STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Supreme Court No. 157176

Court of Appeals No. 334308

Plaintiff-Appellee
-vs-

Lower Court No. 16-001002-FC

JAMES LEE

Defendant-Appellant
_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

_____

JASON R. EGGERT (P75452)
Attorney for Defendant-Appellant

_____

APPELLEE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

I. Is there insufficient evidence Mr. Lee committed an "act" as the term is used in MCL 750.136b(3)(b)?

Court of Appeals answers, "No".

Plainatiff-Appellant answers, "Yes".

Defendant-Appellee answers, "No".

STATEMENT OF FACTS

Introduction

James Lee was charged in Wayne County with second-degree child abuse in violation of MCL 750.136b(3)(b)[1]. Under MCL 750.136b(3)(b), an individual is only guilty of second-degree child abuse if "[t]he person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results."

The charges were related to two instances of anal penetration of Mr. Lee's 15-year-old nephew, EL, by Mr. Lee's boyfriend, Victor Smith ("Smith"). Mr. Lee was EL's legal guardian. (130a-132a). The allegations were that, after the first assault, EL told Mr. Lee that Smith had sex with him. EL claimed Mr. Lee told him he would "take care of it." (170a). Mr. Lee, however, did not remove Smith from the home.

It was the prosecution's theory that Mr. Lee should be held criminally responsible for the second sexual assault because he "did nothing" to prevent Smith from having sex with EL after he was notified of the first instance of assault. (41a-43a). In other words, it was the prosecution's position that Mr. Lee committed a knowing or intentional act likely to cause serious physical or mental harm when he failed to prevent harm to his nephew by "doing absolutely nothing" after learning of the first assault. (41a-43a; 266a).

[1] Mr. Lee was also charged with first-degree criminal sexual conduct as an aider and abettor.

Following a three day trial jury trial before the Honorable Kevin J. Cox, the jury acquitted Mr. Lee of first-degree criminal sexual conduct, but convicted him of second-degree child abuse.

The Trial

Mr. Lee became EL's guardian when EL was 14 years old and remained so for about a year and a half. (131a, 154a). Mr. Lee became his guardian because, as EL's father explained, his family was having financial difficulties and could not provide for him. (131a-132a). Those difficulties included not having a working refrigerator or stove. (131a-132a). EL also regularly fought with his brother. (189a). While EL was in Mr. Lee's care, his father did not visit him for over a year. (143a).

In addition to the lack of financial resources at home, EL is learning disabled. (134a). EL's disability gave him problems with his ability to speak and understand others. (134a). According to his father, it was necessary to repeat information to EL at least "two or three times so he can understand what you tellin' him." (139a). To compound these communication problems, Mr. Lee had substantial hearing issues. Those hearing issues required the use of three sign-language interpreters at trial. (19a-20a).

During the time he was in Mr. Lee's care, EL lived in an apartment in the city of Detroit. (155a-156a). Mr. Lee fed and clothed EL, and made sure he went to school every day. (158a). EL did not know sign language and only communicated with Mr. Lee by speaking to him. (158a). EL claimed, despite Mr. Lee's difficulties hearing, Mr. Lee had no problems hearing him. (159a).

Shortly after EL moved in with him, Mr. Lee's boyfriend Victor Smith also started living in the apartment. (155a). Smith testified he moved in because he had surgery on his foot and could not walk after the procedure. (237a).

First Instance of Sexual Assault

At some point while EL lived in the apartment with Mr. Lee, Smith had anal sex with EL. (161a). According to EL, the intercourse happened in his bedroom. (162a-164a). EL claimed that Mr. Lee was home when the act occurred, but was asleep in his room when it happened. (164a). EL testified that the anal sex felt "not good." (166a).

EL told Mr. Lee what happened the next morning when he got up. (185a). He did not tell Mr. Lee that the anal sex hurt. (168a). According to EL, after hearing about what happened, Mr. Lee told him "okay, I got it." (169a). EL understood this to mean Mr. Lee would take care of it. (170a). EL also claimed Mr. Lee told him he would kick Smith out of the house. (170a). Smith, however, was not kicked out of the apartment. (170a). EL claimed that Mr. Lee did nothing to prevent sexual intercourse from occurring again. (171a).

Second Sexual Assault

Shortly after the first incident, Smith had anal sex with EL again. (172a). Mr. Lee was not home at the time of the second sexual assault. (172a). EL told Mr. Lee about the second sexual assault when he got home and Mr. Lee told him "okay, I got it." (175a). Mr. Lee then called his father, Shawn Bryant, who came to pick up

EL and called the police. (188a). EL was then interviewed by "Kids Talk" about both instances of sexual assault. (163a).

CPS interview of Mr. Lee and Smith

On March 18, 2015, Jonnathan Meade ("Meade") received a CPS referral for allegations of abuse or neglect concerning EL. (58a-59a). As part of this referral, Mr. Meade spoke with Mr. Lee, Victor Smith and EL's parents. He also conducted the interview of EL at Kids Talk. (58a-59a).

Meade interviewed Mr. Lee and Smith at Mr. Lee's apartment. (61a-62a). According to Meade, "Mr. Lee indicated that the allegations were true." (62a). Meade testified those allegations were "sexual abuse, regarding failure to protect, as far as sexual interaction between Mr. Smith and [EL]." (62a).

According to Meade, Mr. Lee also indicated his understanding that "[EL] had solicited sex from Mr. Smith." (63a). Meade clarified that Mr. Lee did not use the word "solicited," but told him that EL had sex with Smith on two different occasions. (63a).

Meade testified Mr. Lee told him that on the first occasion, he, EL and Smith were all talking in the kitchen. (63a). At some point in the conversation, Smith went to the bathroom. (63a). While Smith was using the bathroom, the door was cracked open and "[EL] came back and indicated that he had saw [sic] Mr. Smith's penis and that he wanted him." (63a). Meade claimed Mr. Lee told him he left the house at some point after this occurred and, while he was gone, Smith and EL had sex. (64a).

After the first instance of sexual intercourse, Mr. Lee "confronted Mr. Smith about the interaction." (64a). However, Meade claimed "Mr. Lee indicated that he didn't do anything about it, because he didn't consider it to be rape . . . because [EL] indicated that he wanted it." (65a). Meade testified Mr. Lee did not kick Smith out of house, call CPS or police, or move EL out of the home. (66a).

Meade also discussed the second instance of sexual intercourse between Smith and EL. Meade testified that Mr. Lee told him that, after being informed Smith had sex with EL again, he once again confronted Smith. (67a-68a). Mr. Lee informed Meade that he told Smith he could no longer have "any interaction" with EL because "his trust level had lowered, for Mr. Smith, as far as their relationship was concerned." (68a). Mr. Meade explained that Mr. Lee said he "understood" why the situation could be considered a failure to protect. (70a). He said, though, that he did not think anything was done wrong regarding the first instance of sexual assault. (69a).

Meade also interviewed Smith. According to Meade, Smith said everything Mr. Lee told him was true. (71a).

Testimony of Victor Smith

Victor Smith denied having sex with EL. (238a). He testified he moved into the home after having foot surgery and that Mr. Lee was helping him with his recovery. (239a).

Smith testified that he did not get along with EL. (238a). He testified that EL "expressed" wanting to have sex with him, but that they did not in fact have sex. (240a).

Prosecution's Theory of the Case

During both opening and closing argument, it was the prosecution's theory that Mr. Lee should be convicted because he did "absolutely nothing" to prevent Smith from having sex with EL after he was notified of the first instance of assault. (41a-43a; 262a-263a, 266a). According to the prosecution, Mr. Lee had a legal obligation, one which he would be held criminally responsible for failing to perform, to "notify Protective Services, call the Police, kick [Smith] out, move [EL] out to another residence, to do something to prevent this from happening a second time." (262a).

Appellate Proceedings

On appeal, Mr. Lee argued the evidence was insufficient to support his conviction for second-degree child abuse. In particular, Mr. Lee argued the prosecution failed to present evidence he committed an "act" under MCL 750.136b(3)(b)." Instead, Mr. Lee argued the prosecution's theory that he should be held criminally liable because he "did nothing" after learning that his nephew was sexually assaulted by Smith was only evidence of an omission, not an act.

On December 14, 2017, the Court of Appeals issued an opinion and order vacating Mr. Lee's conviction because the prosecution failed to present evidence he committed an act for purposes of MCL 750.136b(3)(b). (9a-11a). In addition, the

Court of Appeals concluded that "[Mr.] Lee's failure to act does not give rise to criminal culpability for second-degree child abuse under MCL 750.136b(3)(b)." (11a).

On April 26, 2018, upon review of the Prosecution's Application for Leave to Appeal, this Court scheduled this case for oral argument on whether to grant the application or take other action. In addition, this Court ordered the parties to brief the issue of "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)."

I. THERE IS INSUFFICIENT EVIDENCE MR. LEE COMMITTED AN "ACT" AS THE TERM IS USED IN MCL 750.136B(3)(B)

Introduction

This Court ordered supplemental briefing on "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)." The answer to this question is no, for two reasons. First, there is insufficient evidence that Mr. Lee committed an "act" for purposes of MCL 750.136b(3)(b),because the evidence presented at trial only supports the conclusion that Mr. Lee failed to prevent harm to EL by failing to remove Smith from the home after the first incident of sexual assault between Smith and EL This is evidence of an omission, not an act. For this reason alone, the Court of Appeals opinion should be affirmed and Mr. Lee's conviction must be vacated.

Second, even if this Court were to conclude that Mr. Lee committed an act, the evidence is insufficient to establish that he acted "knowingly or intentionally" as required by MCL 750.136b(3)(b). Instead, the evidence only establishes that Mr. Lee's alleged conduct was negligent or, at best, reckless.

Standard of Review

An appellate court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); *People v Wolfe*, 440 Mich 508, 515 (1992); *People v Hampton*,

407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson*, 443 US at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v Patterson*, 428 Mich 502, 525 (1987) (quoting *Winship*, supra).

The interpretation and application of statutes is a question of law and is reviewed de novo. *People v Babcock*, 469 Mich 247, 666 NW 2d 231 (2003). A court's primary purpose in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams,* 475 Mich 245, 250; 716 NW2d 208 (2006). The most relevant starting point for discerning legislative intent lies in the plain language of the statute. *Id.* "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." *Frank v Linkner*, 500 Mich 133; 894 NW2d 574, 580 (2017) (citations and quotation marks omitted). If the Legislature uses clear and unambiguous language, courts must enforce the statute as written. *People v Barbee,* 470 Mich 283; 681 NW2d 348 (2004).

A. There is insufficient evidence to support Mr. Lee's conviction for second-degree child abuse because his alleged conduct is an omission, not an act.

James Lee was convicted of second-degree child abuse based on the theory he "did nothing" to prevent harm to his nephew, EL, after he was informed his roommate and boyfriend, Smith, had sex with him. (T II, 26-28; T III, 25-26, 29). This omission is insufficient to sustain his conviction for second-degree child abuse statute because MCL 750.136b(3)(b) requires that an individual knowingly or intentionally commit an act.

The second degree child abuse statute, MCL 750.136b(3), has three subsections. Each section criminalizes different forms of child abuse. A person may be convicted of second-degree child abuse if any of the following circumstances apply:

> (a) 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.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

Mr. Lee was charged with violating MCL 750.136b(3)(b). As described above, to violate this statute, an individual must commit an act. By its plain terms, this provision of the second-degree child abuse statute only criminalizes knowing and intentional acts that are likely to cause serious physical or mental harm and does not proscribe omissions.

The statute does not provide a definition of knowing or intentional acts. In the absence of a statutory definition, this Court regularly consults dictionary definitions. See *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002). Black's Law Dictionary (10th ed) defines "act" as "1. Something 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." Using this definition, in order to constitute a knowing or intentional act under the statute, an individual must do something and do it knowingly or intentionally.

Here, the prosecution's theory of the case was that Mr. Lee should be held criminally liable under MCL 750.136b(3)(b) because he did "absolutely nothing" to prevent his nephew from being harmed after he learned the Smith sexual assaulted him. (41a-43a; 262a-263a, 266a). Indeed, the entire focus of the case against Mr. Lee was on his failure to take action and to perform his duties as his nephew's legal guardian. Consistent with this theory, the prosecutor argued Mr. Lee should be found guilty failing to fulfill his obligations as a guardian, which required him to "notify Protective Services, call the Police, kick [Smith] out, move [EL] out to another residence, to do something to prevent this from happening a second time." (T III, 25). The prosecution's case was, therefore, premised on Mr. Lee's failure to act or to perform a duty. In other words, Mr. Lee was prosecuted under MCL 750.136b(3)(b) based on an omission – his failure to protect. This is insufficient.

While the second-degree child abuse statute does proscribe some types of omissions, MCL 750.136b(3)(b) expressly requires the commission of an act and

does not proscribe omissions. Instead, the Legislature allowed for the punishment of a limited amount of omissions in MCL 750.136b(3)(a). MCL 750.136b(1)(c) provides a definition of the types of omissions that fall within its scope. It provides: "Omission" means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." Although the statute provides a definition of omission, it does not describe the term generally and, instead, focuses on the types of omissions that are covered by the statute. As a result, a dictionary definition is helpful in determining this issue.

Black's Law Dictionary (10th ed) provides the following definition of omission:

> 1. A failure to do something; esp., a neglect of duty <the complaint alleged that the driver had committed various negligent acts and omissions>. 2. The act of leaving something out <the contractor's omission of the sales price rendered the contract void>. 3. The state of having been left out or of not having been done <his omission from the roster caused no harm>. 4. Something that is left out, left undone, or otherwise neglected <the many omissions from the list were unintentional>.

This definition falls directly in line with the prosecution's theory at trial – that Mr. Lee failed to perform or neglected his duty as a guardian when he "did nothing" to prevent his nephew from being assaulted a second time. His conduct (or lack thereof) is more accurately described as an omission.

On appeal, however, the prosecution has shifted the focus of the alleged conduct that was the basis of their theory at trial. Instead of focusing on Mr. Lee's failure to prevent harm to his nephew, as the prosecution did at trial, the prosecution now argues the evidence is sufficient because Mr. Lee "committed the

affirmative act of leaving the house and giving the boyfriend unsupervised access to the child." See Prosecution's Supplemental Brief, 7-9. In addition, despite the fact that their entire theory of the case was based on the premise that Mr. Lee did "absolutely nothing" to prevent his nephew from being harmed after he learned the Smith sexual assaulted him, the prosecution now submits that "[t]his case does not involve an omission, a failure to act, or inaction." See Prosecution's Supplemental Brief, 11. This argument lacks merit for at least three reasons.

First, by applying the prosecution's approach, a prosecutor could charge conduct beyond the scope of the plain language of second-degree child abuse statute by redefining omissions as acts. In other words, a prosecutor can circumvent the limits the Legislature imposed on the prosecution of omissions by changing the focus away from the failure to perform a duty or to prevent harm to a child. See MCL 750.136b(3)(a); MCL 750.136b(1)(c). For example, if a child was injured due to an individual's failure to clean their home or to perform another duty they had as a guardian, a prosecutor could simply recharacterize that omission as an act by putting the focus on what that individual did instead of cleaning or failing to perform that duty. This approach essentially eliminates the distinction between acts and omissions and is in direct conflict with the plain language of the statute, which expressly recognizes the distinction between them.

Second, the prosecution's repeated reliance on an aiding and abetting theory and the common law duty to protect to support this argument demonstrates that this case involves an omission. See Prosecution's Supplemental Brief, 12-13 fn 46.

In particular, the prosecution has relied on these doctrines to argue that an individual may be convicted as an aider and abettor even in the absence of an act because a parent or guardian has a common law duty to prevent harm to that child.[3] See 14b-16b; 32b-36b; Prosecution's Supplemental Brief, 12-13 fn 46. Further, the prosecution's reliance on the common law duty to protect is telling because the doctrine is used to impose affirmative duties on parents or guardians who fail to prevent harm. In other words, the common law duty to protect is designed to address omissions.

Third, the prosecution's argument also ignores the fact that merely committing an act is not sufficient to sustain a conviction under MCL 750.136b(3)(b). Instead, to be sufficient, a prosecutor must prove both that an individual committed an act and that they did so knowing or intending that serious physical or mental harm is likely to result from that act. Even assuming Mr. Lee's failure to prevent harm is an act, the prosecution cannot meet this burden. This is further discussed *infra*.

Mr. Lee, therefore, requests that this Court affirm the decision of the Court of appeals because the prosecution failed to present any evidence he committed an act, let alone a knowing or intentional act likely to cause serious physical harm. Simply put, Mr. Lee's failure to take action does not constitute an act. Mr. Lee's conviction must be vacated.

[3] The Prosecution's argument that the evidence was sufficient to sustain Mr. Lee's conviction under an aiding and abetting theory ignored the fact that he was never charged and the jury was never instructed under that theory.

B. Alternatively, even if this Court were to conclude that Mr. Lee committed an act by failing to prevent harm to his nephew after learning of the first assault, the conduct involved in this case is, at best, reckless and fails to meet the *mens rea* requirements of MCL 750.136b(3)(b).

In the alternative, even if this Court concludes that Mr. Lee committed an act by failing to protect his nephew after learning of the first assault, the evidence is still insufficient because the conduct involved in this case is, at best, reckless and fails to meet the *mens rea* requirements of MCL 750.136b(3)(b). In particular, the evidence is insufficient to establish that he knowingly or intentionally committed an act likely to cause serious physical or mental harm to his nephew.[4]

The child abuse statute provides no definition of knowing or intentional. Therefore, as with the definitions of act and omission, a dictionary definition is helpful in determining this issue. Black's Law Dictionary (10th ed.), defines "knowing" as "1. Having or showing awareness or understanding; well-informed <a knowing waiver of the right to counsel>. 2. Deliberate; conscious <a knowing

[4] MCL 750.136b(1)(f)&(g) define serious physical and mental harm. Those sections provide:

> (f) "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.
>
> (g) "Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

attempt to commit fraud>." Black's Law Dictionary (10th ed.) also defines "knowledge" as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Using these definitions, an individual knowingly commits an act likely to cause serious physical or mental harm if they knew the likely result of their act would be that the child would be harmed.[5]

Black's Law Dictionary (10th ed.) defines intentional as "[d]one with the aim of carrying out the act." For purpose of the analysis here, an individual intentionally commits an act likely to cause serious physical or mental harm if they intended or planned that the likely result of their act was to harm a child.

The evidence presented at trial fails to establish beyond a reasonable doubt that Mr. Lee knew that the likely result of leaving the home or failing to prevent harm to his nephew after learning of a prior assault would be a second sexual assault. The fact that Smith assaulted his nephew did not make it practically certain that leaving the home or failing to remove Smith from the home would result in another assault.

The evidence is similarly insufficient to establish that Mr. Lee intended that that his nephew suffer serious physical or mental harm if he left the home or failed

[5] The Model Penal Code also supplies a definition of "knowingly" that is consistent with this interpretation of the language in the statute. See Model Penal Code, § 2.02. According to Section 2.02 of the Code, "[a] person acts knowingly with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduction or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

to remove Smith from the home. Indeed, the evidence presented at trial only suggests that Mr. Lee confronted Smith after each assault and then called his father who removed EL from the home and contacted the authorities. (T II 49, 52-53). This is not evidence of an intentional act under MCL 750.136b(3)(b).

If this Court concludes that Mr. Lee's failure to prevent harm to his nephew in this is case constitutes an act, that conduct is, at best, reckless and, therefore, not proscribed by MCL 750.136b(3)(b). This is so because reckless acts are only covered by MCL 750.136b(3)(a), which criminalizes reckless acts that cause serious physical or mental harm to a child. Reckless acts are not punishable under MCL 750.136b(3)(b) as it only criminalizes knowing or intentional acts.

The child abuse statute provides no definition of reckless. Black's Law Dictionary (10th ed.), however, defines reckless as

> Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. • Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.[6]

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[6] This definition is consistent with the definition in the Model Penal Code. Model Penal Code § 2.02(c) provides:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

In addition, Judge Gleicher concluded, in her concurring opinion in *People v Murphy*, 321 Mich App 355, 372; 910 NW2d 374 (2017)(Gleicher, J., concurring), that the Model Penal Code definition of reckless comports with Michigan law and should be adopted.

At best, Mr. Lee's conduct fits this definition. To the extent "leaving" his nephew with Smith is an act, it is reckless or grossly negligent – but it is not knowing or intentional, which is required by MCL 750.136b(3)(b). As a result, the evidence is insufficient 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).

The prosecution fails to cite a single case interpreting MCL 750.136b(3)(b) to support its position that Mr. Lee committed an act or that his conduct constituted a knowing or intentional act likely to cause serious physical or mental harm. Instead, the prosecution heavily relies on *People v Head*, ___ Mich App ___; ___ NW2d ___ (2018)(Docket No. 334255). *Head*, however, is distinguishable and does not support the prosecution's position. The case did not involve the application of MCL 750.136b(3)(b) because Mr. Head was charged and convicted of committing a reckless act causing serious physical harm under MCL 750.136b(3)(a). The analogy the prosecution seeks to draw from the case does not support the conclusion that Mr. Lee acted knowingly or intentionally. Instead, at best, it supports the conclusion that he acted recklessly, which is insufficient to establish a conviction under MCL 750.136b(3)(b).

The evidence is, therefore, insufficient 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). Mr. Lee's conviction must be vacated.

C. The Court of Appeals applied the correct legal standard.

Finally, the prosecution argues the Court of Appeals failed to apply the proper legal standard when it issued its opinion vacating Mr. Lee's conviction. This argument also lacks merit. The Court of Appeals cited and applied the appropriate standard of review in reaching its decision. (9a-11a). It also accurately stated the facts as they were presented and argued by the prosecution at trial. (9a-11a).

The fact that the prosecution disagrees with the result does not mean the Court of Appeals applied the incorrect legal standard. Viewing the evidence in the light most favorable to the prosecution does not require a court to redefine omissions as acts or to conclude that reckless conduct is knowing or intentional. It only requires that the court draw every favorable inference that may be fairly drawn from the facts. The Court of Appeals correctly applied this standard when it concluded that the evidence was insufficient to sustain Mr. Lee's conviction. As a result, Mr. Lee requests that this Court enter an order affirming the Court of Appeals opinion vacating his conviction for second-degree child abuse.

Summary and Request for Relief

Mr. Lee asks this Honorable Court to affirm the decision of the Court of Appeals and enter an order vacating his conviction for second-degree child abuse.

Respectfully submitted,

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