STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs No.

JAMES LEE

Defendant-Appellee.

Circuit Court No. 16-001002
Court of Appeals No. 334308

PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant, James Lee, was convicted by a jury of second degree child abuse. On December 14, 2017, the Court of Appeals issued an opinion vacating Lee's conviction and sentence under the erroneous belief that the evidence presented at trial was insufficient to prove Defendant's guilt because the act of omission "at issue" was not contemplated under MCL 750.136b(3)(a). But Defendant was not charged with an omission under that subsection of the statute— he was charged for knowing and intentional acts likely to cause serious physical or mental harm to a child, under MCL 750.136b(3)(b). Because the evidence supported a conviction under that portion of the statute and the Court of Appeals review was clearly erroneous, it cannot be allowed to stand.

The People appeal that decision by application. This Court's jurisdiction arises from MCL 770.12(2)(a) and MCR 7.301(A)(2).

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QUESTION PRESENTED

I.

A guardian is guilty of second-degree child abuse if he knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results. Here, the child's guardian allowed his boyfriend to continue living in the same residence and have unsupervised access to the child even after learning that the boyfriend had recently sexually penetrated the child, and then the boyfriend sexually penetrated the child again. Was the evidence sufficient to convict the guardian of second degree child abuse?

The People answer: YES
Defendant answers: NO
The Court of Appeals answered: NO

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant, James Lee, was charged with first degree criminal sexual conduct, in violation of MCL 750.520b, and second child abuse, in violation of MCL 750.136b(3). On April 7, 2016, his case and the case against co-defendant, Victor Asa-Allen Smith,[1] were consolidated. Smith was charged with two counts of first degree criminal sexual conduct, in violation of MCL 750.520b.

James Lee became the victim's guardian when the victim was 14 years old, at which time, the victim went to live with Lee at his apartment.[2] The victim had a learning disability that made it difficult for him to speak without slurring his words. He also had difficulty understanding others.[3] Shortly after the victim moved in with Lee, Lee's boyfriend, Victor Smith, also started living in the apartment.[4]

While the victim was 15 years old, Smith sexually penetrated him twice. The victim testified that, the first time, Lee was asleep in the bedroom that Lee and Smith shared, when Smith went into the victim's bedroom and placed his penis in the victim's anus.[5] The victim testified that this hurt him and described the feeling as "not good."[6] The victim reported what happened to Lee and Lee

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[1]*People v Victor Asa-Allen Smith*, Wayne Circuit Court No. 16-002389-01-FC. Smith was convicted of two counts of first-degree criminal sexual conduct MCL 750.520b(1)(b)(i) (same household) and sentenced to 60 to 180 months.

[2]6/9/16, 116, 139-141.

[3]6/9/16, 119.

[4]6/9/16, 140.

[5]6/9/16, 146-149.

[6]6/9/16, 151.

replied, "okay, I got it" and told the victim that he would kick Smith out of the house.[7] But Lee did not kick Smith out of the residence, nor did he call the police or Protective Services. Rather, Lee allowed Smith to remain in the residence.[8]

Shortly after the first incident, while the victim was still fifteen, Smith repeated his conduct by going into the victim's room— this time while Lee was away from home— and again penetrating the victim's anus with his penis.[9] The victim reported Smith's sexual misconduct to Lee. Lee repeated, "okay, I got it."[10] The victim testified that Lee called his father, Shawn Bryant, who came to pick the victim up from the house. Bryant called the police.[11]

Jonnathan Meade, from Children's Protective Service, testified that on March 18, 2015, he interviewed the victim, the victims's parents, the victim's guardian James Lee, and Victor Smith. He spoke to Lee and Smith together at Lee's apartment.[12] Meade told Lee about the sexual abuse allegations and Lee's failure to protect the victim from sexual interaction with Smith. Lee candidly admitted to Meade that the allegations were true. Lee said that Smith had sex with the victim on two different occasions. Lee recounted that, the first time, they were all talking in the kitchen and Smith went to use the bathroom, leaving the door open. According to Lee, the victim told him that he had seen Smith's penis and that he wanted a sexual interaction with Smith. Lee said that he then left the

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[7] 6/9/16, 154-155.

[8] 6/9/16, 155-156.

[9] 6/9/16, 157.

[10] 6/9/16, 160.

[11] 6/9/16, 173.

[12] 6/9/16, 41-45.

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home and, while he was gone, Smith had sexual intercourse with the victim. The victim reported the incident to Lee.[13] Smith told Lee that the victim wanted it, so he gave it to him.[14] Lee said he did not consider this to be rape because the victim wanted it. Lee said he did not call the police or Protective Services, nor did he remove Smith or the victim out of his home.[15]

Lee told Meade that, when the victim reported the second sexual intercourse with Smith, Lee confronted Smith and told him they could no longer have any interaction because Lee's trust level with Smith had lowered.[16] Yet, Lee did not report the second incident to Protective Services or to police, nor did he kick Smith out of the home.[17]

Meade further testified that Smith was present during his entire conversation with Lee. Smith told Meade that everything Lee stated was true. Smith admitted that he had anal sex with the victim and explained that the victim "wanted it, so he gave it to him."[18]

On June 10, 2016, the jury convicted Lee of second degree child abuse.[19] On July 21, 2016, the trial court sentenced Lee to two years probation.[20]

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[13] 6/9/16, 47-50.

[14] 6/9/16, 50.

[15] 6/9/16, 50-51.

[16] 6/9/16, 52-53.

[17] 6/9/16, 53.

[18] 6/9/16, 55-56.

[19] 6/10/16, 79-80.

[20] 6/10/16, 19-20.

On December 14, 2017, the Court of Appeals issued an opinion vacating Lee's conviction and sentence, based on the sufficiency of the evidence. [21] The People appeal that decision by application. This Court's jurisdiction arises from MCL 770.12(2)(a) and MCR 7.301(A)(2).

[21] *People v James Lee*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2017 (Docket No. 334308). The Court of Appeal affirmed the conviction and sentence of Victor Smith. Id.

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ARGUMENT

I.

A guardian is guilty of second-degree child abuse if he knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results. Here, the child's guardian allowed his boyfriend to continue living in the same residence and have unsupervised access to the child even after learning that the boyfriend had recently sexually penetrated the child, and then the boyfriend sexually penetrated the child again. The evidence was sufficient to convict the guardian of second degree child abuse.

Appellate Standard of Review

The standard of review in this area is well settled. The reviewing court must view the evidence in the light most favorable to the prosecution and determine whether a reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.[22]

Discussion

The Court of Appeals, citing *People v Murphy*,[23] erroneously reversed Defendant's conviction under the mistaken belief that the evidence presented at trial was insufficient to prove Defendant's guilt because the act of omission "at issue" was not contemplated under MCL 750.136b(3)(a). But Defendant was not charged with an omission under that subsection of the statute— he was charged for knowing and intentional acts likely to cause serious physical or mental harm to a child, under MCL 750.136b(3)(b). Because the evidence supported a conviction under that portion of the statute, the Court of Appeals December 14, 2017 ruling must be set aside and Defendant's conviction and sentence must be reinstated.

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[22]*People v Hampton,* 407 Mich 354 (1979); *People v Petrella,* 424 Mich 221(1985).

[23]*People v Murphy*, __Mich App__; __NW2d __(2017)(Docket No.331620).

The second degree child abuse statute, MCL 750.136b(3), has three subsections; each section criminalizes different forms of child abuse.[24] Under MCL 750.136b(3)(b), a person, including a guardian,[25] is guilty of child abuse in the second degree if the person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.[26] The Court of Appeals reversed Defendant's conviction based on *Murphy,* in which the Court itself limited to MCL 750.136b(3)(a): "Only subsection (a) is applicable in this case."[27] Because the entirety of the *Murphy* opinion was expressly limited to cases charged under subsection (a), the Court of Appeals erred by indiscriminately applying it to a separate and distinct subsection of the statute.

The law requires that when an appellate court reviews a conviction for sufficiency, it must make all reasonable inferences and credibility choices which will support the verdict, and the scope of review is the same whether the case involves direct or circumstantial evidence.[28] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of

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[24] Under MCL 750.136b(3)(a), a person is guilty of second-degree child abuse if the person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child. MCL 750.136b(3)(c) states that a person is guilty of second-degree child abuse if the person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

[25] MCL 750.136b(d) includes a guardian as a "person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person."

[26] MCL 750.136b(3)(b).

[27] *Murphy*, supra, slip op at 2.

[28] *United States v Clark,* 741 F2d 699 (CA 5, 1984).

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the elements of the offense.[29] The prosecutor's burden is to prove its own theory beyond a reasonable doubt and the prosecutor need not negate every reasonable theory consistent with innocence.[30]

A. *Defendant's conduct constituted an affirmative act under the statute*

Defendant did not simply fail to act, but *acted*. Defendant did not just fail to intervene to protect the child against an abuser; rather, he did an affirmative act.

In this case, Defendant admitted that he knew that Smith was going to have sexual relations with the minor child *before* Smith's initial first-degree criminal-sexual-conduct. In fact, he stated that he left the house, knowing that it was about to happen. Defendant's affirmative acts of leaving the child with Smith, knowing that co-defendant had already sexually penetrated the minor child, facilitated the co-defendant to victimize the child yet again—which he did. Defendant admittedly chose to place the victim under the care and supervision of Smith, knowing that Smith intended to have sexual relations with the minor child. Defendant's only excuse was that he did not consider this to be rape because he claimed, as did the rapist, that the minor victim wanted it.[31] Defendant did not call the police or Protective Services, nor did he remove Smith or the victim out of his home.[32]

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[29] *People v Richardson,* 139 Mich App 622 (1984).

[30] *People v Johnson,* 146 Mich App 429 (1985).

[31] 6/9/16, 47-50. In Defendant's statement to Jonnathan Meade, Defendant said the he did not think that sexual conduct with the child was rape because the child, according the Defendant, consented. Even if this were true, it is a deeply rooted rule in criminal law that ignorance of the law or a mistake of law is not a defense. *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 215 (1997); *People v Weiss*, 191 Mich App 553, 561 (1991).

[32] 6/9/16, 50-51.

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Defendant made a decision to allow Smith to remain in the house and have unsupervised access to the child, knowing that Smith, who had no legal right to have contact with the child, had recently sexually penetrated the child. A reasonable view of the evidence demonstrates that this conduct constituted an affirmative act. In this case, Defendant's actions not only created an unreasonable risk that the child would be re-victimized—Defendant's actions facilitated and made its reoccurrence possible.

What is more, in *People v Maynor*,[33] this Court held that a defendant must have either intended to cause the harm *or* have known that the harm would result from her actions. A jury could find that defendant had the requisite knowledge in this case. A parent, or in this case a guardian, who continues to place his child ward in the care of a known physical abuser is no different from one who drops his child off at the home of a known child molester to spend the night alone with him. No one would question a jury's conclusion that the parent knew his actions would likely cause serious harm to the child under the second scenario. The first scenario is no different. This is not a failure to protect, but an affirmative act that is likely to cause of the harm of the victim, and a foreseeable one, given that Defendant *actually* knew of the prior sexual abuse by his boyfriend.

B. *There is no distinction between aiding and abetting and directly committing an act; defendant may be convicted as an aider and abettor*

There is no distinction between a direct actor and an "aider and abettor" in Michigan. Our statute, MCL 767.39, declares, with a statutory catch-line "Abolition of distinction between accessory and principal," that:

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[33] *People v Maynor,* 470 Mich 289, 295 (2004).

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> 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* (emphasis supplied).

This statutory abolition of the common-law distinctions between accessories before the fact and principals is of ancient vintage, existing in this state for at least a century and a half.[34] Under the statute, one is not charged as an "aider and abettor" or principal, as both are equally culpable.

As explained in *People v Robinson*,[35] "at common law, one could be guilty of the natural and probable consequences of the intended crime or the intended crime itself, depending on whether the actor was a principal in the second degree or an 'accessory before the fact.'"[36] These distinctions were abrogated by legislative action, and so under the statute "a defendant can be held criminally liable as an accomplice if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an 'incidental consequence[ ] which might reasonably be expected to result from the intended wrong.'"[37] The legislature in abolishing these common-law distinctions, "intended for all offenders to be convicted

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[34] See e.g. *People v Brigham,* 2 Mich 550 (1853), noting that "Sec. 1, chap. 161, title 30, makes an accessory before the fact to any *felony,* punishable in the same manner as may be prescribed for the punishment of the principal felon," and *Shannon v People*, 5 Mich 71 (1858), observing that "[T]he act of 1855, section 19 (*Laws of 1855, p. 145; sec. 6065 of Compiled Laws*), enacts 'that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may hereafter be indicted, tried, and punished as principals, as in the case of a misdemeanor.'"

[35] *People v Robinison*, 475 Mich 1 (2006).

[36] Id, 475 Mich at 7-8.

[37] Id, 475 Mich at 9.

of the intended offense . . ., as well as the natural and probable consequences of that offense. . . ."[38] While principals and accomplices may share the identical intent, "sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability . . . ."[39]

A parent or guardian's failure to prevent injury to his or her child may support a conviction under an aiding and abetting theory. Aiding and abetting describes "all forms of assistance rendered to the perpetrator of a crime."[40] Although this Court once referred in dicta to "active, overt participation" as a requirement,[41] the Court has since stated that "encouragement" is sufficient.[42] Michigan courts have also recognized the role of psychological encouragement in aiding and abetting cases,[43] and courts of other jurisdictions have applied those principles in holding that a parent's failure to act may aid and abet a crime.[44]

Professor LaFave has noted that:

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[38] Id.

[39] Id, 475 Mich at 14.

[40] *People v Carines,* 460 Mich 750, 757 (1999).

[41] *People v Carter,* 415 Mich 558, 580 (1982).

[42] *Carines,* 460 Mich at 757-758.

[43] See *People v Smock,* 399 Mich 282, 285 (1976) (a defendant "contributed to psychological underpinnings that give strength to a 'mob' through the device of mutual reassurance"); *In re Thurston*, 226 Mich App 205, 220 n 16 (1998), rev'd 459 Mich 923 (1998) (noting that a jury could find that a defendant provided implicit aid and encouragement by remaining present after he assaulted the victim while others also assaulted her because his action notified the victim that she was helpless and could expect no assistance).

[44] E.g. *North Carolina v Walden*, 306 NC 466, 293 SE2d 780 (1982) ("the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed").

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> 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 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.[45]

He has said also that:

> it is generally true that liability will not flow merely from a failure to intervene. But, under the general principle that an omission in violation of a legal duty will suffice, one may become an accomplice by not preventing a crime which he has a duty to prevent. Thus, a conductor on a train might become an accomplice in the knowing transportation of liquor on his train for his failure to take steps to prevent the offense. Or, even in the absence of positive encouragement, the owner of a car who sat beside the driver might become an accomplice to the driver's crime of driving at a dangerous speed. *Or, a parent might become an accomplice to a crime because of the parent's failure to intervene to prevent the crime from being committed on the parent's offspring*.[46]

A parent who fails to protect his or her child from a known abuser encourages the abuser by essentially tacitly consenting to the crime. In the companion cases of *People v Stanciel and Peters*,[47] the Supreme Court of Illinois considered cases similar to the case at bar and determined that the

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[45] 1 LaFave, *Substantive Criminal Law*, § 6.2(a), p, 437-438.

[46] 1 Lafave, *Substantive Criminal Law* § 13.2(a), p, 341-342.

[47] *People v Stanciel*, 153 Ill 2d 218, 236-237 (1992).

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defendants' failure to protect their children from abuse by their boyfriends supported their convictions of murder under an aiding and abetting theory. The court reasoned:

> Although both [defendants] argue they did not aid the principals in the pattern of abuse which resulted in the death of the children, the evidence presented against both defendants is sufficient to provide the inference that they both either knew or should have known of the serious nature of the injuries which the victims were sustaining. Under the present circumstances, we hold the defendants had an affirmative duty to protect their children from the threat posed by [their boyfriends]. Rather than fulfill that obligation, the defendants entirely ignored the danger posed by these two men, and in doing so aided them in the murders of [the children].

Other courts have reached similar results; for example:

- Our analysis would be the same even if we were to classify defendant's act of standing over the bed, watching Umble molest the victim, as an "omission" rather than act "act." . . . Other "state courts have held that a failure to act can constitute aiding and abetting provided the aider and abettor has a legal duty to act. . . . . we hold that the failure of a parent who is present o take all steps reasonable possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed."[48]

- other states have recognized a duty on the part of a parent to care for and protect his or her child and have upheld the conviction of a parent for the physical and sexual abuse of a child even though that parent was not the perpetrator of the abuse. . . . there was sufficient evidence from which a jury could have reasonably concluded that the appellant knew, when she left A.D. alone with her father, that her father was going to abuse her. . . . there was sufficient evidence that the appellant knew, or should have known, that there was a probability that A.D.'s father would sexually abuse her in the appellant's absence . . . . [49]

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[48] *People v Swanson-Birabent*, 114 Ca App 4th 733, 743-744 (6th Dist., 2004).

[49] *C.G. v State,* 841 So 2d 281, 289, 290, 291 (Ala Crim.App.,2001). And see *North Carolina v Walden*, supra. And see Liang and Macfarlane, "Murder By Omission: Child Abuse and the Passive Parent," 36 Harv J on Legis 397 (1999).

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C. *Conclusion*

Defendant's culpability flows not simply from his failure to prevent harm to the child— his ward— but his affirmative act in facilitating the sexual abuse and continuing to place the child under the supervision and care of the known abuser who had no legal right to have any contact with the child.

For these reasons, the evidence was more than sufficient to support the jury's guilty verdict for the crime of second-degree child abuse. This Court should overturn the Court of Appeals ruling and reinstate Defendant's conviction and sentence.

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RELIEF

WHEREFORE, the People respectfully request that this Court grant this application for leave to appeal or peremptorily reverse the Court of Appeals' ruling and reinstate Defendant's conviction and sentence.

Respectfully submitted,

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