.

¹⁴www.tvw.org/search/sitesearch.cfm?StartPage=3&CFID=3141589&CFTOKEN=56143284&bhcp=1.

This Court should find that Mr. Koch's challenges to the sufficiency of the evidence as it pertains to second degree manslaughter are unpersuasive. In a light most favorable to the State, his Court should hold there is sufficient evidence to support the sentence for manslaughter and affirm the conviction.

C. SUFFICIENT EVIDENCE SUPPORTS THE
CONVICTION FOR CRIMINAL
MISTREATMENT.

Mr. Koch raises two challenges to his conviction for first degree criminal mistreatment: (1) there is insufficient evidence to support the conviction, and (2) there was insufficient evidence to support one or more of the charged alternatives, violating his right to a unanimous jury. See Appellant's Brief at 7-16, 16-19.

1. The State concedes that the crime of criminal mistreatment sets forth alternative means of liability.

When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives are not repugnant to one another. *State v. Noltie*, 116 Wn.2d 831, 842, 809 P.2d 190 (1991); *State v. Chino*, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). If sufficient evidence supports each alternative means of a charged crime, jurors can give a general verdict on that crime without expressing unanimity on

which alternative means was employed by the defendant. *State v. Fortune*, 128 Wn.2d 464, 467, 909 P.2d 930 (1996)(citing *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994)). Under Washington law, first degree criminal mistreatment presents alternative ways of committing the crime – *i.e.*, it identifies four categories of potential defendants. See RCW 9A.42.020(1).

If one or more of the charged alternatives is not supported by substantial evidence, the verdict may stand if the reviewing court can determine that the verdict was based on only those means that are supported by substantial evidence. *See State v. Flemming*, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), *disapproved on other grounds by State v. Mendoza*, 165 Wn.2d 913, 929, 205 P.3d 113 (2009). In such cases the appellate courts review the case under a sufficiency of the evidence standard. *Flemming*, 140 Wn. App. at 137. As noted above, the evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, a reasonable fact finder could find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201; *Mitchell*, 149 Wn. App. at 721; *Flemming*, 140 Wn. App. at 137.

In the present case, the State charged Mr. Koch with first degree criminal mistreatment under the following theories: (1) that he was a

person entrusted with the physical custody of another dependent person, (2) that he was a person who had assumed the responsibility to provide to a dependent person the basic necessities of life, or (3) that he was a person employed to provide a dependent person with the basic necessities of life.

CP 110 at 2.

In closing arguments, the State argued that there was evidence to support each of the three alternatives that it identified in the information. 6P at 47. As a result, the trial court provided the jury a “to convict” instruction that included each of the charged alternatives. CP 57 [Instruction No. 21].

This Court should hold that there is sufficient evidence to support each of the alternative means presented to the jury.

2. There is sufficient evidence to support the claim that the Defendant assumed the responsibility to provide the basic necessities of life.

A criminal defendant is guilty of criminal mistreatment if he or she “assumes the responsibility to provide to a dependent the basic necessities of life to a dependent person,” and he or she recklessly causes great bodily harm to that dependent person by withholding said necessities. RCW 9A.42.020(1).

As previously discussed, there is ample evidence to support the State's argument that Mr. Koch assumed the responsibility to provide the basic necessities of life to his father. In August 2007, after Mr. Koch served an unrelated jail sentence, he voluntarily resumed the duty of caring for his father. CP TBD at 8, 11. Mr. Koch paid his father's taxes, maintained his father's property, cooked his father's meals, and made his father's medical appointments to treat his diabetic condition. CP TBD at 8-10. While Mr. Koch recognized that he was not suited to be a caregiver, and that his father required specialized hospice care, CP TBD at 9-10, 18, 30, he freely admitted that he alone was responsible to seek medical care and ensure his father's hygiene. CP TBD at 24-25. Additionally, Mr. Koch's two sisters testified that he was the primary caregiver to their father. 3RP at 78; 5RP at 49. Because Mr. Koch assumed the role of caring for his father, and his father depended on him for the basic necessities of life, this Court should find that the evidence sufficiently supports this first alternative of liability.

3. There is sufficient evidence to support the claim that the Defendant was employed to provide the basic necessities of life.

RCW 9A.42.020(1) states that a Defendant may be guilty for criminal mistreatment if he or she is "employed to provide to the child or

dependent person the basic necessities of life.” Under RCW 9A.42.010(5):

“Employed” means hired by a dependent person, another person acting on behalf of a dependent person, or by an organization or governmental entity, to provide to a dependent person any of the basic necessities of life. A person may be employed *regardless of whether the person is paid for the services* or, if paid, regardless of who pays for the person’s services.

(emphasis added). See also CP 57 [Instruction No. 26]. The statute does not require monetary remuneration. See RCW 9A.42.010(5).

In the present case, Mr. Koch resided at his father’s house without paying rent after his release from jail. CP TBD at 7-8. When law enforcement asked Mr. Koch about the source of his income, he responded that he was not working other than caring for his father. CP TBD at 8. This Court should find that this evidence, when viewed in a light most favorable to the State, is sufficient to support the argument that Mr. Koch received the benefit of free room and board in exchange for his promise to care for his father. This Court should hold that there is sufficient evidence to support this second alternative of liability.

4. There is sufficient evidence to support the claim that the Defendant was entrusted with the physical custody of his ailing father.

Under RCW 9A.42.020(1), “a person entrusted with the physical custody of a child or dependent person” may also be found guilty for

criminal mistreatment. Unfortunately, the 9A.42 RCW does not define “physical custody” and there is a paucity of case law on this issue. Thus, there is no legal framework to address the situation when a dependent adult lives with, and is entirely dependent on, their adult child.¹⁵

Black’s Law Dictionary, 8th Edition, defines “custody” as “[t]he care and control of a thing or person for inspection, preservation, or security.” Kreaman testified that her father “had pretty much handed the reins over to [James Koch].” 3RP at 78. Furthermore, the record reveals that Lloyd Koch required assistance in all aspects of his life. He entrusted his care and control to his son, the man who was responsible for his meals, arranging his medical appointments, and ensuring his hygiene. See CP TBD at 8-10, 24-25. After this Court reviews the evidence in a light most favorable to the State, it should hold that there is sufficient evidence to support this third alternative of liability, that Mr. Koch was entrusted with the physical care and control of his dependent father.

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¹⁵ The State notes this is one of the reasons why the Legislature sought to amend RCW 9A.42.020(1). See House Criminal Justice and Corrections Committee, January 27, 2005, <http://www.tvw.org/search/sitesearch.cfm?StartPage=3&CFID=3141589&CFTOKEN=56143284&bhcp=1>.

5. There is sufficient evidence to support the remaining elements of first degree criminal mistreatment.

A thorough review of the record shows that there is sufficient evidence to support the remaining elements of first degree criminal mistreatment: (a) that Mr. Koch recklessly withheld the basic necessities of life from his father; (b) that by withholding the basic necessities of life Mr. Koch caused great bodily harm to his father; and (c) that Lloyd Koch was a dependent person.

(a) The Defendant withheld the basic necessities of life from his father.

Pursuant to RCW 9A.42.010(1), the “basic necessities of life” includes health-related treatment, hygiene, and medication. The record shows that, between October 5 and October 11, 2007, Mr. Koch completely failed to address his father’s hygiene needs or ensure that his father received medical attention.

Mr. Koch admitted that it was his responsibility to make medical appointments for his father and ensure that his hygiene needs were met. CP TBD at 8-10, 24-25. Mr. Koch knew that his father had soiled himself when he first sat in his recliner on October 5, 2007. CP TBD at 10. Mr. Koch made no attempts to clean his father until five or six days later. CP TBD at 37. Furthermore, Mr. Koch never contacted medical

personnel to address his father's rapidly deteriorating condition. See 2RP at 43, 174. This Court should hold that there is sufficient evidence to support the finding that Mr. Koch deprived his father of the basic necessities of life.

(b) The Defendant recklessly caused great bodily harm to his father.

A person acts recklessly when he or she “knows of and disregards a substantial risk that a wrongful act may occur and his [or her] disregard of such substantial risk is a gross deviation from conduct that a reasonable [person] would exercise in the same situation.” RCW 9A.08.010(1)(c). The criminal mistreatment statutes define “great bodily harm” as that which “creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.” RCW 9A.42.010 (2)(c).

In the present case, Mr. Koch acted recklessly. Again, Mr. Koch admitted that he was responsible to arrange necessary medical appointments and ensure his father's hygiene. CP TBD at 8-10, 24-25. Again, Mr. Koch knew that adults who soil themselves require immediate assistance. CP TBD at 18, 20. Despite knowing that adults who soil themselves need immediate assistance, Mr. Koch made no

attempts to clean his father until five or six days later. CP TBD at 37. Furthermore, Mr. Koch procrastinated despite the visible signs of serious harm (*i.e.* necrotic sores). *See e.g.*, 2RP at 67-68.

Mr. Koch's decision to wait five or six days before summoning aid was a gross deviation from what a reasonable person would do in the same situation as it was readily apparent to that Lloyd Koch needed immediate medical attention. When Emmons knew that Lloyd Koch required medical attention after spending only a few hours with the man due to the fact that he observe numerous sores on his skin and maggots crawling on his feet. 2RP at 40, 43. Ultimately, it was Emmons who summoned medical aid for Lloyd Koch. 2RP at 43, 174. Emmons's reaction illustrates what a reasonable person would do in Mr. Koch's situation. Koch's behavior was reckless.

There is no doubt that Mr. Koch caused his father "great bodily harm" and protracted suffering. Lloyd Koch died due to the treatment he received from his son. 2RP at 147; 4RP 84-86; 87-91. In addition, the pathologist testified that Lloyd Koch developed pressure sores due to his sitting in the same position for five to six days. 4RP at 68. According to one medical professional, when pressure sores reach the stage where the victim has necrosis, she had only seen one or two patients actually recover. 2RP at 107. A second medical professional testified that Lloyd

Koch had no prospect of recovery due to the extent of his wounds. 2RP at 150-51. This Court should hold that there is sufficient evidence to support the finding that Mr. Koch's reckless conduct caused great bodily harm to his father.

(c) The victim was a dependent person.

The criminal mistreatment statutes require the victim to be a child or dependent person. See RCW 9A.42.020(1). The Legislature defines a "dependent person" as follows:

[A] person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in *RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4). A "vulnerable adult" includes a person who is "[s]ixty years of age or older who has the functional, mental, or physical inability to care for himself or herself." RCW 74.34.020(15)(a). In the present case, it is undisputed that Lloyd Koch was 86 years-old at the time of his death and presumptively a dependent person. See CP TBD at 20.

While Lloyd Koch's age allows for the presumption that he was dependent person, the record includes ample evidence that allows a

reasonable individual to conclude that he was in fact a frail and vulnerable adult. In June 2007, Mr. Koch sought a furlough from a jail sentence to visit his gravely ill father. 2RP at 26. Mr. Koch's letter in support of a furlough states that (1) his father is "95% bedridden," (2) his father wants him to be "his power of attorney," (3) required hospice care, and (4) his father counts on his son to perform various needs. 2RP at 29-32. Finally, Lloyd Koch was never able to extricate himself from the recliner to which his son allowed him to sit for five to six days. This Court should find that there is sufficient evidence to support the jury's finding that Lloyd Koch was a frail and vulnerable adult, *i.e.* a dependent person under RCW 9A.42.020(1).

This Court should hold that there is sufficient evidence to support each of the charged alternative and all of the elements of first degree criminal mistreatment. The State respectfully requests that this Court affirm the conviction for criminal mistreatment.

However, should this Court find that there is insufficient evidence to support any one of the charged alternatives, the State respectfully request that this Court affirm the manslaughter conviction and remand the case for a new trial, instructing the State to retry the criminal mistreatment charge as to those alternatives for which there is sufficient evidence.

D. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT REFUSED THE PROPOSED JURY INSTRUCTION.

James Koch appeals the trial courts decision to refuse a proposed instruction regarding a person's right to refuse care. See Appellant's Brief at 27. This Court should hold (1) that the trial court's ruling was proper, and (2) even if it was an error, the error was harmless.

A defendant in a criminal case is "entitled to have the trial court instruct upon [his] theory of the case if there is evidence to support the theory." *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287 (2009) (quoting *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *Buzzell*, 148 Wn. App. at 598 (quoting *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000)). A refusal to give a requested jury instruction may constitute reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case. *Buzzell*, 148 Wn. App. at 598 (citing *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)).

1. The proposed jury instruction was not a complete statement of the law.

Instructions to the jury must (1) permit a party to argue his or her theory of the case; (2) not be misleading; and (3) when read as a whole, properly inform the trier of fact of the law. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004).

In the present case, Defense counsel proposed the following instruction, citing *In re Colyer*, 99 Wn.2d 114, 743, 660 P.2d 738 (1983):

It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

CP 51. The trial court refused to give the instruction, and defense counsel never objected, nor took exception to the trial court's decision. 6RP at 8, 37.

Mr. Koch's proposed instruction, citing *In re Colyer*, 99 Wn.2d 114, 660 P.2d 738 (1983), was misleading and did not properly inform the trier of fact of the law. This Court should find that the trial court did not err when it refused defense counsel's proposed instruction. See 6RP at 8.

As the Washington Supreme Court noted in *Colyer*, the "right to refuse treatment" is not absolute. 99 Wn.2d at 122. The State has a compelling in interest to see that the lives of its citizens are preserved.

99 Wn.2d at 122. This interest weakens only when treatment serves to prolong a life inflicted with an incurable condition, or when the degree of bodily invasion outweighs the State's interest in preserving life. *Colyer*, 99 Wn.2d at 122. Mr. Koch's proposed instruction did not properly inform the jury of the law – *i.e.* when a third party may compel a dependent person to accept medical care.

In *Colyer*, the Washington Supreme Court considered the removal of life sustaining systems from an incurable patient. 99 Wn.2d at 139. There, the Supreme Court reasoned that the life supporting treatment the incompetent patient received sought only to prolong life unnaturally and constituted a great invasion of her body. 99 Wn.2d at 122. Thus, the Supreme Court concluded that the patient's right to privacy was greater than the State's interest in preserving life. 99 Wn.2d at 122.

In the present case, assuming Lloyd Koch fought his son's care, Lloyd's privacy rights were outweighed by the interest in preserving life. Before Lloyd sat in his chair, he was reasonably fit. 2RP at 148. He only required the basic necessities of life (*e.g.* food, clean hygiene, occasional medical check-ups) and not life sustaining / prolonging equipment (*e.g.* respirators). *See e.g.* CP TBD at 8-10, 16. Mr. Koch's obligation to provide the basic necessities of life constituted a de

minimis invasion of his father's rights and did not breach the general rule proposed by defense counsel in the refused instruction.

Because the proposed instruction was misleading, did not accurately inform the jury of the law, and fail to aid the jury in any type of balancing of competing interests, the trial court did not err when it refused the proposed instruction.

2. Any error in not giving the instruction was harmless.

Should this Court find that the instruction was a proper statement of the law and that there was sufficient evidence to support it, this Court may still affirm the conviction because Mr. Koch still was able to present his theory of the case. Thus, the error was harmless. *See Buzzell*, 148 Wn. App. at 601

The test to determine whether a constitutional error is harmless is whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Buzzell*, 148 Wn. App. at 601 (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). *See also State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (court finds constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result without the error).

Here, the trial court allowed Mr. Koch to argue his theory of the case without the proposed instruction. 6RP at 8. In closing arguments, defense counsel argued at great length that Mr. Koch and his sister did everything in their power, short of unlawful physical force, to tend to their father's needs in the last weeks of his life. See 6RP at 51-59. In its rebuttal, the State reviewed Mr. Koch's arguments and highlighted the evidence that contradicted his claim that his father was not receptive to aid during the week he suffered in his recliner. See 6RP at 69-75.

This Court should find that Koch presented his theory of the case through his recorded statement to law enforcement, his sister's testimony, and defense counsel's argument that he made repeat efforts to tend to his father's needs and that those efforts were rejected. The State's witnesses testified that Lloyd Koch never resisted the efforts of third parties who sought to rescue him from the recliner, bathe him, and provide him medical care. See e.g., 2RP at 40-42, 70, 113. The case turned on which testimony the jury believed. Even with the missing jury instruction, this case turned on the credibility of the witnesses. The instructional error was harmless and this Court should affirm the convictions. See *Buzzell*, 148 Wn. App. at 601.

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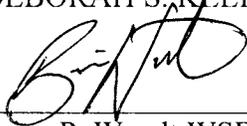
IV. CONCLUSION

For the reasons argued above, the State respectfully requests that this Court affirm the convictions for second degree manslaughter and first degree criminal mistreatment. However, should this Court find that there is insufficient evidence to support one of the charged alternatives for criminal mistreatment, it should affirm the manslaughter conviction and remand the case for a new trial, instructing the State to retry the alternatives of criminal mistreatment for which there is sufficient evidence. Finally, should this Court find that Mr. Koch's convictions violate the rule against double jeopardy, it should affirm the manslaughter conviction and vacate only the conviction for criminal mistreatment.

Respectfully submitted this 13th day of July, 2008.

DATED this 14th day of JULY, 2009.

DEBORAH S. KELLY, Prosecuting Attorney



Brian P. Wendt WSBA #40537
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX "A"

JAMES KOCH INTERVIEW

Date: October 12, 2007

Case #: 2007-13704

Det. Viada: Okay, this is Jason Viada, with the Port Angeles Police Department. I'm in the, uh, the patrol division's interview room. It's, uh, 16 minutes after midnight, August, uh, it's October 12th, 2007. We're at, uh, 321 E. 5th Street. Persons present are myself and James Koch, that's spelled K-O-C-H. No one else is present in the room. Mr. Koch, I just want to make sure that you understand that I...I turned a recorder on, and I want to make sure that you know that and that I have your permission to record our conversation.

James Koch: Sure.

Det. Viada: Okay, I appreciate that. Um, you understand that you're down here voluntarily?

James Koch: Yes.

Det. Viada: You understand that you're not under arrest?

James Koch: Yes.

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Det. Viada: Okay, um, I was only just made aware that you had provided your written statement to the patrol officers. I appreciate you doing that. I just had a chance to look at it real briefly. Thank you.

James Koch: (Unknown) Couldn't remember if...if...you know when.

Det. Viada: Well, it's easier to talk than to write. That's kind of why I wanted to just have a conversation with you, and before we go any further, like I said, you're not under arrest, but I just want to make sure you understand what your rights are. I'm going to go over that with you, okay.

James Koch: (Unknown)

Det. Viada: You have the right to remain silent. Any statement you make may be used against you in a court of law. You have the right at this time to talk to an attorney for advise before answering any questions, and you may have

such attorney with you during questioning. If you cannot afford an attorney one will be appointed for you without cost prior to questioning if you so desire. You may stop answering questions at any time even though you've commenced answering questions without asking for an attorney. I'm going to sign here indicating that I read that to you.

James Koch: Okay.

Det. Viada: What time is it? I don't wear a watch. I have to look at this phone every time I want to know what time it is.

James Koch: Had it for a reason. (Unknown)

Det. Viada: Maybe it just gets in the way. Okay, uh, the next line reads, "I have read the statement of my rights or have had them read to me and I understand what my rights are. Having these rights in mind, I'm willing to talk to the officer." If you agree with that can you...have you sign here please.

James Koch: Yep.

Det. Viada: Thanks (unknown)

(Brief pause)

Det. Viada: Just need to fill out the top of this form here. Um, do you go by...do you go by Jim or people....

James Koch: (Talking at same time) I usually go by Jim.

Det. Viada: Jim? Okay. Your name's James though right?

James Koch: Yeah.

Det. Viada: Okay, what's your middle initial?

James Koch: P.

Det. Viada: P? Like Paul?

James Koch: Yes.

Det. Viada: Okay, what's the address there at the house again?

James Koch: 831 W. 10th.

Det. Viada: Um-hmm.

James Koch: It is 98363.

Det. Viada: Yeah, I think you're right. Um, I'm aware that you've...you've been a resident of that home for quite some time, but your kind of in and out there over the last handful of years I suppose. Um, but you've lived there for the last couple of months pretty solid, is that right?

James Koch: Yeah, last year since (unknown)

Det. Viada: Since you got out of jail?

James Koch: Yeah.

Det. Viada: I'm going to ask you to talk, speak up just a little bit so we make sure are picked up on the recorder okay? What's your date of birth again?

James Koch: 10-6-59.

Det. Viada: Um-hmm. Is there a phone hooked up there at the house?

James Koch: Yes.

Det. Viada: What's the phone number?

James Koch: 457

Det. Viada: Um-hmm.

James Koch: 2952

Det. Viada: Okay. Who else lives there?

James Koch: My sister, Rose Gloyd.

Det. Viada: Rose is your sister?

James Koch: Yeah.

Det. Viada: Is she older or younger than you?

James Koch: Way older.

Det. Viada: Okay, like how many years?

James Koch: Oh, I think she just turned...I think she's ten years older than me.

Det. Viada: Okay.

James Koch: Was born in '48. September 15, of '48 (unknown).

Det. Viada: Okay. Does anybody else live there?

James Koch: Uh, she has a friend that's living there. A...a guy that's (unknown)

Det. Viada: (Talking at same time) Was that the guy who answered the door?

James Koch: No, that was another...that is just a friend that's over. Um, Kiwi Howard, or not...um, Coley Howard.

Det. Viada: Coley Howard lives there?

James Koch: (Talking at same time) Yes.

Det. Viada: And Coley is a friend of Rose's.

James Koch: Right.

Det. Viada: Okay. And...so and there was a guy that answered the door. Who's that?

James Koch: (Unknown) Is a I know him by Kiwi, but I don't know his first name, but I know his last name. He's...he's a Maxfield from out west.

Det. Viada: Okay.

James Koch: From the Maxfields (unknown)

Det. Viada: And he's just visiting, is that right? How long is he going to visit for?

James Koch: Well, he's (unknown) a day or two.

Det. Viada: Okay.

James Koch: Because, uh, he just found that he was evicted today.

Det. Viada: Oh, okay.

James Koch: From his residence.

Det. Viada: All right. And uh, what about Angela? Angela McBride.

James Koch: I don't know.

Det. Viada: I thought that she lived there.

James Koch: She was living there, and Rose kicked her out.

Det. Viada: Okay.

James Koch: She wasn't supposed to be living there.

Det. Viada: Is she a relative?

James Koch: Yeah, she's Rose's daughter.

Det. Viada: She's Rose's daughter. Angela is Rose's daughter, okay. So I guess that makes her your...

James Koch: My niece.

Det. Viada: Niece.

James Koch: Yes.

Det. Viada: And Dominique?

James Koch: Dominique would be my great nephew.

Det. Viada: Okay, and...

James Koch: That's Angie's boy.

Det. Viada: Angie's boy, and he's not living there either?

James Koch: No, he's in Georgia.

Det. Viada: Okay, anybody else there now?

James Koch: Um, Tom McBride, Angie's dad.

Det. Viada: Did you say Tom McBride? Okay. Does he live there?

James Koch: Um, no. They've been staying there for a few days, and uh, he said he was going to be there one more day, but I don't know.

Det. Viada: So is he Rose's brother?

James Koch: He's Rose's ex.

Det. Viada: Is it...

James Koch: That's Angie's dad.

Det. Viada: Rose's ex-husband.

James Koch: Yeah.

Det. Viada: Okay. All right, and he'll just be around a couple of days...?

James Koch: He said he was going to get out tomorrow.

Det. Viada: Okay.

James Koch: I...I...I don't know for sure. I will probably see to it that he's out tomorrow because he...

Det. Viada: Anybody else there?

James Koch: No, that other fellow that was there if he is still wandering around there was a friend visiting, um, Coley.

Det. Viada: If a person who...

James Koch: (Talking at same time, unknown)

Det. Viada: Had been visiting Coley.

James Koch: Yes.

Det. Viada: Okay.

James Koch: Yeah, just for um...

Det. Viada: Not overnight?

James Koch: No.

Det. Viada: Okay.

James Koch: I can't remember his name, Keyna?

Det. Viada: Hawaiian dude?

James Koch: Yes.

Det. Viada: Yeah, okay. I know who you mean. All right, um, so when I...when I went to the house tonight, there was a, uh, sign on the front...or that said, "Knock on the back door."

James Koch: Uh-huh.

Det. Viada: Went around the back, knocked on the door, now your bedroom was just off to the right.

James Koch: (Unknown)

Det. Viada: Okay, and Rose? Where's Rose's room?

James Koch: On the opposite side of the back door.

Det. Viada: Oh, just...

James Koch: (Talking at same time) On the left.

Det. Viada: Just on the left, all right.

James Koch: (Talking at same time) On the east side.

Det. Viada: Okay, I mean are there more bedrooms in the hall? (Unknown)

James Koch: There was one...there was one more bedroom off the kitchen, in the middle of the house.

Det. Viada: Okay.

James Koch: And then there's Dad's bedroom that's off the...if you come in the front door it will be the right.

Det. Viada: Okay, fair enough.

James Koch: It's a four bedroom.

Det. Viada: Okay. Um, so you...whose house is it?

James Koch: It's my dad's.

Det. Viada: It's your dad's house?

James Koch: Yes.

Det. Viada: Okay. How does he pay for it?

James Koch: Well, he...he bought it and paid for it. He...he retired from Crown Zellarbach Mill.

Det. Viada: Oh, he's retired from Crown Z?

~~**James Koch:** (Unknown)~~

Det. Viada: Okay, so does he get a pension?

James Koch: Yes.

Det. Viada: How about social security?

James Koch: I believe both.

Det. Viada: Okay. And so, um, so he has the means to pay, or the money to pay the property taxes, the...

James Koch: Yeah.

Det. Viada: ...keep the lights on.

James Koch: The last few years I've taken care of the property taxes.

Det. Viada: Oh, yeah, you have.

James Koch: Well, it's still in his name, but I've been (unknown)

Det. Viada: Okay.

James Koch: That's the first thing I did when I got out of jail.

Det. Viada: First thing you did when you got out of jail?

James Koch: Yes.

Det. Viada: All right.

James Koch: Because nobody else seemed to have the legs to go in there and do it.

Det. Viada: (Unknown) What's your source of income?

James Koch: Um, I have been unemployed. I've been just care taking there since I got out of jail, and I've been dealing with the city because we have too many rigs parked in the yard (unknown)

Det. Viada: (Talking at same time, unknown)

James Koch: I've been dealing with the city for going on a year. And uh, I think finally we got the yard to where it's maintainable.

Det. Viada: Um-hmm.

James Koch: And I've got some of the rigs out of the yard and ready to go as soon as the opportunity arises to tow them away.

Det. Viada: Now are you, let me just, let me understand this. You're currently unemployed. You said you've been caretaking there what do you mean by that?

James Koch: Well, I'm...just (unknown) okay, as a son of his, you know. I've told him and I promised him that I would (unknown)

Det. Viada: That...

James Koch: That I would help him, help take care of him, and let him have his dying wish. He wants to die at home where mom died.

Det. Viada: Okay.

James Koch: And he's a very, very stubborn man.

Det. Viada: Um-hmm.

James Koch: Very stubborn.

Det. Viada: When did you make that promise to take care of him?

James Koch: Um, about five or six years ago.

Det. Viada: Um-hmm.

James Koch: (Clears throat) And in fact an assault happened. I slapped my dad.

Det. Viada: Um-hmm.

James Koch: Over four years ago. (Clears throat) And then, (unknown) it was a big mistake. Impatience. Um, I made a big mistake. I felt very small. Anyway, um, at that time I was being represented by John Black for the assault, and it was brought up to him, and in open court about me and my dad had an agreement that I would help take care of him, and do my best to take care of his needs. Uh, until he died there you know, not trying to rush anything, and (unknown) my sisters weren't doing anything to help, they weren't even coming by the house for years. He had no company. And uh, nobody else wants to take care of him so I knew somebody had to, and I took that position of bein' there at least for him, and cooking for him, and I've watched the stages of deterioration, and I'm not a caregiver. I'm just a man that's trying to make ends meet. And I knew that I was going to have problems with my father, with his stubborn streak and his pride. And knew I was going to have to get some outside help to...for caregiving because I can't do it. It's not in my blood. What we did today was a miraculous task, I...between me and three other people

we managed to get him over the chair that he was stuck in for about five days. Five or six days. (Unknown) it began with I think with embarrassment, because he potties himself, you know, crapped his pants, and he didn't want to move out of embarrassment. And he would not let me or anybody else help him. He just...and I've been making doctors appointments for him because he's...he's a diabetic and (unknown) medication, I know it for over a year, and I've been very, very concerned about that. And before we tackled this mess today, so I'm a little bit more mad at him then...get the house sanitized a little bit because the breathing air was getting very, very sour in the living room and kitchen was putrid. I knew I had to get it dealt with so (unknown) few people today and we tackled it, and moved him as gently as we knew how, and left him better than (unknown) as much as I could with him still breath, and...and it wasn't enough. And I was pretty embarrassed, and I'm embarrassed to say, when I pulled his socks off maggots came off under his toes. And that really hurt me. My strongest intention was to go straight to hospice tomorrow morning. Because (unknown) I didn't know I was stuck. My sister, she's...Rose, she's a cripple, and I...basically I let her move in to Dad's house, when I couldn't be there.

Det. Viada: You say Rose is crippled?

James Koch: Yeah, she had a bad wreck when she was about twenty, twenty-two years old.

Det. Viada: Was that her laying on the couch when...when I was there tonight?

James Koch: Sitting on the bed.

Det. Viada: Looked like somebody's laying on the couch watching tv.

James Koch: That's Tom.

Det. Viada: Oh.

James Koch: That was Tom McBride.

Det. Viada: He was laying on the couch watching tv?

James Koch: Yes.

Det. Viada: Okay. Whose responsibility is it to take care of your dad?

James Koch: Um, nobody's been pinpointed yet, and so far I seem to be the only one with transportation, but I'm pushing my luck, but I'm...I gotta make sure that there's an emergency vehicle there, and um, a way to get him

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groceries and this and that. I don't have a driver's license and that's one of the first things I want to get taken care of. I just want to be responsible and do the right thing.

Det. Viada: Um-hmm. I don't really care about the driver's license issue, what I'm talking about is...what I'm talking about is, um, you're indicating that, that's uh, I mean you take his socks off, there were maggots under his toes.

James Koch: Yeah.

Det. Viada: Whose fault is that? I mean, I'm not trying to mean, but seriously, whose fault is that?

James Koch: I feel the blame.

Det. Viada: Why? Why do you feel the blame?

James Koch: Because.

Det. Viada: I mean, I can see you being hard on yourself, but it's no mean...tell me why...tell me why you think that's your fault.

James Koch: Because I do the...nobody else was going to do it in the family.

Det. Viada: Yeah, do you think Rose could do it?

James Koch: I don't think she's good for the job, though. No. She could do it in a pinch, one or two times.

Det. Viada: Hmm.

James Koch: But it's not something that she could carry out, you know, as a...as a...as a responsibility.

Det. Viada: You and your dad had an agreement that you were going to take care of him, is that what I understand?

James Koch: Yeah. It's just a verbal agreement (unknown)

Det. Viada: (Talking at same time) Yeah, right.

James Koch: (Talking at same time, unknown)

Det. Viada: You talk to your dad about that? I mean (unknown)

James Koch: Yeah, five years ago when we could talk. And we had a big conversation to talk about it.

Det. Viada: How did that conversation go? Can you tell me a little bit about that?

James Koch: Um, well it...it began with, uh, my neighbor, Bob Cole, was pretty concerned about my dad. Him and my dad fished together quite a bit. Not a lot, but over the last few years they fished together a lot, and he asked me if Dad had a will, and I told him I didn't know. So, I got on my dad and asked him, "Do you have a will?" And he said, "No." And I was upset because my dad was always very strict with telling us kids, "Make sure you deal with your stuff," and your legality....legal stuff, and get...get that stuff behind you. And uh, it won't haunt you. I talked to him and talked him, and I tried to get him to do a will, you know, on his own, and I even...we even went down to Lane Wolfley's office, went in there and I was going to talk to an attorney, and we got basically put off, you know, set aside on hold, and we just figured we'd return, and we never did, because I knew an attorney that needed to be, you know, that it would be a good idea to have an attorney present for a will. And then I told my dad after we talked about all that, um, you know (unknown) the plan was...was that my older sister, Shirley, um, Kreaman, be power of attorney, but she's had some psychological problems, and...and some issues that I don't think she's up for the job, and I told my dad that. I told him that I would...I really can't see her handling that kind of...handling responsibility, and we were talking about power of attorney, and uh, about the same time (unknown) my sister came running to me and my dad, and here she is nearly 60, and she comes running to us talking about three abortions she had 35 years ago, and she's now doing counseling for it.

Det. Viada: Your sister meaning? Kreaman?

James Koch: (Unknown)

Det. Viada: Oh, Kreaman, okay.

James Koch: And I...that's where, um, uh, I, you know brought it up to my father that I didn't think that...that it was a good idea that she handled it. And uh, I was trying to talk him into a, you know, having an open mind, and maybe thinking about it an attorney that...a neutral party for power of attorney. And he hmed and hawed, he goes, "Well, why don't you do it. Jim, will you do it?" And at that time I told him no. And because my...you know, I watched this whole ordeal take place with my dad being power of attorney for my mom's mom, and there was a lot of family separation after all that. After things were divvied out, and I didn't want to be in those shoes. My family's spaced apart enough, distant enough from each other, and I just didn't want to feel hated anymore than I already felt, so I told him no, and then time passed, we didn't really talk about it too much anymore for

awhile, for a couple of months, and then we sat down a little bit and briefed over it a little bit, and I told him that I would consider it if I was able to gain information, you know, if I can get proper counsel (unknown) and whatever (unknown) I need to do and I got to do to be power or attorney. (Unknown) I was ready for the responsibility. Very truly I just didn't want...I...for one I wasn't ready, and for two I feared it. I fear failing, and uh, and then we come down to, okay, I'll take the responsibility but only if (unknown) we never did get anything legal done. And then I got out of jail...

Det. Viada: Do you mean in August?

James Koch: Yeah, in August (unknown) um, I couldn't talk to my dad anymore.

Det. Viada: I don't understand.

James Koch: Too...too much time went by and he just wasn't as coherent, couldn't talk...conversation with him.

Det. Viada: Um-hmm.

James Koch: Procrastinated, procrastinated, one thing led to another. When I get overloaded I just go to the river.

Det. Viada: Um-hmm.

James Koch: You know, fish for a little while. Try to ride through the bumps, try to figure out what I need to do.

Det. Viada: Um-hmm.

James Koch: It's the only place I can because it seems like I'm hounded otherwise. I no more than turn around, try to relax, and somebody's knocking on my door, "Hey, Jim, you got a tool. I've got this problem or that problem. I try and help everybody I can, but I can only spread myself so thin.

Det. Viada: Um-hmm.

James Koch: And...

Det. Viada: In your...so your saying that you couldn't talk to your dad when you got out of jail. Is that because maybe his mind slipped a little bit with passage of time?

James Koch: Yeah, yeah.

Det. Viada: Can he walk?

James Koch: He was walking until he sat in that chair and didn't get up.

Det. Viada: How many days ago? Or weeks?

James Koch: (Talking at same time) I...I would say six days ago.

Det. Viada: Six days ago?

James Koch: Yes. Okay.

Det. Viada: Okay.

James Koch: Um, I...when I got help to lift him up out of his chair and just took his clothes off him until he was very shaky at the knees.

Det. Viada: Um-hmm.

James Koch: While two people was holding him up.

Det. Viada: Um-hmm. Who are the people that helped you?

James Koch: It was me, um, John Echezarreta...

Det. Viada: Um-hmm.

James Koch: And uh, one of Coley's friends, Brian, I don't know his last name, and Coley. They all helped.

Det. Viada: Coley's friend Brian.

James Koch: Yes. He volunteered for the job. And I...I had it sat in my mind, plus I went out (unknown) this morning, and I asked Dad, "Are you ready for getting changed today?" And he...and he kind of gave me a grunt and nodded his head.

Det. Viada: Did you say Coley helped to or just Brian?

James Koch: Yes, Coley's friend and Coley and John. It took a small team of us to deal with it all.

Det. Viada: Um-hmm.

James Koch: Cause we had a garbage bag, you know, of clothes and stuff.

Det. Viada: Bef..before your dad sat down in that chair six days ago, um, did he cook for himself or did you do that?

James Koch: No, we did that. Me and Rose.

Det. Viada: You and Rose cooked for him?

James Koch: Yeah, we cooked for him.

Det. Viada: Take turns?

James Koch: Then we got Meals and Wheels coming in to.

Det. Viada: Oh, Meals on Wheels, came.

James Koch: Yeah.

Det. Viada: Do they still come?

James Koch: Yeah, well, yeah the delivered today. Every Thursday.

Det. Viada: Every Thursday?

James Koch: Yes.

Det. Viada: Okay.

James Koch: They've been bringing meals probably for two months, three months
(unknown)

Det. Viada: Um, how about bathing? Before he sat in the chair, bathing, tell me about that.

James Koch: He never had no baths. He would not go into a bath tub even when he was strong enough to do it himself.

Det. Viada: Um-hmm.

James Koch: That man never had a bath in 25 years.

Det. Viada: Really? Shower? Anything?

James Koch: Sponge bath.

Det. Viada: Sponge bath?

James Koch: That's all he would do for himself.

Det. Viada: Hmm.

James Koch: It was like he was (unknown)

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Det. Viada: (Talking at same time) Why?

James Koch: I don't know. I don't know. It was like he was scared of the bath tub and I never got...I don't know the answers.

Det. Viada: Yeah, okay.

James Koch: I really don't. (Unknown)

Det. Viada: Laundry. Who does the laundry?

James Koch: I do it every chance I can, and our washer has been on the brink of breaking down so things have just been getting overwhelming.

Det. Viada: Okay, (unknown)

James Koch: Everything was working fine before I...before I got (unknown) caught up in the system and went to jail.

Det. Viada: How long were you in jail?

James Koch: Well, I visited the (unknown) off and on for about four years.

Det. Viada: Yeah, okay.

James Koch: Um, thirty days here, thirty days there. Still goin' home off and on (unknown) because I know he needed help.

Det. Viada: Um-hmm.

James Koch: Breaking the order because regardless of what took place, I still love my dad.

Det. Viada: Um-hmm.

James Koch: There's no taking that away.

Det. Viada: Um-hmm.

James Koch: I got caught there a couple times.

Det. Viada: Um-hmm.

James Koch: (Unknown)

Det. Viada: Okay. Um, how about going to the bathroom? Could he go to the bathroom by himself?

James Koch: He was doing all right. He was doing all right. Every now and then he'd leave a little mess in there in the bathroom, on the toilet seat where he'd scoot off.

Det. Viada: Um-hmm.

James Koch: And not wipe well.

Det. Viada: Um-hmm.

James Koch: And but he wouldn't accept any help.

Det. Viada: Um-hmm.

James Koch: He just...the man's got a stubborn streak that you wouldn't believe. Irish German, say nothing more.

Det. Viada: Um-hmm.

James Koch: (Unknown) he was a man of strength and power, you know, and...and he helped a lot of people out. He was a jigger boss down at the mill. He took the authority picture, you know. Things like that. If they didn't, he made sure somebody knew that they did.

Det. Viada: Um-hmm.

James Koch: Yes, my dad was very stern, very strict in a lot of ways. You know, then I discovered a way to avoid probate catalog on top of his dresser that had been there for ten years, and he didn't even know what it said because he didn't read it.

Det. Viada: Um-hmm.

James Koch: He was avoiding it.

Det. Viada: Um-hmm.

James Koch: Procrastination. That's the worst thing we all got in our paths.

Det. Viada: Um-hmm. Procrastination. I think this case is about procrastination. You're shaking your head yes.

James Koch: Um-hmm.

Det. Viada: Six days ago he sat down in that chair, pooped his pants, and I think you meant...I think you meant to clean him. I mean, I think you both know

we're both human beings. If some guy poops his pants, this guy needs help right now. You agree with me?

James Koch: Yes.

Det. Viada: Yeah.

James Koch: Absolutely.

Det. Viada: And...and...and then minutes just started slipping by. Right? If I understand you correctly. Then minutes became hours. And in this case the hours became days, and you just sat there. I mean, I...I...I'm getting from you, I mean, your shaking your head yes. I think you knew something needed to be done.

James Koch: I did. I did. I was willing to get outside help, but I didn't. In fact I had contact....contacted hospice, and got their hours from them, and fully intended on swinging in there and talking to them because it sounded like they weren't gonna just would rush over when I talked to them. I don't have both because I didn't maybe express how urgent the help was needed and then that my dad he didn't...

Det. Viada: So let me understand this correctly. You...you did go talk to hospice?

James Koch: I called them.

Det. Viada: You called them?

James Koch: Yes.

Det. Viada: When did you call them?

James Koch: It would be the beginning of this week.

Det. Viada: It's Thursday now. Did you...are you telling me that (unknown)

James Koch: (Talking at same time, unknown)

Det. Viada: Are you telling me you called them on Monday?

James Koch: Yes.

Det. Viada: Okay. What day did he...what day did he sit down in the chair and poop his pants? If...if I...am I...am I describing that properly? Is that what happened?

James Koch: Yes.

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Det. Viada: Okay, what day was that?

James Koch: It would have been Friday of last week.

Det. Viada: Friday, six days ago? Okay. Okay. Did you know what had happened?

James Koch: Yes.

Det. Viada: Okay, and that chair's in the kitchen right? How come the chair's in the kitchen?

James Koch: Why? What...what do you mean? (Unknown)

Det. Viada: Why...why's it in the kitchen?

James Koch: (Unknown) been where it's located. He's...(unknown)

Det. Viada: (Talking at same time, unknown) It's just...it's just weird I've never seen a recliner in a kitchen before that's all.

James Koch: Well, he used to man the wood stove and he sat right there.

Det. Viada: Um-hmm.

James Koch: And he was closer to the heat.

Det. Viada: Okay.

James Koch: Um, plus it was a straight arm shot for tv and...

Det. Viada: Yeah, (unknown)

James Koch: (Laughs) And...

Det. Viada: So he's got the wood stove and he's got the tv.

James Koch: Yeah.

Det. Viada: All right. When was the last time he slept in his bed?

James Koch: Well, it would have been the night before he got in the chair. (Unknown)

Det. Viada: Since Thursday night now sort of. Okay. Okay, so he's not one of these guys that like slept in the chair before six days ago?

James Koch: No.

Det. Viada: Okay.

James Koch: Now and then, yeah, but not on a regular basis.

Det. Viada: Yeah, I understand. So, (unknown) whenever, last Friday he's got his oxygen, is in the chair. You can see something needs to be done. Are you following, I'm sorry, I don't even know.

James Koch: No, I'm not.

Det. Viada: You ever take care of a small child?

James Koch: Yeah, and...and I've raised sixteen nieces and nephews.

Det. Viada: Sixteen nieces and nephews. Have you ever changed a diaper?

James Koch: I babysat eleven kids at one time.

Det. Viada: All right. That's a lot of kids. So you...is...is that a yes? I've changed diapers.

James Koch: Yes, I've changed every one of their diapers.

Det. Viada: Okay.

James Koch: I mean every one of their butts I should say.

Det. Viada: Yeah, I understand. So, when a kid has a....when a kid has a poopy diaper, how long do you wait before you change it?

James Koch: Uh, I deal with it right away.

Det. Viada: Okay. Okay, so let me just...I don't understand. I don't...I guess I don't...I don't...I mean, you seem like a guy who wants to do the right thing. You seem like the guy who knows what the right thing was to do, but you didn't do it, and I don't...I don't understand it. What am I missing, Jim?

James Koch: Uh, well Dad has a very strong stubborn streak, and he will fight you.

Det. Viada: How old is he? I'm sorry, I don't even know?

James Koch: He's 86.

Det. Viada: Okay, go on.

James Koch: And...and I made doctors appointments for him twice over the last few weeks, and had to postpone them because I thought I was going to be able to drive him to the clinic....

Det. Viada: Um-hmm.

James Koch: To see Doctor Hub...Hudgings, and he would fight...he would...he would...he wouldn't help. He wouldn't.

Det. Viada: Didn't want to go to the doctor?

James Koch: No.

Det. Viada: Wanted to die at home.

James Koch: Oh boy.

Det. Viada: And probably afraid...

James Koch: (Talking at same time, unknown)

Det. Viada: ...that if he went to the doctor...

James Koch: (Talking at same time, unknown)

Det. Viada: ...their going to put him in the hospital and he was going to die there. Is that...am I right?

James Koch: Yeah.

Det. Viada: Okay. So, he sits down in the chair and he's a mess, and you know that...and you...but you know that you could go up to him when nobody else is around and say, "Dad, nobody's looking. I know you're sitting in a pile of crap. We got to get it cleaned up." Right? You're shaking your head yes.

James Koch: Yeah, I, uh, in most parts I can do that, and he would agree with me, but it...(unknown) needing it done, but when it comes to the physical action, you know, you know he fights against me, and I didn't...and I don't want any physical actions towards my father again. I don't want to hurt...I don't want to hurt him. I don't want to have any more, um, assault or anything to do with that.

Det. Viada: (Talking at same time) I understand that. (Unknown)

James Koch: (Talking at same time) You know (unknown)

Det. Viada: (Talking at same time) How does your dad communicate with you now?

James Koch: Now?

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Det. Viada: Yeah.

James Koch: He hasn't been.

Det. Viada: Does he..?

James Koch: He just.

Det. Viada: Okay, when he...?

James Koch: Shrugs his shoulders and (unknown)

Det. Viada: Does he...like did you have any communication with him about the fact that he's sitting there in a mess, like is he...is he communicating to you that he needs help, or is he communicating to you that he does not want help? Or is he not communicating?

James Koch: He's not communicating.

Det. Viada: Okay.

James Koch: But the look that he gives me. He...he used to rely strictly on dirty looks.

Det. Viada: Hmm.

James Koch: So to speak, you know (unknown) you know situations, and he would glare at you. If it's something that needs done and he don't want to do it, and he'll...I mean, I...I communicate with him, but he didn't respond back really except for just maybe a nod or you know, the last week has been...it just would roll his eyes back and just ignore my presence half the time

Det. Viada: Um-hmm.

James Koch: But the last couple of days before today has been really stressing me out because of the situation, and I knew it had to be dealt with, and I kept mentioning the fact that he would feel much better. I would feel much better, and we could get the house a lot more sanitary if he would just...just understand that I'm just trying to help him. And I see his eyebrows raise up, you know, and I tell him, "Dad, I'm doing this out of love. I'm not trying to make you suffer here. You're...you're doing that to yourself. I can't make you do what you're not gonna wanna do." And I refused to try because I don't...like I said, I didn't want no more...I'm done with jail if I can help it now. I'm 48 years old, I don't need it. Um, I just want...I just want to help him through his life and be able to have mine too.

Det. Viada: Right.

James Koch: You know, and I didn't know I was going to be pinned down to be the responsible one.

Det. Viada: You didn't know that.

James Koch: Until I told him that I would take responsibility and accept power of attorney but...

Det. Viada: And when was that?

James Koch: Like I said, I told him that after that conversation we had nearly five years ago.

Det. Viada: Um-hmm.

James Koch: But we both procrastinated when he was able.

Det. Viada: Um-hmm.

James Koch: Um, I'd be ready to do it and he wouldn't. And there was times that he was ready to take care of things in a way, and I wasn't.

Det. Viada: Um-hmm.

James Koch: Um...

Det. Viada: Okay, I think we agree on what happened. I don't...I mean, I don't think we've ever disagreed on what happened. What happened was you agreed to take care of your dad. Six days ago he sat in the chair and pooped his pants, and you knew it and he knew it, and he sat there, and he sat there, and sat there for six days. You were there and you knew it. You didn't help him. Am I right?

James Koch: I made attempts.

Det. Viada: You made attempts. Tell me about the attempts.

James Koch: (Talking at same time, unknown) Me and my sister.

Det. Viada: Um-hmm.

James Koch: The day of his appointment that we had scheduled, which was Wednesday, the last appointment was Wednesday, the 3rd.

Det. Viada: Yeah.

James Koch: Okay, me and my sister was both arm and arm with him.

Det. Viada: I'm talking about during the last six days.

James Koch: Hasn't it? The 3rd? Okay, no, I guess not.

Det. Viada: Since he sat in that chair, what have you done to help him? Not what did you mean to do, but what did you end up, or what you knew you should be doing, but what did you do? Your shaking your head no.

James Koch: I...

Det. Viada: Well, I don't...what I know is that you didn't help him. What I don't understand is why, James. I can't...

James Koch: I don't know why.

Det. Viada: I can't wrap my brain around that. Tell me why you didn't (unknown)

James Koch: I...I didn't...It's not that I didn't want to help him.

Det. Viada: Well why, hey, I...I am convinced that you knew what needed to be done, and maybe you wanted it to be done, but what I don't understand is why you didn't do it. That's what I can't figure out about this whole case.

James Koch: I don't know.

Det. Viada: I don't know either.

James Koch: I don't know.

Det. Viada: I mean, did you think about it?

James Koch: I...I...I...yeah (unknown)

Det. Viada: (Talking at same time) Did it bother you?

James Koch: Oh yeah, yeah. It's been bothering me every day.

Det. Viada: (Talking at same time) Did you lose sleep over it?

James Koch: Yes.

Det. Viada: Okay, so you're laying...you're laying there at three in the morning, and you're thinking, "My dad's sitting there in a pile of shit." I mean literally.

James Koch: I've been talking to everybody.

Det. Viada: Yeah.

James Koch: Trying to come up with the right answers.

Det. Viada: Yeah.

James Koch: And just me just going and grabbing him and moving him wasn't the right answer.

Det. Viada: It wasn't the right answer.

James Koch: Because...because he (unknown) he....because...

Det. Viada: Maybe you're right, but you understand, I think you and I both agree that you're....you're responsible to either do it or make sure it gets done.

James Koch: Um-hmm.

Det. Viada: Right, and do we agree on that a hundred percent?

James Koch: Yes, yes.

Det. Viada: Okay. So, I guess...I guess we agree that you...you knew it needed to be done, you knew you were the person who had to make it happen, but you didn't make it happen. Do we agree on all that?

James Koch: I think I didn't make today happen.

Det. Viada: Make today happen? Tell me what you mean by that. I don't understand.

James Koch: Well, we managed to get him up out his chair, and pulled his clothes off. Um, wipe him down some, I was afraid of hurting him. Uh, I went in to get him and he was having a real hard time standing straight.

Det. Viada: Um-hmm.

James Koch: Um, had a few people helping hold him, um, so I wiped him down with water and a sponge fairly, not quick, quick, but you know, as much as I could handle. Man, I can't handle that kind of stuff. I...

Det. Viada: Why...why not? Because it stinks?

James Koch: Oh, my god! Um, yes.

Det. Viada: Okay.

James Koch: Okay. And you know, I...I was gagging from the moment I started, but I didn't let it stop me. I wiped him down the best I was able to at the time,

and I wanted him dry and wiped off. And I couldn't...do it all without him being in the tub.

Det. Viada: Um-hmm.

James Koch: You know (unknown) and we got him moved I got a change of clothes on him so he'd be warmer and drier, we got, immediately we got his old clothes out of there, garbage bagged up, the carpet piece that was under his chair, the chair out, and the cleaned around where it was. Real thorough, you know bleached and Pinesol and this and that. And got him into his other chair because we have a new chair, well not a new one, but another recliner for him. And I set that one up for him, and we got him in that, and give him a blanket, and made sure he was warm, and I knew he was drier, and I also knew he wasn't done bathing.

Det. Viada: Um-hmm.

James Koch: Being bathed.

Det. Viada: Um-hmm.

James Koch: Okay. I managed to get the chair out of the front yard to the back yard in the wood shed. Um, that was...that was horrifying to do that for me. It really...it really was. I love the hell out of my dad, I love him with all my heart man, but I'm not cut out for that kind of work, so maybe I just can't be a caretaker.

Det. Viada: Maybe you're right. Could your dad have done that for himself? What you...what you did for him today?

James Koch: No.

Det. Viada: You're saying no? No. I understand what you did today. I think I understand it, and I...and I think that's what needed to be done. And I...I guess, I'm just having hard time understanding this case. It's difficult for me and I...tell me if I'm wrong. The reason that this didn't happen six days ago, I mean, you came up with the right answer, and you did the right thing today, the reason it didn't happen six days ago when getting from your whole explanation this evening, is that it's...it kind of just boils down to procrastination, and that's something that you and your dad have both had a hard time with. Is that right?

James Koch: Certainly. Yes.

Det. Viada: Okay. Is there any other...is there any better explanation for why...why you didn't do what you did today six days ago?

James Koch: No.

Det. Viada: You're saying no?

James Koch: I don't know. I really don't know.

Det. Viada: Well, is...is the answer no, or is the answer I don't know?

James Koch: Is there a better explanation? No, it's probably pretty close. In fact probably right on the money.

Det. Viada: Okay, I just wanted to make sure that I'm understanding what happened and why, and so that, I mean, the question that you and I have been trying to answer (unknown) tonight is why, and I think that the answer is procrastination. Do you think we can come up with a better answer?

James Koch: To why?

Det. Viada: Yeah.

James Koch: (Unknown) between procrastination and...and shame.

Det. Viada: Okay.

James Koch: (Unknown) I feel pretty small.

Det. Viada: You do?

James Koch: Yes.

Det. Viada: Yeah.

James Koch: And I should.

Det. Viada: Okay. So, um, I understand a little more about what happened today okay.

James Koch: Well.

Det. Viada: Today, today you knew it needed to be done. It needed to be done six days ago, you did it today. You did do it. You took a chair, he had a chair he was sitting in, and that chair is now in your shed, is that right?

James Koch: Yes.

Det. Viada: Okay, and that's the shed that's out back on the alley, right? It's kind of...it's a pretty big shed.

James Koch: Well, yeah, there's a...there's a wood shed part there by the driveway part.

Det. Viada: Okay.

James Koch: Um, and it's full of mattresses, and couches, refrigerator. I need to a couple of dump runs.

Det. Viada: (Unknown) okay. So there's a chair in the wood shed. What color's the chair?

James Koch: Oh, god!

Det. Viada: Is it a recliner?

James Koch: It's a recliner. It's, um, seems like it's a blond...

Det. Viada: I'm sorry, what?

James Koch: Two tone brown maybe?

Det. Viada: Brown/blond?

James Koch: Brown, yeah.

Det. Viada: Okay. Okay.

James Koch: That's what I'm picturin'.

Det. Viada: You mentioned, uh, cleaning up some clothes and things like that that maybe your dad had been wearing. You say you bagged them up?

James Koch: Yeah.

Det. Viada: Where is that? Where's all the bags?

James Koch: Well, the bag (unknown)

Det. Viada: Um-hmm.

James Koch: Which right now, is still holding his wallet and his keys.

Det. Viada: Um-hmm.

James Koch: And right now under the back porch.

Det. Viada: Under the...?

James Koch: Yeah, I put it somewhere where nobody just...

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Det. Viada: (Talking at same time) Yeah, okay.

James Koch: ...grab it.

Det. Viada: Is it a black plastic bag?

James Koch: (Talking at same time) Yes, yes.

Det. Viada: Under, okay? So, it's got a...it's a black plastic bag...

James Koch: Yeah.

Det. Viada: Garbage bag is what...

James Koch: Yes.

Det. Viada: All right, under the back porch.

James Koch: (Unknown)

Det. Viada: And it has his clothes which still have his wallet and his keys.

James Koch: Right.

Det. Viada: But you put it under there and nobody's going to get to it.

James Koch: I put it under there so nobody...so it wasn't just laying out in the open.

Det. Viada: Yeah, okay. That makes sense.

James Koch: Because I think more than a couple of people were aware of it...them items were in there.

Det. Viada: Okay, I understand.

James Koch: I've had to deal with quite a bit of theft around there.

Det. Viada: Yeah. So they...I saw some photographs tonight of a maroon chair and a white blanket, white rug on a (unknown) and that's the chair, that's not the chair he's been sitting in for six days...

James Koch: (Talking at same time) No. That's the new (unknown)

Det. Viada: (Talking at same time) That's the new chair. The newer chair. That rug is new. What did you use to clean him up with? Towels? Sponge? What?

James Koch: A sponge.

Det. Viada: Huh?

James Koch: Sponge.

Det. Viada: Where's the sponge now?

James Koch: It's in the bathroom.

Det. Viada: In the bathroom.

James Koch: In a bucket.

Det. Viada: Bathroom.

James Koch: Yep.

Det. Viada: What color is the sponge?

James Koch: It's a, uh, sponge with a green scrub pad.

Det. Viada: Hmm.

James Koch: I didn't use the scrub pad on him, I just used the sponge.

Det. Viada: You know, I didn't even ask, James, and I didn't think that either.

James Koch: (Laughs) And I was grateful that I was going to use soap, water, and somebody else said, "No, because then you got to rinse it," and so we did water, warm water (unknown)

Det. Viada: Just used warm water so you didn't have to rinse it.

James Koch: (Unknown)

Det. Viada: I mean, I understand what you mean.

James Koch: But um, I'm just...I...I can't do that work. I can't...I can't...I can't mop him down. I can't sponge him down. The pride on his side gets in the way for one. I mean, he gets mad at me.

Det. Viada: Okay, so let me just, you know, I want to see your dad get the help he needs, and so let me just understand is that you made an agreement to take care of him five years ago. You got out of jail in August. You went to the home and you...you took over that role of caretaking, um, but you realize now, and what you're telling me is, Jason, I...I...can't do that. I'm not...I'm not going to be able to do that. I'm not cut out for it. Somebody else needs to do that. Am I...am I right?

James Koch: Yes.

Det. Viada: Okay.

James Koch: Yes.

Det. Viada: Okay, well...

James Koch: (Unknown)

Det. Viada: I understand if you say you feel small, but I think....I think it takes a certain amount of strength to admit I made a promise, but I can't keep it, okay. Am I?

James Koch: Yeah.

Det. Viada: Am I in the right place?

James Koch: You're on the right track.

Det. Viada: Okay. Okay. I understand.

James Koch: And I'm...I'm hurting inside over it.

Det. Viada: Yeah. Yeah.

James Koch: Yeah. I don't know what's causing me to, my feelings are causing me to want to run from it and I don't want to do that.

Det. Viada: Yeah, okay. I understand.

James Koch: And I guess I just didn't look down the road far enough and see what I'd be doing. I was hoping to have some professional help in there before now or you know helping me.

Det. Viada: Yeah.

James Koch: And other people living at the house is...is put a damper on a few things to because they're all wanting my attention, and wanting my help, and wanting me to do things for them, and I've got...I've got to stop them in their tracks and say, "Hey, you know what? What have you done for this guy here today? You're living under his roof too. If you can't help him you shouldn't be here."

Det. Viada: Um-hmm.

James Koch: Because they're just in my way.

Det. Viada: Um-hmm.

James Koch: And uh, I just got to let them know that maybe they're walking in the wrong tracks right now. Maybe they should be, um, living with their own family.

Det. Viada: Um-hmm. Is there anything else about this whole case that...that I'm missing? That I don't...that I don't know that I need to know?

James Koch: If there is I'm not thinking of it right now. (Unknown) my mind's just boggled with the whole ordeal from today.

Det. Viada: Okay, let me give you a few minutes to think about it. I'm going to step out of the room. I'm going to turn the tape recorder off. It's now 1:16 a.m. It's still the 12th of October 2007. We're still in the patrol division interview room at Port Angeles Police Department, and the persons present are still, uh, same, myself and James Koch. I'm going to turn the recorder off.