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. 156430

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

_____/

DEFENDANT'S SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

BY: CHRISTINE A. PAGAC (P67095)
MICHAEL R. WALDO (P72342)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Table Of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

This Court's first question is premised on the parent/defendant *knowing* (1) that the other custodial parent has seriously injured their child in the past and (2) that leaving their child with the other parent will (not might, but will) result in serious physical injury or death to the child. These premises do not exist in this case. And their absence highlights just why there was insufficient evidence to convict Ms. Worth-McBride of second-degree murder and first-degree child abuse, as either a principal or an aider and abettor, for her son Junior's death at the hands of his father, Josh Wilson. She lacked the malice to support a second-degree murder conviction. Furthermore, if omissions can support a first-degree child abuse conviction (the plain language of the statute says they cannot), she lacked the higher intent to harm required under MCL 750.136b for a conviction under that statute as a principal. Omissions cannot support conviction under an aiding and abetting theory in any event.

In this case, there was no evidence that Ms. Worth-McBride knew that Mr. Wilson had seriously injured Junior before she saw him punching, and fatally injuring, Junior – an assault in which she immediately intervened when she returned home. While the autopsy report revealed healing fractures, the evidence showed (1) that Junior did not appear injured to his grandmother when she saw him as recently as a few days before his death and (2) that while Ms. Worth-McBride had seen Mr. Wilson handle the baby roughly ("tossing" and "bear hugging" him), there was no evidence that any of those incidents resulted in a serious physical injury. Ms. Worth-McBride simply cannot be, reasonably, charged with knowledge of what was in the coroner's autopsy report when she made the decision to go to the soup kitchen and leave Junior with his father.

Without this knowledge, Ms. Worth-McBride could not have *known* that Wilson would kill their son that day. A mother leaving a child with the father is not the equivalent of leaving a child in a hot car, or outside in freezing temperatures, or letting the child play with a live electrical

wire. All of these actions are inherently dangerous because science (and common sense) tells us exactly how these physical forces will harm the human body every single time. Humans are not as predictable. Absent proof that Ms. Worth-McBride knew that their child's father was an imminent threat to his safety, she cannot be criminally liable for leaving the child in his care.

Statement Of Facts

This case arises out of the tragic death of 3-month-old, Joshua Wilson, Jr. ("Junior"), at the hands of his father, Joshua Wilson, Sr. ("Wilson"). Appendix, 196a. Junior died from blunt force trauma to his abdomen, ultimately resulting in hemorrhagic shock. Appendix, 19a, 21a. Wilson struck Junior several times on the day he died, as well as the night before. Appendix, 63a-64a.

Junior's mother, Kelli Worth-McBride, was 21-years-old at the time of his death. Appendix, 186a. She, Junior, and Wilson lived together in a Westland apartment. Appendix, 31a. Ms. Worth-McBride is disabled and received social security benefits due to her disability. Appendix, 252a. Neither she nor Wilson was employed at the time of Junior's death. Appendix, 134a, 185a.

On the morning of his death, Junior appeared to be fine. Appendix, 171a. Ms. Worth-McBride left the apartment with a neighbor, Michael Lalonde, to get a meal at the local soup kitchen, while Wilson stayed behind with Junior. Appendix, 171a, 197a.

After returning from the soup kitchen with Mr. Lalonde, Ms. Worth-McBride saw Wilson hit Junior in the stomach. Appendix, 180a-181a. She yelled for Wilson to stop and ran towards him. Appendix, 52a, 180a, 184a. She was too late: Junior's body was limp. Appendix, 52a, 184a. She told her friend to call 911. Appendix, 171a, 180a. Her friends tried to resuscitate Junior until the paramedics arrived. Appendix, 171a.

Sergeant Dinsmore from the Westland Police Department interviewed Ms. Worth-McBride at the hospital for about twenty minutes while doctors treated Junior. Appendix, 126a, 169a. Ms. Worth-McBride initially told police she was not home when Junior was injured and that Junior was not moving when she returned from the soup kitchen. Appendix, 171a. According to Sergeant Dinsmore, Ms. Worth-McBride also told him during this interview that she had once thrown Junior into his bassinet, but it did not hurt him. Appendix, 193a-195a.

She was arrested and re-interviewed again that night at the Westland Police Station for less than two hours. Appendix, 137a, 175a-176a. Sergeant Dinsmore did not ask Ms. Worth-McBride about her educational background. Appendix, 187a. He never asked whether she struggled in school or needed any specific resources for special needs. Appendix, 131a, 133a. Ms. Worth-McBride told Sergeant Dinsmore she received public assistance, but he did not ask her why. Appendix, 134a. He did not know she was disabled. Appendix, 134a. He did not recall whether he asked about her relationship with Wilson, such as how long they had been together or whether he was violent towards her. Appendix, 186a, 191a.

During the interview, Sergeant Dinsmore yelled at her, informed her that Junior died, and showed her a picture of her dead son. Appendix, 179a. Ms. Worth-McBride started crying and told him that she was home when Wilson punched Junior in the stomach several times. Appendix, 180a. When she saw Wilson hit Junior, she yelled for him to stop and ran towards him. Appendix, 180a.

According to Sergeant Dinsmore, "[w]e asked about the different – he [*sic.*] injuries in different stages of healing and she said in the past she had seen him throw the child down four times..." Appendix, 181a. Sergeant Dinsmore asked her to explain what she meant and "[s]he said he would toss him down into the crib, toss him into the car seat or into the playpen." Appendix, 55a. She also saw Wilson "bear hug" Junior to get him to stop crying three times. Appendix, 182a, 184a. Ms. Worth-McBride demonstrated a "bear hug" on a teddy bear by folding it at the waist. Appendix, 182a. She told Wilson to stop when she saw him throw or bear hug Junior. Appendix, 185a.

Junior's paternal grandmother, Ms. Sexton, visited the baby "almost every weekend" and saw him the Sunday before his death. Appendix, 31a, 36a.[1] Junior "was fine, normal" when she visited Sunday. Appendix, 32a. Ms. Sexton never observed any signs of abuse. Appendix, 32a-33a. Likewise, the baby seemed fine when Ms. Worth-McBride left the apartment. Appendix, 171a.

Sergeant Dinsmore also interviewed Wilson. Appendix, 188a. Initially, Wilson said that Junior became limp unexpectedly after Wilson changed his diaper. Appendix, 59a. He later told Sergeant Dinsmore that he slapped Junior's stomach four to five times because Junior would not drink his bottle. Appendix, 64a. Junior made a gurgling noise, so Wilson "tried burping him... squeezed him and shook him a little." Appendix, 64a. Ms. Worth-McBride and her friend returned from the soup kitchen. Appendix, 64a.

Wilson changed Junior's diaper. Appendix, 64a. Junior struggled and cried; Wilson again "smacked his stomach four times" and rubbed his knuckles into Junior's chest. Appendix, 64a-65a. Ms. Worth-McBride told him to stop. Appendix, 64a. Junior stopped breathing. Appendix, 64a. They called for help and tried resuscitating Junior until the paramedics arrived. Appendix, 64a.

Wilson also told police that the night before Junior died, while Ms. Worth-McBride was out, he slapped Junior twice in the stomach. Appendix, 63a. When Junior continued to cry, Wilson "tossed" Junior into his car seat several times until Junior stopped crying and fell asleep. Appendix, 63.

Dr. Jentzen conducted the autopsy on Junior. Appendix, 8. He opined Junior "died from hemorrhagic shock due to exsanguination or bleeding as a result of lacerations of mesentery and spleen." Appendix, 21a. Dr. Jentzen further opined that blunt force trauma to the front of the

[1] Sergeant Dinsmore was the only witness called at trial. Appendix, 172a. However, the preliminary examination transcript was admitted by reference and included testimony from Ms. Sexton, Sergeant Dinsmore, and Dr. Jentzen. Appendix, 202a.

abdomen caused the hemorrhagic shock. Appendix, 26a. 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." Appendix,13a-16a, 23a. Junior had bruising on his abdomen, back, head, and knees. Appendix, 9a-10a. According to Dr. Jentzen, "the bruising is contemporaneous to the time of death or occurred in a short period of time prior to that." Appendix, 24a. Considering the pattern of the injuries, Dr. Jentzen concluded that the injuries were inflicted intentionally. Appendix, 12a.

Aside from Dr. Jentzen's autopsy, the prosecution offered no evidence as to what caused Junior's healing fractures, aside from vague statements that Junior had previously been "bear hug[ged]" and "toss[ed]" into his crib, car seat, and playpen. Appendix, 55a. No evidence was offered as to whether Junior had been seen by a doctor at any point before his death.

Similarly, no testimony was offered by Michael Lalonde, who according to Sergeant Dinsmore, was sleeping at the apartment when Wilson struck Junior. Appendix, 196a. There was no reference to any interviews conducted with the neighbors who performed CPR on Junior before the arrival of the paramedics. Appendix, 171a.

The Prosecution charged Ms. Worth-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.

Appendix, 206a. Ms. Worth-McBride rejected the prosecution's offer to plead guilty to second-degree murder with a sentence agreement of 18-40 years. Appendix, 96a. Wilson pled guilty to second-degree murder and was sentenced to 27-60 years. Appendix, 96a-97a.

After the very short waiver trial, 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." Appendix, 239a. Judge Lillard acquitted Ms. Worth-McBride of felony murder because she lacked the necessary *mens rea* (Appendix, 233a, 240a), yet convicted her of first-degree child abuse and second-degree murder. Appendix, 232a, 237a.

Judge Lillard concluded that based on the medical evidence admitted at trial, Ms. Worth-McBride "had to know that serious harm **could** result to her child if she continued to allow him to be in the presence" of his father. Appendix, 231a. In support of this conclusion, Judge Lillard relied on the injuries identified during the autopsy, including Junior's extensive bruising and healing fractures. Appendix, 229a, 231a-232a, 282a.

At a post-conviction hearing based on Ms. Worth-McBride's claim of insufficient evidence, Judge Lillard affirmed the conviction and confirmed she convicted Ms. Worth-McBride as a principal, not as an aider and abettor. Appendix, 265a, 280a. In its written opinion denying Ms. Worth-McBride's post-conviction motion, Judge Lillard clarified that she convicted Ms. Worth-McBride of first-degree child abuse based on a separate act prior to Junior's death, "antecedent to her leaving Junior alone with Joshua Wilson, Sr., on the day of his death." Appendix, 267a. In support of that conviction, the court relied on the medical evidence, which revealed "Junior had been subjected to physical abuse by his parents throughout his three months of life" and "was covered with bruises," as well as Ms. Worth-McBride's statement to Sergeant Dinsmore that she had once "thrown Junior down." Appendix, 267a.

I. Leaving A Child With The Other Custodial Parent Could, Theoretically, Support A Conviction For Second-Degree Murder If The Prosecution Meets The High Burden Of Showing That The Parent/Defendant Knew That The Other Parent Was An Imminent Threat To Their Child's Physical Safety. Omissions, However, Cannot Support A Conviction For Child Abuse, First Degree.

In first year criminal law class, law students are taught that a crime requires both an actus reus and a mens rea. This Court poses the question whether a parent's failure to act to limit the other custodial parent's rights to their child can be the actus reus for criminal liability as a principal for either child abuse, first degree, or murder in the second degree. The answer is that while it could for murder, if the parent/defendant acts with malice, an omission is punishable only as child abuse, second degree, under the statutory language of the child abuse statute, MCL 750.136b.

Standard of Review

The interpretation of statutes is a question of law and is reviewed de novo. *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004).

Murder

Historically, the catch all crime of "manslaughter" was defined to include the "negligent omission to perform a legal duty." *People v Ryczek,* 224 Mich 106, 110; 194 NW2d 609 (1923). In *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), this Court reiterated the same point, that the "negligent omission to perform a legal duty" was involuntary manslaughter. *Id.* at 536. Parents have the legal (and the moral) duty to rescue their children from peril, and the failure to take "reasonable and proper efforts" to rescue the child is "guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies." *People v Beardsley,* 150 Mich 206, 209; 113 NW 1128 (1907).

But, in *People v Holtschlag*, this Court "emphasized" that *Ryczek* was "not a definitive statement regarding the elements of involuntary manslaughter," and that the "sole element distinguishing manslaughter and murder is malice." 471 Mich 1, 21; 684 NW2d 730 (2004). "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*, 457 Mich 442, 464; 579 NW2d 868 (1998). This last type of malice is termed "depraved-heart murder." Assuming, as this Court did, that the child died as a "result of the parent/defendant leaving the child in the care of the other parent with knowledge that the other parent previously injured the child and that serious physical harm or death would be caused by leaving the child with the other parent," the mens rea of at least "depraved heart" murder would seem to be established.

These assumptions, however, are false with respect to this case, and fail to acknowledge the complications and tensions that would be present in most cases. For instance, although the question is posed as "leaving the child with the other parent," the situation would still need to be analyzed through the prism of the parental rights of the other (albeit dangerous) custodial parent. Parents have a "fundamental liberty interest" to the care, custody and management of their child." *Hunter v Hunter*, 484 Mich 247, 258; 771 NW2d 694 (2009). If the "dangerous" parent is either the child's mother, or if the child was born while the parents were married, in order to legally limit the other parent's access to the child, a parent would have to take either the desperate step of calling the police and having the child removed from the home, MCL 712.14a, or obtaining an emergency order regarding parenting time and/or custody (presumably ex parte because the Court's question describes what appears to be an imminent threat to the child's safety) *See* MCL 722.27a. The only way (legally) a parent could act unilaterally without the intervention of the state,

is if the dangerous parent is the father who signed an affidavit of parentage, and then only if there is no court order for parenting time or custody. *See* DCH-0682 term (c).

Thus, while in theory a parent/defendant could be guilty as a principal for second-degree murder for "leaving the child in the care of the other parent," this rule must be carefully circumscribed to require that the danger be imminent, and not remote, and that a parent/defendant only be required to take reasonable steps to protect their child. A "dangerous" parent is not like a hot car, as in *People v Maynor,* 470 Mich 289; 683 NW2d 565 (2004). It is a certainty that a child will be seriously injured, or killed, if left in a hot car for a period of time: the car will always be hot, and the heat will always have a specific impact on the human body. In contrast, no person can truly "know" what another will do, and so parents should not be required to be perfect predictors of the behavior of the other parent. It is not hard to imagine that a parent could have seriously injured a child in the past, gone through some sort of program even through CPS, and have regained their right to parenting time. If the parent/defendant were not successful in convincing either a police officer or a judge of the imminent danger the other parent poses, the parent would face a Catch-22: if they are right about the imminent danger, but defer to the judgment of authorities, they face not only the prospect of their child being injured, but also prosecution for "leaving" the child with the other parent.

Child Abuse

While caselaw would permit a parent to be convicted as a principal for murder under the hypothetical outlined by this Court, it would not permit prosecution as a principal for first-degree child abuse. The Legislature in enacting the child abuse statute, MCL 750.136b expressly limited criminal responsibility for "omissions" to second-degree child abuse. Statutes must be read as a whole in order to determine the intent of the Legislature. *See Robinson v City of Lansing*, 486 Mich 1, 10 n 4; 782 NW2d 171 (2010). First-degree child abuse requires that the person

"knowingly or intentionally cause[s] serious physical or serious mental harm to a child." MCL 750.136b(2). If, however, a person's "omission causes serious physical harm or serious mental harm to a child" then that person is guilty of child abuse in the second degree. MCL 750.136b(3). An "omission" is further statutorily defined as a "willful failure to provide food, clothing or shelter. . . or willful abandonment of a child." MCL 750.136b(1)(c). Finally, a "person" is statutorily defined as, essentially, someone acting "in loco parentis." MCL 750.136b(1)(d). In other words, the only people who could be charged with child abuse are ones who owe a duty to the child.

Thus, the Legislature established a scheme whereby parents could be charged with first-degree child abuse whenever their *actions* caused serious physical harm, or second-degree child abuse whenever their *omissions* caused serious physical harm. (This Court's question appears to assume legal causation, and so that is not addressed here). Leaving a child in the care of the other custodial parent is not an act, but rather an omission: a failure to move out, to seek legal assistance to terminate or at least limit parental rights, but cannot properly be characterized as an act. The cause of the harm is always the action of the other parent. Because the Legislature decided to place acts of omission and recklessness in the second-degree provision, and not the first-degree provision, that conduct is only punishable as second-degree child abuse. *See Robinson v City of Lansing,* 486 Mich at 15 (stating that the Court "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute") (quotation marks and citation omitted). Accordingly, only acts by which a defendant specifically intended to harm the child are punishable under the first-degree child abuse statute. To the extent "leaving" the child with the other parent is an act, it is reckless – gross negligence – but it is not intentional, which is required for conviction of first-degree child abuse.

II. Where A Parent Leaves A Child In The Care Of The Other Custodial Parent, With Knowledge That The Other Parent Previously Injured The Child And That Serious Physical Harm Or Death Would Result To The Child, But Provided No Other Forms Of Assistance To The Perpetrator Of The Crime, The Parent Cannot Be Guilty Of Aiding And Abetting Either Child Abuse In The First Degree Or Second-Degree Murder.

Standard of Review

The interpretation of statutes is a question of law and is reviewed de novo. *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004).

Discussion

Michigan's aiding and abetting statute cannot be read to include the failure to act according to a legal duty as the "actus reus" for the crime.

A. The Plain Language of the Statute Indicates the Legislature, since 1927, has Required Affirmative Action in Order to Impose Criminal Liability as an Aider and Abettor.

A court's goal "in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.'" *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "[W]ords and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a. Further "[j]udicial construction is not permitted." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). "It is the role of the judiciary to interpret, not write, the law." *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005).

This Court must begin with the plain language of the statute. The Michigan Legislature has spoken clearly as to what constitutes aiding and abetting:

> Every person concerned in the commission of an offense, **whether he directly commits the act** constituting the offense **or procures, counsels, aids, 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 (emphasis added)].[2]

This Court has noted that "Michigan's aiding and abetting statute has been in force and substantively unchanged since the mid-1800s." *People v Robinson*, 475 Mich 1, 7-8; 715 NW2d 44 (2006). The Legislature amended the statute in 1927 to its current form, "which substitutes 'procures, counsels, aids, or abets' for 'aid and abet.'" *Id.* at n 17.

The Legislature originally specified four *actions* by which an individual who aids and abets the commission of a crime can be charged as if the individual directly committed the offense: *procures*, *counsels*, *aids* or *abets*. In order to determine the intent of the Legislature, it is necessary for this Court to examine the plain language of the statute, and the definition of the words specifically chosen.

In 1927, the definition for each of these four words required action:

> *Procure*: I. To bring about or effect by care, contrivance, or special agency . . . hence, in general, to bring about, produce, or cause; also, to obtain or get by care, effort, or the use of special agencies or means.
>
> *Counsel*: I. To give counsel or advice to; advise; also, to urge the doing or adoption of; recommend (a plan, etc.). II. To give counsel or advice; also, to take counsel.
>
> *Aid*: I. To help; assist; afford support or relief to; second (efforts); facilitate (a process); II. To give help or assistance.

[2] Violation of MCL 767.39 is not a "separate substantive offense," but rather a "'theory of prosecution' that permits the imposition of vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). In addition, the statute "neither expressly nor impliedly limits the persons or crimes encompassed by its terms. The language of the statute applies to 'every person' who commits 'an offense.'" *People v Moore*, 470 Mich 56, 68; 679 NW2d 41 (2004).

> *Abet*: To encourage by approval or aid, esp. in wrongdoing; urge or help on mischievously; instigate; foment.

[*The New Century Dictionary*, 1927].

In *Robinson*, this Court noted that the 1927 amendment to the statute did not change the substance of the aiding and abetting statute, because the terms "procure" and "counsel" are synonyms to "aid and abet." *Robinson*, *supra*, at 8 n 17. At common law, "aid and abet" was defined as "'to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about or encourage, counsel, or incite as to its commission.'" *Id.*, quoting Black's Law Dictionary (5th ed.), p. 63. Both the common law definitions and the 1927 dictionary definitions require ***affirmative action***.

The current dictionary definitions have changed little since the statute's enactment, and still require action:

> *Procure*: 1. To obtain by care, effort, or the use of special means. 2. To bring about, esp. by complicated or indirect means
>
> *Counsel*: 7. To give advice to; advise. 8. To urge the adoption of, as a course of action; recommend
>
> *Aid*: 1. To provide support for or relief to; help; 2. To promote the progress of; facilitate; 3. To give help or assistance
>
> *Abet*: To encourage, support, or countenance by aid or approval, usu. in wrongdoing.

[*Random House Webster's College Dictionary*, 1997].

Based on the plain language of the statute and the definitions of those plain terms, the failure to act cannot be a basis for aiding and abetting. The language used by the Legislature in the statute requires ***affirmative action***, and has for the past eighty-seven years. This is in stark contrast

to the statutes of several other jurisdictions, and the language of the Model Penal Code. *See, infra*, Part II.C.

Given the statutory language of Michigan's aiding and abetting statute the answer to the Court's question is that aiding and abetting cannot be proven where a defendant fails to act according to a legal duty but provides no other form of assistance to the perpetrator of the crime.

B. This Court's Precedent Requires Affirmative Action and Intent in Order to be Held Criminally Liable as an Aider and Abettor.

In 2006, this Court noted that "there has been little case law from this Court interpreting *the language* of this statute." *Robinson, supra*, at 8 (emphasis in original). However, there are three required elements a prosecutor must prove beyond a reasonable doubt to sustain a conviction under an 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 that [the defendant] gave aid and encouragement.

Id. at 6, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

The Second Element

While this Court did not specifically define the language used in the statute, this Court interpreted the second element in *Moore, supra*: "[t]he phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *Id.* at 63.

This Court was explicit in further defining the actions that constitute aiding and abetting:

> Aiding and abetting means to assist the perpetrator of a crime. An aider and abettor is 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 the perpetrator if such assistance is needed.

Id., quoting 21 Am Jur 2d, Criminal Law, § 206, p. 273.

"[T]he amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant 'performed acts or gave encouragement that assisted.'" *Id*, quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (internal citations omitted).

The prosecutor must demonstrate that the passive parent "specifically aided the commission of" first-degree child abuse by "perform[ing] acts," encouraging, supporting, or inciting the abuse of the child. *Id.* at 70. A failure to act according to this duty does not meet the requirements of being an aider and abettor because there is no "active encouragement" by "word or deed . . . or . . . conduct." *Moore*, *supra*, at 63.

Over 80 years ago, in *People v Burrel*, this Court recognized that to be found guilty as an aider and abettor, defendants must *act*. 253 Mich 321; 235 NW 170 (1931). In *Burrel*, the defendant had driven his friend and an underage girl to a deserted road, and parked the car while his friend had sex with the complainant. *Id.* at 322. Even though the defendant was present during the commission of a statutory rape and was charged as an aider and abettor, the court reasoned there was no record evidence that he knew the crime was occurring, or intended the crime to occur, and reversed his convictions. *Id.* at 323. This Court held that "'[m]ere 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 abetter [sic] or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent." *Id.*, quoting 1 Cyc. Crim. Law (Brill), 233.

Similarly, "[s]ome form of *active*, *overt* participation toward the accomplishment of the offense is required, as is a completed crime and a guilty principal." *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982) (emphasis added). The *Carter* court, in distinguishing aiding and

abetting from conspiracy, quoted the United States Supreme Court: "[a]iding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he *consciously* shares in a criminal act, regardless of the existence of a conspiracy." *Id.* at 580-581, quoting *Pereira v United States,* 347 US 1, 11; 74 S Ct 358; 98 L Ed 435 (1954) (emphasis added).

Even if the parent knew "that an offense [was] about to be committed or [was] being committed," by the other parent that is not enough to be guilty as an aider or abettor. *Id.* at 323. Nor is "mental approval . . . passive acquiescence or consent." *Id.* "[A]ctive, overt participation" in the first-degree child abuse is necessary to be found guilty as an aider or abettor. *Carter*, *supra*, at 580. A failure to act is not active participation.

The Third Element

This Court interpreted the third element of aiding and abetting in *People v Robinson*, *supra*:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. [T]he prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Robinson, *supra*, at 15.

In *People v Nix*, this Court specifically addressed the interplay between a legal duty, the failure to act, and the aiding and abetting statute. 453 Mich 619; 556 NW2d 866 (1996). There, the defendant was charged with felony-murder, with the underlying felony being kidnapping, and first-degree premeditated murder. *Id.* at 621. The defendant's boyfriend kidnapped the decedent

and locked her in a trunk. *Id.* at 621-622. The defendant was in the car with the boyfriend and knew the decedent was in the trunk. *Id.* at 621-622, 641. While the focus of the appeal was a Double Jeopardy claim, the dissent dedicated a portion of its opinion to analyzing one's legal duty to act. *Id.* at 637-641 (Boyle, J., dissenting). The majority responded:

> The prosecution's case . . . rested entirely on the allegation that defendant acquired knowledge that the victim was confined in the trunk and became complicit in the criminal endeavor when she failed to act to free or otherwise aid the victim. And if guilt can accompany a failure to act—that is, guilt by omission—then, obviously, it can only be so because the guilty party had an obligation to act in some way, was legally compelled to act in some way, had a duty to act in some way.

Id. at 627.

Given the lack of a Michigan decision on point with the facts of this case, a review of statutes of other states, the federal statute and the Model Penal Code are instructive guides for any further analysis.

C. The Model Penal Code, and the Statutes of Several Other States Include Specific Language Imposing Accomplice Liability for the Failure to Act According to a Legal Duty, whereas the United States Supreme Court Interpreted the Federal Aiding and Abetting Statute, which is Substantially Similar to Michigan's, to Require Affirmative Action.

Unlike Michigan, several states have explicit statutory provisions imposing accomplice liability if a person fails to act when they have a legal duty and several also include an additional intent to promote/assist in the commission of the crime.

> Ala Code § 13A-2-23: A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense: (1) He procures, induces or causes such other person to commit the offense; or (2) He aids or abets such other person in committing the offense; or (3) **Having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.**

Ark Code § 5-2-403: (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
(1) Solicits, advises, encourages, or coerces the other person to commit the offense; (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or (3) **Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.**

Del Code tit 11, § 271: A person is guilty of an offense committed by another person when: (2) Intending to promote or facilitate the commission of the offense the person: a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or c**. Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.**

Haw Rev Stat § 702-222: A person is an accomplice of another person in the commission of an offense if: (1) With the intention of promoting or facilitating the commission of the offense, the person: (a) Solicits the other person to commit it; or (b) Aids or agrees or attempts to aid the other person in planning or committing it; or (c) **Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do.**

Ky Rev Stat § 502.020: (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or (c) **Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.**

NJ Stat § 2C:2-6: c. A person is an accomplice of another person in the commission of an offense if: (1) With the purpose of promoting or facilitating the commission of the offense; he (a) Solicits such other person to commit it; (b) Aids or agrees or attempts to aid such other person in planning or committing it; or (c) **Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or**

ND Cent Code § 12.1-03-01: 1. A person may be convicted of an offense based upon the conduct of another person when: a. Acting with the kind of culpability required for the offense, he causes the other to engage in such conduct; b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, **having a statutory duty to prevent its commission, he**

> **fails to make proper effort to do so**; or c. He is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.
>
> Or Rev Stat § 161.155: A person is criminally liable for the conduct of another person constituting a crime if: (2) With the intent to promote or facilitate the commission of the crime the person: (a) Solicits or commands such other person to commit the crime; or (b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or (c) **Having a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make.**
>
> Tenn Code § 39-11-402: A person is criminally responsible for an offense committed by the conduct of another, if . . . : (3) **Having a duty imposed by law** or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, **the person fails to make a reasonable effort to prevent commission of the offense.**
>
> Tex. Penal Code § 7.02: (a) A person is criminally responsible for an offense committed by the conduct of another if: (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense; (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) **having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.**
>
> (emphasis added).

The Model Penal Code § 2.06 (2001) has a similar provision:

> (3) A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or commit it, or (iii) **having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.**

In *Rosemond v United States*, 134 S Ct 1240; 188 LE2d 248 (2014), the Supreme Court of the United States interpreted the federal aiding and abetting statute, which is similar to Michigan's

statute: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 USC § 2 (2014). The Court noted that "§ 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Id.* at 1245. There are two components to the federal aiding and abetting statute: a person "(1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* Simply put, the two requirements are "*affirmative* act and intent." *Id* (emphasis added).

The Court specifically pointed out that "Congress used language that 'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'" *Id.* at 1246-1247, quoting *Reves v Ernst & Young*, 506 US 170, 178; 113 S Ct 1163; 122 LEd2d 525 (1993). Regarding the intent component, the Court noted that "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Id.* at 1248, quoting *Nye & Nissen v United States*, 336 US 613, 619; 69 S Ct 766; 93 L Ed 919 (1949).

A person must "*actively* participate[] in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 1249 (emphasis added). Thus, while the facts of *Rosemond* did not involve a question of a failure to act according to a legal duty, § 2 is substantially similar to Michigan's statute, and the Supreme Court's analysis makes it clear that ***affirmative actions*** and intent are required for accomplice liability.

Similarly, other states with statutes similar to Michigan, i.e. with no explicit provision establishing criminal liability as an aider and abettor based on a failure to act, have held that their statutes do not provide for accomplice liability based on a failure to act.

In *State v Jackson*, 137 Wash 2d 712, 725; 976 P2d 1229 (Wash 1999), the Supreme Court of Washington, sitting *en banc*, interpreted Washington's accomplice liability statute. That statute provided, in pertinent part:

> 3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it; or
>
> (b) His conduct is expressly declared by law to establish his complicity. [*Jackson*, *supra*, at 721-722, quoting RCW 9A.08.020.]

The defendant was the foster mother of the victim and was at work when the foster father was alone with the child when the child died of blunt force trauma to the head. *Id.* 716-718. In addition to the injuries that led to the child's death, there was a previous possible episode of child abuse. *Id.* Both parents were charged with child abuse and felony murder. *Id.* at 719. The trial court gave the following instruction to the jury: "unless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; *a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so*." *Id.* at 719 (internal citations omitted; emphasis in original). Both parents were convicted. *Id.*

The Washington Supreme Court held that the instruction regarding accomplice liability was erroneous and reversed the defendants' convictions:

> It is readily apparent that this statute does not extend accomplice liability to a person, much less a parent or foster parent, based on the person's failure to fulfill a duty to come to the aid of another. Because such a basis for accomplice liability does not appear in the statute, it follows that the trial court's instruction was a notable expansion on the reach of the statute. *Id.* at 722.

The court further noted that "[t]he Legislature's failure to extend liability under our accomplice statute for a parent's failure to act was not, in our judgment, a mere oversight," given that the accomplice statute was based on the Model Penal Code, which does have a provision for the failure to act according to a legal duty as a basis for accomplice liability. *Id.*

In *Martin v State*, 361 So2d 68, 69 (Mo 1978), the Supreme Court of Missouri addressed a case where both a husband and wife were convicted of the manslaughter of their young child. The testimony at trial indicated that the defendant husband was alone with the child. *Id.* at 69-70. The only notice the defendant wife had of any previous abuse was bruises on the child, which she asked the defendant husband about and he provided a "satisfactory explanation." *Id.* at 70.

The court held there was insufficient evidence to convict the defendant wife, and specifically distinguished a 1949 case from Indiana[3]:

> The only evidence connecting appellant with the crime indicated there were some old bruises on the child with the inference that appellant knew about them, and that appellant did not show concern when she saw the child at the Webster County Hospital. The State contends that a parent is charged with the custody, welfare and protection of her child and cites *Mobley v. State*, 227 Ind. 335, 85 N.E.2d 489 (1949). However, that case simply states that to actively countenance and support the doing of a criminal act by another is to encourage it within the meaning of the aiding and abetting statute and that a person encouraging the commission of a felony is guilty as a principal. The evidence in the present case does not indicate that appellant encouraged the abuse of her child by Martin, or that she was present, aiding and abetting in any abuse of the child. [*Id.*]

[3] In *Mobley v State,* 227 Ind 335; 85 NE2d 489 (Ind 1949), the Indiana Supreme Court affirmed the conviction of a mother for aiding and abetting the death of her child. Both the mother and the mother's boyfriend were convicted in the death of the child, and both had abused the child in the past. *Id.* at 341-342. The defendant mother admitted that "she was afraid Fagan [boyfriend] would leave her and that she had sacrificed the welfare of her child for the companionship of Fagan and that she knew she was guilty (of killing the child)." *Id.* at 342. The court noted that evidence tended to show that the defendant *actively* contributed to the child's death. *Id.* at 344.

In *Commonwealth v Raposo*, 413 Mass 182, 184; 595 NE2d 773 (Mass 1992), the Massachusetts Supreme Court analyzed its accessory before the fact statute[4]: "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." *Id.* at 184.

The defendant was the mother of a mildly retarded 17-year-old girl. *Id.* at 183. The mother's boyfriend told the defendant that he intended to have sex with her daughter, and did, in fact rape the daughter. *Id.* at 183-184. The defendant was convicted "on the theory that, as the mother of the victim, the defendant had a common law duty to protect her child from harm, and that her failure to take reasonable steps to fulfil this duty is an omission sufficient to make her liable as an accessory." *Id.* at 185.

The Massachusetts Supreme Court noted that even though the defendant knew about the intent of her boyfriend, and did not go to the police, such omissions still were not sufficient to convict her as an accessory, because "what is required to be convicted as an accessory before the fact is not only knowledge of the crime and a shared intent to bring it about, but also some sort of act that contributes to its happening." *Id.* at 185, 188-189. The court reversed the convictions, and declined to "read into our accessory before the fact law the principle that a mere omission by a parent to take action to protect a child, without more, is the equivalent of intentionally aiding in the commission of a felony against that child. By its very terms, [the statute] requires more than an omission to act." *Id.* at 188.

[4] The accessory before the fact statute has since been amended to a general aiding and abetting statute: "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Mass Gen Laws ch 274 § 2.

In contrast, there are jurisdictions in which the failure to act according to a legal duty, even in the absence of a statute, can serve as the basis for accomplice liability. In *People v Stanciel*, 153 Ill 2d 218, 606 NE2d 1201 (Ill 1992), the Illinois Supreme Court analyzed two consolidated cases, both of which "involve[d] the death of a child, murdered by the boyfriend of the child's mother," and that "in both cases, according to the findings of the trial court, the mother knew of the on-going abuse of the child by the murderer." *Id.* at 232. The court addressed "whether the mother's knowledge of this on-going abuse, coupled with the continued, sanctioned exposure of the child to this abuse, is sufficient to hold the mother accountable for the murder of the child." *Id.*

Illinois' criminal accountability statute (aiding and abetting) states, in relevant part: "A person is legally accountable for the conduct of another when:...(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." *Id.* at 232-233, quoting Ill Comp Stat ch 720 § 5/5-2.

The Illinois Supreme Court relied primarily on the criminal law treatise by LaFave and Scott[5] to adopt a duty to act in the context of a parent-child relationship, and that the failure to act can make a parent criminally liable as an aider and abettor. *Id.* at 236. The court held that that both defendant mothers "had an affirmative duty to protect their children from the threat posed by [the boyfriends]. Rather than fulfill that obligation, the defendants entirely ignored the danger posed by these two men, and in doing so aided them in the murders." *Id.* at 237. *See also State v Walden*, 306 NC 466, 476; SE2d 780 (NC 1982) (holding "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed."); *People v Rolon*, 160 Cal App 4th 1206; 73 Cal Rptr 3d 358 (Cal Ct

[5] W. LaFave & A. Scott, Criminal Law § 26, at 182 (1972).

App 2008) (holding that "aiding and abetting liability can be premised on a parent's failure to fulfill his or her common law duty to protect his or her child from attack . . . We emphasize, however, that liability as an aider and abettor requires that the parent, by his or her inaction, intend to aid the perpetrator in commission of the crime, or a crime of which the offense committed is a reasonable and probable outcome."). *But see People v Culuko*, 78 Cal App 4th 307, 330-331; 92 Cal Rptr 2d 789 (2000) (the jury "could not have convicted him or her of felony child abuse *as an aider and abettor* based solely on inaction" (emphasis in original)).

In addition, and perhaps unsurprisingly, the prosecution of individuals under a failure to protect theory disproportionately affects mothers. Murphy, Jane C., *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 Cornell L. Rev. 688, 719-20 (1998). However, there are reasons why a mother may not prevent abuse being committed by another person, including a lack of financial resources, the fear of increased violence to herself and her children, potential criminal liability for leaving or reporting the situation, and the fear of losing custody of her children. *Id.* Such prosecutions may actually deter women from taking positive steps toward ending abuse, as they may be prosecuted as accomplices if they choose to report the abuse. *Id.*

Similarly, failure to protect cases often rely on stereotypes of a "good mother". Fugate, Jeanne A., NOTE, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U.L. Rev. 271 (2001). One particular stereotype revolves around the idea that a mother must be "all-knowing." If a mother fails to meet these stereotypes, there is a tremendous likelihood that she will be held as equally culpable as the person who actually put hands on a child, regardless of her intent, knowledge, or actual actions. Dressler, Joshua. *Symposium: Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 Santa Clara L. Rev. 971 (2000). Such a result is fundamentally unfair.

A parent has a legal duty to protect her child, and as a society we expect this. See *People v Beardsley*, 150 Mich 206, 209; 113 NW 1128 (1907). To acquiesce to the prosecution's novel theory and allow the creation of a new category of criminal culpability without any statutory authority would open up a whole new category of criminal prosecutions where criminal defendants could be tried and convicted without any statutory authority or basis simply because that person did not act according to societal norms.

III. The Evidence Is Insufficient To Support These Convictions. There Is No Evidence That Ms. Worth-Mcbride Knew That Wilson Had Seriously Injured Junior In The Past, And She Took Steps To Stop His Fatal Assault On Their Son Demonstrating That She Had No Intent That He Be Injured By Wilson.

Standard of Review

The standard of review for sufficiency of the evidence is *de novo*. *People v Wolfe,* 440 Mich 508, 513; 489 NW2d 748 (1992).

Discussion

On the day Junior was killed, Ms. Worth-McBride saw Wilson slap their son, in the abdomen shortly after she returned from the local soup kitchen. Appendix, 184a. She ran towards them, demanded that Wilson stop hitting Junior, and yelled for a friend to call 911. Appendix, 180a, 184a. Neighbors subsequently performed CPR on Junior until the paramedics arrived. Appendix, 171a. There was no evidence that Ms. Worth-McBride knew that Wilson had seriously injured their son in the past. These facts stand in stark contrast to the hypothetical proposed in this Court's question, which assume that the defendant/parent knew of a previous serious injury and left the child in the other parent's care knowing that death or serious injury will result. Neither of these elements exist in this case.

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).

A. The Evidence was Insufficient to Convict Ms. Worth-McBride of First-Degree Child Abuse Because There was No Evidence that She Intended for Junior to Suffer Serious Harm or that She Knew Junior Would Suffer Serious Harm if Left in his Father's Care.

In order to convict Ms. Worth-McBride of first-degree child abuse, the prosecution had to prove that she "knowingly or intentionally caused serious physical... harm to [her son]." MCL 750.136b(2). The prosecution was required to establish beyond a reasonable doubt, "not only that [Ms. Worth-McBride] intended to commit the act, but also that [Ms. Worth-McBride] intended to cause serious physical harm or knew that serious physical harm would be caused by her act. *Maynor*, 470 Mich at 291. Ms. Worth-McBride's alleged "act" was her failure to protect Junior from his father.

As discussed above, Ms. Worth-McBride could not be convicted as a principal or aider and abettor for first-degree child abuse for a failure to act. But, even assuming she could be, the prosecution conceded that Ms. Worth-McBride did not intend for her son, Junior, to suffer serious harm. Appendix, 205a. Thus, in order to sustain a conviction for first-degree child abuse, the prosecution had to prove Ms. Worth-McBride **knew** Junior **would** suffer serious harm if left in Wilson's care. Black's Law Dictionary defines "**knowingly**" as: "[i]n such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was **practically certain** to result; deliberately." KNOWINGLY, Black's Law Dictionary (10th ed. 2014) (emphasis added). Similarly, MCL 8.9, the recently enacted culpability statute[6] states:

> (d) "**Knowledge**" means awareness or understanding with respect to a material element of an offense if both of the following circumstances exist:
>
> ...

[6] This statute applies to crimes committed on or after January 1, 2016. It is cited to indicate the legislature's consistent use of the term knowingly.

> (*ii*) The element involves a result of the person's conduct, and the person is aware that it is **practically certain** that his or her conduct will cause that result.

MCL 8.9 (emphasis added).

Thus, according to "common and approved usage" of the term, one knowingly causes an outcome only if she is practically certain her behavior will do so. MCL 8.3a. The evidence is insufficient to support such a finding. Ms. Worth-McBride told the officers that she had seen Wilson "throw" or "toss" Junior into his car seat, crib, and playpen about four times. Appendix, 55a, 181a-182a. Additionally, she told officers that she observed Wilson "bear-hug" Junior in order to quell his crying. Appendix 182a. She also told Sergeant Dinsmore that she once threw Junior into his bassinet, but never hurt Junior. Appendix, 193a-195a. There was no evidence that any of those acts had resulted in serious injury to Junior. While the autopsy uncovered healing broken bones, there was no evidence of (1) how the injuries occurred or (2) that Ms. Worth-McBride was aware of them. In fact, the baby's grandmother testified that he appeared fine whenever she saw him, which was regularly. Appendix, 31a. This sparse record does not support a conclusion that Ms. Worth-McBride knew Wilson would seriously harm Junior.

In *People v Borom*, this Court considered whether probable cause existed to bind Ms. Borom over for trial on felony murder and first-degree child abuse, where Ms. Borom left her child alone with her boyfriend, knowing that her child previously sustained serious physical injury while under her boyfriend's care. *People v Borom*, 497 Mich 931; 857 NW2d 2 (2014). In that case, Ms. Borom's son suffered three serious injuries in the span of two weeks, all under the care of Ms. Borom's boyfriend. First, the child broke his arm, followed by an incident where the child suffered third-degree burns in the bath tub. The final injury – blunt force trauma to his head – led

to the child's death. Ultimately, this Court declined to grant leave and allowed Ms. Borom to stand trial for felony murder, predicated on first-degree child abuse. *Id.*

Borom is distinguished from the case at hand because, unlike Ms. Borom, Ms. Worth-McBride did not know that Junior had sustained serious physical harm when left in Wilson's care. Ms. Worth-McBride may have observed questionable parenting by Wilson, but there is no indication she knew Junior had sustained *any* injury while in his father's care, let alone serious physical injuries like those sustained by Ms. Borom's son, who had suffered a broken arm and third-degree burns while in the care of her boyfriend within weeks of his fatal head injury. See *People v Borom*, No. 313750, 2013 WL 6690728 at *7 (Mich Ct App, December 19, 2013).[7]

The actions by Ms. Worth-McBride upon learning Junior was in imminent harm further showed that she did not intend for him to be harmed, and did not know that he *would* be harmed. The trial court even so found, stating that serious harm "could" result, not "would" result. Appendix, 231a.

The trial court also erred in its factual findings regarding Ms. Worth-McBride's knowledge before she left him (briefly) in Wilson's care. In its closing argument, the prosecution relied on the injuries discovered during the autopsy to support its position that Ms. Worth-McBride knew Junior had previously sustained serious physical injury at the hands of Wilson. (See Appendix, 205a: "The people's argument is based on... the medical records which indicated that this child in a mere three months suffered clavicle fractures, numerous rib fractures, was covered in bruises basically from head to toe."). But, autopsy records cannot show what Ms. Worth-McBride knew when she went to the soup kitchen for lunch that day.

[7] This is an unpublished decision from the Court of Appeals, cited for its summary of the underlying facts.

Judge Lillard erroneously relied on the extent of Junior's injuries at the time of his death to conclude Ms. Worth-McBride knew of the extent of Wilson's abuse. The court observed, "[h]is body was basically covered with bruises on the front, the back, his head. There is blood coming from his mouth. I mean there's no question that this child was very, very physically abused in his short life." Appendix, 229a. These injuries, however, were all sustained that day. Dr. Jentzen explained that Junior's extensive bruising was contemporaneous to the fatal injuries he sustained that day. Appendix, 24a. Further, Wilson's paternal grandmother, Ms. Sexton, saw Junior every weekend, including just three days before Junior's death. Appendix, 31a, 36a. She never observed any bruising or any other outward manifestation of Junior's suffering. Appendix, 32a-33a. Judge Lillard further reasoned Ms. Worth-McBride knew serious harm "could result" to Junior by leaving him in his father's presence, "given the nature of these injuries that were all over this child's body, the fact that this child had injuries that were in various states of healing..." Appendix, 231a. Dr. Jentzen assessed Junior had several healing fractures, but there was no evidence who had caused the injuries, or that they were apparent to anyone. Appendix, 16a. Junior's grandmother's testimony, in fact, demonstrates that they were not. Judge Lillard continued, "[w]hen you think about a child that had bruises all over his body and was probably in excruciating pain that makes the likelihood that he was going to cry even greater..." Appendix, 231a-232a. The court later reiterated, "there's no way it can be said that she had no idea what was being done to this baby because of the sheer nature of the injuries." Appendix, 232a. These findings, however, are not supported by the evidence.

In addition to the wrongful attribution of knowledge to Ms. Worth-McBride, Judge Lillard erroneously concluded Ms. Worth-McBride "admit[ted] to being present when Joshua Jr. was being beaten by his father both on December 18th and 19th." Appendix, 227a. Ms. Worth-McBride told Detective Dinsmore she was home on December 19, the day Junior died, and saw

Wilson strike Junior in the abdomen. Appendix, 182a-183a. She intervened and took Junior from Wilson, then sought immediate assistance for her son. Appendix, 180a, 184a. But she never indicated, and no evidence existed to support Judge Lillard's finding that Ms. Worth-McBride saw Wilson strike Junior the night before. In fact, Wilson's statement forecloses this finding; Wilson told Sergeant Dinsmore he struck Junior out of anger the night before he died while Ms. Worth-McBride was out. Appendix, 63a.

Compounding the Judge's improper and inconsistent findings, it is unclear precisely what alleged conduct by Ms. Worth-McBride served as the basis for her conviction for first-degree child abuse. When rendering the court's verdict on the first-degree child abuse charge, Judge Lillard cited the alleged criminal act committed by Ms. Worth-McBride: "in this case, leaving the child with his father or allowing the child to remain in the presence of his father." Appendix, 230a. At a post-conviction hearing based on Ms. Worth-McBride's motion to vacate her convictions, Judge Lillard clarified that she convicted Ms. Worth-McBride as a principal based on "her own action and her own inaction." Appendix, 265a. In a subsequent written opinion, Judge Lillard opined that "a rational trier of fact could have concluded [Ms. Worth-McBride] committed first-degree child abuse as a distinct act to her leaving Junior home with Joshua Wilson, Sr., particularly when she, by her own admission, threw Junior down." Appendix, 282a. Judge Lillard further explained, "this Court concluded the Defendant committed first-degree child abuse as a separate act, antecedent to her leaving Junior alone with Joshua Wilson, Sr., on the day of his death." Appendix, 284a. But, in order to be convicted of first-degree child abuse a serious injury must occur, and there was no evidence that this separate act (whatever it was) resulted in any injury, let alone a serious one.

In sum, Judge Lillard's factual findings are inconsistent with the record, and her legal conclusions are internally inconsistent. Ms. Worth-McBride did not see Wilson strike Junior the

night before he died, nor any other time. Junior was not covered in bruises before Wilson inflicted the fatal beating on the day Junior died, so these bruises have no bearing on what Ms. Worth-McBride knew. Similarly, there was no evidence anyone knew about the healing fractures before the autopsy. Finally, the Judge's own conclusion, that Ms. Worth-McBride knew Junior "**could**" have been seriously injured if left with his father (Appendix, 231a), forecloses a first-degree child abuse conviction, which requires knowledge that the injuries "**would**" be inflicted. *Maynor*, 470 Mich at 295 (emphasis added). The court's alternate theory of liability – that Ms. Worth-McBride committed first-degree child abuse based on her statement that she previously threw Junior in his bassinet – is completely devoid of any factual support. There is no indication or that Junior sustained any injury consistent with that mechanism.

Accordingly, the evidence was insufficient to convict Ms. Worth-McBride of first-degree child abuse.

B. The evidence presented was insufficient to convict Ms. Worth-McBride of second-degree murder, where no evidence exists that she acted with malice.

In line with the arguments presented in sub-section A, *supra*, Ms. Worth-McBride did not know Wilson was going to kill or seriously injure her son, or even that it was likely. As such, she lacked the malice required to support a conviction for second-degree murder. *See Goecke,* 457 Mich at 463–464.

As far as Ms. Worth-McBride knew, Junior had never sustained serious physical harm at the hands of Wilson. While she observed Wilson handle Junior in a questionable manner on several occasions, she never saw Wilson display the level of violence he inflicted on the day of Junior's death. And when she saw Wilson strike Junior, she immediately yelled for him to stop, intervened, and beckoned a neighbor to call 911. Appendix, 180a, 184a. These actions alone foreclose the conclusion that Ms. Worth-McBride acted with "with wanton and willful disregard

for human life." *Goecke,* 457 Mich at 467. As soon as she realized Junior's life was in jeopardy, she did what she could to save him.

In *Goecke*, this Court granted leave in three consolidated cases, in different procedural postures,[8] but each involving defendants who caused fatal car accidents while intoxicated, speeding, evading police, hitting other pedestrians or cars, and disobeying traffic laws. The evidence presented in those cases was sufficient to sustain a conviction or bindover for second-degree murder. The drivers' actions were far beyond mere drunk driving, but reflected a "wanton and willful disregard of the likelihood that the natural tendency of [their] conduct was to cause death or great bodily harm." *Id.* at 470.

Here, unlike the drivers in *Goecke,* Ms. Worth-McBride's inaction did not reflect an indifferent disregard for human life. Indeed, she sought assistance to help save her son as soon as she learned he was injured. If she was culpable at all, her omission may have been negligent or reckless, and possibly charged as involuntary manslaughter. But her omissions did not reflect "a wanton disregard for human life." *Goecke*, 457 Mich at 467.

Despite the court's verdict, Judge Lillard's reasoning suggests she actually concluded Ms. Worth-McBride lacked malice. Judge Lillard rendered an inconsistent verdict, acquitting Ms. Worth-McBride of felony murder based on her lack of the requisite *mens rea* for that charge, yet convicting her of second-degree murder. Appendix, 234a, 237a. The court explained:

> I don't know if she was paralyzed by fear. I don't know if it was her youth or her inexperience that caused her to fail to protect this child... Basically what I'm trying to say is I think what happened to this baby was horrible, but the only reason I did not find her guilty of homicide felony murder in the first-degree is because I don't think that she took any direct action to injure this child or abuse this child that led to his death. She just failed to protect him and I don't

[8] Two of the cases involved sufficiency challenges on appeal. One of the cases involved a pretrial challenge to the bindover.

> think that is the requisite action or requisite mens rea to support a first-degree murder conviction.

Appendix, 239a-240a.

The evidence is insufficient to sustain the second-degree murder conviction here under any theory. Ms. Worth-McBride did not behave with malice on the day her son was murdered by Wilson. The evidence does not show that she knew Wilson was an imminent threat to the baby until the moment she saw him "slapping" the infant, and she sprung into action to save the child. Her conviction must be vacated.

Judgment Appealed From And Relief Sought

Defendant-Appellant asks this Honorable Court to vacate the sentence, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Christine A. Pagac
_____
CHRISTINE A. PAGAC (P 67095)
MICHAEL R. WALDO (P 72342)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: August 9, 2018