2008 WL 6013395 (Ark.App.) (Appellate Brief)
Court of Appeals of Arkansas.

Warren LAW, Appellant,
v.
STATE OF ARKANSAS, Appellee.

No. CACR 08-231.
July 14, 2008.

An Appeal from the Pulaski County Circuit Court
The Honorable Marion Humphrey Circuit Judge

Brief of Appellee

Dustin McDaniel, Attorney General, Karen Virginia Wallace, Assistant Attorney General, Arkansas Bar #85043, 323 Center Street, Suite 200, Little Rock, Arkansas 72201, (501) 682-8078, Attorneys for Appellee.

***i** TABLE OF CONTENTS

***ii** POINTS TO BE RELIED UPON

***iii** TABLE OF AUTHORITIES

***1 ARGUMENT**

The appellant was convicted in a bench trial of adult abuse and sentenced to five years' imprisonment, with three of those years suspended. (R. 58-60, Add. 14-16) He appeals, contending that the trial court erred by denying his directed-verdict motion and by refusing to find the adult-abuse statute, Ark. Code Ann. § 5-28-103 (Repl. 1997), unconstitutionally void for vagueness and dismiss the charge against him. [1] He is wrong, and his conviction should be affirmed.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONVICTION.

On appeal, a directed-verdict motion is treated as a challenge to the sufficiency of the evidence. *E.g.*, *Bangs v. State*, 338 Ark. 515, 518, 998 S.W.2d 738, 741 (1999). In determining whether evidence is sufficient to support a conviction, this Court views the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and it affirms if substantial evidence supports the verdict. *Wells v. State*, 93 Ark. App. 106, 108, 217 S.W.3d 145, 147 (2005). Evidence is substantial if it is forceful enough to compel reasonable minds to reach a conclusion without resorting to speculation or conjecture. *Wells*, 93 Ark. App. at 108, 217 S.W.3d at 147.

Circumstantial evidence can support a conviction; where circumstantial evidence alone is relied upon, it must exclude every other reasonable conclusion but the guilt of the accused. *E.g.*, *Bangs*, 338 Ark. at 518-519,998 S.W.2d at 741. The question whether ***2** circumstantial evidence excludes every other reasonable hypothesis other than guilt is usually reserved for the factfinder. *E.g.*, *Carter v. State*, 324 Ark. 395, 398, 921 S.W.2d 924, 925 (1996).

The appellate court does not weigh the evidence presented at trial or assess the credibility of witnesses, as that is a matter for the factfinder. *E.g.*, *Harmon v. State*, 340 Ark. 18,24, 8 S.W.3d 472,474-475 (2000). The trier of fact is free to believe all or part of a witness's testimony. *E.g.*, *Harmon*, 340 Ark. at 24, 8 S.W.3d at 476. Inconsistent testimony does not render proof insufficient as a matter of law, and one eyewitness's testimony is sufficient to sustain a conviction. *E.g.*, *id.* at 24-25, 8 S.W.3d at 476. The factfinder is not required to believe the accused's version of the events. *E.g.*, *Bangs*, 338 Ark. at 520, 998 S.W.2d at 742. The factfinder may consider and give weight to any false and improbable statements made by an accused in explaining suspicious circumstances. *E.g.*, *Watson v. State*, 290 Ark. 484, 489, 720 S.W.2d 310, 312 (1986).

A defendant's criminal intent can be inferred from his or her behavior under the circumstances, *E.g.*, *Harmon*, 340 Ark. at 26, 8 S.W.3d at 477 (2000). It is presumed that a person intends the natural and probable consequences of his or her acts. *E.g.*, *id.* Under these standards, the appellant's argument must fail.

The information charged the appellant and his sister, Mary Law, with committing adult abuse during a period of time on or about January 1, 2005 through March 14,2005 by purposely abusing or neglecting his mother, Geneva Law, thereby causing physical injury or ***3** substantial risk of death.[2] (R. 7, Add. 2) At that time, Ark. Code Ann. § 5-28-103 (Repl. 1997) read as follows, in pertinent part:

(a) It shall be unlawful for a person or caregiver to abuse [or] neglect any person subject to protection under the provisions of this chapter.
(1) Any person or caregiver who purposely abuses an endangered or impaired adult in violation of the provisions of this chapter, if the abuse causes serious physical injury or substantial risk of death, shall be guilty of a Class B felony and shall be punished as provided by law.

(2) Any person or caregiver who purposely abuses an endangered or impaired adult in violation of the provisions of this chapter, if the abuse causes physical injury, shall be guilty of a Class D felony and shall be punished as provided by law.

(c)(1) Any person or caregiver who neglects an endangered or impaired adult in violation of the provisions of this chapter, causing serious physical injury or substantial risk of death, shall be guilty of a Class D felony and shall be punished as provided by law.

Arkansas Code Annotated 5-28-101 (Supp. 2003) defined the applicable terms:

As used in this chapter, unless the context otherwise requires:
(1) “Abuse” means:

(A) Any intentional and unnecessary physical act which inflicts pain on or causes injury to an endangered or impaired adult, including sexual abuse;

(B) Any intentional or demeaning act which subjects an endangered or impaired adult to ridicule or psychological injury in a manner likely to provoke fear or alarm [.]...

(3) "Caregiver" means a related or unrelated person.... that has the responsibility for the protection, care or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily[.]

(5) "Endangered adult" means:

(A) An adult eighteen (18) years of age or older who is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to that person and who demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition...

(8)(A) "Impaired adult" means a person eighteen (18) years of age or older who, as a result of mental or physical impairment, is unable to protect ***4** herself from abuse, sexual abuse, neglect, or exploitation, and as a consequence thereof is endangered.

(10) "Neglect" means acts or omissions by an endangered adult; for example, self-neglect or intentional acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting:

(A) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult;

(B) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered or impaired adult to the appropriate medical personnel; or

(C) Negligently failing to carry out a prescribed treatment plan[.]

The appellant was convicted of a Class D felony, and, although the circuit court did not specify whether he was convicted under §5-28-103(b)(2) or (c)(1), the judge remarked during sentencing that he considered this a case of "extreme neglect." (R. 58-60, 358,419, Ab. 126, Add. 14-16) On appeal, the appellant concedes that the victim suffered serious physical injury or substantial risk of death, but he argues that the State failed to prove that (1) the victim was an endangered or impaired adult, (2) the appellant was a person or caregiver, (3) he neglected the victim, and (4) his neglect caused the victim's injuries. [3] (Appellant's Brief at ARG 3) His argument must fail, as the record reveals that substantial evidence supports his conviction.

First, substantial evidence proved that the appellant was an endangered or impaired adult. Records of the Arkansas Department of Health and Human Services Adult Protective Services Agency, introduced into evidence as State's Exhibit 36, showed that, when Geneva ***5** Law, the victim, went to live with the appellant in April, 2001, she was 82 years old, lacked the capacity to care for herself, was "very confused," and was not capable of performing normal activities of daily living. [4] (R. 75, 396, Ab. 5) She could not provide information without relying on a relative for assistance, and she had to be cued to bathe. (R. 396) She had just left a home from which she had been evicted for "unhealthy living conditions." (R. 396) Clearly she met the definition of an endangered or impaired adult as set forth in the statute at the time she went to live with the appellant in 2001. Her condition only deteriorated after that, as shown by her medical records and the testimony of Dr.Moses Ejiofor, both discussed at length below.

Second, there was substantial evidence to prove the appellant was a person or caregiver as contemplated by § 5-28-103. Though the victim had lived in her own home with her daughter, Mary Law, prior to 2001, that home was condemned as unsanitary and

unsafe, and the victim went to live with her sister in Searcy, while Mary Law went to live with the appellant. (R. 70-74, 76-79, Ab. 4-6) Arkansas Department of Health and Human Services Adult Protective Services Agency records showed the agency received a hotline call in April, 2001, claiming that the victim's sister could not care for her. (R. 70-74, Ab. 4-5) Records showed that the agency contacted the appellant about picking his mother up. (R. 74, 396, Ab. 5) The report noted that the appellant "advised he would come and get her to live with him and her daughter on 4-18-01." (R. 396) The report later noted that the appellant picked her up and "she has moved in with [the appellant] and her daughter in Little Rock where she can ***6** receive full time supervision." (R. 396) The report stated that she was "now living with her family in Little Rock as of 4-18-01. (R. 396) Agency notices were sent to the victim in care of the appellant at his address, 4701 Elmwood Road in Little Rock. (R. 75, Ab. 5) Contrary to the appellant's contention in his brief, there is nothing in the record to indicate that the victim's move to his house was conditioned on Mary Law taking care of her there. Thus, the report shows that the appellant voluntarily took the victim into his care and custody.

Additionally, Richard Harrison testified that he bought land from the victim in April, 2003. (R. 79-81, Ab. 6-7) Harris testified that he negotiated the purchase with the appellant, never speaking to Geneva Law personally, and that the appellant represented that he could speak for his mother, (R. 81-82, Ab. 7) When Harrison met the appellant, Geneva Law, and Mary Law at a bank to close the sale, the appellant instructed him to make the check out to Mary Law. (R. 82-83, Ab. 7-8) Thus, the appellant had begun acting for his mother in business transactions at least two years prior to her rescue from his home.

Finally, the condition of the home, its layout, and the circumstances surrounding the victim's rescue provide evidence that the appellant was one of her caretakers. Also, when taken with the evidence of the victim's condition at the time of her rescue, they provide substantive evidence that he neglected the victim and that his neglect caused her injuries, the third and fourth elements necessary to prove adult abuse. Testimony from a paramedic, a crime scene specialist, a police lieutenant, and a code enforcement officer established that, on March 14, 2005, emergency medical personnel were sent to 4701 Elmwood in response to a call about a patient with infected bedsores that needed to be examined. (R. 87, 90, Ab 9, 11) The appellant greeted them and directed them to the home's back entry. (R. 87-88, Ab. 9) ***7** There they were met with a very strong odor that smelled like rotting flesh, as were those who subsequently entered the home that day (R. 87, 88, 90, 108, Ab. 9, 10, 16); in fact, the code enforcement officer had to put Vicks under her nose to be able to walk into the house. (R. 142, Ab. 33) In the bedroom, they found the victim, a frail elderly female with multiple bruises of varying age on her. (R. 88, Ab. 9) She was non-verbal, and the room "was not an appropriate environment for anyone to be in." (R.88, Ab. 9) Emergency personnel had to be careful lifting her from the bed for fear they would injure her further, considering her bedsores; they eventually called the fire department and the police to help so that they could more gently remove her from the home. (R. 89, Ab. 10)

The bedroom had rodent feces on the carpet, and there were ants and cockroaches crawling on both the bedding and Ms. Law. (R. 89, 108, Ab. 10,16) The victim had a towel under her hip area, and there was a deflated plastic mattress under the towel; under that, there was a plastic garbage bag and soaked newspapers that smelled of urine and feces. (R. 89, Ab. 10) The mattress itself appeared to be soaked with urine and feces as well, (R. 89, 108, Ab. 10, 16); in fact, it had soaked for so long, the mattress had molded. (R. 131, Ab. 26). The horrible smell permeated the entire house. (R. 138, Ab. 30)

Mary Law, the appellant's sister, was sitting at the end of her mother's bed when emergency personnel entered the room, and she answered their questions about the victim. (R. 99-100, Ab. 13-14) They also asked the appellant some questions, and he indicated that he had not seen his mother for a couple of weeks; that he worked at night and was unable to look after her; and that Mary was the one who was usually with her. (R. 101, 104-105, Ab. 14, 15)

***8** Photos of the inside of the residence and the victim's bed that were introduced into evidence as State's Exhibits 1 through 11. (R. 109-112, 116-117, 361-371, Ab. 17-19) Exhibit 1 showed the area where the appellant's personal items were, Exhibit 2 showed a bedroom that was full of enough newspaper "to fill a dumpster," and Exhibit 3 showed a den where Mary Law slept. (R. 110, 361-363, Ab. 17) Exhibits 4, 5, and 6 (top photo) and 11 (bottom photo) showed the very dirty bathroom. (R. 110, 364-366, 371, Ab. 17-18) Exhibit 7 showed the door to the victim's bedroom, and the photos made it clear that there were

handprints in blood or paint on the door as well as a lock that was reversed and could be engaged from the outside of the room to lock the victim inside. (R. 110-111, 367, Ab. 18)

The remainder of Exhibits 8 through 11 showed the conditions inside the victim's bedroom. (R. 111-112, 368-371, Ab. 18-19) The newspaper shreds and animal feces shown in Exhibit 8 were on the victim's skin. (R. 111, 368, Ab. 18) Exhibits 9 and 10 showed a loop of heavy tape attached to the headboard with roaches stuck to it which, the police sergeant testified, "could have been there to restrain someone." (R. 11, 122, 369-370, Ab. 18, 23) When the bed covers were moved back, roaches and ants "just scurried." (R. 111, Ab. 18-19)

Photos of the victim taken at the hospital were introduced into evidence as State's Exhibits 12 through 19. (R. 116-117, 372-379, Ab. 21) The photos show the victim's overall bad physical condition as well as "crater-sized" bedsores that "you could have stuck your fist in," according to the police sergeant. (R. 112, Ab. 19) The victim was in pain because she was groaning and squeezing her eyes. (R. 113, Ab. 19-20) Regarding Exhibit 18, a photo of a large, deep, bedsore, there were ants crawling in it, even by the time the police lieutenant arrived at the emergency room to photograph the victim. (R. 115, 378, Ab. ***9** 20) Exhibit 19 showed a piece of feces on the victim's skin. (R. 115, 379, Ab. 20) The victim's clothing, which had been removed by hospital personnel, was on the floor, and it smelled like rotting flesh and feces. (R. 116, Ab. 20-21) The nurses at the hospital who were attending the victim were picking ants off her skin. (R. 116, Ab. 21)

The crime scene specialist went to the hospital to see the victim, and she could smell the stench down the hallway before she ever reached the victim's hospital room. (R. 131, Ab. 26-27) She identified State's Exhibits 20 through 34 as photos of the victim that were taken by another specialist, and they were admitted into evidence.[5] (R. 132-134, 380-394, Ab. 27-28) She also identified Exhibit 35 as a photo of the bath robe the victim had been wearing.[6] (R. 134, 395, Ab. 29) In addition to the injuries shown in the photographs, the victim had blisters and sores in her vaginal area. (R. 134-135, Ab. 29)

The code enforcement officer confirmed that the property was owned by the appellant. (R. 142, Ab. 33) Her description of the home's condition was similar to that given by previous witnesses, with the added details that there were feathers throughout the house, there was blood on the bed, the victim's clothes were thrown in a pile on the floor rather than hung in the closet, and the closet looked as though it had been used to house an animal. (R. 144-146, Ab. 33-34) She testified that she did not remember seeing any door ***10** that would seal off one portion of the house from another, only bedroom doors. (R. 143-147, 152, Ab. 34-36, 38) A notice to clean up the house was written to both the appellant and Mary Law; a citation ultimately was written only in Mary Law's name, but that was because she was the person present at the home during the reinspection; the witness testified that the appellant also could have been cited. (R. 152-155, 156-157, Ab. 38-40)

The evidence established that the victim had not seen her doctor since January, 2001, about three months before she went to live with the appellant. (R. 158-162, Ab. 41-42) The doctor continued to refill her medications, including blood pressure medication, until October, 2004, when he refused to refill them unless she came in for an office visit. (R. 158-162, Ab. 41-42) State's Exhibit 37, records from Kroger Pharmacy showing that her last prescription was filled on November 11, 2004, was introduced into evidence.[7] (R. 166, 398-399, Ab. 43) The doctor's records showed that, on January 22, 2001, when the victim was living only with Mary Law, the victim was 82 years old, weighed 161 pounds, and was classified as obese. (R. 161-162, Ab. 42)

Dr. Moses Ejiofor examined the victim at the hospital on March 14, 2005, the day she was removed from the appellant's home. (R. 167-168, Ab. 44) He described her as bone thin, disheveled, unkept, malnourished, immobile, and smelling like rotting flesh. (R. 171, Ab. 45) She had a large wound overlying her thoracic spine that was so deep, he could see bone and the shining outline of her spine. (R. 172, 176, Ab. 46, 48) She had another large wound in her sacral area which was a big, stage four ulcer, with stage four describing the ***11** most advanced stage of an ulcer. (R. 172, 176, Ab. 46, 48) She had wounds on both sides of her pelvis. (R. 172, Ab. 46) Her left ear canal was plugged up by a blood clot, which the doctor was afraid to dislodge for fear that she would bleed. (R. 172, Ab. 46) She was moaning weakly from the pain of the physical examination, but she was too weak to flinch or pull away. (R. 172-173, Ab. 46) Dr. Ejiofor said that the wounds were ugly and appeared chronic, like they had been there for some time. They were necrotic, and they were not bleeding, which told the doctor that they were not

new. She had ecchymosis, or a bluish discoloration, all over her skin, and bruises all over her body. (R. 173-174, Ab. 46-47) Dr. Ejiofor identified State's Exhibits 20 through 34 as photos of the victim and testified that they depicted what he saw when he examined her. (R. 174-177, Ab. 47-49) He did not think that her bruises were consistent with having a fall. (R. 175, Ab. 47)

A CT scan of the victim's brain showed bleeding and fluid in her brain that was causing pressure on one side of the brain; he attributed this to head trauma. (R. 177-178, Ab. 48-49) He cultured three organisms from her left eye alone, and approximately eight to nine organisms from the ulcers, ranging from pseudomonas to staphylococcus to glossocele. (R. 178-179, Ab. 49) Dr. Ejiofor and a surgeon debrided the ulcers twice to remove dead tissue. (R. 180, Ab. 50) He described her injuries as life-threatening for a person of any age because they were so infected. (R. 181-182, Ab. 51) He also stated that she would not have been able to get herself out of bed. (R. 182, Ab. 51) Dr. Ejiofor testified that the victim initially improved but died about a month from the time she entered the hospital. (R. 186, Ab. 52)

Finally, the appellant's demeanor on the day of the victim's rescue is telling. Despite his claims of extreme illness and overwork, the paramedic and the police sergeant testified that he did not look sick or unhealthy at the time the victim was taken from the house, he was ***12** not having problems walking, he had no problems talking to them, and he did not seem to be in any pain. (R. 105, 127, Ab. 15, 25) The sergeant described the demeanor of the appellant and his sister at the scene as strange, because they just sat very quietly with their heads down, not expressing a lot of concern. (R. 117, Ab. 21)

Clearly substantial evidence supported the conviction for adult abuse. The appellant's contention that his frail, incompetent, elderly mother who stayed with him for four years until her rescue was merely a licensee living with him temporarily until her own home could be made suitable for her is ludicrous. This Court should affirm the conviction.

II. THE TRIAL COURT DID NOT ERR BY REFUSING TO DECLARE ARK. CODE ANN § 5-28-103 VOID FOR VAGUENESS.

Statutes are presumed constitutional; and the burden of proving otherwise is on the appellant. *E.g.*, *Jefferson v. State*, 372 Ark. 307, 317,S.W.3d,(2008). If it possible to construe a statute as constitutional, this Court must do so. *Jefferson*, 372 Ark. at 317, S.W.3d at___. " statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable." *Id.*

"[A] law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and capricious discriminatory enforcement." *Id.* Generally, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. *Id.* "When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute ***13** must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by statute, he cannot be heard to complain." *Id.*

The appellant argues that Ark. Code Ann. § 5-28-103 (Repl. 1997) is void for vagueness because, he contends, the definitions of "caregiver" and "neglect" in § 5-28-101 (Supp. 2003) contain contradictory terms. Specifically, contends that a "caregiver" has the responsibility for the protection, care, or custody of an endangered or impaired adult, while the definition of "neglect" describes a caregiver as one who is responsible for the care and supervision of an endangered or impaired adult. Thus, he contends, one definition contains a reference to custody while the other does not, making the statute void for vagueness.

The appellant's analysis is wrong. As noted earlier, "[c]aregiver' means a related or unrelated person ... that has the responsibility for the protection, care or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily[.]" The definition of "neglect" does not redefine "caregiver." Instead, it refers to a caregiver who is "responsible for the care and supervision of an endangered or impaired adult." There is no vagueness there.

Nor is there merit to the appellant's argument that the definition of "caregiver" is so vague as to impose an inappropriate duty of care on someone who merely lives with another person. The definition of caregiver clearly requires that a person voluntarily has assumed responsibility for the protection, care or custody of an endangered or impaired adult. Taking a roommate or running a bed-and-breakfast, the examples cited by the appellant in his brief at ARG 10, does not meet that definition. However, taking one's endangered and impaired elderly mother into one's home at the request of a social services agency, conducting ***14** business on her behalf, and allowing her to live in the home for four years in a room that locks from the outside does meet that definition. The statute provided the appellant adequate notice of the criminal nature of his acts; he is no "entrapped innocent." *E.g.*, *Jefferson,* 372 Ark. at 317. Thus, his conviction should be affirmed.

CONCLUSION

For the reasons stated herein and based on the authorities cited, the State respectfully submits that this case should be affirmed in all respects.

Footnotes

1 It appears that the appellant's arguments on appeal, found at ARG 1 through 10 of his brief, are reprinted at ARG 10 through 20 of his brief. Thus, the appellee's brief references only the arguments found at ARG 1 through 10 of the appellant's brief.

2 Mary Law pleaded guilty and was sentenced to five years' imprisonment months prior to the appellant's trial. (R. 199, Ab. 61)

3 By arguing that he did not neglect the victim, the appellant necessarily contests the alternative charge presented by the State, i.e., that he purposely abused the appellant. Likewise, this Point will address only the issue of whether the appellant neglected the victim, as substantial evidence of neglect is sufficient to sustain his conviction in this instance.

4 While the court reporter's notation in the record and the appellant's abstract say the exhibit was marked for identification, the trial judge received it into evidence on the prosecution's motion. (R. 75, Ab. 5)

5 While the court reporter's notation in the record and the appellant's abstract say the exhibits were marked for identification, the trial judge received them into evidence on the prosecution's motion. (R. 134, Ab. 29)

6 While the court reporter's notation in the record and the appellant's abstract say the exhibit was marked for identification, the trial judge received it into evidence on the prosecution's motion. (R. 134, Ab. 29)

7 While the court reporter's notation in the record and the appellant's abstract say the exhibit was marked for identification, the trial judge received it into evidence on the prosecution's motion. (R. 166, Ab. 43)