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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUDY HOPPER MOLSON,

Defendant and Appellant.

G048942

(Super. Ct. No. 10HF0586)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis, and Michael Joseph Benke, Deputy Attorneys General, for Plaintiff and Respondent.

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Judy Hopper Molson appeals from the judgment following her conviction on felony counts alleging (1) that between November 30, 2009 and March 26, 2010, she committed elder abuse by infliction of unjustifiable physical pain and mental suffering on a person over the age of 65 (Pen. Code, § 368, subd. (b)(1); all further statutory references are to this code); (2) that between February 10, 2009 and March 26, 2010, she had committed caretaker theft of an amount in excess of \$400 from a person over the age of 65 (§ 368, subd. (e)); and (3) that between October 1, 2009 and March 31, 2010, she had engaged in eavesdropping and improperly recorded conversations (§ 632, subd. (a)). She was sentenced to a combined five year term of imprisonment.

Defendant challenges her convictions on counts 1 and 2, but not on count 3. She argues the evidence was insufficient to support her conviction on the first count of elder abuse, because while she had accepted some responsibility in caring for the victim, she was neither legally bound to provide him with medical treatment, nor did she engage in conduct reflecting either an intent to provide it or criminal negligence in failing to do so. She also argues her conviction on the second count of caretaker theft must be reversed because the jury was erroneously instructed that \$400 was the threshold value of stolen goods for purposes of establishing the theft was a felony, even though the threshold amount had been raised to \$950 under the amended statute.

We reject defendant's first contention, because the evidence is more than sufficient to establish that she expressly assumed the role of "caregiver" for the victim, who was elderly and suffered from dementia, and she accompanied him to all visits with his endocrinologist after November 2009. A reasonable person in her position would have appreciated the danger associated with the victim's diabetic condition and the importance of adherence to his medication regimen – especially after he fell and hit his head as a result of low blood sugar. Nonetheless, she not only failed to take reasonable steps to ensure his medication regimen was adhered to, she prevented other caregivers from performing that function.

However, the Attorney General agrees with defendant's second contention, and so do we. Section 368, subdivision (e) was amended in 2009, changing the threshold amount for the value of goods required to qualify as felony caretaker theft from \$400 to \$950, and the jury instructions in this case should have included that higher amount. But the Attorney General also argues the instructional error was harmless beyond a reasonable doubt, because there can be no question that the significant amount of property defendant obtained from the victim, including taking sole title to his home, shared title to his 2007 Cadillac automobile, and at least one significant transfer of cash from his bank account following the appointment of his son as conservator – exceeded \$950. Again, we agree. We reject defendant's attempt to portray this count as focused solely on her alleged theft of small personal and decorative items from the victim's home, rather than her efforts to obtain ownership of his most valuable assets.

Having found no prejudicial error, we affirm the judgment.

## FACTS

The victim, Leo Innerbichler was 86 years old at the time of trial. By that point, he was suffering from advanced dementia and was deemed incompetent to testify at trial. As the Attorney General acknowledges, Innerbichler's preliminary hearing testimony was introduced at trial for the sole purpose of proving his vulnerability to manipulation, and not to establish the truth of facts he stated.

Other evidence admitted at trial established that Innerbichler was married to his wife, Mabel, for nearly 55 years, and the two lived in the home they owned in Costa Mesa for about 25 years. The Innerbichlers had two adult children, Jennifer and Stephen. (We refer to Innerbichler's family members by their first names for purposes of clarity only; no disrespect is intended.)

Defendant owned a barbershop near the Innerbichler home, and she befriended both Mabel and Innerbichler. Defendant joined the Innerbichler family for dinner on occasion, and prior to Mabel's death in December 2006, defendant provided some assistance in caring for her.

In 2006, prior to Mabel's death, Innerbichler had begun showing signs of inappropriate anger and a degenerating memory. Jennifer noticed he tended to become confused when driving and would get lost easily. She was fearful about allowing her children to be in the car while he was driving. Due to the family's concerns about these issues, he was evaluated by a Dr. Chance at U.C.I.

Following Mabel's death, defendant continued her relationship with Innerbichler. In fact, on the day after Mabel died, he took her to eat at an expensive restaurant. This outing appeared inconsistent with Innerbichler's lifelong habit of financial frugality. Moreover, Innerbichler's children noticed that "things started going missing" from Innerbichler's home following Mabel's death. The missing items included Lladro figurines, estimated to be worth between \$350 and \$400, a china doll worth \$200, Limoges boxes, Mabel's wedding ring, a carved wooden boat from Stephen's childhood and a Tiffany-style lamp estimated to be worth between \$200 and \$300. Innerbichler did not notice these items were missing until his children pointed it out, and although he got defensive when they mentioned it, he agreed to ask defendant to return them. Defendant admitted to Innerbichler that she had taken a Lladro figurine, but declined to return it because she had already given it to her daughter.

Innerbichler, who drove a 2007 Cadillac, also purchased a Ferrari at defendant's request, as well as a Porsche and a "classic Ford" truck between 2007 and 2009. Other than the Cadillac, all of these cars were gone by the time of trial; defendant's daughter testified that defendant had sold the Porsche.

In May 2007, Innerbichler gave his son, Stephen, a power of attorney over his finances, and requested that Stephen help him manage his finances. Even at that

point, Stephen doubted his father had the capacity to grant a power of attorney, but nonetheless accepted the responsibility because he wanted “to find out what the heck was going on.” What Stephen discovered was that Innerbichler had amassed nearly \$40,000 in credit card debt. This accumulation of debt was wholly inconsistent with Innerbichler’s lifelong financial habits, most particularly his emphatic opposition to accumulating credit card debt. Stephen also learned that his father was paying a monthly cell phone bill, even though he did not own a cell phone. Moreover, as defendant acknowledges in her opening brief, the evidence demonstrated that “much of the funds [sic] had been taken from [Innerbichler’s] IRA accounts.”

Ultimately, Innerbichler’s children confronted defendant about the automobile purchases and the missing items in December 2008. They also expressed concern that “quite a lot of money . . . was gone” from Innerbichler’s IRA. Defendant responded “if he wants to give me gifts, then why not?” The children also asked defendant what her “intentions” were toward Innerbichler. She denied any intention of marrying him, claiming he had “cheated” on her by bringing prostitutes to the house.

However, by April 2008, defendant had already indicated an intention to marry Innerbichler. She had accompanied him to an appointment with his urologist, who understood that defendant and Innerbichler “were getting some blood testing to get married” and “it seemed like . . . kind of a rush situation.” During that appointment, defendant asked the urologist to write a letter expressing that Innerbichler was “of sound mind.” Although the urologist had never treated Innerbichler for issues relating to mental health, and only saw him for approximately 15 or 20 minutes at a time, three or four times per year, he agreed to write a letter after briefly discussing the matter privately with Innerbichler. Ultimately, the urologist wrote a letter stating merely that on the date of Innerbichler’s visit, he “seemed of his usual state of mind” and appeared “alert and was able to respond to all questions asked.”

By March 2009, Innerbichler's children had become so concerned about defendant's growing influence over his financial affairs that they contacted Adult Protective Services (APS) and filed a complaint. In April or May 2009, APS discovered a deed reflecting that Innerbichler had transferred title to his home into defendant's name, for "no consideration" on February 10, 2009.

When asked about the fact his home had been deeded to defendant, Innerbichler repeatedly denied any recollection of having placed title solely in defendant's name, although he later indicated he had wanted her name "on title" because they were married. No marriage, however, had taken place by that point.

In June 2009, Innerbichler was evaluated by a Dr. Liao, who concluded he did not have the mental capacity to be making financial decisions. In addition to his cognitive decline, Innerbichler also suffered from other medical problems, most prominently diabetes. He had been insulin dependent since approximately age 45.

In July 2009, Costa Mesa Police Detective Eugene Kim visited defendant in her shop after reviewing Dr. Liao's report. He told her "pretty explicitly" that she was "on notice that [Innerbichler] does not have [the] mental capacity to be making financial decisions." She told Kim that she loved Innerbichler, wanted to marry him, and claimed that she "takes care of him, his daily routine." Defendant informed Kim that she had also assumed responsibility for Innerbichler's medical needs.

In October 2009, title to Innerbichler's 2007 Cadillac was transferred into the joint ownership of defendant and Innerbichler.

In November 2009, endocrinologist Dr. Diana Albay took over Innerbichler's diabetes treatment when his prior endocrinologist began winding down her practice. Defendant accompanied Innerbichler to his first appointment with Albay, and identified herself as his "live-in caretaker." She was also present in the room during each his subsequent appointments with Albay, which occurred every two to four weeks. Because Albay was aware that Innerbichler suffered from dementia, she told defendant

how important it was for him to take his insulin, and she specifically advised defendant “on more than one occasion” that “she needed to remind and help and make sure that Mr. Innerbichler was taking his insulin when he should.” At one point, defendant responded by claiming Innerbichler “could do it himself” and Albay told her “she needed to still make sure, regardless, that he was taking his insulin.”

Despite these efforts, Albay observed that Innerbichler’s diabetes did not appear to be well-managed, and his blood sugar was often dangerously high. She suspected he was not receiving his insulin injections regularly. Albay instructed Innerbichler and defendant that he needed to keep a log reflecting when he took his medication, and to download the readings from his blood glucose meter. However, his compliance with these instructions was very poor.

Moreover, Albay was also concerned that Innerbichler’s poorly regulated blood sugar levels would mean the level would drop too low at times, and she twice prescribed a “glucagon kit” which is an emergency medication that can be given to a patient by a caregiver or paramedics, when the patient has become hypoglycemic to the point of that it cannot be addressed with “oral agents . . . like glucose tablets for food to raise blood sugar.” But although the doctor explained the importance of this medication to defendant, those prescription were never filled, allegedly because “they forgot.” Ultimately, Albay concluded that Innerbichler had not received good care for his diabetes while defendant was acting as his caregiver.

Albay testified that when Jennifer subsequently assumed responsibility for managing Innerbichler’s medications (following defendant’s arrest) his blood sugar levels were monitored more closely, and were stabilized. Thereafter, the frequency of his appointments with Albay decreased from once every two to four weeks, to only once every six months.

Also in November 2009, Stephen filed a petition to establish a conservatorship over him. On November 30, immediately after Jennifer served him with

a copy of that petition, defendant and Innerbichler obtained a confidential marriage license and were married. Defendant thereafter opposed the establishment of Innerbichler's conservatorship, although Innerbichler himself did not. In a telephone conversation recorded by defendant herself, she complains about his son taking over the finances and exercising control over how Innerbichler's money is spent. He responds by pointing out that Stephen "loves me [and is] trying to protect me."

Despite defendant's opposition, the conservatorship was established – first on a temporary basis in February 2010, and then permanently in June 2010.

In December 2009, while the conservatorship petition was pending, Stephen discovered that the income flowing into Innerbichler's bank account had suddenly decreased. After investigation, he learned that Innerbichler's Social Security benefits, representing about \$1,500 per month of his income, had been diverted into a separate bank account owned jointly by defendant and Innerbichler. After the conservatorship was established, the Social Security benefits were redirected to Innerbichler's original account.

Additionally, after the temporary conservatorship was established, Stephen contacted defendant and demanded she return Innerbichler's credit cards and his debit card. She refused. He also discovered that one day after he was appointed conservator, \$1,000 had been transferred from Innerbichler's bank account into defendant's personal bank account. Stephen demanded defendant restore that money to Innerbichler's account. She refused. Finally, Steven demanded that defendant give him the keys to Innerbichler's Cadillac. Again, she refused.

In February 2010, Innerbichler's children went to his home to take him to lunch. He was not there, but defendant was. She informed them that Innerbichler had fallen and was in the hospital. They went immediately to the hospital, where they found him in the emergency room. They spoke to a social worker at the hospital, who recommended that either Innerbichler should be placed in an assisted living facility, or be

provided with professional caregivers, since he had fallen due to an episode of low blood sugar.

Innerbichler's children promptly arranged for professional caregivers to visit him in his home every day between 4:00 p.m. and 8:00 p.m., to assist him with his personal needs and monitor his diabetes medication as well as his compliance with other medical needs. When informed of those arrangements, defendant became belligerent and stated she would not allow any professional caregiver to have access to Innerbichler. When the first caregiver arrived at the scheduled time, no one answered the door. This pattern continued. The caregiver was allowed in the home on one occasion during the second week, but it was Innerbichler himself who answered the door, and defendant was not present. On another occasion, defendant answered the door and turned away the caregiver, stating "I don't want care. We're fine."

On another day, the caregiver was already at the house when Innerbichler arrived home with his children. Defendant was not present. The caregiver and Jennifer entered the home and discovered that none of the medications he was supposed to take on a daily basis were laid out in his pill box. Instead, the only medication organized in the box was Advil P.M., which was not a prescribed medication. Innerbichler himself later acknowledged to a police detective that it appeared his prescription medications had been switched out for supplements and sleeping pills, which meant that "I could fall asleep and not wake up."

On February 18th, during an appointment with Innerbichler's endocrinologist, Albay, defendant requested Albay provide a note stating that he was not required to have any professional caregivers. Defendant explained that home healthcare services were too costly for them because "Innerbichler was on a fixed income, and . . . they felt that they could manage on their own."

Sympathetic to defendant's claim of restricted finances, Albay provided the note, but specified that it was conditioned on Innerbichler's blood sugar levels improving,

and that if they did not, the professional caregiving would have to be resumed. Thus, on February 25th, the professional caregiver was informed by defendant that she had a note from Innerbichler's doctor, designating her as his primary caregiver, and stating she did not need the assistance of professional caregivers.

In March 2010, defendant was interviewed at her barbershop by a police detective. During the interview, defendant claimed Jennifer had "set [her] up" by going to the house and filling up "all these little holes" in Innerbichler's pill box to make defendant look bad. Defendant also claimed to be a "[c]ertified nurse" in her home country of Guatemala. She claimed that as part of her training she learned how to properly give shots, including insulin shots, and to check blood sugar levels. However, she then denied that she had any responsibility for the proper administration of Innerbichler's insulin, because she was "never . . . his care giver." She explained she was not his caregiver "[b]ecause I never got paid."

When the detective pointed out she had some responsibility for Innerbichler's care due to her status as his wife, she acknowledged that, but asserted his high blood sugars were not her fault, because "he likes to eat a lot of sugar" and "I cannot stop him." She also stated she did not personally believe Innerbichler had dementia, and had never been told he did until just three or four months previously. She admitted that Detective Kim had come to talk to her about Innerbichler, but denied he told her Innerbichler suffered from dementia. She did not recall Kim telling her that Innerbichler lacked the capacity to make financial decisions.

In response to the detective's question about "[w]ho's car [she is] driving right now," she stated that the car "is [Innerbichler's]" but "[i]t is in his name and in my name." She explained that her name had been added to the Cadillac's title after they got married, and the reason was because she had been pulled over while driving it so she and Innerbichler agreed her name should be added to the title.

And in response to the detective's questions regarding her ownership of Innerbichler's house, she claimed that Innerbichler "chose to do it," "because he loves me." When asked if she thought it was fair that she was the sole owner of the house, even to the exclusion of Innerbichler himself, she simply insisted that Innerbichler "is a broker [and] knew what he was doing."

The police detective also spoke with Innerbichler several times in March 2010. He asked Innerbichler about some of the credit card charges Stephen had been concerned about, including a \$7,000 charge at Costco. Innerbichler responded that he and defendant liked to shop at Costco, and they bought small items like laundry detergent and fruits and vegetables. The detective also asked Innerbichler about defendant taking out life insurance policies on him and paying for them out of his account. Innerbichler responded that he had not known she had done that.

When defendant was arrested, Innerbichler's Cadillac was parked at her barbershop. The police released the car back to his family. Inside the car, they discovered two blood sugar meters, some insulin and some hypodermic needles. Police later searched defendant's barbershop and her Honda automobile, pursuant to a search warrant. They found D.M.V. paperwork relating to Innerbichler's Cadillac and discovered, in addition to the change of title, a notification that the address for the vehicle had been changed from Innerbichler's home to defendant's shop. The police also found credit cards and debit cards for accounts established in 2010 in Innerbichler's name, along with corresponding cards for the same accounts in defendant's name. They also found paperwork relating to a life insurance policy, as well as paperwork from Innerbichler's doctors, with instructions pertaining to his medications. Inside defendant's Honda, the police found a wallet and several pieces of identification belonging to Innerbichler, as well as the deed transferring title of Innerbichler's home to defendant.

Innerbichler was given a cognitive evaluation by Dr. Bonnie Olsen in January 2011. Based upon how poorly he performed during that evaluation, as well as

her review of the records of his prior cognitive evaluations, she opined that he was very susceptible to the power of suggestion and could be easily manipulated. She explained that his impaired cognitive ability rendered him susceptible to manipulation by someone he trusted, and that his poor short-term memory meant he was more likely to succumb to undue influence. She stated he was unable to make “complex financial decisions,” which she defined as “decisions that will have an impact on his life going forward.” She stated Innerbichler would not have the ability to make decisions requiring him to “weigh out the consequences.”

Olsen also explained that this impairment would not have occurred suddenly – it would have been developed over a long period of time. Based upon the extent of Innerbichler’s impairment at the time she examined him, her knowledge of the usual progression of his disease, and her review of Dr. Liao’s report from 2009, she opined that Innerbichler would also have lacked the capacity to make any complex financial decisions as far back as February 2009, and would have been unable to properly manage his own medications on a consistent basis as far back as 2009.

Finally, Olsen opined that Innerbichler’s impairment would have been obvious to anyone who had regular interaction with him. She believed he might be able to hide his confusion or memory loss for a short period of time, but if a conversation advanced beyond casual pleasantries, his impairment would become obvious.

## DISCUSSION

### *1. Sufficiency of the Evidence to Support Elder Abuse*

Defendant first challenges the sufficiency of the evidence to support her conviction on the count alleging elder abuse. “In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value

such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We are obligated to “resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence.” (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Reversal is justified only when “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (*People v. Bolin, supra*, 18 Cal.4th at p. 331.)

As defendant acknowledges, criminal liability for elder abuse was established “to protect members of a vulnerable class from abusive situations where serious injury or death is likely to occur.” Section 368, subdivision (b)(1) imposes such liability on “[a]ny person who knows or reasonably should know that a person is an elder or dependent adult and who . . . having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependant adult to be injured, or willfully causes or permits the elder or dependent adult to be place in a situation in which his or her person or health is endangered . . . .”

Defendant argues the evidence in this case is insufficient to sustain her conviction of this crime because while it establishes she “had accepted some responsibilities in assisting Mr. Innerbichler[,] she was neither legally bound to provide medical treatment nor did her actions indicate either an intent or a level of criminal negligence such as to render her liable for elder abuse . . . .”

We disagree. Defendant’s argument essentially ignores the evidence that she repeatedly declared herself to be Innerbichler’s caregiver, including to his endocrinologist, Dr. Albay. This evidence was sufficient to demonstrate she had accepted *primary* responsibility for looking after him. Moreover, the evidence demonstrated that Innerbichler was suffering from dementia, which would have been

apparent to any person who spent a significant amount of time with him, and that it significantly impaired his own ability to manage his medications.

But even if defendant could not have discerned the significance of Innerbichler's impairment on her own, the evidence also reflected she was present at every appointment Innerbichler had with Albay, who testified that not only did she carefully explain to defendant how important it was that Innerbichler's blood sugar levels be managed properly, but she also advised defendant, repeatedly, that in light of Innerbichler's dementia, "*she needed to remind and help make sure that [he] was taking his insulin when he should.*" (Italics added.)

In light of those explicit warnings, which were certainly sufficient to inform a reasonable person that (1) Innerbichler needed to be reminded to take his insulin, and (2) his health would be endangered if he did not do so, the jury could certainly conclude defendant was criminally negligent for failing to remind him – especially after he fell and hit his head in February 2010, as a result of an incident of low blood sugar.

Defendant's focus on her purported lack of a duty "to provide medical treatment" – i.e., to *personally administer his insulin* – because she believed Innerbichler to be "capable of administering the medications himself, if reminded," is a red herring, and actually highlights why her course of conduct was unlawful.

The argument is a red herring because no one ever claimed Innerbichler was incapable of *administering* his medications, including his insulin. Instead, the evidence showed that because of the progressive nature of his dementia, he had become incapable of adhering to his regimen on a consistent basis. What he needed was someone to pay attention to his medical needs and remind him when he needed to check his blood sugar, inject his insulin, and take his other medications – exactly what Albay had told defendant that *she must do*.

Significantly, defendant's own argument assumes Innerbichler would have taken the insulin *if reminded*. So if defendant had done that, then according to her theory,

Innerbichler's blood sugar levels would have been well managed during the period she was acting as his caretaker, just as they later were when Jennifer began overseeing his care. But according to Albay, they were not. Consequently, the obvious inference is defendant – Innerbichler's self-proclaimed caregiver – failed to comply with Albay's express direction that she *remind* Innerbichler to take his insulin and *make sure* he was doing so, even though Albay had also explained to her how dangerous it was if Innerbichler's blood sugar levels were not properly managed. The jury could easily conclude that her failure to do so was wilful.

Defendant's other arguments fare no better. First, she suggests it was not reasonable to expect her to monitor Innerbichler's medication, because "while [she] may have indicated to Dr. Albay that she was [Innerbichler's] live-in caretaker, the record indicates that she continued to run her salon on a day-to-day basis." In other words, defendant believes she should be excused from the caretaking obligation she explicitly assumed, because she also had a business to run and thus could not possibly have fulfilled that obligation on a consistent basis. But of course, the fact defendant knew she would not be able to properly care for Innerbichler in the manner his doctor had explained to her – on more than one occasion – was required, only makes her more culpable for failing to ensure that alternative caregivers were engaged to fulfill that need.

But not only did defendant fail to arrange for alternative caregivers, she affirmatively thwarted the efforts of Innerbichler's children to do just that. Even after Innerbichler suffered a dangerous fall resulting from an incident of low blood sugar, defendant prevented the professional caregivers hired by his children from entering his home to provide the very care she now acknowledges he needed – oversight of his medication regimen. Perhaps most disturbingly, when a caregiver and Jennifer were finally able to get into the house – on a day defendant was not present – they discovered that his pill organizer contained none of his prescribed medications, and was instead filled with Advil P.M. Even if the jury did not conclude it was defendant herself who had

switched out these medications – and that she was attempting to cover that up by barring the professional caregivers from the home – it would nonetheless have been justified in determining she acted unlawfully by ignoring the inappropriate content of that pill organizer.

Defendant also suggests the undisputed evidence that she drove Innerbichler to his doctor’s appointments, or otherwise offered some occasional assistance to him, demonstrates she fulfilled her obligations as his caregiver. We disagree. Fulfilling some aspects of the caregiver role does not excuse the fact that she failed to do other basic, but very important, things that would be reasonably expected of Innerbichler’s caregiver – such as ensure he received his medications.

Finally, defendant also argues that “there seems to be no valid reason why [she], rather than [Innerbichler’s] children, should assume responsibility for [his] elevated [blood sugar] levels in February and March 2010.” We can think of at least four: (1) she volunteered for that responsibility when she declared to Albay, Innerbichler’s endocrinologist, that she was his “live-in caretaker”; (2) she alone accompanied Innerbichler to all appointments with Albay and received instructions from Albay concerning his diabetes care; (3) she was already married to Innerbichler by that time; and (4) she repeatedly refused to allow the professional caregivers *his children had arranged to care for him* into the house. Thus, we conclude there is no valid reason for defendant to complain about being held responsible for Innerbichler’s elevated blood sugar levels in February and March 2010.

Finding no insufficiency in the evidence to support defendant’s conviction for elder abuse, we conclude that conviction must be affirmed.

## 2. *Erroneous Jury Instruction on Value of Goods to Qualify for Felony Conviction*

Defendant’s second contention is that her felony conviction on the count of caretaker theft must be reversed because the jury was erroneously instructed that \$400

was the threshold value of stolen property for purposes of establishing the theft was a felony, even though the threshold amount had been raised to \$950 when section 368 was amended in 2009. Our review of this issue is de novo (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088), and we agree the instruction was erroneous.

The amendment of section 368 was effective in January 2010, during the period in which defendant was alleged to have committed her theft. Thus, it is possible she actually completed the crime while the threshold for the felony remained at \$400. However, as the Attorney General concedes, “[a] statutory amendment that mitigates punishment by increasing the dollar amount required to prove an offense, applies retroactively to crimes committed *before* its effective date where the judgment is not final and . . . there is no savings clause.” (Citing *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1196.) The rule is cogently stated by our Supreme Court: “amendments, such as the one at issue here, that mitigate punishment by increasing the dollar amount for certain crimes or enhancements, should be applied retroactively, in the absence of a saving clause or other indicia of a contrary legislative intent.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) As the Attorney General concedes, there is no indicia that our Legislature intended this increase in the threshold value of stolen property would not apply retroactively to cases such as this one. Consequently, defendant was entitled to the benefit of the higher threshold, and we conclude the instruction specifying the \$400 amount was erroneous.

On the other hand, the Attorney General also contends this instructional error was subject to a harmless error analysis, and moreover, given the overwhelming evidence that the property defendant managed to extract from Innerbichler – including title to his house and shared title to his 2007 Cadillac – was worth far in excess of \$950, we must conclude the error was harmless beyond a reasonable doubt. Again, we agree. As explained by our Supreme Court, “[A]n instructional error that improperly . . . omits an element of an offense . . . generally is not a structural defect in the trial mechanism

that defies harmless error review and automatically requires reversal under the federal Constitution.” ( *People v. Gonzalez* (2012) 54 Cal.4th 643, 662-663; see *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35].) And if an instruction which entirely *omits* an element of the offense is properly reviewed under a harmless error analysis, we have no trouble concluding that instruction which merely *understates* an element is subject to such review as well.

The harmless error analysis requires us to ask the question: “‘Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?’” ( *People v. Gonzalez, supra*, 54 Cal.4th at p. 663.) Where the omitted element of the offense was subject to significant dispute at trial, the harmless error analysis commonly focuses on examining “whether ‘the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions.’ [Citation.] A reviewing court considers ‘the specific language challenged, the instructions as a whole[,] the jury’s findings’ [citation], and counsel’s closing arguments to determine whether the instructional error ‘would have misled a reasonable jury. . . .’” ( *People v. Bell* (2009) 179 Cal.App.4th 428, 439.)

However, in other cases, such as *Neder v. United States, supra*, 527 U.S. 1, [119 S.Ct. 1827, 144 L.Ed.2d 35] (*Neder*), where there is no indication that *other* instructions given to the jury might support an implied finding on the omitted element, and no finding can be inferred from the jury’s verdict, the harmless error analysis focuses instead on whether, considering the trial record as a whole, there appears to be any reasonable possibility that the jury might have found in defendant’s favor on the omitted element if asked to address it. Thus, in *Neder*, the United States Supreme Court considered whether the court’s failure to instruct the jury that it must find the false statements made by defendant on his tax return to be “material” for purposes of the charged crime of filing false income taxes, amounted to harmless error. (*Id.* at p. 16.)

Without considering either the content of other instructions, or the jury's verdict, the court had no trouble concluding the error was harmless. In doing so, it explained that "the Government introduced evidence that Neder failed to report over \$5 million in income from the loans he obtained. The failure to report such substantial income incontrovertibly establishes that Neder's false statements were material to a determination of his income-tax liability. The evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury – and does not argue here – that his false statements of income could be found immaterial. Instead, he defended against the tax charges by arguing that the loan proceeds were not income because he intended to repay the loans, and that he reasonably believed, based on the advice of his accountant and lawyer, that he need not report the proceeds as income. . . . In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder v. United States, supra*, 527 U.S. at pp. 16-17.)

This case is similar to *Neder*. At trial, defendant never disputed that during 2009, she obtained title to Innerbichler's house, a half interest in his 2007 Cadillac, and money, including \$1,000 which was transferred from his bank account into her personal account the day *after* Stephen was appointed conservator. Moreover, the evidence was also undisputed that after Stephen was appointed, he demanded defendant return Innerbichler's credit cards, his debit card and the keys to his Cadillac, but she refused. Although the precise value of this property cannot be ascertained from the record, it is disputably greater than \$950 – the \$1,000 transfer into defendant's bank account alone meets that threshold. Defendant never suggested at trial that these assets did not have very significant value. Rather than deny she obtained Innerbichler's property, or making any claim that its value was small, defendant simply claimed she had come by it

honestly – her defense was that Innerbichler voluntarily gave her his house, his Cadillac and his money, and that despite the prosecutor’s assertion to the contrary, he remained competent to do so at all relevant times.

Thus, the key disputed issue at trial was whether Innerbichler was competent – either to manage his own medication regime without supervision (which was relevant to the elder abuse count), or to give his property away to defendant. As the prosecutor explained in her closing argument, “to find the [theft] count as charged, I have to prove to you that [Innerbichler] didn’t intend to transfer ownership of the property. [¶] So where does that get us to? The definition of consent.” Defendant certainly disputed the prosecutor’s claim that Innerbichler lacked the requisite mental capacity by 2009, but the jury’s verdicts against her on both these counts makes clear that it found against her on this dispositive issue.

And on appeal, defendant once again refrains from claiming that the value of Innerbichler’s house, his Cadillac and his money would not have added up to \$950. Instead, she takes a different tack, contending these indisputably valuable assets *were not intended to be covered by the theft charge*. She asserts that the only property she was accused of stealing from Innerbichler was the small personal and decorative items that went missing from his home during 2008. In her reply brief, she goes so far as to claim “the record does not indicate the [prosecution] made any . . . argument . . . that the Cadillac and/or the house were items . . . covered by the charges in count [2].” Her assertion is incorrect.

First, the information filed against defendant clearly suggests it was Innerbichler’s house and Cadillac, rather than the personal and decorative objects, which were the primary focus of the theft count. Specifically, the information alleges defendant’s theft took place “[o]n or about and between *February 10, 2009* and March 26, 2010.” (Italics added.) According to the testimony given by Innerbichler’s children at trial, the decorative objects had already disappeared from his home prior to December

2008, while the house itself was not deeded to defendant until *February 10, 2009* – the exact date referenced in the information. Moreover, the Cadillac was not transferred into her name until October 2009, and the \$1,000 was not transferred from Innerbichler’s account into her personal account until the day after Stephen was appointed conservator, in February 2010. Thus, each of these significant property transfers falls within the specific time frame alleged in the information, suggesting that they, rather than the personal and decorative objects, were the primary focus of this theft charge.

Moreover, as relevant to the theft charge, the prosecution’s medical expert specifically opined that by February 2009, Innerbichler was no longer competent to *engage in the sort of complex financial decisions which affected his future*. She distinguished these “complex” decisions from such simple decisions such as whether he could afford to go to lunch or to buy socks. She never claimed Innerbichler would have been incompetent to make simple financial decisions in 2009, such as whether to give away personal possessions, and offered no opinions about his competency in 2008, when the personal and decorative items apparently disappeared. Thus, this aspect of the expert’s opinion was directly applicable only to Innerbichler’s more significant property transfers in 2009 – the house, the Cadillac, his savings – and if defendant believed the only property at issue for purposes of the theft charge were the small objects that had disappeared from Innerbichler’s home, we would have expected this aspect of the expert’s testimony would have been objected to as irrelevant. It was not.

Finally, contrary to defendant’s claim, the prosecution did address defendant’s acquisition of Innerbichler’s house and Cadillac as part of his closing argument on the theft count: “So on the theft, we have the items missing from the home, *his actual home taken from him in 2009, his car . . . his savings . . .* all of which together obviously exceeded way over \$400.” (Italics added.)

Thus, the record is entirely inconsistent with defendant’s effort to portray her conviction for caretaker theft as having been based solely on her acquisition of the

small decorative and personal items which disappeared from Innerbichler's home. And because she does not – and never did – claim that the combined value of the other property she admittedly obtained from Innerbichler in 2009 and 2010, including his house, his Cadillac and his cash, might arguably be less than \$950, we conclude the instructional error was harmless beyond a reasonable doubt.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.