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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs **Michigan Supreme Court No. 156430**

KELLI MARIE WORTH-MCBRIDE,
Defendant-Appellant.

Court of Appeals No. 331602
Circuit Court No. 13-000575-02

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This case has been mischaracterized. It is not a case about a woman who left her healthy child with the boy's father while getting lunch and then came home to the horrific surprise of finding the child mysteriously dead. This is a case where a woman covered up for her abusive boyfriend. Defendant ignored the fact that her three-month-old suffered nine broken bones at her boyfriend's hands. She saw nine separate acts of abuse. She witnessed her boyfriend perform two final acts of abuse on two consecutive days and then she left the victim alone with him on the second day, after he'd already abused the victim once. Then, when she came home and found he had killed the victim, she attempted to lie to the police and claim that nothing improper happened. There was no surprise involved.

To facilitate her argument, defendant's supplemental brief attempts to sanitize and minimize the extent and severity of the abuse that defendant watched codefendant, Joshua Wilson, Sr., inflict on their three-month-old baby, using terms like toss and bear-hug, that make the abuse sound affectionate, rather than descriptive terms for the bone-breaking assaults. As will be discussed later, the victim suffered nearly unbelievable damage from prolonged abuse. At the time of death, the victim had bruises that covered the surface of his body and twenty-four bone fractures. Nine of those broken bones were old enough that the breaks were in the process of healing. Of those healing fractures, several were at least two weeks old. Both the trial court and the Court of Appeals found that extreme injury to the child, combined with the abuse that defendant witnessed, were sufficient to find that the defendant knew her act of leaving the victim in Wilson's care would cause serious harm to the victim. That conclusion was clearly supported by the facts. Defendant's inferential argument, that the baby's fatal beating at the hands of her codefendant was a stunning surprise, was not supported. Rather, the victim's final beating was

simply the next in a long line of tortures defendant witnessed her codefendant inflict on the victim.

The trial court convicted defendant of second-degree murder and first-degree child abuse for her act of leaving the victim with her codefendant, despite her knowledge about the abuse he inflicted on the victim. On appeal, the Court of Appeals affirmed defendant's convictions. Upon defendant's application for leave to appeal, this Court ordered specific supplemental briefings and oral arguments.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

An otherwise permissible action, which is done in such a manner so as to breach a legal duty, is an act of misfeasance against that duty. Here, defendant, the mother of the three-month-old victim, breached her duty of care by leaving the victim with a man she knew would cause serious injury to the victim. Did defendant perform an act of misfeasance against her duty of care?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

The People answer, "Yes."

Defendant would answer, "No."

II

The evidence for a conviction of second-degree murder is sufficient if a defendant acts in wanton and willful disregard for the likelihood of a particular action to result in great bodily harm, and the victim dies as a result of the act. Here, evidence showed that defendant left the three-month-old victim with her boyfriend, despite knowing that he had savagely and repeatedly abused the victim, had abused him the previous day, had already abused him that morning, and that the victim suffered extreme injuries as a result of the abuse. The victim was killed when defendant left him with the boyfriend. In a light most favorable to the People, were the elements of second-degree murder satisfied?

The trial court did not answer this question.

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

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III

The evidence for a conviction of first-degree child abuse is sufficient if a defendant knowingly causes serious physical harm to the victim. Here, evidence showed that defendant left the three-month-old victim with her boyfriend, despite knowing that he had savagely and repeatedly abused the victim, had abused him the previous day, had already abused him that morning, and that the victim suffered extreme injuries as a result of the abuse. The victim was killed when defendant left him with the boyfriend. In a light most favorable to the People, were the elements of first-degree child abuse satisfied?

The trial court did not answer this question.

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

IV

The actus reus of aiding and abetting is satisfied if a defendant facilitates or helps another with the commission of a crime. Here, defendant provided the opportunity for the homicide when she left the victim with Wilson, while knowing that Wilson had, and would continue to, inflict serious harm on the victim. Was the actus reus of aiding and abetting satisfied by defendant's facilitation of the murder through the act of leaving the victim with Wilson?

The trial court did not answer this question.

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

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COUNTERSTATEMENT OF FACTS

On May 2, 2014, defendant was convicted of second-degree murder[1] and first-degree child abuse[2] as a result of her involvement in the abuse and murder of her three-month-old child, Joshua Wilson, Jr. Codefendant, Joshua Wilson, Sr., the baby's father, pleaded guilty to second-degree murder.

The victim, baby Joshua, was repeatedly and brutally abused by his parents, most notably his father, near the end of his young life. The victim and his parents, defendant and codefendant, all lived together.[3] Neither defendant nor Wilson was employed and defendant received a "Government check."[4] Defendant admitted that Wilson abused the victim by throwing him at his car seat and she had witnessed him do that at least four or five times.[5] Defendant admitted that she also threw the victim into his bassinette, but claimed it did not hurt him.[6] Defendant also knew that Wilson had a particularly sadistic method of dealing with crying. When baby Joshua would cry, Wilson would fold the infant in half and hold him there, until the compression in the victim's lungs would end the crying, because the victim could not breathe.[7] To normalize the practice of crushing the infant like this, defendant and Wilson named that fold-torture act "bear

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[1] MCL 750.317.
[2] MCL 750.136b(2).
[3] Defendant's Appendix, 31a.

This brief will use the Appendix attached to Defendant's Supplemental Brief for all references to the record. The abbreviation used will be "D.App." Additionally, this brief will cite to the preliminary examination transcript as part of the proofs at trial because the trial court reviewed that transcript as part of the facts of the case, with the approval of the parties. D.App., 201-02a.

[4] D.App., 185a. This fact is only relevant to the extent that it shows defendant was consistently at home with the victim during the period of time when the initial fractures were inflicted, two weeks prior to the murder, through the time he suffered from those broken bones, up to the murder.
[5] D.App., 52a.
[6] D.App., 192a.
[7] D.App., 55a.

hugging."[8] Defendant saw Wilson fold-torture the victim at least four different times.[9] Defendant personally witnessed Wilson throw the victim on the morning of the murder.[10] She witnessed defendant fold-torture baby Joshua the day before the murder.[11]

The skeletal survey performed before the autopsy indicated that baby Joshua sustained horrific injuries as a result of the abuse he suffered and that the abuse had continued for a long time. The skeletal survey showed the victim suffered from a list of "remote" or "healing" injuries—injuries not inflicted at or near the time of death—which included nine bone breaks:

- The victim had healing fractures of the both the right and left clavicles (collarbones).[12]
- Four of the victim's ribs had fractures that were healing. On the right side, there was healing fracture of the number-10 rib. The number-7 rib on the left side had a healing fracture. The number-12 ribs on both the right side and the left had healing fractures.[13]
- The victim's right wrist (the radius) showed a healing fracture.[14]
- There were healing fractures in both of the victim's knees (the tibias), where part of the bone was sheared off at the growth plate.[15]

The medical examiner, Dr. Jeffrey Jentzen, was able to give an approximate time of injury for both the four healing broken ribs and the two knee fractures, which indicated that the victim had been suffering from those broken bones for at least two weeks.[16] Some of the breaks to the victim's ribs were described "as classic abusive injuries that we see when children are--are

[8] D.App., 182a.
[9] Originally, defendant claimed that Wilson had stopped the victim from breathing with the fold-torture three times. D.App., 184-85. When questioned further, she indicated that she saw Wilson do the fold-torture on the day before the murder and "four different times." D.App., 185.
[10] D.App., 184-85a.
[11] D.App., 185a.
[12] D.App., 13a.
[13] D.App., 13a.
[14] D.App., 16a.
[15] D.App., 16a.
[16] D.App., 22-23a.

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compressed and there is pressure put over the portion of the spine that then causes fractures of the ribs."[17]

On December 19, 2012, the victim was murdered. Originally, defendant attempted to deny that anything improper ever took place.[18] She claimed that, when she left the home, the victim was fine. When she came back, the baby was not moving. Wilson gave the baby a bath to try to cool him down.

That fantasy account did not correspond with the reality of what happened. The truth was uncovered by the autopsy. The victim showed clear signs of acute abuse that directly led to the victim's death. The injuries that were contemporaneous with the victim's death included:

- There were multiple bruises and contusions "throughout all… of the body surfaces." [19] This included six areas of bruising and almost thirty separate bruises.[20] This included bruises over the sternum, the heart area, the midline of the abdomen, and the pubic bone. There were patterns of bruising over the ribs on both sides of the victim—probably inflicted by an adult squeezing the victim. There were patterns of bruising concentrated over the victim's spine. The victim suffered bruises over the kneecaps of both legs.[21] The victim had two bruises over his face.[22] In the opinion of the medical examiner, the bruises were inflicted injuries.[23]
- In addition to the healing fractures described above, the victim suffered from fifteen fresh rib fractures that were inflicted near the time of death. There were recent fractures in ribs numbered 3-10 on the right side next to the victim's spine and ribs 3-9 on the left side.[24]
- There was a 3.5-4-inch tear in the victim's mesentery (the organ that anchors the small intestine and contains blood vessels), which hemorrhaged and caused massive internal bleeding.[25]
- There was a laceration to the victim's spleen.[26]
- The victim's brain was swollen from lack of oxygen.[27]

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[17] D.App., 15a.
[18] D.App., 101-27a.
[19] D.App., 9a.
[20] D.App., 19-20a.
[21] D.App., 9-12a.
[22] D.App., 19a.
[23] D.App., 11-12a.
[24] D.App., 15a.
[25] D.App., 17a.
[26] D.App., 17-18a.
[27] D.App., 18-19a.

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The Medical Examiner testified that the victim died from blunt force trauma which resulted in "hemorrhagic shock due to exsanguination or bleeding as a result of lacerations of mesentery and spleen." The manner of death was homicide.[28]

Upon discovering evidence that defendant had lied to them—from both the injuries found on the victim and an interview with the other witness who had gone out with defendant—the police interviewed her a second time. Initially, defendant told them the same story and even laughed about it.[29] At that point, one of the officers conducting the interview yelled, saying her baby was dead, and then the officers showed her pictures of the dead baby. Defendant broke down and cried.[30] Then she explained what really happened. She said she arrived home much earlier than in her previous story and witnessed defendant hitting the baby four or five times. At this point, she intervened, told defendant to stop, and took the baby.[31] As described above, defendant also admitted to all the prior abuse, explaining that she and Wilson threw the baby and Wilson fold-tortured the baby to stop crying. She also admitted that she would have to intervene and tell Wilson to stop when he was throwing or fold-torturing the victim.[32]

The trial court found defendant guilty of first-degree child abuse and second-degree murder. To convey the trial court's findings regarding the first-degree child abuse, the judge said,

> It was clear from the testimony that was presented on this record and the exhibits admitted that this was his practice; that when the baby would cry he would fold him in half and bear hug him until he stopped crying. Anyone knows that a normal three month old baby is going to cry. When you think about a child that had bruises all over his body and was probably in excruciating pain that

[28] D.App., 21, 26a.
[29] D.App., 179a.
[30] D.App., 179a.
[31] D.App., 179-80a.
[32] D.App., 53a.

> makes the likelihood that he was going to cry even greater and that he would be subjected to the practice of bear hugging that the defendant had previously witnessed, and I think under those circumstances there is sufficient evidence to find the defendant guilty of child abuse in the first degree, and that is my finding at this time.[33]

The trial court, however, found defendant not guilty of first-degree felony murder, even though it found defendant guilty of both second-degree murder and the predicate felony of first-degree child abuse. Instead, the trial court convicted defendant of the lesser charge of second-degree murder. The defense specifically requested that the trial court consider second-degree murder.[34] In regards to finding defendant guilty of second-degree murder, the trial court made the following finding: "I think [defendant's] actions showed a wanton and willful disregard of the natural tendency of the conduct that she knew was going on would result in that child being harmed…."[35]

After the trial, both the People and the defense agreed that the trial court's original verdict was not consistent, considering that the court expressly found all the elements for first-degree felony murder. Upon the defense motion to vacate defendant's convictions, the trial court indicated that it found defendant had committed first-degree child abuse for a different act, previous to the murder.[36] According to the record, that was defendant's admitted act of throwing the victim; one of the acts that could have corresponded with the victim's numerous healing fractures. The trial court explained that this reading made the verdict consistent.

Defendant appealed the conviction and the Court of Appeals affirmed her convictions. This Court ordered specific briefings and oral argument on whether to grant defendant's

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[33] D.App., 231-32a.
[34] D.App., 218a.
[35] D.App., 237a.
[36] D.App., 284a.

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application for leave to appeal or to take other action. This Court specifically requested that the briefs answer the following questions:

> (1) whether a parent/defendant, either as a principal or as an aider and abettor, can be convicted of first-degree child abuse or second-degree murder when a child suffers serious physical harm or death 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; and (2) if so, whether the evidence is sufficient in this case to establish the defendant's knowledge that serious physical harm or death would be caused by leaving the child with the other parent.[37]

The People file this supplemental brief to answer the questions presented by this Court and to respond, where proper, to the defendant's supplemental brief.

[37] *People v Worth-McBride*, 501 Mich 1055 (2018).

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ARGUMENT

I.

An otherwise permissible action, which is done in such a manner so as to breach a legal duty, is an act of misfeasance against that duty. Here, defendant, the mother of the three-month-old victim, breached her duty of care by leaving the victim with a man she knew would cause serious injury to the victim. Defendant performed an act of misfeasance against her duty of care.

Standard of Review

This Court reviews questions regarding both common law and statutory law de novo.[38]

Discussion

Defendant is not entitled to relief, because in a light most favorable to the People, the evidence was sufficient to establish all the elements of both first-degree murder and second-degree murder. In this Court's order scheduling oral argument on the question of whether to grant the application or take other action, it directed the parties to answer the following question:

> [W]hether a parent/defendant, either as a principal or as an aider and abettor, can be convicted of first-degree child abuse or second-degree murder when a child suffers serious physical harm or death 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.[39]

The answer to this Court's question is: "Yes." A parent/defendant can be convicted of second-degree murder and first-degree child abuse when: (1) a child dies as a result of being left with an abusive parent, and (2) the defendant has knowledge that leaving the victim with the abusive parent will cause serious physical harm or death.

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[38] See *People v Moreno*, 491 Mich 38, 44 (2012).
[39] *Worth-McBride*, 501 Mich 1055.

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This Court's second question directed to the parties, based contingently on the first was, "whether the evidence is sufficient in this case to establish the defendant's knowledge that serious physical harm or death would be caused by leaving the child with the other parent."[40] Again the answer to that question is, "Yes." The evidence is sufficient to establish defendant, in this case, knew that harm would result from her act of leaving the victim with the other parent who was in the midst of repeatedly inflicting serious injuries on the victim. The sufficiency of the mens rea in this case will be discussed in sections II and III below.

Defendant's act of leaving the victim, her three-month-old son, with a man she knew to be abusive was an act of misfeasance, the commission of an otherwise permissible act that violates a legal duty, which had both a physical and a legal dimension. This act of misfeasance serves as the actus reus element in both of defendant's convictions.[41] Although defendant assumes, without analysis, the self-serving conclusion that leaving the victim with codefendant Wilson was an act of omission, that conclusion is both incorrect and ultimately, immaterial. This portion of the brief will discuss: (1) whether the acts taken by defendant in this case were acts of omission (nonfeasance) or acts of commission (misfeasance or malfeasance) and (2) the rules regarding the use of acts of omission as the actus reus in crimes.

A. Leaving a child in the custody of a known abuser constitutes an act of misfeasance, breaching the parental duty of care.

Defendant's act of leaving the child in the care and under the control of a known abuser constituted an act of misfeasance, which was a breach of the parental duty of care. As with all acts of misfeasance, defendant performed an otherwise permissible act in an impermissible

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[40] *Id.*

[41] Notably, the trial court provided a different actus reus for the first-degree child abuse conviction, after a post-conviction hearing. The People will briefly discuss that actus reus in the section III, below.

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manner. Unlike defendant's assertion, this misfeasance was not an omission to perform her parental duties. Acts of omission, when discussed in the context of a legal duty, are also called acts of nonfeasance. But the People's theory, the facts presented at trial, and the trial court's factual findings were consistent in the conclusion that defendant committed misfeasance, an act of commission, which resulted in the abuse and death of the victim. It is uncontested that defendant left the victim under the control and in the care of codefendant Wilson on the day Wilson beat the child to death. The facts are similarly clear that, at that very time, the victim was already suffering from nine bone breaks, which had been inflicted by Wilson, and several of these fractures were at least two weeks old.

Defendant performed an act of commission when she left the victim in the custody of codefendant Wilson. There was both a physical and a legal dimension to this affirmative act.

The physical dimension of defendant's act of commission is simple and obvious. Defendant physically left the victim at the house while she departed. An "act" is merely "anything done…; deed; performance."[42] "Commission" as used in this context is "[t]he act of doing or perpetrating."[43] The simple, geographical, definition for "leave," is "to go out of or away from, as a place."[44] Clearly, leaving home without taking the victim was the affirmative perpetration of a physical act or deed. That issue should not be in dispute.[45]

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[42] ACT, Dictionary.com Unabridged, Random House, Inc., accessed August 22, 2018, <https://www.dictionary.com/browse/act>. (Present and future tense definitions omitted.)

For the recipient's ease of use, this brief will utilize the online versions of the Random House Dictionary (Dictionary.com) and the Oxford Dictionary (OxfordDictionaries.com), when the colloquial definition is appropriate and provide full internet addresses for each definition used. Black's Law Dictionary will be used when a word has a particular legal usage or is a term of art.

[43] COMMISSION, Black's Law Dictionary (10th ed. 2014).

[44] LEAVE, (Leave[1]), Dictionary.com Unabridged, Random House, Inc., accessed August 22, 2018, <https://www.dictionary.com/browse/leave>. See also, LEAVE, (Leave[1]),

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Defendant's act of "leaving" involved a simultaneous legal dimension. When she physically departed, she left the victim behind, entrusting codefendant Wilson with her responsibilities. As applied to the legal act, the applicable definition for "leave" is: "Deposit or entrust to be kept, collected, or attended to."[46] Stated by a different dictionary, this definition for "leave" is "to give in charge; deposit; entrust."[47] This, again, is an act of commission. A parent's act of "leaving" a young child somewhere, with or without other people present, is a legal act. When the act leaves the child in a dangerous circumstance, it becomes an act of misfeasance. In *People v Maynor*, this Court implicitly recognized that leaving children somewhere—in that case, a hot car—was a legal act sufficient to support a conviction for first-degree child abuse, when accompanied by the appropriate level of intent.[48]

The reason that leaving a child constitutes a legal act of misfeasance, rather than just a physical act of commission, pertains to the duties that parents have to their young children. Parents are bound by the common law duty of care. In *People v Beardsley*, this Court's applied

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OxfordDictionaries.com, Oxford University Press, accessed August 22, 2018, <https://en.oxforddictionaries.com/definition/leave> ("*[with object]* Go away from").

[45] It is unclear whether defendant intends to claim that the physical act of leaving cannot be an act of commission, a position which would prove untenable. In her supplemental brief, defendant claimed that "[t]o 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." This statement, at least implicitly, acknowledges that "leaving" is an act of commission.

The People, obviously, disagree with the assertion that the existence of any particular actus reus element legally mandates any finding (or lack of finding) regarding the element of mens rea. Although a single actus reus might be shared by multiple defendants in different cases, the differences in mens rea can often mean the difference between complete innocence and a capital felony. This case is no different. The trial court made factual findings regarding defendant's intent, along with the findings about her act. The two issues are separate.

[46] LEAVE, (Leave[1]), OxfordDictionaries.com, Oxford University Press, accessed August 22, 2018, <https://en.oxforddictionaries.com/definition/leave>.

[47] LEAVE, (Leave[1]), Dictionary.com Unabridged, Random House, Inc., accessed August 22, 2018, <https://www.dictionary.com/browse/leave>.

[48] *People v Maynor*, 470 Mich 289, 295–97 (2004).

the common law regarding the duty of care.[49] The *Beardsley* Court indicated that when a person, through a "domestic relationship," takes on the "custody and care of a human being," who is an infant, that person "is bound to execute the charge with proper diligence."[50] As with any other duty imposed by the statutory or common law, breaches of the duty of care may come in the form of malfeasance,[51] misfeasance,[52] or nonfeasance.[53] Although the facts indicate that defendant breached her duty of care in all three methods, through three different acts, malfeasance and nonfeasance are not at issue for the purposes of this subsection.[54]

Defendant's act of leaving the three-month-old victim under the control of, and in the care of, someone she had just witnessed abusing him was an act of misfeasance. Misfeasance is the performance of a deed that would otherwise be permissible, but is done in such a way as to violate a duty. Misfeasance is clear when viewed in the context of parental duties. Stated simply in misfeasance terms, a parent may leave a child in another person's care as part of their exercise

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[49] *People v Beardsley*, 150 Mich 206, 209–10 (1907).
[50] *Id.*
[51] "Wrongdoing…." MALFEASANCE, OxfordDictionaries.com, Oxford University Press, accessed September 13, 2018, <https://en.oxforddictionaries.com/definition/malfeasance>.
[52] "A transgression, especially the wrongful exercise of lawful authority." MISFEASANCE, OxfordDictionaries.com, Oxford University Press, accessed September 13, 2018, <https://en.oxforddictionaries.com/definition/misfeasance>.
[53] "Failure to perform an act that is required by law." NONFEASANCE, OxfordDictionaries.com, Oxford University Press, accessed September 13, 2018, <https://en.oxforddictionaries.com/definition/nonfeasance>.
[54] Malfeasance—the direct commission of an impermissible act—was implicated by defendant's own confession to throwing her child. The trial court held, after a post-trial hearing, that it based its decision on the first-degree child abuse conviction on a theory that defendant directly harmed the victim by throwing him. While the facts on the record sufficiently support this conclusion, it is hard to see this holding from the trial court's initial findings. Further, the issue of malfeasance is separate from the questions this Court provided.

Similarly, this subsection will not deal with nonfeasance. Nonfeasance is, in this case, synonymous with the term "act of omission." Defendant committed an act of nonfeasance, when she declined to take any affirmative steps to protect the victim from the serious harm that she knew was occurring.

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of parental responsibilities, but a parent commits an act of misfeasance if they leave a child in the care of a known child abuser. Some examples of proper execution of parental duties contrasted with misfeasance against the parental duty of care include:

- A parent may permissibly discipline a child. But a parent breaches the duty of care through an act of misfeasance when the "discipline" is unreasonable and abusive.[55]
- A parent may permissibly leave young children unattended in a safe area for a short while. But a parent breaches the duty of care through an act of misfeasance by leaving children unattended in a hot car for more than three hours.[56]
- A parent may permissibly leave the child in the care of another person who will care for and protect the child. But a parent breaches the duty of care through an act of misfeasance by leaving the child with someone who they know will abuse the child.[57]

Committing an act of misfeasance by "leaving" a child somewhere is a serious issue. When a parent leaves, they are simultaneously exercising parental control over the child by making them remain. Young children are not free to come and go as they choose. Instead, they will stay at the location where they are placed and will be subject to the care or the dangers present in that location. Here, the victim was a three-month-old infant with nine broken bones. He was totally helpless. He had no method of determining whether he would go or stay. Defendant made that choice for him when she left him with Wilson, his abuser. Cases from this and other states illustrate the dark history of abuse-by-leaving. Young children left in a hot car will remain while they slowly die of heat exposure.[58] A young child left alone with a violent dog

[55] See *People v Sherman-Huffman*, 466 Mich 39, 42 (2002).
[56] See *Maynor*, 470 Mich 289.
[57] See *Muehe v State*, 646 NE2d 980, 983 (Ind Ct App, 1995); *State v Walden*, 306 NC 466 (1982); *People v Rolon*, 160 Cal App 4th 1206 (2008).
[58] See *Maynor*, 470 Mich at 291–92.

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will be helpless to defend itself.[59] A child left in the hands of a known sexual predator will be sexually abused.[60] Children left with known physical abusers will often be killed.[61]

When a parent leaves the child somewhere, with or without another person present, the parental duty of care does not dissipate.[62] If the duty did dissipate whenever a parent left a child somewhere, both this Court's *Maynor* case and the mountain of out-of-state cases based on the application of common law parental duties would all be wrongly decided.

The duty of care is not removed even when the child is left in the care of the other parent. As shown through the decisions of other states, parents remain criminally liable for a breach of the duty of care through malfeasance, misfeasance, or nonfeasance, even if they show that the other parent was in charge of the child. Similarly, the duty for care is not abrogated by a showing that that the other parent breached their own duty of care to the child. In *State v Zobel*, the South Dakota Supreme Court held that "[E]ach spouse has an equal duty to support and protect the child and cannot stand passively by and refuse to help them when it is reasonably within their power to do so."[63] In *Muehe v State*, the Indiana Court of Appeals found a defendant-mother criminally liable for failing to prevent her husband, the victim's father, from

[59] See *People v Hayashi*, unpublished case of the Cal Ct. App, 2016 WL 1355574, issued April 5, 2016 (Docket No A142434) (a toddler, who was left alone, got into a garage with violent dogs and was mauled to death); *State v Hardy*, 97 NE3d 838 (Ohio Ct App, 2017) (a grandmother left a child alone with a pit bull, which mauled the child to death when the grandmother returned).
[60] See *Muehe*, 646 NE2d at 983.
[61] See *Rolon*, 160 Cal App 4th 1206.
[62] The duty to care for a child is intrinsic in the parental rights and responsibilities; it does not diminish merely because a child temporarily is left at a different location or with a different person than the parent. In order for the duty of care to be removed, parental rights and responsibilities must be terminated.
[63] *State v Zobel*, 81 SD 260, 274 (1965), overruled in part on a different issue by *State v Waff*, 373 NW2d 18 (SD, 1985).

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sexually abusing her daughter.[64] The defendant argued that she had no right to prevent the victim's father, who had partial custody, from accessing and abusing the victim. The Court held that the defendant was liable because the situation was no different from a case of physical abuse where "[the defendant] would have a clear duty to remove her daughter from the situation in order to avoid injury, or at the very least, to report her suspicions to the proper authorities."[65] The Indiana Supreme Court held that even when a defendant can show that the other parent breached their duty, "the criminal neglect of one parent [the breach of parental duty] is no excuse for the criminal neglect of the other."[66] The Texas Court of Criminal Appeals held, based on a statute that merely codified parts of the common law duty of care, "unless it is shown that one parent has sole and exclusive care, custody, and control of a minor child, both parents may be guilty" of breaching the duty of care.[67]

The above cases all indicate the same principle; a parent owes a duty of care to her child and cannot rely on another parent's presence to nullify her own duty of care. An act of misfeasance against the duty of care is not cleansed by an act of malfeasance committed by the other parent, especially when the parent charged with misfeasance had knowledge that the other parent would commit the malfeasant act.

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[64] *Muehe v State*, 646 NE2d 980, 983 (Ind Ct App, 1995). Even though the source of the duty was different in *Muehe*, the reasoning that one parent cannot ignore the other parent's abuse of their child is equally applicable to this case.
[65] *Id.*
[66] *Eaglen v State*, 249 Ind 144, 150 (1967). *Eaglen* was a case regarding the application of a codified portion of the common law duty of care. The applicable duty, in this case, is not relevant. This case is relevant because the *Eaglen* Court acknowledged that the parental duty of care is owed to the child by each parent individually.
[67] *Harrington v State*, 547 SW2d 616, 619 (Tex Crim App, 1977). In this case, the part of the duty of care that was breached was the duty to provide, rather than the duty to protect. But as they are both part of the parental duty to care for a child, the analysis is the same.

Ultimately, defendant was incorrect to classify her act of leaving as an "omission" or nonfeasance. Although nonfeasance certainly occurred at other points, leaving the victim with Wilson was an act taken within defendant's authority as a parent but the act was impermissible because defendant knew Wilson would continue abusing the victim. Defendant's act of "leaving" the victim under the control of defendant resulted in a breach of the duty of care, creating a paradigmatic act of parental misfeasance.

B. Acts of omission, or nonfeasance, while not typically punished in the criminal law, can be sufficient to make out the actus reus of a crime when the defendant omits to perform a legal duty with the accompanying criminal intent.

As discussed above, defendant clearly performed an act of misfeasance when she left the victim with Wilson while knowing that Wilson would continue to abuse the victim. Defendant asserts, however, that leaving the victim with her codefendant was an act of omission, which she then claims cannot make out the actus reus for first-degree child abuse or aiding and abetting. Although part of defendant's argument involves the wording of the statutes, the main thrust of the argument appears to be the belief that an act of omission cannot satisfy the actus reus of a crime, unless that crime specially says that the actus reus can be satisfied by acts of omission. Defendant is wrong. As a general rule, the actus reus element of crimes committed in Michigan can be satisfied by acts of omission or nonfeasance. The legislature specifically codified this concept as the norm for all of Michigan's criminal statutes when it wrote, at the beginning of the Michigan Penal Code, "[t]he term 'act' or 'doing of an act' includes 'omission to act'."[68] More recently, the new—and inapplicable[69]—culpability statute reaffirmed the legislature's intent that

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[68] MCL 750.10.

[69] As defendant notes, the 2015 Culpability Statute, MCL 8.9, is completely inapplicable to the case at hand. First, the statute directly states that it "does not apply to, and shall not be construed to affect, crimes under… [t]he Michigan penal code…MCL 750.1 to 750.568." MCL 8.9(7), (7)(b). Since the crimes in question here are MCL 750.317 and MCL 750.136b(2), the

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"[t]he person's criminal liability is based on conduct that includes either a voluntary act or *an omission to perform an act or duty* that the person is capable of performing."[70]

To whatever extent defendant relies on the argument that nonfeasance, or the omission to fulfill her duty to protect the victim, is not a recognized form of actus reus in Michigan, she is incorrect. Merely reclassifying defendant's misfeasance as nonfeasance or omission cannot relieve her of criminal liability. Obviously, the actus reus of most crimes occurs based on the commission of some prohibited act. Nevertheless, the failure to perform some lawfully required act, an act of nonfeasance, may also make up the actus reus of a crime. According to the widely quoted *Substantive Criminal Law* treatise by Wayne R. LaFave,

> Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself…. *But there are situations which do give rise to a duty to act.*[71]

One of the situations where the common law imposes an affirmative duty is in regards to the legal duty parents have to care for their young children. Part of this duty of care is the duty to act to protect a child from harm and abuse. LaFave explains the duty to act as follows.

> The common law imposes affirmative duties upon persons standing in certain personal relationships to other persons—*upon parents to aid their small children*, upon husbands to aid their wives, upon ship captains to aid their crews, upon masters to aid their servants. Thus a parent—or, indeed, another "person standing in loco parentis"—may be guilty of criminal homicide for failure to call a doctor for his sick child, *a mother for failure to prevent the fatal beating of her baby by her lover*, a husband for failure to aid his imperiled wife, a ship captain for failure to pick up a seaman or passenger fallen overboard, and an employer for

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Culpability Statute does not apply. Second, the Culpability Statute specifically states that it will not apply to any crime that took place before January 1, 2016. MCL 8.9(1). Here, the victim was murdered on December 19, 2012. Again, the Culpability Statute does not apply.

The People exclusively cite MCL 8.9 to show the legislature's continued support for classifying common law acts of omission as "acts" for the purpose of criminal liability.

[70] MCL 8.9(1)(a) (emphasis added).

[71] LaFave, 1 Subst Crim L § 6.2(a) *Duty based upon relationship*, (3d ed) (emphasis added, footnote citations omitted).

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failure to aid his endangered employee. Action may be required to thwart the threatened perils of nature (e.g., to combat sickness, to ward off starvation or the elements); *or it may be required to protect against threatened acts by third persons*.[72]

Michigan maintains the common law where not directly superseded by statutory law or modified by this Court. Accordingly, acts of nonfeasance—where a defendant fails to perform a required legal duty—may permissibly make out the actus reus for a crime, if the defendant also had the required mens rea.[73] Stated differently, the law treats acts of omitting to perform a legal duty as affirmative acts, for the purposes of establishing a crime.[74] This rule is one of simple function. Without criminal liability for failure to fulfill legal duties—whether in the statutory law or the common law—there would be no repercussions for criminals who rely on the betrayal of legal trust to commit crimes. Examples of this behavior include:

- A security guard, who has the duty to lock up a bank, commits a criminal act of nonfeasance if she declines to lock up the bank because she was paid to facilitate a robbery.

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[72] LaFave, 1 Subst Crim L § 6.2(a)(1) *Duty based on relationship,* (3d ed) (emphasis added, footnote citations omitted).

[73] See LaFave, 1 Subst Crim L § 6.2 *Omission to act*, (3d ed).

> More difficult, however, are crimes which are not specifically defined in terms of omission to act but only in terms of cause and result. Murder and manslaughter are defined so as to require the "killing" of another person; arson so as to require a "burning" of appropriate property. Nothing in the definition of murder or manslaughter or arson affirmatively suggests that the crime may or may not be committed by omission to act. *But these crimes may, in appropriate circumstances, be thus committed.* So a parent who fails to call a doctor to attend his sick child may be guilty of criminal homicide if the child should die for want of medical care, though the parent does nothing of an affirmative nature to cause the child's death. *Even accomplice liability may be grounded in an omission to act, as may liability for an attempt.* (Emphasis added, footnote citations omitted.)

[74] See MCL 750.10. The criminal code specifically classifies "acts of omission" as "acts" for the purposes of criminal liability. Obviously, if the rule was that acts of nonfeasance could not support criminal convictions unless they were specifically enumerated, this part of the statute would be rendered void. But the simple fact is that acts of omission or nonfeasance to duty were recognized under the common law and were reaffirmed by the legislature's election to classify acts of omission as "acts."

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- A father, who has the parental duty to protect his eight-month-old son, commits a criminal act of nonfeasance if he rids himself of parental burdens by declining to pick up the child and instead watches the baby crawl into a busy street and be killed by a vehicle.

- A husband, who has the duty to care for a mentally disabled wife, commits a criminal act of nonfeasance if he decides to try to collect on life insurance by declining to feed her.

In each of the above hypothetical situations, the act in question is the omission or nonfeasance of a person to fulfill a legal duty. In the absence of criminal liability for acts of omission, each of these situations would be, shockingly, a legal act.[75] If acts of omission were permissible,[76] this would create an unconscionable inconsistency. Without nonfeasance liability, an outsider performing the minimal act to achieve the same result—a thief breaking through a bank's locked door, a stranger pushing a child into a busy street, or a kidnapper starving a victim—would be criminally liable; whereas an insider, who accomplishes the same result by betrayal of trust, would be insulated from the full criminal repercussions.

Here, defendant was the mother of the three-month-old victim. It is unquestionable that she owed a duty of care to the victim. Likewise, it is clear that she owed the victim a duty to act to protect the victim from danger. If defendant breached her duty of care to the victim by refraining from doing an act—such as protecting him—she is criminally liable for nonfeasance.

The act that was the subject for both the People's theory and the trial court's finding of guilt was an act of clear misfeasance. Nevertheless, defendant cannot insulate herself from liability for her actions by merely reclassifying her act from misfeasance to nonfeasance. Either

[75] The acts listed above are each acts of nonfeasance where the actus reus of a crime can be fulfilled by the breach of a legal duty. Although these acts of nonfeasance could be punished by statutes that are specific to the circumstance or the deed, they are all very clearly acts of omission.

[76] If acts of omission and nonfeasance were generally permissible, associated legal duties would be nonexistent. A legal duty only exists to whatever extent it is legally binding upon the responsible party.

way, the important consideration is the intent with which defendant committed the act that broke the duty. Both nonfeasance and misfeasance can make out the actus reus of a crime.

Conclusion

Defendant left the victim in the care of someone she knew was abusive and had seriously injured the victim. This affirmative action constituted an act of misfeasance against the duty of care. The sufficiency of the evidence of both of defendant's convictions must be viewed in the light of what she did, rather than what she failed to do. But, even if she were only responsible for an act of omission, or nonfeasance to her duty of care, nothing about her criminal liability would change.

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II.

The evidence for a conviction of second-degree murder is sufficient if a defendant acts in wanton and willful disregard for the likelihood of a particular action to result in great bodily harm, and the victim dies as a result of the act. Here, evidence showed that defendant left the three-month-old victim with her boyfriend, despite knowing that he had savagely and repeatedly abused the victim, had abused him the previous day, had already abused him that morning, and that the victim suffered extreme injuries as a result of the abuse. The victim was killed when defendant left him with the boyfriend. In a light most favorable to the People, the elements of second-degree murder were satisfied.

Standard of Review

This Court reviews questions of statutory construction de novo.[77] When the language is clear, this court will "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written."[78]

In reviewing a claim that there was insufficient evidence to support a conviction, the reviewing court must consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.[79] The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the verdict.[80] The scope of review is the same whether the evidence is direct or circumstantial.[81]

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[77] *People v Morey*, 461 Mich 325, 329 (1999).
[78] *Id.*
[79] *People v Nowack*, 462 Mich 392, 399 (2000); *People v Petrella*, 424 Mich 221 (1985).
[80] *Nowack*, 462 Mich at 400.
[81] *Id* at 399.

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Discussion

Defendant is not entitled to relief, because in a light most favorable to the verdict, the evidence was sufficient to establish all the elements of second-degree murder. Here, the evidence showed the extensive torture inflicted on the victim, by Wilson in the presence of defendant, included fold-torturing and throwing the three-month-old victim. These continued abuses resulted in nine broken bones, some of which were approximately two weeks old on the day of the murder. The day before the murder, defendant witnessed Wilson fold-torture the victim. The morning of the murder, defendant witnessed Wilson throw the victim. Then, without any indication that Wilson would stop inflicting serious bodily injuries on the victim, she left the child there, under his power, all the while knowing the abuse and the accompanying serious injuries would continue to occur.

A. The act of intentionally leaving an infant with another parent who has recently inflicted serious harm on that infant, with knowledge that the natural tendency of that act is to cause death or great bodily harm, and death occurs, is sufficient to establish the elements for second-degree murder.

Second-degree murder is an appropriate conviction when a victim dies as a result of being left in the care of a known abuser, who was engaged in a pattern of repeatedly inflicting serious injury on the victim.

In *People v Goecke,* this Court held that "[t]he elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse."[82] With regards to the actus reus element of second degree murder, the People must establish both factual causation and proximate causation. The *Goecke* Court explained that the malice required for murder convictions can stem from one of three mindsets: "[1] the intent to kill, [2] the intent to cause great bodily harm, or [3] the intent to do an act in wanton and wilful

[82] *People v Goecke*, 457 Mich 442, 463–64 (1998) (citation omitted).

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disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[83]

The first and last elements were clearly satisfied regarding this Court's initial question. The death of the victim—in the instant case, baby Joshua—was very clear. There was no justification or excuse ever offered for the murder, and no justification is considered in the question posed by this Court.

The remaining two elements of second-degree murder are the actus reus and the mens rea. Although this Court's question appears to be focused on the third element, mens rea, the People will briefly discuss both of the two elements that are in question.

The act-element of second-degree murder, that the death was caused by an act of the defendant, is established in the hypothetical. A parent's act of leaving a child with a known abuser is an act of misfeasance against the parent's duty of care. If death results from the misfeasance of leaving an infant under the authority of their killer, the act is both a factual and a proximate cause of the victim's death. To show causation for second-degree murder, the People must show both prongs of factual causation and proximate causation. The first prong of factual causation is easily met. "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred."[84] In the hypothetical, the parent/defendant's act of misfeasance—knowingly leaving the child under the control of an abusive parent—is a "but for" cause of the child's death. The child would not be murdered without the misfeasance of the parent/defendant. Stated in the opposite, if the parent/defendant

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[83] *Goecke*, 457 Mich at 64 (citation omitted).
[84] *People v Feezel*, 486 Mich 184, 194–95 (2010).

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did not leave the child under the care and control of the abuser, the child would not be dead. Accordingly, the factual causation prong of the actus reus is satisfied.

To establish the proximate causation prong, the People do not need to show that a defendant's actions were the only, or even the primary, cause of death. The element is satisfied if the act is "a contributory cause that was a substantial factor," in the events leading to the victim's death.[85] The touchstone factor when determining whether a particular action is a proximate cause of death or injury is whether that death or injury was "reasonably foreseeable," based on the actions of the defendant.[86] When there is another person—akin to the abusive parent in this case—that contributes to the death or injury, the question "is whether the intervening cause was foreseeable based on an objective standard of reasonableness."[87] This Court's first hypothetical adopted the trial court's position, which indicated that the facts from this case provide that defendant acted with "knowledge." Knowledge is a much higher standard than reasonable foreseeability. If a defendant knows great bodily harm will result from taking an action—such as, leaving a child with a man who has recently broken nine of the victim's bones and was witnessed abusing the child that very day—then great bodily harm or death were, clearly, reasonably foreseeable outcomes. Accordingly, the proximate cause prong and the element of causation are satisfied.[88]

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[85] *People v Bailey*, 451 Mich 657, 676, *amended on denial of reh* 453 Mich 1204 (1996).
[86] *People v Schaefer*, 473 Mich 418, 437 (2005), holding mod by *People v Derror*, 475 Mich 316 (2006).
[87] *Schaefer*, 473 Mich at 437.
[88] As will be discussed below, this Court's hypothetical question accurately reflects the situation at hand. The victim's injuries and death were reasonably foreseeable, considering that Wilson had already inflicted nine broken bones on the victim and, at the time defendant left the victim under his control; Wilson was currently engaged in a pattern of abusive activities.

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The second element at issue, mens rea, is likewise satisfied by the language of the Court's question. To sustain a conviction of second-degree murder, the People need only show malice. Malice can be satisfied by a showing that the act was done "in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[89] If the defendant "knows" that death or great bodily harm will result, but leaves the victim with the abusive parent anyways, the act establishes a clear inference that it was done with "wanton and willful disregard," or even direct "intent" to cause harm.

This Court's initial hypothetical can be answered in the affirmative regarding second-degree murder. A defendant-parent, who leaves a child with an abusive parent, while knowing that the abuse will continue and great bodily harm or death will be caused, is guilty of an act of misfeasance against the parental duty of care. The act of misfeasance combined with the requisite malice, displayed by the defendant's knowledge, meets all the elements of second-degree murder.

B. In a light most favorable to the prosecution, the evidence at trial was sufficient to sustain defendant's conviction for second-degree murder, beyond a reasonable doubt.

The evidence presented in this case was sufficient to convict defendant of second-degree murder. Again, the only two elements of second-degree murder that are in dispute are the actus reus and the mens rea. The Court is, rightly, focused on the defendant's mens rea at the time of the act. Nevertheless, since defendant partially argued the actus reus, the People will respond.

Defendant's misfeasance satisfied the actus reus of second-degree murder.

Even though defendant errantly categorizes her act of misfeasance as nonfeasance, defendant agrees that leaving a child in the hands of an abuser could satisfy the actus reus of

[89] *Goecke*, 457 Mich at 64 (citation omitted).

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second-degree murder if accompanied by the proper mens rea. Nevertheless, defendant still attacks the actus reus prong of her convictions, by suggesting that her criminal culpability—the misfeasance she engaged in by leaving the victim in control of Wilson—was attributable to her desire to not to interfere with Wilson's parental rights.[90] This argument lacks any legal weight for four distinct and separately dispositive reasons.

First, had defendant merely refrained from the act of misfeasance—by not leaving the victim under the merciless control of Wilson, and instead, either stayed or kept the child with her—none of Wilson's parental rights would have been implicated. Wilson had no right to get rid of defendant so that he could abuse the child to his heart's content without her complaints. Defendant had every right to decline to leave the victim alone with Wilson. Defendant's act of misfeasance had nothing to do with Wilson's rights. Basically, this is a non-issue.[91]

Second, Wilson's "parental rights" did not encompass abusing the child. The duty defendant breached was not a duty to deny Wilson's fatherly rights, but rather it was a duty to protect the victim from harm. Whenever Wilson's "rights" boiled down to causing harm, those

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[90] Defendant also argues a hypothetical. She claims a mother who tries to fulfill her duty of care, but fails because the police or the courts refuse to listen to her, would be in the same situation as defendant. This is false. The actual defense of impossibility is always available when a defendant takes all reasonable steps to fulfill a legal duty but fails. Here, this entire scenario is irrelevant. Defendant took no steps to protect the victim. She told nobody. She did not seek any help. She left the child with defendant even though he abused the child both that day and the day before. Then, she tried to cover the whole thing up. These are not the actions of someone trying, but failing to perform a legal duty. These are the actions of someone ignoring the abuse inflicted on her three-month-old, ignoring her duty to protect that child, and then creating excuses to get away with her misfeasance.

[91] The entire premise of this interference-with-parental-rights claim is the errant assumption that defendant's act was an act of nonfeasance. Defendant makes a second error when she self-servingly assumes that compliance with an affirmative duty of care could only have been possible by physically taking the child away from Wilson. When this claim is compared to the facts of the case as both argued by the People and found by the trial court, it loses all relevance. The act resulting in defendant's conviction was an act of misfeasance, which was entirely irrelevant to any of Wilson's parental rights or lack thereof.

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rights cease to exist. There is not and, in this state, never has been a right for a parent to abuse a child. This Court expressed that sentiment one hundred and nine years ago in the case of *People v Green*.

> [W]e hold that it is the unquestionable right of parents and those in loco parentis to administer such reasonable and timely punishment as may be necessary to correct growing faults in young children; *but this right can never be used as a cloak for the exercise of malevolence or the exhibition of unbridled passion on the part of a parent.*[92]

Defendant had every right to interfere with Wilson's abuse of the victim. Wilson, on the other hand, had absolutely no right to harm the victim.

Third, defendant cannot cite her own failures to execute her duty of care as the reason justifying her misfeasance in leaving the victim with Wilson. Wilson was a serial abuser who had no business spending time alone with the victim. If defendant had gone to the authorities at any time during the last two weeks of the victim's short life and explained the excruciating and flagrant abuse the victim had suffered, as well as the nine broken bones that Wilson had inflicted on him, then Wilson would have been arrested for first-degree child abuse and he would have been separated from the victim. But defendant ignored her parental duties to protect the victim by refusing to seek the authorities. In fact, defendant did not do a thing to try to protect the victim. She hid the abuse—even after the child was murdered—from everyone. She never tried to leave defendant. She never tried to find a third party to intervene. This absolute failure to protect the victim constituted nonfeasance towards her duty to protect her three-month-old child.

Defendant cannot, now, claim that she was required to leave the victim with Wilson because Wilson's parental rights had not been terminated. Wilson's rights had not been terminated because of defendant's nonfeasance. Had defendant complied with her duty to

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[92] *People v Green*, 155 Mich 524, 533 (1909).

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protect baby Joshua, the law would have stepped in and she would have been well within her rights to exclude all contact between Wilson and the victim.[93] To claim otherwise does not make sense. The People can think of no legal duty where an act of misfeasance by the defendant would be justified by a prior act of nonfeasance by that same defendant. Such a construction would literally suggest that two wrongs—committed by the same defendant against the same victim—make a right.

Fourth, nonabusing parents have even greater responsibilities when it comes to in-home abuse because they are a child's only witness and defense. Although this is a matter of first impression for this state, other states have previously dealt with the "parental rights" defense when a nonabusing parent was charged with breaching her duty of care to a child. In a persuasive opinion by Judge Linda L. Chezem, the Indiana Court of Appeals held that the abusing parent's joint custody of an abused child was not an excuse for failing to protect the victim from abuse at the hands of that parent.

> In a situation where it is the other parent perpetuating the abuse upon the child, the nonabusing parent is under an even greater duty to takes steps necessary to prevent the abuse. First, the parent has a higher probability of knowing about the abuse because she lives with both the victim and the abuser. Second, the relationship of the child-victim to the parent-abuser presents additional problems that do not arise when the abuser is a stranger. Due to the added problems inherent in a parent-child abuse situation, the nonabusing parent, as the only

[93] Of course, as noted immediately above, defendant always had the right to step in to prevent abuse because Wilson never had the right to abuse the victim. Regardless, the emphasis here is on defendant's circular logic. She believes she should not be held accountable for an act of misfeasance, leaving the victim with Wilson, because Wilson had parental rights to the child. But Wilson only had parental rights to the victim because defendant refused to report the ongoing abuse to the authorities. She uses her nonfeasance to justify her misfeasance.

That logic would be akin to a business accountant claiming that an act of misfeasance—embezzlement of corporate funds was permissible because of her prior act of nonfeasance—intentionally failing to remove her own name from an inappropriate payroll. In that hypothetical case, and this very real case, refusal to comply with a legal duty cannot legitimize a later action in breach of that duty, even when the two are connected.

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> advocate for the child, has a greater responsibility to prevent such abuse when it becomes or should have become evident to that parent.[94]

Ultimately, the fact that Wilson was defendant's father rather than a stranger, acquaintance, or a mere household member is irrelevant. Nobody has the carte blanche to abuse a child without the interference of the child's parent. Defendant's duty was to protect her three-month-old child. When she had obvious evidence—from witnessing severe abuse that brought about nine broken bones, most of which were suffered two weeks before the date in question—that duty included protecting the victim from Wilson. With all that knowledge, when defendant left the victim in Wilson's control, the act was misfeasance against her duty to protect the victim. In a light most favorable to the verdict, this act of misfeasance satisfies the actus reus of second-degree murder, no matter the identity of the abuser.

Defendant's act of knowingly leaving the victim with Wilson, even though she knew Wilson had abused the victim the previous day and that very morning, exhibited wanton and willful disregard of the likelihood that Wilson would again inflict great bodily harm on the victim.

In a light most favorable to the People, the mens rea of second-degree murder was sufficiently established to sustain defendant's conviction. As noted above, both defendant's initial brief and defendant's supplemental brief contest the mens rea element by downplaying the abuse that defendant watched Wilson inflict on the victim. Although the victim was gravely abused on the day of his death, this was not the first, nor the second, nor even the fifth time that defendant witnessed Wilson torture the victim. Eventually, defendant admitted that she

[94] *Muehe*, 646 NE2d at 984. *Muehe* involved codified statutory law regarding neglect of a dependent and the sexual abuse of a minor child. Despite these differences, the case still fully illustrates the relevant point. Nonabusing parents cannot ignore their parental duties of protection, merely because the abusive parent still has custodial rights. Custody is not a non-interference pact when it comes to abuse. As Judge Chezem eloquently put it, in these cases the nonabusing parent will often be "the only advocate for the child."

witnessed defendant torture-fold the victim on the day before the murder and another "four different times."[95] Defendant also claimed that she had witnessed Wilson "throw [the victim] down" a total of "[f]our times."[96] The last time Wilson threw the victim was "[a]t 10:30 am," before she left the victim with Wilson on the day of the murder.[97] Accordingly, with all reasonable inferences drawn in favor of the verdict, the People established nine instances of physical abuse that occurred prior to the murder. There is no question as to the severity of the abuse that occurred during these events. These were not simple, innocent "tosses" or "hugs." These acts were brutal and violent enough to break bones. Before the date of the murder, the victim had already suffered fractures of the both the right and left clavicles (collarbones),[98] and his right wrist (the radius).[99] Further, the victim had suffered breaks in both knees and four broken ribs that were at least two weeks old at the time of the murder.[100]

The victim's self-serving claim that she was surprised by Wilson inflicting great bodily harm on the child is patently incredible in light of the extent of the victim's injuries. The intentionally mitigating comment, that the baby looked "normal," made by codefendant Wilson's mother, did absolutely nothing to diminish the weight of the physical evidence. It does not take a doctor to tell someone that a child suffering from nine simultaneously broken bones would have been in outright agony. Common knowledge gained merely by being human is sufficient to understand the significant suffering caused by even a single broken bone. The extent of baby Joshua's injuries would create a clear inference that defendant knew full well of Wilson's

[95] D.App., 185a.
[96] D.App., 184a.
[97] D.App., 185a.
[98] D.App., 13a.
[99] D.App., 16a.
[100] D.App., 16a; D.App., 13a.

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savagery—and knowledge that it would continue if she left the victim with him—even in the absence of her admissions. After all, defendant lived with the victim and Wilson and was usually present, because she did not work a job. Any adult living in constant contact with a baby that was tortured and injured to that extreme would know that the infant was being repeatedly and savagely abused.

Regardless, defendant's admissions make her level of knowledge crystal clear. Defendant admitted that she had seen nine separate instances of abuse, two of which occurred within the day preceding her act of leaving the victim with Wilson and the resulting murder. Clearly, Wilson was not just intermittently abusing the victim. He was engaged in a pattern of abusing the victim. This is unsurprising, considering that Wilson considered the abuse to be discipline for crying. A three-month-old, tortured to the point that he had nine fractured bones spread between his torso and three of his four limbs, would be able to do little more than cry non-stop. It was at this point, that defendant chose to leave him in Wilson's care.

In a light most favorable to the verdict, defendant's knowledge was enough to establish malice. "A [fact-finder] may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm."[101] Here, the inference is simple. Defendant admitted that she knew Wilson was a serial abuser and knew that he had abused the child both the day before and the morning of the murder. It can be inferred that defendant knew that the abuse caused extensive injuries, because nine broken bones is far in excess of any potential injury that could be hidden from a full-time caregiver. Accordingly, defendant's extensive knowledge of the abuse and the victim's injuries meant that she, likewise, knew that the victim would likely be further injured if left alone and under the control of Wilson.

[101] *Nowack*, 462 Mich at 401 (cleaned up).

Conclusion

Defendant is not entitled to relief, because the evidence presented by the People at trial was sufficient to prove all the elements of second second-degree murder beyond a reasonable doubt. The actus reus of second-degree murder is satisfied by defendant's act of misfeasance, which she committed by leaving the victim under the control of Wilson, even though she knew that Wilson was engaging in a pattern of inflicting serious harm on the child. The mens rea of second-degree murder is established by an inference drawn from defendant's knowledge. Defendant knew Wilson was abusing defendant and she knew he was causing serious injury. The seriousness of the victim's condition, even before the murder, establishes the inference of knowledge. Leaving the victim with defendant was an act of wanton and willful disregard for the likelihood that Wilson would continue to inflict great bodily harm on the victim. In a light most favorable to the People, and with all reasonable inferences drawn in favor of the verdict, the evidence was sufficient to support defendant's conviction for second-degree murder.

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III.

The evidence for a conviction of first-degree child abuse is sufficient if a defendant knowingly causes serious physical harm to the victim. Here, evidence showed that defendant left the three-month-old victim with her boyfriend, despite knowing that he had savagely and repeatedly abused the victim, had abused him the previous day, had already abused him that morning, and that the victim suffered extreme injuries as a result of the abuse. The victim was killed when defendant left him with the boyfriend. In a light most favorable to the People, the elements of first-degree child abuse were satisfied.

Standard of Review

This Court reviews questions of statutory construction de novo and will enforce the laws as written.[102] This Court reviews a challenge to the sufficiency of the evidence for whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[103]

Discussion

In a light most favorable to the People, there was sufficient evidence provided at trial to support defendant's conviction for first-degree child abuse. This section deals both with whether the act of leaving a child with an abusive parent, knowing the child will be seriously harmed, can satisfy the actus reus of first-degree child abuse and whether defendant had that knowledge.

A. The act of intentionally leaving an infant with another parent who has recently inflicted serious harm on that infant, with knowledge that that act would cause death or great bodily harm, and harm results, is sufficient to establish the elements for first-degree child abuse.

Leaving a victim under the control of an abusive parent, with knowledge that the abuser will cause serious physical harm to the child, is an act of misfeasance against the parental duty of

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[102] *Morey*, 461 Mich at 329.
[103] *Nowack*, 462 Mich at 399; *Petrella*, 424 Mich 221.

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care and can support a 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."[104] Accordingly, there are five elements to first-degree child abuse: (1) that a defendant is a "person" under the statute (which means a parent, guardian, or other caregiver),[105] (2) a mens rea of "knowingly or intentionally," (3) an actus reus of "causes," (4) a result of "serious physical or serious mental harm," and (5) a victim that is "a child." As with the elements of second-degree murder, defendant exclusively contests the actus reus and mens rea elements of her conviction; the other elements are satisfied by uncontested facts.[106]

A defendant/parent's misfeasance of knowingly leaving a child with an abusive parent satisfies the actus reus of first-degree child abuse.

The actus reus of first-degree child abuse can be satisfied by an act of misfeasance against the parental duty of care, such as leaving a child with a known abuser.

Defendant's argument on the actus reus element is based on an errant factual assumption combined with an errant legal conclusion. Defendant errantly assumes that any breach of parental duty falls into the category of nonfeasance or omission. This assumption is incorrect. As discussed extensively in section I above, when a person makes an affirmative act that would usually be within their authority, but in doing so he or she breaches a legal duty, that action constitutes an act of misfeasance. Leaving a child in someone's control is an affirmative action and, when that action breaks a legal duty, it becomes an act of misfeasance.

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[104] MCL 750.136b(2).
[105] MCL 750.136b(1)(d).
[106] As the victim's mother, defendant meets the statutory definition of a "person." The victim not only suffered serious physical harm, he also died. The three-month-old victim was a "child" within the definition of the statute.

Using the correct terminology, the analysis is simple, if the misfeasance of intentionally leaving a child with an abuser is accompanied by the requisite mens rea ("knowingly or intentionally") and serious physical harm occurs, the elements of first-degree child abuse are met.[107]

First-degree child abuse can be satisfied by an act of nonfeasance against the parental duty of care, even though second-degree child abuse proscribes certain enumerated omissions.

Although not directly applicable to the instant case—or any case in which a victim-child is either left in the care of a known abuser or some other parental malfeasance or misfeasance is at issue—it is also important to discuss defendant's errant assertion that the language of the second-degree child abuse statute somehow prohibits the prosecution of all acts of nonfeasance against the parental duty of care that are not enumerated in MCL 750.136b(1)(c).

As noted above, Michigan is a common law state and, accordingly, an act of nonfeasance resulting in a breach of a legal duty is sufficient for the actus reus of a crime, unless the statutory language says otherwise. The statutes in question are the first-degree child abuse statute, the second-degree child abuse statute pertaining to select "omissions," and the statutory definition of "omission" from the child abuse statute. The first-degree child abuse statute is quoted above. The second-degree child abuse statute indicates, in relevant part, that "[a] person is guilty of child abuse in the second degree if" a "person's omission causes serious physical harm or serious mental harm to a child…."[108] Importantly, this part of the second-degree child abuse statute only covers designated "omissions" that are categorized as, "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child."[109]

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[107] *Worth-McBride*, 501 Mich 1055.
[108] MCL 750.136b(3) & (3)(a).
[109] MCL 750.136b(1)(c).

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Defendant argues that because the second-degree child abuse statute mentions specific "omissions," what the legislature was really trying to say is that: (1) no other nonfeasance to perform parental duties may be charged as child abuse, outside of what was listed in the narrow definition of the second-degree child abuse "omissions" and (2) only "*actions*"[110] may be charged as first-degree child abuse. Although this reinterpretation of the statute could potentially be helpful to defendant's case, it goes against the clear language of the statute. To reuse defendant's citation to disprove her point, "it is well established that [the Courts] may not read into the statute what is not within the Legislature's intent as derived from the language of the statute."[111] Further, this Court has a policy against following defendant's advice, because it refuses to read an abrogation of the common law into a statute, where the statute does not expressly require that abrogation. "The Legislature has the authority to abrogate the common law. When it does so, it should speak in no uncertain terms."[112]

The intent of the legislature is clearly exhibited in the language of the statute. The actus reus of the first-degree child abuse statute is "causes," the broadest possible language which encompasses all possible methods of actus reus.[113] As a term of art, "cause" means simply "to bring about or effect."[114] Using the definition, "causes" means any potential actus reus that "bring[s] about" the harm in question. The actus reus of "causes" is significantly broader than the default of actus reus of "act," and as observed in section I above, even the term "act"

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[110] Defendant's Supplemental Brief, 9 (emphasis in original). This quote does not come from the statute, but rather from defendant's supplemental brief. In fact, the term "action" does not appear in the entire child abuse statute.
[111] *Robinson v City of Lansing*, 486 Mich 1, 15 (2010) (cleaned up).
[112] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74 (2006) (citations omitted), see also *Moreno*, 491 Mich at 41.
[113] MCL 750.136b(2).
[114] CAUSE, Black's Law Dictionary (10th ed. 2014).

encompasses "omission to act"[115] The language of the first-degree child abuse statute is plain on its own, without defendant's recommended add-ins.

Although defendant argues that the second-degree child abuse statute implicitly changes the meaning of the first-degree child abuse language, a very simple analysis of the statute shows that this is far from accurate. The second-degree child abuse statute codifies only the following omissions, or acts of nonfeasance, against the parental duties: the duties to provide "food," "clothing," and "shelter" and the duty not to abandon the child. That means other common law parental duties, including the duty to protect[116] and the duty to provide medical care,[117] remain unaltered. The only effect of this subsection is that the legislature has directed that the harm-specific mens rea for a designated list of acts of nonfeasance will be presumed.

Anything which "causes" serious harm to a child, when coupled with knowledge that it would cause that harm, will satisfy the elements of first-degree child abuse. Defendant's reinterpretation, however, would create legal absurdities. Under defendant's theory, a mother/defendant who accidentally forgot to feed her son, resulting in serious harm, would be guilty of second-degree child abuse. But under that same theory, a father/defendant who intentionally refused to give his diabetic son insulin shots, while knowing that the child would suffer serious permanent harm, is not committing child abuse of any kind, even if the child is

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[115] MCL 750.10.

[116] See Section I above.

[117] See *Buffington v State*, 824 So 2d 576, 582 (Miss, 2002) "Certainly, failure to feed, nourish, or provide medical care to a child can be intentional, and such a refusal may cause serious bodily harm." (The Mississippi Supreme Court noted that failure to fulfill certain types of parental duties could be presumed to meet the undefined term of "abuse").

See also *Rolon*, 160 Cal App 4th at 1213, "A parent has a legal duty to his or her minor child to take every step reasonably necessary under the circumstances in a given situation to exercise reasonable care for the child, to protect the child from harm, and to obtain reasonable medical attention for the child."

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rendered permanently comatose by the knowing nonfeasance. This, of course, is an absurd result. The proper method for dealing with both acts of nonfeasance is through the child abuse statute. When someone, like defendant in the instant case or the father in the above hypothetical, knowingly causes serious harm to a child, the elements of first-degree child abuse are met. The abusive act can be one of malfeasance, misfeasance, or nonfeasance and the statute treats them all exactly the same. The legislature could not be more transparent by its use of the word "cause" in MCL 750.136b(2). The legislature was concerned with preventing *all types* of child abuse that knowingly cause any type of serious harm, not cherry-picking specific theories of actus reus.

Ultimately, the instant subsection of this brief does not directly apply to the case at bar. In this case, we are discussing the misfeasance of a parent, which fits squarely inside the statute even if the Court were to use defendant's interpretation to narrow the meaning of the legislature's language. The misfeasance of leaving a child with a repeat abuser was the theory the People argued and the trial court adopted at trial. But even if this Court were to directly consider defendant's nonfeasance, when she looked the other way as the victim was repeatedly and brutally abused by Wilson, this subsection shows that such a theory would properly support a finding of first-degree child abuse.

"Knowing" that an act of misfeasance will cause serious harm to a child is the exact mens rea required to establish of first-degree child abuse.

In direct answer to this Court's question, if a defendant "knows" that "serious physical harm or death" would result from the act of leaving the victim in the care of an abuser, the requisite mens rea for the crime of first-degree child abuse is met. This answer is

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uncontestable.[118] As this Court provided in the seminal case of *Maynor*, the required mens rea element of the statute is that "the defendant intended to cause serious physical or mental harm… or that she knew that serious mental or physical harm would be caused…."[119] Accordingly, if a defendant/parent knows that serious mental or physical harm would be caused by the act of leaving her child with a known repeat abuser, the mens rea of first degree child abuse is met.

As illustrated by the combination of the three parts of this subsection, this Court's initial hypothetical must be answered in the affirmative. If a parent/defendant commits an act of misfeasance by leaving her child with a repeatedly abusive parent, with knowledge that serious harm would occur, and serious harm does occur, the elements of first-degree child abuse are satisfied.

B. In a light most favorable to the prosecution, the evidence at trial was sufficient to sustain defendant's conviction for first-degree child abuse, beyond a reasonable doubt.

The evidence presented in this case was sufficient to convict defendant of first-degree child abuse. The only element of child abuse in question here is the mens rea of "knowingly or intentionally."[120] As indicated in *Maynor*, this intent is applied to the phrase "causes serious physical or serious mental harm to a child."[121] In light of Wilson's repeated and severe acts of abuse, when defendant left the victim with Wilson, she knew that doing so would cause the victim serious physical harm.

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[118] It appears that this Court intentionally phrased the question according to the first-degree child abuse statute.
[119] *Maynor*, 470 Mich at 295.
[120] In its order, this Court specifically requests that the parties address the sufficiency of the proofs regarding the mens rea element of first-degree child abuse. For her sufficiency argument, defendant likewise confines her argument to the element of mens rea. For those reasons, and because the foregoing sections adequately addressed the actus reus, the People will likewise confine this discussion to the mens rea.
[121] *Id.*

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Black's Law Dictionary says that "knowingly" means "[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."[122] Defendant, as could be expected, focuses on the word "certain," and then asserts that nobody can be certain that another person can do anything. Alone, however, this logic is incomplete. The reason that absolute, or pure, "certainty" is never used as a required intent is that it is impossible to establish. People can be mistaken. People can be wrong. Pure, objective, certainty is, perhaps, beyond human capacity to entertain. This, of course, is why first-degree child abuse does not require pure certainty. It requires that the perpetrator act "knowingly" or was "practically certain" that serious harm will occur. "Practically" means "[v]irtually; almost."[123] Thus, the required mens rea is that the defendant be "almost" certain that serious harm would occur.

In most cases, the intent prong rests on inferences drawn from the facts.[124] This case is no exception. Here, the facts clearly support an inference that defendant acted with knowledge that leaving the victim with defendant would cause serious harm. Defendant argues that the People's case should be considered legally insufficient because, she claims, there was no direct evidence: (1) that the she knew Wilson was causing serious injuries to the victim and (2) that the victim's nine broken bones came from being thrown or fold-tortured. These arguments merely devolve into the meritless claim that the People must provide direct evidence of intent, something that is not required. Inferences based on the gruesome facts are sufficient to establish defendant's mens rea beyond a reasonable doubt. As this Court previously held, "It is for the

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[122] KNOWINGLY, Black's Law Dictionary (10th ed. 2014).
[123] PRACTICALLY, OxfordDictionaries.com, Oxford University Press, accessed September 25, 2018, <https://en.oxforddictionaries.com/definition/practically>
[124] It is rare that a defendant directly admits to intent.

trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences."[125]

Here, defendant acted knowingly—was almost certain that serious harm would occur—when she left the victim in the care of defendant, while knowing the extreme abuse he had put the victim through. Defendant's arguments to the contrary defy common sense.

Defendant's first argument is a claim that she did not have knowledge that Wilson was causing serious harm to the victim. As part of this claim, she seeks to distinguish the case of *People v Borom*,[126] a very similar felony murder and first-degree child abuse case where this Court agreed that the defendant should stand trial for knowingly leaving her son in the care of her abusive boyfriend.[127] Defendant distinguishes the case, by arguing that in *Borom* the defendant was on notice, given that the victim suffered two injuries within two weeks—a broken

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[125] *People v Hardiman*, 466 Mich 417, 428 (2002).
[126] *People v Borom*, 497 Mich 931 (2014).
[127] As a side note, defendant also makes the claim that a "dangerous" parent is not like a hot car and there is no way a person can "truly know" and be certain of what another person would do. Defendant's supplemental brief, 8 (quotations omitted).

Defendant is incorrect. If defendant were correct, *Borom* would have been wrongly decided. But *Borom* was rightly decided. A person *can* "know," or be "almost certain" of what someone else will do, based on the situation and their prior experiences with a person. The evidence in *Borom* showed that an inference drawn from the two instances of abuse and two injuries could satisfy the knowledge requirement for first-degree child abuse. The evidence here, that the victim suffered nine broken bones at the hands of Wilson, likewise created an inference that satisfied the trier of fact that defendant had the requisite knowledge for first-degree child abuse. That inference was permissible.

Defendant's only support for the contention that a person can never legally know what someone else will do is based on the admittedly imaginary scenario where a previously abusive person was rehabilitated through outside help, to become a normal member of society, before regressing and committing a crime that surprises a hypothetical defendant. That situation has nothing to do with the instant situation. There is no evidence or suggestion that Wilson ever received help for his abusive tendencies, because defendant refused to report him. Wilson's abuse of the victim on the day of the murder was not a surprise to defendant. She knew it would happen, because that's just what Wilson did; when baby Joshua cried, Wilson abused him.

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arm and a third-degree burn, suffered at the hands of the defendant's boyfriend—before the final injury which resulted in the victim's death.

Defendant's efforts to claim that she was oblivious to the abuse and to distinguish the case from *Borom* are futile. In *Borom*, the Court of Appeals held, and this Court refused to disturb the decision that, a jury could find the defendant acted knowingly when she left the victim with her abusive boyfriend, after the child had suffered two serious injuries in two weeks. Here, the trial court found defendant acted knowingly because: (1) the victim suffered *nine* broken bones due to being abused and some of those breaks were two weeks old, (2) defendant actually witnessed nine separate instances where the victim was abused by Wilson, (3) one of the witnessed instances of abuse happened the day before the murder, and (4) one of the witnessed instances of abuse happened on the morning of the murder. As the Court of Appeals rightly noted, "Junior's multiple healing fractures, which Dr. Jentzen opined were approximately two weeks old, were so severe that defendant's argument that she was not aware of their severity is implausible."[128] When considered in a light most favorable to the People and all inferences are drawn in favor of the verdict, the defendant clearly had even more reason than the *Borom* defendant to know that Wilson would inflict serious physical harm on the victim.

Defendant's second argument, that there was no evidence that the acts of abuse she witnessed Wilson perform caused the victim's injuries, is both implausible and irrelevant. This claim is implausible because it is common knowledge that throwing or crushing an infant will cause serious harm. It does not take a doctor's explanation to realize that throwing an infant will cause broken bones. It is a matter of common sense that throwing a three-month-old will cause serious harm. But a doctor did explain that there were fractures in both of the victim's knees and

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[128] D.App., 290a.

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the victim's wrist that occurred well before the murder. It does not take a doctor's explanation to realize that folding a baby in half and then squeezing him until he stops crying because he starts to suffocate[129] would cause serious physical harm. Again, that is a matter for common sense. But a doctor did testify that several of the victim's broken ribs were caused by compression, or squeezing, rather than by blunt-force trauma.[130] Further, defendant, herself, came to the same conclusion. When the police officers shouted at her that her baby was dead and confronted her with all the injuries he had suffered, she disclosed both the events surrounding the murder itself and the abuse that led up to the victim's death. If defendant did not think that throwing or crushing the victim was abusive and would cause serious injury, then there was no reason to list those instances to the police as reasons for the victim's injuries.[131] Defendant's statements contrasting her own abusive actions to that of Wilson give rise to a similar inference. After disclosing that Wilson threw the baby, the detectives asked defendant whether she ever threw the child. Although defendant admitted she threw the victim, she was very careful to note that even though she threw the baby once, that event did not cause the victim any injury.[132] The obvious

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[129] The People have no intention of using euphemisms to diminish the shocking nature of the abuse in this case. When described by Sergeant David Dinsmore, the interrogating officer, he explained that Wilson would take the victim, compress him, and then squeeze him until he "couldn't breathe." D.App., 57a. (spelling of breath[e] corrected).

A baby that is not breathing is suffocating. "Suffocate" means to "[h]ave or cause to have difficulty in breathing." SUFFOCATE, OxfordDictionaries.com, Oxford University Press, accessed September 26, 2018, <https://en.oxforddictionaries.com/definition/suffocate>

The People cannot think of *any* situation where a parent would fail to see that suffocating a child would cause serious mental or physical harm.

[130] D.App., 15a.

[131] It is an elementary deduction, that when asked about instances of abuse during an interrogation, a defendant will not list non-abusive activities.

[132] D.App., 55a.

inference is that she knew, when Wilson threw the victim, he caused serious harm and she wanted to contrast her own act of throwing the victim.[133]

Although defendant claims there is no direct evidence tying the victim's injuries to the witnessed abuse, this is ultimately an irrelevant claim because defendant knew that Wilson was the source of the victim's injuries. The victim was seriously injured before the murder, which was obvious from the sheer number of healing fractures. Defendant knew that Wilson was the source of the victim's broken bones because she had witnessed him repeatedly perform acts of abuse that would cause that type of injury. The inference of defendant's knowledge is established, regardless of whether those nine specific acts of abuse accounted for each of the nine broken bones in the victim's body. There is no requirement that the defendant needs to know which types of abuse resulted in what types of injury. The fact that she knew defendant was a serious abuser (based on what she witnessed) and that his abuse of the victim caused serious injury (failing to realize the victim had nine broken bones is implausible) is sufficient to show knowledge that Wilson had seriously injured the victim.

In a light most favorable to the People, defendant had knowledge that leaving the victim with Wilson would result in serious physical harm to the victim. The past injuries were much worse and even more obvious than in *Borum* and it is utterly implausible for defendant to claim ignorance of the victim's horrific injuries or the nexus between the abuse and the victim's injuries.

The trial court's reasoning was in lock-step with this conclusion. Defendant quotes an unartful word choice by the trial court in discussing the first-degree child abuse standard—the

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[133] Notably, as indicated by its opinion after the post-conviction motion, the trial court did not believe defendant's attempt to mitigate her own abusive actions.

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judge mentioned the word "could" as opposed to "would"[134]—to argue that the trial court never made the proper finding. This is incorrect. The trial court's finding on the count of first-degree child abuse is as follows.

> It was clear from the testimony that was presented on this record and the exhibits admitted that this was his practice; that when the baby would cry he would fold him in half and bear hug him until he stopped crying. Anyone knows that a normal three month old baby is going to cry. When 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 and that he would be subjected to the practice of bear hugging that the defendant had previously witnessed, and I think under those circumstances there is sufficient evidence to find the defendant guilty of child abuse in the first degree, and that is my finding at this time.[135]

Accordingly, it is clear that the trial court's reasoning was: (a) Wilson practiced abuse by folding the victim when he cried, (b) normal three-month-old babies cry frequently, (c) the victim was in excruciating pain, which meant he would cry more, (d) defendant knew that based on those reasons, "he would be subjected to the practice of bear hugging that the defendant had previously witnessed." Accordingly, the trial court's holding used the accurate language.

C. The trial court's clarification of its findings of fact after the post-conviction hearing addressed all the elements for first-degree child abuse.

In its written opinion after the post-conviction hearing, the trial court indicated that it found that defendant guilty of first-degree child abuse based the direct abuse defendant

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[134] Defendant argues that the use of the word "could" automatically makes the trial court's holding improper in the way of a reverse magic word context. While the People agree that it was, perhaps, not the most artful wording, it is also not a strictly impermissible word choice.

As discussed above, the standard of "knowing" is "practically certain," not "completely" or "perfectly" certain. Thus, the word "could," which simply denotes possibility, may be properly used when the context makes that possibility extremely likely. If something is extremely likely, it is also nearly certain. In this context, the two phrases are synonyms. Meanwhile, there is nothing in the statute that indicates the magic word to satisfy the knowingly standard is "would." Rather, the context is what is important. When the trial court's statements are read in the context of the very next paragraph, the trial court indicates that defendant knew that Wilson "would" inflict abuse and serious harm on the victim. D.App., 231-32a.

[135] D.App., 231-32a.

performed before the murder. Contextually, the act the trial court referred to was defendant's act of throwing the infant. The trial court's conclusion that this constituted first-degree child abuse was supported by the numerous injuries the victim suffered that could be attributable to that type of assault. Obviously, the trial court did not believe defendant's attempt to minimize her own part in the abuse. This was a permissible inference for the fact-finder to make. When two individuals beat and torture the same person (the victim), in the same manner (throwing), during the same period of time (the two weeks leading up to the victim's death), it is not a defense to claim that the other person must have been the one to cause the serious injury. If defendant's act of throwing the victim was the direct cause of injury, she is liable as a principle. If defendant's act of throwing the victim was merely another instance of abuse with no direct injury, it is still an act aiding and abetting the abuse from Wilson, which caused injury. At the very least, defendant's act of throwing the victim would be encouragement for Wilson to throw the victim. With all inferences drawn in favor of the verdict, defendant was responsible for first-degree child abuse based on her own act of malfeasance.

Nevertheless, this issue is mostly peripheral. The trial court's initial findings indicated that it found defendant guilty of first-degree child abuse because of her act of leaving the victim with Wilson, while knowing the serious harm that would result. This issue is also well beyond the questions this Court requested the parties answer. Regardless, the trial court's alternate reasoning, though not necessarily at issue here, meets the elements of first-degree child abuse.

Conclusion

In a light most favorable to the People, the evidence was sufficient for a reasonable fact-finder to find that defendant had knowledge that her act of leaving the victim with Wilson would result in serious physical harm beyond a reasonable doubt. Just like the defendant in *Borom*,

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defendant knew what Wilson would do, based on her observations of the abuse the victim suffered at his hands in the recent past. The extent, severity, and immediacy of the abuse were much greater in this case than in *Borom*. Defendant's claim that she just did not know about the injuries is implausible, especially considering her admissions to directly witnessing the abuse. With all reasonable inferences drawn in favor of the verdict, there was sufficient evidence to support defendant's conviction for first-degree child abuse.

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IV.

The actus reus of aiding and abetting is satisfied if a defendant facilitates or helps another with the commission of a crime. Here, defendant provided the opportunity for the homicide when she left the victim with Wilson, while knowing that Wilson had, and would continue to, inflict serious harm on the victim. The actus reus of aiding and abetting was satisfied by defendant's act of leaving the victim with Wilson, which facilitated the victim's murder.

Standard of Review

This Court reviews a challenge to the sufficiency of the evidence for whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[136]

Discussion

Defendant claims that there was insufficient evidence to convict her under a theory of aiding and abetting Wilson's abuse or murder of the victim. Again, however, defendant bases this claim on the assumption that her nonfeasance was the reason for her conviction. As discussed exhaustively above, that was not the case. Defendant was convicted for an act of misfeasance—leaving the victim in the care of a person she knew would inflict serious harm.

Accordingly, the only question to be asked is whether that act fell within the range of prohibited conduct in the aiding and abetting statute.

> 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.[137]

Defendant's brief has already adequately discussed the definitions of the words procure, counsel, aid, and abet. These definitions are not in question, with the exception for defendant's

[136] *Nowack*, 462 Mich at 399; *Petrella*, 424 Mich 221.
[137] MCL 767.39.

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assertion and emphasis that "affirmative act" should be read into the statute when it neither appears in the statute nor is suggested in the definition of any of the words. It is clear that neither "procure" nor "counsel" are at issue in this case. The People will, however, reiterate the Random House definitions of "aid" and "abet," because these are the words at issue.

The definition of "aid" is "to provide support for or relief to; help," "to promote the progress or accomplishment of; facilitate," or "to give help or assistance."[138] The definition of abet is "to encourage, support, or countenance by aid or approval, usually in wrongdoing."[139]

Accordingly, defendant aided and abetted Wilson's abuse and murder of the victim. By leaving the victim with Wilson, knowing that he would be abused, defendant *facilitated* the abuse. Without defendant's act that facilitated Wilson with an opportunity to beat the victim without interference, the victim would be alive. Further, defendant *countenanced*,[140] or gave moral support for, the abuse by leaving the victim alone with Wilson, the same act that facilitated the crime.

Even if only defendant's acts of nonfeasance were considered—which would not make sense, considering that it was defendant's misfeasance, her affirmative act of leaving the victim in Wilson's care, that was at issue—the elements of aiding and abetting could theoretically be supported. Similar to, and perhaps even clearer than, the statute on first-degree child abuse, there is nothing about the aiding and abetting statute that forbids fulfillment by an act of nonfeasance or omission. If the act of omission aids, facilitates, or encourages a crime, with the

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[138] AID, Dictionary.com Unabridged, Random House, Inc., accessed September 26, 2018, <https://www.dictionary.com/browse/aid>.

[139] ABET, Dictionary.com Unabridged, Random House, Inc., accessed September 26, 2018, <https://www.dictionary.com/browse/abet>.

[140] "Countenance" is defined as "approval or favor; encouragement; moral support." COUNTENANCE, Dictionary.com Unabridged, Random House, Inc., accessed September 26, 2018, <https://www.dictionary.com/browse/countenance>.

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accompanying intent, then that omission can be charged under an aiding and abetting theory. There is no reason to conclude, from the language the legislature used, that it meant to abrogate the typical position of allowing acts of omission to satisfy the actus reus of a crime. Defendant's bare assertion otherwise does not constitute such a reason. Neither does out-of-state case law support that position, considering that (1) the majority rule favors accessory liability for acts of omission[141] and (2) when dealing with the clear language of a Michigan statute, outside cases dealing with other statutes are not particularly helpful.

In a light most favorable to the verdict, defendant's act of misfeasance—when breaching her duty of care by leaving the victim in a situation where she knew he would be seriously abused—meets the elements of aiding and abetting for both first-degree child abuse and second-degree murder.

[141] See *Rolon*, 160 Cal App 4th at 1216–19.

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RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's application for leave to appeal. If this Court wishes to clarify this issue to the aid of the bench and the bar, the People would request an order that indicates that the actus reus for second-degree murder, first-degree child abuse, or liability under an aiding and abetting theory can be satisfied by an act of nonfeasance, misfeasance, or malfeasance, when the defendant owes a legal duty to the victim.

Respectfully submitted,

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