STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

KELLI MARIE WORTH-MCBRIDE

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 331602

Lower Court No. 13-0575-02

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: Valerie Newman (P 47291)
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STATE OF MICHIGAN

IN THE SUPREME COURT

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Supreme Court No. _____

Plaintiff-Appellee

Court of Appeals No. 328571

-vs-

Lower Court No. 13-0575-02

KELLI MARIE WORTH-MCBRIDE,

Defendant-Appellant.
_____/

CERTIFICATE OF SERVICE

TO:

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Valerie Newman, attorney at law, says that on September 6, 2017, she sent one copy of the following:

APPLICATION FOR LEAVE TO APPEAL
CERTIFICATE OF SERVICE

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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September 6, 2017

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This case presents the Court with the opportunity to address a critical issue in Michigan jurisprudence, one which the Court started to address in *People v Borom*, 497 Mich 931; 857 NW2d 2 (2014) – whether someone can be convicted of first-degree child abuse and potentially first-degree murder if the child dies, simply for leaving a child in the care of someone who has previously injured the child or under whose care the child sustained injuries.

Kelli McBride, her boyfriend and their biological son all lived together. The child died as a result of injuries inflicted by the biological father in whose care he had been left when Kelli went to get food at the local soup kitchen. The child had been harmed in the past by his father but not to the extent that Kelli or the grandmother, who saw him regularly, sought intervention.

In this bench trial the trial court specifically found that Kelli did not aid or abet the co-defendant father nor did she have the requisite intent for first-degree murder. The trial judge therefore acquitted her of first-degree murder yet found her guilty of first-degree child abuse and second-degree murder simply for leaving her child in her father's care for a short while so she could get some food. Kelli immediately reacted and told the co-defendant to stop when she saw him hitting the child and though there was no phone in the home made sure 911 was called.

The appellate court erred in its interpretation of the first-degree child abuse statute, which criminalizes overt action not omission. If Kelli is guilty of any crime it is not any crime that requires an overt act and mens rea. (Opinion attached as Appendix A)

STATEMENT OF QUESTION PRESENTED

I. WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN KELLI WORTH- MCBRIDE'S CONVICTIONS OF FIRST-DEGREE CHILD ABUSE AND SECOND DEGREE MURDER, WHERE NO EVIDENCE WAS ADMITTED EVEN SUGGESTING MS. WORTH-MCBRIDE TOOK ANY AFFIRMATIVE ACT TO HARM THE CHILD AND WHERE THE TRIAL COURT EXPLICITLY FOUND SHE DID NOT HAVE THE REQUISITE INTENT TO HARM HER CHILD TO SUPPORT A CONVICTION FOR SECOND DEGREE MURDER?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

A. DID THE PROSECUTION PRESENT INSUFFICIENT EVIDENCE TO SUPPORT MS. WORTH-MCBRIDE'S CONVICTION FOR FIRST-DEGREE CHILD ABUSE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

B. DID THE PROSECUTION PRESENT INSUFFICIENT EVIDENCE TO SUPPORT THE SECOND-DEGREE MURDER CHARGE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

C. EVEN UNDER THE PROSECUTION'S AIDING AND ABETTING THEORY, WHICH THE TRIAL COURT EXPLICITLY DISAVOWED, WAS THE EVIDENCE TO CONVICT MS. WORTH-MCBRIDE INSUFFICIENT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Judge Qiana Lillard sitting as the finder of fact acquitted Defendant Kelli Worth-McBride of felony murder and convicted her of first-degree child abuse and second-degree murder for the death of Ms. Worth-McBride's three-month old son, Joshua Wilson Jr. ("Junior").[1] (WT II 11, 16).[2] Judge Lillard sentenced Ms. McBride to twenty-five to forty years in prison for second-degree murder and fifteen to thirty years for first-degree child abuse to run concurrently. (ST 14-15). The sentence was at the top of her guidelines. Ms. McBride now appeals these convictions.

On December 19, 2012, 21-year-old Kelli Worth-McBride was living with her boyfriend, Joshua Wilson, and their 3-month-old son, Junior. (WT I 21). Ms. Worth-McBride went to a soup kitchen with a friend, Michael Lalonde. (WT I 11). Mr. Wilson stayed home with Junior. (WT I 11).

After returning from the soup kitchen with Mr. Lalonde, Ms. Worth-McBride saw Mr. Wilson hit Junior in the stomach. (WT I 20, 21). She yelled for Wilson to stop and ran towards him. (WT I 20, 24). Junior's body was limp. (WT I 24). She told her friend to call 911. (WT I 11, 20). Her friends tried to resuscitate Junior until the paramedics arrived. (WT I 11).

Detective Dinsmore from the Westland Police Department interviewed Ms. Worth-McBride and Mr. Wilson at the hospital while doctors treated Junior. (WT I 9, 28). Ms. Worth-McBride initially told police she was not home when Junior was injured and that he was not

[1] By finding Ms. McBride not guilty of felony murder and, instead, guilty of second-degree murder, Judge Lillard entered an inconsistent verdict. Even though judges sitting as the trier of fact may not enter inconsistent verdicts, "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" *Evans v Michigan*, 568 US __; 133 S Ct 1069; 185 L Ed 2d 124 (2013). "[A] trial judge that rewards a defendant for waiving a jury trial by 'finding' not guilty of a charge for which acquittal is inconsistent with the court's factual findings cannot be corrected on appeal." *People v Ellis*, 468 Mich 25, 28; 558 NW2d 142 (2003).

[2] Transcript citations are as follows: WT I – 4/30/14 Waiver Trial; WT II – 5/2/14 Waiver Trial; PE – 1/17/13 Preliminary Examination; ST – 5/29/14 Sentencing; PC – 4/29/16 Post Conviction Hearing.

moving when she returned from the soup kitchen. (WT I 11). She was arrested and re-interviewed again that night. (WT I 15-16). Detective Dinsmore yelled at her, informed her that Junior died, and showed her a picture of her dead son. (WT I 19). Ms. Worth-McBride started crying and told him that she was home when Junior became unresponsive and that she saw Mr. Wilson punch Junior in the stomach several times. (WT I 20).

When asked about the older injuries discovered during the autopsy, Ms. Worth-McBride said she had seen Wilson "throw" Junior down four times in the past. (WT I 22, 24). She also saw Mr. Wilson "bear hug" Junior to get him to stop crying three times. (WT I 22, 24). Ms. Worth-McBride demonstrated a "bear hug" on a teddy bear by folding it at the waist. (WT I 22). She told Wilson to stop when she saw him throw or bear hug Junior. (WT I 25).

Junior's paternal grandmother, Ms. Sexton, visited the baby "almost every weekend" and saw him the Sunday before his death. (PE 31, 36). [3] Junior "was fine, normal" when she visited Sunday. (PE 32). Ms. Sexton never observed any signs of abuse. (PE 32-33).

Detective Dinsmore also interviewed Mr. Wilson. (WT I 28). Initially, Wilson said that Junior became limp unexpectedly after Wilson changed his diaper. (PE 59). He later told Detective Dinsmore that he slapped Junior's stomach four to five times because Junior wouldn't drink his bottle. (PE 64). Junior made a gurgling noise, so Wilson "tried burping him… squeezed him and shook him a little." (PE 64). Ms. Worth-McBride and her friend returned from the soup kitchen. (PE 64). Wilson changed Junior's diaper. (PE 64). Junior struggled and cried; Wilson again "smacked his stomach four times" and rubbed his knuckles into Junior's chest. (PE 64-65). Ms. Worth-McBride told him to stop. (PE 64). Junior stopped breathing.

[3] Detective Dinsmore was the only witness called at trial. (WT I 12) However, the preliminary examination transcript was admitted by reference and included testimony from Ms. Sexton, Detective Dinsmore, and Dr. Jentzen. (WT I 42)

(PE 64). They called for help and tried resuscitating Junior until the paramedics arrived. (PE 64).

Dr. Jentzen conducted the autopsy on Junior. (PE 8). He opined Junior "died from hemorrhagic shock due to exsanguination or bleeding as a result of lacerations of mesentery and spleen." (PE 21). Dr. Jentzen further opined that blunt force trauma to the front of the abdomen caused the hemorrhagic shock. (PE 26). He also found "recent rib fractures that occurred contemporaneous to the time of death" and other rib, clavicle, radius, and tibia injuries that "were at least two weeks old." (PE 13-16, 23). Junior had bruising on his abdomen, back, head, and knees. (PE 9-10). According to Dr. Jentzen, "the bruising is contemporaneous to the time of death or occurred in a short period of time prior to that." (PE 24). Considering the pattern of the injuries, Dr. Jentzen concluded that the injuries were inflicted intentionally. (PE 12).

The Prosecution charged Ms. McBride with felony murder and first-degree child abuse under an aiding and abetting theory:

> [H]er obligation and her duty to protect her child was to take the child away from Mr. Wilson and to not allow her child to be with Mr. Wilson who was going to continue, and did continue to harm the child. She did not do so and, therefore, she aided and abetted in the child abuse and that therefore makes her guilty of the Felony Murder.

(WT I 46).

Judge Lillard concluded that Ms. Worth-McBride "didn't take any direct action that caused her child's death and she didn't encourage or aid and abt (*sic*.) the principal actor, being the father of the child, that actually abused the child." (WT II 18). Judge Lillard acquitted Ms. Worth-McBride of felony murder because she lacked the necessary *mens rea* (WT II 12, 19), yet convicted her of first-degree child abuse and second-degree murder. (WT II 11, 16). At a post-conviction hearing based on the Ms. Worth-McBride's claim of insufficient evidence, Judge

Lillard confirmed she convicted Ms. Worth-McBride as a principal, not as an aider and abettor. (PC 6)

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN KELLI WORTH- MCBRIDE'S CONVICTIONS OF FIRST-DEGREE CHILD ABUSE AND SECOND DEGREE MURDER, WHERE NO EVIDENCE WAS ADMITTED EVEN SUGGESTING MS. WORTH-MCBRIDE TOOK ANY AFFIRMATIVE ACT TO HARM THE CHILD AND WHERE THE TRIAL COURT EXPLICITLY FOUND SHE DID NOT HAVE THE REQUISITE INTENT TO HARM HER CHILD TO SUPPORT A CONVICTION FOR SECOND DEGREE MURDER.

Standard of Review and Issue Preservation

The standard of review for sufficiency of the evidence is *de novo*. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992). There is no issue preservation requirement, but Ms. Worth-McBride filed a timely motion in the trial court raising this issue.

Discussion

Kelli Worth-McBride was denied due process under the United States and Michigan Constitutions when she was convicted of second-degree murder and first-degree child abuse based on legally insufficient evidence. US Const, Am VI, XIV; Const 1963, art 1, § 17. The test for sufficiency of the evidence requires viewing the evidence in the light most favorable to the prosecution and determining whether there was sufficient evidence for a reasonable trier of fact to find each of the essential elements of the offense proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 318-19; 99 S Ct 2781 (1979); *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

The mere existence of *some* evidence to support the conviction is not enough; there must be "sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Hampton*, 407 Mich at 366; *Wolfe*, 440 Mich at 514. Sufficiency of the evidence

requires considering the evidence as a whole:

> The concept of sufficiency . . . is designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law. . . . In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt.

Hampton, 407 Mich at 367-68. The trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The prosecution charged Ms. Worth-McBride with felony murder and first-degree child abuse under a theory of aiding and abetting. (See WT I 46). At a post-conviction hearing on this matter, Judge Lillard clarified that she did not convict Ms. Worth-McBride as an aider and abettor, but rather as a principal. (PC 6). Under either theory, as a principal or as an aider and abettor, the evidence was insufficient to convict as Ms. Worth-McBride committed no act to harm Junior and the prosecution failed to prove that she intended to harm Junior, intended for Mr. Wilson to harm Junior, or knew Mr. Wilson would seriously harm Junior.

A. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MS. WORTH-MCBRIDE'S CONVICTION FOR FIRST-DEGREE CHILD ABUSE.

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b. The statute defines serious physical harm as "any physical injury to a child that seriously impairs the child's health or physical well-being, including but not limited to brain damage, a skull or bone

fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." *Id.*

There is no dispute that Joshua Wilson killed his son, Junior, with blunt force trauma. He confessed to police that he repeatedly slapped his son in the stomach just before he stopped breathing and Ms. Worth-McBride saw him do it. (PE 64; WT I 20). Dr. Jentzen's findings corroborated Wilson's confession. (PE 21). As soon as Ms. Worth-McBride saw Wilson hit their son, she told him to stop, ran and took Junior from Wilson, and told her friend to call 911. (WT I 20).

In order to convict Ms. Worth-McBride of first-degree child abuse, the prosecution had to prove that (1) she *intended* for Junior to suffer serious physical harm or (2) she actually *knew* Mr. Wilson would cause serious physical injury to Junior. *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

The court agreed there was no evidence to suggest Ms. Worth-McBride *intended* for Junior to suffer serious physical harm: "there is no evidence on this record to support that [Ms. Worth-McBride] left that baby with his father with the intent that he'd be killed… [or] with the intent that great bodily harm would result to him." (WT II 12). Judge Lillard framed the ultimate issue as "whether or not the defendant here had knowledge that serious physical harm *would result* to the child if she continued to allow Joshua Wilson to have access to their baby…" (WT II 10) (emphasis added). The court then relied on Junior's "injuries that were all over his body… injuries that were in various states of healing" to conclude that Ms. Worth-McBride "had to know that serious physical harm *could* result to her child if she continued to let him be in [Wilson's] presence…" (WT II 10) (emphasis added).

The court's reasoning is flawed for two reasons. First, the child abuse statute, MCL 750.136b, and the unpublished opinion that the prosecution relied on in developing its theory, *People v Borom*,[4] 2013 WL 6690728 (Docket number, 313750, decided December 19, 2013)(attached as Appendix A), are clear that first-degree child abuse is not applicable where the parent knows harm *could* result. See *Borom* at *4. Rather, the standard requires knowledge that serious physical injury *would* result. *Id.*

Second, the court retroactively attributed knowledge to Ms. Worth-McBride that does not accurately state what she actually knew on December 19, 2012, before Junior died. Many of the "injuries[5] that were all over [Junior's] body" were injuries Junior had just sustained, which caused Ms. Worth-McBride to intervene and ensure someone called 911. (WT II 8). Untrained medical professionals then attempted to resuscitate Junior before paramedics arrived, which also could have caused some of the bruising and fractures observed during the autopsy. (WT I 11). According to Dr. Jentzen, the bruises "were contemporaneous to the time of death or occurred in a short period of time prior to that." (PE 23). Further, Ms. Worth-McBride did not *know* that Junior had multiple remote fractures in his body when she left him under his father's supervision. That was learned only after the autopsy. These injuries were also not apparent to Junior's grandmother, Ms. Sexton, who saw him every weekend, including just days before he died. (PE 31-32). There is no proof that Junior displayed any external signs of injury prior to his death.

[4] Not only is *Borom* non-precedential, it is minimally persuasive since that opinion was in a completely different procedural posture than the case at hand as it involved an interlocutory appeal of the lower court's decision to bind the defendant over for trial.

[5] In rendering the verdict, Judge Lillard summarized Junior's injuries. (WT II 7) Amongst others, she cited, "cerebral anoxia with durent hemorrhage" and "bilateral retinal hemorrhage and optic nerve hemorrhage." (WT II 7). Dr. Jentzen observed brain swelling, likely caused by lack of oxygen, during the autopsy, but that was the extent of his testimony about any injuries to the brain or head. (PE 18-19) There was no testimony regarding retinal or optic nerve hemorrhages. These injuries may have been cited in the autopsy report or medical records, which were not provided to appellate counsel

The prosecution failed to present any proof that Ms. Worth-McBride *knew* Mr. Wilson would seriously harm Junior that day. There was no evidence that Mr. Wilson articulated his intent to injure Junior. He wasn't angry that day. (WT I 11). He wasn't intoxicated or in any sort of agitated mental state. (PE 64) According to Ms. Worth-McBride, "when I was home he was fine with Junior." (WT I 11).

The prosecution and the trial court bridged this insurmountable knowledge gap by seizing upon statements Ms. Worth-McBride made to Detective Dinsmore immediately after learning her son was dead. When asked about the prior injuries discovered during Junior's autopsy, Ms. Worth-McBride listed some questionable things she had seen him do in the past. Specifically, she saw Wilson "throw" Junior down or four occasions, and "bear hug" him to stop him from crying on three occasions. (WT I 22, 24). The court concluded that these non-descript actions should have alerted Ms. Worth-McBride that Mr. Wilson was necessarily going to seriously injure Junior that day.

This analysis is problematic for several reasons. First, the record does not contain specific details about the level of force Ms. Worth-McBride observed in these past incidents beyond the vague description provided by Detective Dinsmore. The fact that Ms. Worth-McBride saw Junior's father "throw" him on several occasions is open to interpretation. For instance, a colossal difference exists between the actions of a parent who playfully throws his child up in the air and catches her and a parent who angrily throws a child against an unyielding surface. Webster's Dictionary, for example, provides several varying definitions for "throw," including but not limited to the following: (1) "to propel through the air in any manner;" (2) "to drive or impel violently;" and "to put in a particular position or condition."[6] When asked to

[6] "throw." Merriam-Webster Online Dictionary. 2017. http//www.merriam-webster.com (23 Jan. 2017).

elaborate, Ms. Worth-McBride said she saw Mr. Wilson "toss him down into the crib, toss him into the car seat or into the playpen." (PE 55). Webster's Dictionary also provides multiple definitions for "toss," including, "to throw with a quick, light, or careless motion or with a sudden jerk."[7]

The term "bear hug" is also open to interpretation and degree, ranging from a hug tighter than usual to suffocation. Detective Dinsmore asked Ms. Worth-McBride to demonstrate what she saw on a teddy bear, "and she squeezed her arm up as if folding the child in half." (PE 55).

Detective Dinsmore made no effort to clarify precisely what level of force Wilson used when he "threw" or "tossed" Junior, or gave him a "bear hug." The prosecution took Ms. Worth-McBride's vague statements made at a time of grief, just after police showed her pictures of her dead son, and fashioned them into its theory. The trial court accepted this manner of proof and allowed these vague statements to bootstrap the missing evidence of Ms. Worth-McBride's *mens rea*.

The prosecution relied heavily on *People v Borom*, 2013 WL 6690728 (Docket number, 313750, decided December 19, 2013), for its novel theory of conviction. Not only is this case unpublished, non-binding, and minimally persuasive given its procedural poster at the time of the opinion; it is also distinguishable from the case at hand.

The victim in *Borom*, a 16-month-old boy, suffered second and third-degree burns on July 23, 2011,[8] followed by fatal head injuries three days later. *Borom* at *1, 7-8. It was unclear

[7] "toss." Merriam-Webster Online Dictionary. 2017. http//www.merriam-webster.com (23 Jan. 2017).

[8] The specific dates of these incidents were referenced in Justice Markman's concurrence to the Supreme Court Order denying Ms. Borom's interlocutory appeal, but directing a special verdict if the prosecution proceeded on an aiding and abetting theory. *People v Borom*, 497 Mich 931; 857 NW2d 2 (2014)

whether the child's mother, Ms. Borom, was present when the injuries occurred, but her boyfriend, 17-year-old Mr. McCullough, was present on both occasions. *Id.* at *7-8.

The prosecution presented alternative theories of Ms. Borom's culpability on all counts, including that Ms. Borom intentionally injured her child and that Ms. Borom aided and abetted Mr. McCullough, who intentionally injured the child. *Id.* This Court concluded[9] that a parent may be convicted of first-degree child abuse where the parent failed to prevent serious physical harm that she *knew* would result, and that the failure to prevent harm from someone the parent thinks *may* be dangerous does not constitute first-degree child abuse. *Id.* at *1.

Applying those principles to the facts in *Borom*, this Court held that probable cause existed to charge Ms. Borom as a principal for the burns since a reasonable juror could have concluded Ms. Borom was present and caused the burns herself. *Id.* at *7. However, this Court also held that probable cause did not exist to charge Ms. Borom based on Mr. McCullough burning her son because there was no evidence that she *knew* McCullough would harm her son at that time. *Id.* This Court reasoned that Ms. Borom's knowledge that her son previously suffered a broken arm while in Mr. McCullough's care did not translate to knowledge that he would necessarily harm her son. *Id.*

With regard to the head injuries, which came after the child suffered a broken arm and burns while in McCullough's care, this Court held that probable cause existed to charge Ms. Borom as a principal and as an aider and abettor. *Id.* at *8. At that point, Ms. Borom knew her child had suffered two serious injuries while in McCullough's care and a reasonable juror could therefore have concluded she *knew* McCullough would seriously injure her son if left in his care again. *Id.* at *8.

[9] This Court further concluded that a duty exists at common law to prevent harm to one's child and that aiding and abetting first-degree child abuse may be proven by a parent's failure to act to prevent the harm. *Id.* at *1.

These facts differ substantially from the case at hand. First, Mr. Wilson was Junior's father, as opposed to a minor, live-in boyfriend like Mr. McCullough. As such, he had the same parental rights and duties to care for Junior as Ms. Worth-McBride. She was not the sole custodial parent and had no authority to prevent Wilson from seeing his son. She could only have done so with a court order or assistance from law enforcement. Second, Ms. Worth-McBride was not aware of any serious injuries Junior suffered at the hands of his father prior to his death. Unlike Ms. Borom, Ms. Worth-McBride was not aware of any broken bones or burns Junior sustained while in his father's care. She may have observed Wilson "toss" Junior into the crib and "bear hug" him to stop crying, but the level of force she saw Wilson use was never established. Though the autopsy revealed some injuries that the pathologist opined were at least two weeks earlier, Ms. Worth-McBride was not aware of those injuries at the time. This fact is corroborated by the testimony of Mr. Wilson's mother, Ms. Sexton, who saw Junior just days before his death and thought he was fine. Finally, some of the bruising and injuries observed during the autopsy could very well have been caused by the neighbor's resuscitation efforts rather than Wilson's prior abuse.

Ms. Worth-McBride's level of knowledge at the time of Junior's death is far more similar to that of Ms. Borom at the time of her son's burns, as opposed to Ms. Borom's level of knowledge at the time of his head injuries that occurred much later. Though Ms. Borom had reason to believe McCullough *may* have been a danger to her son at the time of his burns, due to a previous broken arm, she did not *know* he would cause serious physical injury to her son. Ms. Worth-McBride had far less reason to suspect Mr. Wilson would seriously harm her child at the time of his death. She was not aware of any injury Junior suffered in his father's care.

Furthermore, unlike Ms. Borom,[10] as soon as Ms. Worth-McBride *knew* Junior was distressed, she immediately intervened and beckoned a friend to call 911.

The facts in this case simply do not fit the allegation and the trial court's conclusion. The law treats intentionally causing serious injury to a child and knowingly allowing a child to suffer serious injury with the same level of culpability: first-degree child abuse. The statute also addresses decreasing levels of culpability in second, third, and fourth-degree child abuse.

Ms. Worth-McBride's alleged misconduct should have been charged, at worst and if at all, under second-degree child abuse. The Legislature's inclusion of "omission" and "reckless act" as conduct punishable as second-degree child abuse cannot be ignored. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). If the Legislature had intended for the failure to protect one's child to be punishable as first-degree child abuse, the Legislature could have included the language from MCL 750.136b(3)(a) under the first-degree child abuse umbrella. Because the Legislature did not do this, and specifically defined the conduct involved in this matter, its intention was plain and this Court should engage in no further construction. See *Robertson*, 465 Mich at 748.

The prosecution failed to prove Ms. Worth-McBride knew Wilson would injure Junior on the day in question. He made no affirmation of his intention to do so. There is no indication that he actually intended to harm Junior prior to the point at which he became upset and struck Junior. As far as Ms. Worth-McBride (and Ms. Sexton) knew, Junior had never suffered any injury at the hands of his father. The court erroneously attributed knowledge to Ms. Worth-McBride based on information gained during the autopsy, and erroneously blurred the distinction between what Ms. Worth-McBride knew *could* happen with what she knew *would* happen.

[10] See also *People v Portellos*, 298 Mich App 431; 827 NW2d 725 (2012), where this Court cited the defendant's failure to call for assistance as evidence of her guilt.

Therefore the evidence presented was insufficient to convict, particularly where the legislature has provided a more applicable section of the statute to prosecute Ms. Worth-McBride's alleged omission: second-degree child abuse. Therefore, this Court should vacate Ms. Worth-McBride's convictions.[11]

B. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT THE SECOND-DEGREE MURDER CHARGE.

Having established that the prosecution failed to prove Ms. Worth-McBride possessed the requisite intent for first-degree child abuse, it necessarily follows that the prosecution also failed to prove second-degree murder. Whereas first-degree child abuse only requires proof that the defendant intentionally or knowingly caused serious physical harm to a child, second-degree murder requires proof of malice. Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 475 Mich 442, 463; 579 NW2d 868 (1998).

The facts and circumstances of a killing may give rise to an inference of malice. As our Supreme Court said in *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), a jury "may infer malice from evidence that the defendant intentionally set in motion a force likely to cause

[11] If this Court remands to the trial court for re-sentencing based on a lesser offense, then it should remand to a different Judge. At the post-conviction hearing, when addressing the issue of inconsistent verdicts, Judge Lillard stated, "So even if I were inclined to vacate the second degree murder conviction, which I'm not… [i]t won't change anything because she's been convicted of child abuse in the first degree which is a capital offense. The guidelines are discretionary and it's not going to change one thing as it relates to her sentence." (PC 14) When announcing the court's verdict, Judge Lillard also expressed, "I think that I suffered vicarious trauma" based on her prior experiences with child death cases. (WT II 18). Based on Judge Lillard's unequivocal position that vacating Ms. Worth-McBride's murder conviction would have no impact on her sentence, and Judge Lillard's assessment that she has been traumatized by prosecuting and/or presiding over child death cases, this Court should preclude her from any further involvement with Ms. Worth-McBride's case. See *People v Evans*, 156 Mich App 68, 401 NW2d 312 (1986); see also *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015).

death or great bodily harm." Thus in *Nowack*, where a defendant intentionally released and ignited gas into an apartment building, and the ensuing fire caused death, the Michigan Supreme Court concluded that the prosecution sustained its burden of proving malice. *Id.*

The facts of Ms. Worth-McBride's case could not be more different. As established in sub-section A, *supra*, Ms. Worth-McBride's observation of Wilson tossing Junior into a crib and bear-hugging Junior to stop crying did not translate to knowledge that Wilson would necessarily cause *serious physical injury* to Junior on the day in question. Her observations most certainly did not translate to knowledge that Junior would *die* or suffer *great bodily harm*. While Ms. Worth-McBride perhaps should have reported her concerns regarding Wilson's parenting to law enforcement, the prosecution has attempted to bridge an enormous gap from possible negligence to malice with little to serve as the foundation.

In fact, when announcing the court's reasoning for acquitting Ms. Worth-McBride of felony murder, Judge Lillard actually precluded a finding of guilt for second-degree murder (though she subsequently convicted Ms. Worth-McBride of second-degree murder, rendering an inconsistent verdict). Having concluded Ms. Worth-McBride did not intend for Junior to be killed or suffer great bodily harm, the court framed the issue as "whether she knowingly created a very high risk of death or that (*sic.*) great bodily harm knowing that such harm would likely be the result of leaving her child with her father -- with his father?" (WT II 12) She concluded, "[c]learly I don't think she did this, that she left the child with the father, in order to assist him in committing child abuse and I do think she had *some knowledge* that he was abusing the child but… I would have instructed the jury that they should also consider the lesser charge of second degree murder." (WT II 12-13).

For the same reasons articulated in sub-section A, *supra*, the prosecution failed to present sufficient evidence of second-degree murder because the prosecution failed to establish that Ms. Worth-McBride's decision to leave Junior in his father's care constituted an intent to kill, an intent to commit great bodily harm, or that she created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result.

Furthermore, the evidence presented in Ms. Worth-McBride's trial is far short of that deemed sufficient for second-degree murder in prior cases. For example, in *People v Biggs*, 202 Mich App 450, 453; 509 NW2d 803 (1993), sufficient evidence was presented of second-degree murder when the victim's mother repeatedly smothered her child then attempted to revive the child with CPR. According to this Court, "this evidence shows that defendant intentionally set in motion forces that she knew were likely to cause death or great bodily harm. The evidence was therefore sufficient for the jury to infer that defendant acted with willful and wanton disregard." *Id.* at 454.

This Court reached a similar conclusion in *Portellos*, 298 Mich App at 445. Ms. Portellos was aware of the risk posed by her breech birth. Instead of seeking medical care after the birth, she wrapped the still baby in a towel and placed the baby in a garbage bag. Like in *Biggs*, "the natural and probable consequence of those actions included death or serious injury" and Portellos "knowingly took those actions with a wanton disregard of the risks." *Id.* at 445-446. Thus, "sufficient evidence support[ed] Portellos's convictions of. . . second-degree murder." *Id*. at 445.

Conversely, in *People v Giddings*, 169 Mich App 631, 633-34; 426 NW2d 732 (1988), this Court affirmed the circuit court's decision to bindover only on involuntary manslaughter, and not second-degree murder, where the only evidence presented at the preliminary exam was

that the baby died of starvation. This Court concluded, "proof of death by starvation, standing alone is insufficient to infer the element of malice necessary to sustain a bindover for second-degree murder." *Id.* Defendants as parents had a legal duty to provide nourishment for their baby; the failure to perform the duty led to the child's death; and, the defendants were grossly negligent when they failed to seek aid in response to the baby's emaciated appearance. But those facts did not establish probable cause that the parents acted with malice. *Id.* at 634.

Here, at worst, Ms. Worth-McBride's actions are akin to the parents in *Giddings*, who failed to seek aid when they should have realized there was a problem. Perhaps Ms. Worth-McBride should have sought assistance from law enforcement based on her observations of Wilson with their son, Junior. But the position taken by the prosecution and the court is contrary to logic and precedent. No reasonable factfinder could conclude that Ms. Worth-McBride intended to kill or inflict great bodily harm upon Junior, or that she knew it was likely that Wilson would inflict great bodily harm upon Junior and she wantonly and willfully disregarded that likelihood by failing to prevent Wilson from interacting with his son (with no legal authority to do so). Accordingly, based on the trial court's inconsistent verdict and insufficient evidence, this Court should vacate Ms. Worth-McBride's second-degree murder conviction.

C. EVEN UNDER THE PROSECUTION'S AIDING AND ABETTING THEORY, WHICH THE TRIAL COURT EXPLICITLY DISAVOWED, THE EVIDENCE TO CONVICT MS. WORTH-MCBRIDE WAS INSUFFICIENT.

When announcing the verdict, Judge Lillard explicitly found that Ms. Worth-McBride did not take any direct action against Junior and that Ms. Worth-McBride neither aided nor abetted Mr. Wilson in committing his crime against Junior. (WT II 18). At the post-conviction hearing, Judge Lillard confirmed she convicted Ms. Worth-McBride as a principal and not as an aider and abettor, as the prosecution argued. (See PC 6). Just as the evidence was insufficient to convict

Ms. Worth-McBride as a principal, it is also insufficient to convict her under a theory of aiding and abetting.

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aid, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. The prosecution must establish three elements to support a conviction under the aiding and abetting theory:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

People v Carines, 460 Mich 750, 768; 597 NW2d 130 (Mich. 1999).

The plain language of MCL 767.39 requires affirmative action. The statute uses the language "procures, counsels, aid, or abets" to define the *actus reus* of the crime. In *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004) (quoting 21 Am Jur 2d, Criminal Law, § 206, p. 273), the Michigan Supreme Court described an aider and abettor as "one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by his conduct makes clear that he is ready to assist." Here, Ms. Worth-McBride did not encourage Mr. Wilson "by word or deed" to commit the crime. *Id.* In fact, she did just the opposite and stopped Wilson as soon as she witnessed the crime. (See WT I 20, 24).

A defendant present during the commission of a crime is not an aider and abettor without additional evidence of assistance. In *People v Burrel*, 253 Mich 321; 235 NW 170 (1931), our Supreme Court rejected a conviction for aiding and abetting statutory rape where the defendant drove the car around while the principal committed the act in the backseat. The defendant had

not "knowingly provided and driven his car for Bracken to commit statutory rape." *Id*. at 323. Even "[i]f it be inferred that, after the stopping the car, he knew what his guests were doing in the bank of the car, it makes no difference." *Id.* The court held: "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mental approval, sufficient, nor passive acquiescence or consent." *Id.*

The "mere presence" principle established in *Burrel* is widely accepted. See *People v Blevins*, 314 Mich App 339; __ NW2d __ (2016) ("It is well settled that mere presence is insufficient to establish guilt as an aider and abettor"). In *People v Killingsworth*, 80 Mich App 45; 263 NW 2d 278 (1977), this Court overturned a husband's conviction of aiding and abetting his wife in the commission of welfare fraud based on the mere presence rule. Even though the husband was living with his wife and knew she received public assistance benefits, the evidence did not support the conviction because "[t]here is not one shred of evidence on this record that Charles Killingsworth acted to aid or abet, or counsel or procure, the commission of the alleged crime." *Id.* at 50. Evidence of Mr. Killingsworth's mere presence while his wife committed welfare fraud was insufficient to convict.

As the trial court concluded, Ms. Worth-McBride did not aid or abet Mr. Wilson in the commission of his crime against Junior. Accordingly, there is insufficient evidence to support a conviction under an aiding and abetting theory.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant-Appellant Kelli Worth-McBride asks that this Honorable Court grant this application for leave or peremptorily vacate her convictions and sentences or grant such other relief as is appropriate.

Respectfully submitted,

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