STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs Supreme Court No. 157176

JAMES LEE

Defendant-Appellee.

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

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF
BY DIRECTION OF THE COURT'S ORDER OF APRIL 26, 2018

ORAL ARGUMENT REQUESTED

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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 Defendant's conviction and sentence, holding that Defendant's "failure to protect the victim from [co-defendant] Smith is not the type of omission contemplated" by MCL 750.136b(1)(c) and "to be convicted of second-degree child abuse, a person must have committed an affirmative act, which he did not do."[1] But Defendant was not charged with having committed an omission under MCL 750.136b(3)(a), he was charged under MCL 750.136b(3)(b) with knowingly or intentionally committing an act likely to cause serious physical or mental harm to a child regardless of whether harm results. Defendant, the child's guardian, left the house and gave his boyfriend unsupervised access to the child, knowing that his boyfriend had recently sexually penetrated the child, then the boyfriend sexually abused the child, yet again. The evidence was sufficient for a rational trier of fact to conclude that Defendant committed an act when he intentionally left the child in the care of a known rapist.

The People filed a timely application for leave to appeal. On April 26, 2018, this Court directed the Clerk to schedule oral argument and ordered the parties to file supplemental briefs addressing "whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed an 'act' as that term is used in MCL 750.136b(3)(b)."[2] As the evidence was sufficient, the Court of Appeals' ruling should be overturned.

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[1] *People v Lee*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2017 (Docket No. 334308). 8a-14a.

[2] This Court directed the Clerk to schedule the oral argument for the same future session as oral argument in *People v Worth-McBride* (Docket No. 156430).

QUESTION PRESENTED

I.

A person 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, Defendant, the child's guardian, committed the affirmative act of leaving the house and giving the boyfriend unsupervised access to the child, knowing that the boyfriend had recently sexually penetrated the child, then the boyfriend sexually abused the child, yet again. Was the evidence sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Defendant committed an act, under MCL 750.136b(3)(b), when he intentionally left the child in the care of a known rapist?

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

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

Defendant became the victim's guardian when the victim was fourteen years old, at which time the victim moved into Defendant's apartment.[4] The victim had a learning disability that made it difficult for him to speak without slurring his words. He also had difficulty understanding others.[5] Shortly after the victim moved in with Defendant, Defendant's boyfriend, Victor Smith, also started living in the apartment.[6]

While the victim was fifteen years old, Smith sexually penetrated him twice. The victim testified that, the first time, Smith came into his bedroom while Defendant was asleep in the bedroom that Defendant and Smith shared. Smith placed his penis in the victim's anus.[7] The victim testified that this hurt him and described the feeling as "not good."[8] The victim told Defendant what

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[3] *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. 8a.

[4] 131a, 154a-156a.

[5] 134a.

[6] 155a.

[7] 161a-164a.

[8] 166a.

happened and Defendant replied, "okay, I got it" and told the victim that he would kick Smith out of the house.[9] But Defendant did not kick Smith out of the residence, nor did he call the police or Protective Services. Rather, Defendant allowed Smith to remain in the residence.[10]

Shortly after the first incident and while Defendant was away from the home, Smith repeated his conduct by going into the victim's room and again penetrating the victim's anus with his penis.[11] The victim reported Smith's sexual misconduct to Defendant who repeated, "okay, I got it."[12] The victim testified that Defendant called his father, Shawn Bryant, who came to pick the victim up from the house. Bryant called the police.[13]

Jonnathan Meade, from Children's Protective Service, testified that on March 18, 2015, he interviewed the victim, the victim's parents, Defendant, and Victor Smith. He spoke to Defendant and Smith together at Defendant's apartment.[14] Meade told Defendant about the sexual abuse allegations and Defendant's failure to protect the victim from sexual interaction with Smith. Defendant candidly admitted to Meade that the allegations were true. Defendant recited a dissimilar account of the events than the victim's testimony, but he admitted knowing that Smith had sex with the victim on two different occasions. Defendant said that the first time, he, Smith, and the victim were all talking in the kitchen and Smith went to use the bathroom, leaving the door open.

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[9]169a-170a.

[10]170a-171a.

[11]172a.

[12]175a.

[13]188a.

[14]56a-60a.

According to Defendant, the victim told him that he had seen Smith's penis and that he wanted a sexual interaction with Smith. Defendant said that he then left the home and, while he was gone, Smith had sexual intercourse with the victim. The victim reported the incident to Defendant.[15] Defendant said that Smith told him that the victim "wanted it," so Smith "gave it to him."[16] Defendant said he did not consider this to be rape because the victim wanted it. Defendant said he did not call the police or Protective Services, nor did he remove Smith or the victim from his home.[17]

Defendant told Meade that, after the victim reported a *second* sexual intercourse with Smith, he confronted Smith and told him that he could no longer have any interaction with the victim because Defendant's trust level with Smith and the relationship that they shared had "lowered."[18] Yet, Defendant did not report the second incident to Protective Services or to police, nor did he kick Smith out of the home.[19]

Meade further testified that Smith was present during his entire conversation with Defendant. Smith told Meade that everything Defendant 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."[20] When Smith

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[15]62a-65a.

[16]64a-65a.

[17]65a-66a.

[18]67a-68a.

[19]68a.

[20]70a-71a.

testified at the joint trial, he denied any sexual conduct or behavior with the victim and denied that he made any admissions to Meade.[21]

On June 10, 2016, the jury convicted Defendant of second-degree child abuse.[22] On July 21, 2016, the trial court sentenced him to two years probation.

On December 14, 2017, the Court of Appeals issued an opinion vacating Defendant's conviction and sentence based on the sufficiency of the evidence.[23] The People appealed that decision by application. On April 26, 2018, this Court directed the Clerk to schedule oral argument and ordered the parties to file supplemental briefs addressing "whether there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant committed an 'act' as that term is used in MCL 750.136b(3)(b)."[24]

[21] 234a-245a.

[22] 1a-5a.

[23] 8a-11a.

[24] This Court also directed the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Worth-McBride* (Docket No. 156430).

ARGUMENT

I.

A person 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, Defendant, the child's guardian, committed the affirmative act of leaving the house and giving the boyfriend unsupervised access to the child, knowing that the boyfriend had recently sexually penetrated the child, then the boyfriend sexually abused the child, yet again. The evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Defendant committed an act, under MCL 750.136b(3)(b), when he intentionally left the child in the care of a known rapist.

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.[25]

Discussion

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.[26] Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense.[27] The prosecutor's burden is to prove its own theory beyond a

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

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

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

reasonable doubt and the prosecutor need not negate every reasonable theory consistent with innocence.[28]

Reviewing the trial evidence in the light most favorable to the prosecution, these facts are undisputed:

- Defendant was the minor victim's guardian.
- Smith had sexual intercourse with the minor victim.
- The victim informed Defendant about it.
- Smith had no custody rights to the child.
- Knowing that Smith had sexual intercourse with the child, Defendant left the house, leaving the child in Smith's unsupervised care.
- Smith had sexual intercourse with the child while Defendant was away.

A. *Defendant's conduct of placing the child under the unsupervised care of Defendant's boyfriend, knowing that the boyfriend had recently sexually penetrated the child, constituted an affirmative act under the statute.*

Under MCL 750.136b(3)(b), a person, including a guardian,[29] 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.[30] Here, 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, Smith had sexual intercourse with the minor child and the child informed Defendant what happened.[31] After Defendant knew about the first incident, Defendant's act of

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

[29]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."

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

[31]63a-64a.

knowingly and intentionally leaving the child with the rapist constituted an affirmative act that was likely to cause the victim serious harm—which it did. The evidence showed that Defendant admittedly chose to leave the child with Smith, giving Smith unsupervised control over the child because Defendant did not consider sexual relations between a minor child and an adult man to be rape, claiming, as did the rapist, that the minor victim wanted it.[32] Defendant did not call the police or Protective Services, nor did he remove Smith or the victim from his home.[33]

This is not a case in which a member of the household who is not allowed to care for the child seizes on the opportunity presented by his mere presence in the home to harm the child. Defendant made a decision to allow Smith to remain in the house, then Defendant left the house, giving Smith 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 rational jury could find from the evidence that Defendant's act of leaving the child in the care of a known rapist was 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.

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[32]Meade testified that Defendant told him that he did not think that sexual conduct with the child was rape because the child, Defendant claimed, consented. 62a-65a. 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).

[33]65a-66a.

B. *The Court of Appeals misconstrued the affirmative act of leaving the child in the care of a known rapist as "inaction," thus its ruling must be set aside.*[34]

The Court of Appeals erroneously relied on *People v Murphy*[35] by ruling that Defendant's "failure to prevent harm to the victim does not satisfy the requirements of MCL 750.136b(3)(b)" and "'[s]imply failing to take an action does not constitute an act.'"[36] Contrary to the Court of Appeals' decision, this case does not involve the type of "inaction" seen in *Murphy*.[37] There, the Court held that the prosecutor presented no evidence of an affirmative act by the defendant that led to the child's death; it only presented evidence of the defendant's inaction, i.e., failing to clean her house to ensure that morphine pills were not in reach of the child.[38] In fact, there was no evidence showing *how* the victim found the morphine pill; the prosecutor surmised that it was likely that the child's grandmother dropped the pill on the carpet about a month earlier, before the grandmother died of cancer.[39] The prosecutor's theory was that the victim died because of the defendant's "reckless acts;" her "inaction" and inability to protect the child and provide a safe home environment.[40]

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[34]The Court of Appeals also ruled that Defendant did not commit an "omission" as defined under MCL 750.136b(1)(c), because he provided the victim with food and a place to live. 9a. But the People's theory was that Defendant violated MCL 750.136b(3)(b), *not* MCL 750.750.136b(3)(a), therefore the definition of "omission" under the statute is entirely inapplicable to this case.

[35]*People v Murphy*, 321 Mich App 355, — , — NW2d— (2017).

[36] Id, slip op. at 3.

[37]*People v Murphy*, 321 Mich App 355, — , — NW2d— (2017); slip op. at 3.

[38] Id.

[39]Id, slip op. at 1, footnote 2.

[40]Id, slip op. at 1-2.

The Court in *Murphy* held that the element of a "reckless act," under MCL 750.136b(30(a), required the prosecutor to present evidence of an "act," that is "'[s]omething done or performed, esp. voluntarily; a deed,' or '2. The process of doing or performing; an occurrence that results from a person's will being exerted on the external world[.]'"[41] "Simply failing to take an action does not constitute an act" and since the prosecutor presented no evidence that any affirmative act taken by the defendant, only inaction by the failure to clean her house, the Court ruled that the prosecutor failed to present sufficient evidence of an affirmative act.[42]

This case does not involve an omission, a failure to act, or inaction. The key evidence here consisted of Defendant's affirmative act of leaving the home and giving the known rapist unsupervised access to the child. That conduct constitutes an affirmative act under the statute.

Compare *Murphy* to the facts in *People v Head*[43] where the Court of Appeals recently upheld a second-degree child-abuse conviction based on the sufficiency of an affirmative act.[44] In *Head*, the defendant stored a loaded shotgun in an unlocked closet of his bedroom and allowed his children to play in that bedroom while unsupervised. The Court held that these facts constituted a knowing and intentional *act* that was likely to cause serious physical harm to a child because the loaded short-barreled shotgun was readily accessible to the young children whom the defendant left unsupervised.

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[41]Id, slip op. at 3.

[42]Id, slip op. at 3-4.

[43]*People v Head*,— Mich App—,— NW2d—(2018) (Docket No. 334255); slip op. at 4.

[44]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.

In *Head*, the act for which the defendant was convicted was not his failure to remove the weapon from the hands of the children; it was his affirmative action in leaving his children unsupervised in the presence of a known danger—the loaded shotgun. In this case, the known danger was Smith. Defendant intentionally placed the child under the unsupervised care of a known rapist. The trial prosecutor explained it best in her closing remarks:

> So, imagine there's a seven year old girl, who's living with her single mother. And the mother is a great mother. The mother clothes her child, feeds her child, helps her with her homework, takes her to dance class, and cooks -- makes chocolate chip cookies every day, after school. And then the mother gets a boyfriend, and the boyfriend moves in. And the boyfriend start molesting the seven year old. And the seven year old tells her mother, your boyfriend raped me. And mother does nothing about it. She doesn't call the Police, she doesn't call Protective Services, she doesn't kick the boyfriend out, she doesn't move the child out. She lets life go on. She leaves the child home alone, with her boyfriend, and low and behold, another sexual act occurs.
>
> Would there be any doubt in your minds that this mother should be held accountable for leaving her boyfriend home alone with this child, so that he could rape again? I submit to you, none of you would have a problem with prosecuting that mother for what she did. Well, what we have is the exact same situation.[45]

In this case, the prosecutor presented sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Defendant committed an act under MCL 750.136b(3)(b). The Court of Appeals ruling must be set aside and Defendant's conviction and sentence must be reinstated.[46]

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[45]260a-261a.

[46]The People wish to make clear that while Defendant was charged for having committed an affirmative act—leaving the child in the care of a known rapist—the Court of Appeals' opinion seems to suggest that a failure to protect by one who has a duty to protect, such as a parent or guardian, is simply inaction and "does not give rise to criminal culpability." While this was not the fact scenario in the case before this Court and the Court of Appeals' language does not affect the outcome of this case, its conclusion is erroneous and misleading. Where there is a duty to protect, the failure to protect may support a conviction under an aiding and abetting theory. See *People v Beardsley*, 150 Mich 206, 209–210 (1907); *People v Giddings*, 169 Mich

C. *Conclusion*

The Court of Appeals did not use the correct standard when reviewing this case for sufficiency. That is, the Court of Appeals failed to review the evidence in the light most favorable to the prosecution.[47] Using the correct standard, the following facts were sufficient to sustain Defendant's conviction for the crime of second-degree abuse:

- Defendant was the minor victim's guardian.
- Smith had sexual intercourse with the minor victim.
- The victim informed Defendant about it.
- Knowing that Smith had sexual intercourse with the child, Defendant left the house, leaving the child in Smith's unsupervised care.
- Smith had sexual intercourse with the child while Defendant was away.

Even though the statute only requires the prosecutor to prove an act *likely* to cause serious physical or mental harm to a child *regardless of whether harm results*, the Court of Appeals found that the prosecutor failed to present evidence Defendant "knowingly or intentionally acted to cause

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App 631, 635 (1988). A parent who fails to protect their child from a known abuser encourages the abuser by essentially tacitly consenting to the crime and is culpable of murder under an aiding and abetting theory. See the companion cases of *People v Stanciel and Peters*, 153 Ill 2d 218, 236-237 (1992). Professor LaFave has noted that, "[t]he 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*. . .. Action may be required to . . . protect against threatened acts by third persons. See 1 LaFave, *Substantive Criminal Law*, § 6.2(a), p, 437-438 (emphasis added). 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. . . *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*. 1 Lafave, *Substantive Criminal Law* § 13.2(a), p, 341-342 (emphasis added).

Again, this case involves Defendant's own act, which is sufficient under the statute.

[47] *Hampton*, supra.

serious physical or mental harm to the victim, within the statutory definitions of serious physical or mental harm." But under the facts of this case, a jury could find that Defendant had the requisite intent. In *People v Maynor*,[48] this Court held that to prove the knowingly or intentionally element of the offense, the prosecution, in a first-degree child-abuse case,[49] was required to establish that the defendant either intended to cause serious physical harm *or* that she knew that serious physical harm would be caused.[50] A parent, or in this case a guardian, who leaves the home and places his child ward in the care of a known sexual 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—leaving the child in the care of the known rapist— 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. Moreover, a reasonable trier of fact could conclude beyond a reasonable doubt that allowing an adult to have sexual intercourse with a minor child, particularly a vulnerable child with learning disabilities, is likely to cause serious mental harm to the child. Again, the statute does not require that harm actually occur. If the Court of Appeals had properly reviewed the evidence presented at trial, it would have found that the evidence was sufficient in this regard.[51]

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

[49] MCL 750.136b(2).

[50]*Maynor*, 470 Mich at 295.

[51]Furthermore, *had* the Court of Appeals viewed the evidence in the light most favorable to the People, it would not have considered let alone mentioned Smith's self-serving trial testimony that was entirely irrelevant to Defendant's sufficiency challenge.

Finally, the notion that Defendant is not criminally liable because he acted to protect the child *after* Smith raped him the *second* time is absurd. Under the statute, Defendant's own criminal conduct occurred when he left the child in the hands of the known rapist.

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.

The evidence was more than sufficient to sustain the jury's guilty verdict. This Court should overturn the Court of Appeals ruling and reinstate Defendant's conviction and sentence.

RELIEF

WHEREFORE, the People respectfully request that this Court reverse the Court of Appeals' ruling and reinstate Defendant's conviction and sentence.

Respectfully submitted,

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Date: June 28, 2018.