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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANE RICHARD KRUKOWSKI,

Defendant-Appellee.

_____/

Supreme Court No.

Court of Appeals No. 334320

Lower Court No. 15-041274-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CODIE LYNN STEVENS,

Defendant-Appellee.

_____/

Supreme Court No.

Court of Appeals No. 337120

Lower Court No. 15-041275-FH

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

The People seek leave to appeal the Michigan Court of Appeals' unpublished opinion, issued August 1, 2019, which vacated defendants' convictions and sentences and remanded both cases for entry of orders of acquittal.[1] This application for leave to appeal is being timely filed within 56 days of that opinion. Therefore, this Court has jurisdiction over the instant application for leave to appeal pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(a).

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[1] *People v Krukowski*, unpublished per curiam opinion of the Court of Appeals, issued August 1, 2019 (Docket Nos. 334320 and 337120).

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STATEMENT OF QUESTIONS INVOLVED

I. **Whether the Court of Appeals erred by rejecting the prosecutor's "intentional act" theory on the basis that defendants did not commit an "act" that was "likely to cause serious physical . . . harm" under MCL 750.136b(3)(b) by relying on *People v Murphy*, 321 Mich App 355 (2017), which is distinguishable and did not involve culpability under MCL 750.136b(3)(b), and by adopting a "common sense" position that defendants' act was unlikely to cause serious physical harm when that position was contradicted by medical testimony presented at trial.**

Plaintiff-Appellant says "YES".
Defendant-Appellee says "NO".
The trial court did not address this question.
The Court of Appeals said "NO".

II. **Whether, in addition to the dangerous act of feeding the infant multiple bottles of water, the Court of Appeals erred by failing to address several other "acts" committed by defendant Stevens and failing to acknowledge or address the Court of Appeals' published opinion in *People v Head*, 323 Mich App 526 (2018), which is at odds with *Murphy*.**

Plaintiff-Appellant says "YES".
Defendant-Appellee says "NO".
The trial court did not address this question.
The Court of Appeals said "NO".

III. **Whether the Court of Appeals imposed an overly narrow reading of the statutory phrase "willful abandonment" in MCL 750.136b(1)(c) and improperly applied the semantic canon of *expressio unius est exclusio alterius* to hold that a parent's failure to seek professional medical care following an infant's traumatic injury is not an "omission" for purposes of MCL 750.136b(3)(a).**

Plaintiff-Appellant says "YES".
Defendant-Appellee says "NO".
The trial court did not address this question.
The Court of Appeals said "NO".

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STATEMENT OF FACTS

The charges in these cases arose out of events that took place between February 7, 2015 and February 22, 2015, and involve an infant, Roegan Krukowski. Roegan was born via Cesarean section on December 6, 2014, following a 19-hour labor (Trial Transcript [Tr] 5/4/16, 34-35). According to the infant's mother, defendant Codie Lynn Stevens, Roegan was bruised from forehead to mid-chest after the delivery (Tr 5/4/16, 38). Stevens and Roegan were discharged a few days later, however, and at a doctor's appointment on December 11, 2014, the infant presented as normal and healthy without any sign of bruising (Tr 4/28/16, 25-26), his only issues being difficulty keeping certain formulas down and slight jaundice (Tr 5/4/16, 44).

On February 7, 2015, while defendant Dane Krukowski was giving 11-week-old Roegan a bath, the infant allegedly slipped out of his hands and struck his head on the side of the bathtub (Tr 5/4/16, 164). Krukowski explained that the infant fell facedown into over a foot of water, so he reached in and scooped him up (Tr 5/4/16, 192-194). Krukowksi testified that, immediately following the incident, he called Stevens upstairs and told her what had happened (Tr 5/4/16, 50, 167). After the fall, Krukowski noticed that Roegan's head was a "little red" where it had made contact with the bathtub, and he later observed bruising and swelling in the same area (Tr 5/4/16, 168-171). Stevens described the visible injury as a dime-sized circle that was yellowish in color with "slight swelling" (Tr 5/4/16, 72). Neither Krukowski nor Stevens sought professional medical treatment for Roegan after the fall (Tr 5/4/16, 170). Instead, they applied a cold cloth and a bag of frozen peas to the area of Roegan's head that appeared to be injured (Tr 5/4/16, 75; 170-171).[2]

[2] The only other potential time of injury Krukowski testified regarding was an incident when he claimed he slipped on a stair while carrying Roegan in January 2015. However, Krukowski was adamant that he was holding Roegan against his belly and chest, so the infant was not "crushed against the floor or a wall" (Tr 5/4/16, 189-190).

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On February 9, 2015, Stevens and her mother, Shawn Stevens, appeared for a previously scheduled appointment with Roegan's pediatrician, Dr. Elvira M. Dawis (Tr 5/4/16, 45). Dr. Dawis testified that Stevens reported Roegan was irritable, fussy, and could not be pacified (Tr 4/28/16, 26, 44). Stevens testified that she informed Dr. Dawis about the "incident in the bathtub," explaining that the infant had "fallen out of [Krukowski's] arms and he had hit his head" (Tr 5/4/16, 53, 77).[3] However, Dr. Dawis denied that Stevens told her that Roegan hit his head and did not note any falls in her medical records (Tr 4/28/16, 26-28). Dr. Dawis explained that she asks parents as a matter of course whether an injury or fall occurred when an infant presents as irritable or fussy, but when she asked Stevens that question, Stevens expressly denied any injury or fall (Tr 4/28/16, 25-26). Dr. Dawis thus wrote in her medical notes for the appointment that "mom denies any fall" (Tr 4/28/16, 26).

When Dr. Dawis could not determine the cause of the Roegan's fussiness and irritability, she discussed with Stevens and her mother the option of seeking chiropractic care, which Stevens agreed to do (Tr 4/28/16, 29-30). Stevens brought Roegan in for chiropractic treatments on February 9, 10, and 18, 2015 (Tr 5/4/16, 157-158). Chiropractor Michael Dense treated Rogean on February 9, 2015. He explained that, as part of his treatment, he held Roegan upside down and gave a "little pump" to make the baby arch his back to align the spine (Tr 4/28/16, 121-122). Chiropractor Jason Barrigar treated Roegan on February 10 and 18, 2015. He also explained that he held Roegan upside down and then lifted his heels to straighten the spine (Tr 4/28/16, 159). Stevens's mother testified that she heard Roegan's body "crack" during the first procedure (Tr 4/28/16, 80). Stevens also testified that she heard a "crack" sound when the chiropractors adjusted

[3] At trial, Stevens's mother testified that Stevens told Dr. Dawis they "had an accident, and [Roegan] had a bump on the head," but she did not describe that Stevens advised Dr. Dawis that the child had been dropped on his head on the side of a bathtub (Tr 4/29/16, 76).

Roegan's back, and again when they adjusted his neck (Tr 5/4/16, 55-58).

On February 21, 2015, Roegan vomited after Stevens fed him (Tr 5/4/16, 59). When she attempted to feed him again three or four hours later, he vomited again (Tr 5/4/16, 59). Stevens said that, after cleaning him off, she laid Roegan in his crib, but when she checked on him an hour or so later he was "covered in vomit" (Tr 5/4/16, 59). Stevens testified that she believed Roegan might have the flu, so she made him an eight-ounce bottle of peppermint water, which he was able to keep down (Tr 5/4/16, 59-60). That night, Stevens made Roegan another four-ounce bottle of peppermint water, which he drank, and then put him down for the night (Tr 5/4/16, 60). According to Stevens, Roegan slept through the night, but the next morning, she heard him whimpering in his crib (Tr 5/4/16, 60). Stevens explained that Roegan was "lying on his side, [and] his arm was twitching" (Tr 5/4/16, 62). When the infant would not stop twitching, Stevens and Krukowski decided to bring him to the emergency room (Tr 5/4/16, 63).

Emergency room nurse Sara Markle testified that Roegan's vital signs were stable, but that the infant's head looked "large to us, very rounded, not really having definition," which she explained could result from an excess of cerebral spinal fluid (Tr 4/27/16, 190). Markle explained that they were concerned because defendants advised that they had been giving the infant water, which she explained can cause electrolyte imbalances and seizures (Tr 4/27/16, 192). She did not recall Stevens or Krukowski disclosing that Roegan had fallen two weeks earlier (Tr 4/27/16, 197). Shortly after arriving at the hospital, nurses placed an IV in Roegan's right arm (Tr 5/4/16, 146). Stevens testified that the nurses had to "completely ben[d] his wrist" to keep the infant still to get the IV in (Tr 5/4/16, 89). Krukowski testified that the nurse "cranked [the infant's] arm back . . . far enough you start seeing white" (Tr 5/4/16, 181).

Dr. Jessica Kirby, the emergency room physician, testified that Roegan did not display any

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obvious signs of external trauma, but because the infant was exhibiting seizure activity, she initially suspected low sodium or an electrolyte imbalance and ordered labs (Tr 4/28/16, 59). When the laboratory results returned normal, however, Dr. Kirby suspected trauma or bleeding on the brain and ordered a CAT scan (Tr 4/28/16, 60-64), which revealed multiple brain bleeds (Tr 4/28/16, 65). Dr. Kirby explained that the bleeds were of different ages, with one appearing to be less than 72 hours old and another appearing much older (Tr 4/28/16, 89). Dr. Kirby explained that, given the young age of the infant, she was immediately concerned about non-accidental trauma (Tr 4/28/16, 65). According to Dr. Kirby, Stevens and Krukowski did not disclose the bathtub fall until after the CAT scan results came back positive for brain bleeds and the parents were confronted with the findings (Tr 4/28/16, 71-72). By contrast, Krukowski testified that he and Stevens informed the physicians "right off the bat" about the bathtub fall when they arrived at the hospital (Tr 5/4/16, 205).

Shortly thereafter, Roegan was transferred to the pediatric intensive care unit (PICU) (Tr 4/28/16, 71), where his condition deteriorated and doctors placed him on a ventilator, inserted a feeding tube, and placed a subdural drain in his head to remove fluid from the brain (Tr 4/29/16, 13). The pediatric intensive-care physician, Dr. Michael Fiore, testified that Roegan suffered from ongoing seizure activity, intracranial hemorrhages of different ages, multiple rib fractures that were in various stages of healing, and bilateral retinal hemorrhages, which were assessed as being non-accidental in nature (Tr 4/29/16, 17). Dr. Fiore explained that, due to the extent of the injuries, Roegan would have died that day without serious medical intervention (Tr 4/29/16, 25-26, 29). Dr. Fiore also explained that, although other factors were present that likely caused the seizures in this case, giving an infant a large quantity of water can cause very low sodium and is a "common cause of seizures in babies" (Tr 4/29/16, 52).

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Radiologist Gerard Farrar testified that MRI images taken on February 22, 2015, revealed bleeding around Roegan's brain; some of the bleeding was at least a few weeks old, while other bleeding had occurred "[w]ithin a day or two, or – or a couple days" (Tr 4/29/16, 97-99). He explained that numerous traumatic events could cause brain hemorrhages, such as shaking, falls out of crib or down stairs, or car accidents (Tr 4/29/16, 104-105). He testified that the older brain bleed could possibly be from a rough delivery, but this was unlikely because such bleeding likely would have resolved within two-and-a-half months (Tr 4/29/16, 107, 111). Dr. Farrar further testified that it was unlikely the newer bleed was related to any birth injury (Tr 4/29/16, 107).

Ophthalmologist Majed Sahouri testified that he was called in to take photographs of the back of the infant's eyes, including the retina and optic nerves (Tr 4/27/16, 215). He explained that the infant had retinal hemorrhages that were "too numerous to count" (Tr 4/27/16, 217-218). Dr. Sahouri believed the hemorrhages were non-accidental in nature and explained that hemorrhages of that variation and severity would require internal force from inside the eye (Tr 4/27/16, 220). He explained that shaking could cause the injury, but blunt-force trauma could not (Tr 4/27/16, 220). Dr. Sahouri explained that a baby falling and hitting his head would likely cause a "few hemorrhages, but not to this extreme" (Tr 4/27/16, 221). Dr. Sahouri testified that some of the hemorrhages appeared darker than others, which could "indicate different ages," but he could not conclude they were of different ages with medical certainty (Tr 4/27/16, 226-227, 230). Dr. Sahouri did not believe a single-force incident could cause the injury or that a chiropractic adjustment could do so (Tr 4/27/16, 232).

Neurosurgeon Frank Schinco testified that the newer hemorrhages in Roegan's brain were between 36 and 48 hours old, while the older hemorrhages were at least more than a week old (Tr 4/29/16, 138). In Dr. Schinco's opinion, the brain hemorrhages in conjunction with the retinal

hemorrhages "indicate[d] a very significant probability and likelihood that the child had been shaken in a typical manner" (Tr 4/29/16, 139). Dr. Schinco further testified that, although a child striking his head from a fall of several feet could cause a skull fracture, it could not cause subdural hemorrhages of different ages and could not cause retinal hemorrhaging (Tr 4/29/16, 158-159).

Radiologist Kristin Constantino explained that she reviewed a skeletal survey x-ray, taken on March 1, 2015, of the infant's entire body (Tr 4/28/16, 180). She explained that Roegan had a skull fracture that separated the two bone fragments by roughly half of an inch (Tr 4/28/16, 187-189). The infant had a facture to his left forearm that was already in the process of healing, meaning it was at least five days out and up to weeks out before the images were taken (Tr 4/28/16, 191-192). Dr. Constantino also explained that the skeletal survey revealed three broken ribs, which were in the process of healing, meaning the injuries had occurred somewhere between five days and weeks before the x-ray was taken (Tr 4/28/16, 197-199, 210-211).

Roegan was released from the hospital nine days after he was admitted to the PICU (Tr 4/29/16, 45). Defendants were both charged with second-degree child abuse, MCL 750.136b(3)(a) and (b), under three theories: (1) that defendants committed a reckless act that caused serious physical harm to the child, MCL 750.136b(3)(a); (2) that defendants willfully abandoned Roegan, which caused serious physical harm, MCL 750.136b(3)(a); and (3) that defendants committed an intentional act that was likely to cause serious physical harm, regardless of whether such harm resulted, MCL 750.136b(3)(b). Following a six-day trial, juries found both defendants guilty of second-degree child abuse.[4] On June 14, 2016, the trial court sentenced Krukowski to 36 months' to 10 years' imprisonment and sentenced Stevens to 18 months' to 10 years' imprisonment.[5]

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[4] Defendants had a joint jury trial before separate juries.

[5] Defendants parental rights were later terminated under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j), and MCL 712A.19b(5) in a child-protective proceeding. On June 21, 2016, the Court of

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Krukowski and Stevens both filed an appeal as of right in the Court of Appeals. On appeal, both defendants moved for a remand for a *Ginther*[6] hearing, asserting that their trial attorneys provided ineffective assistance by failing to obtain an expert to refute the prosecutor's evidence suggesting that Roegan had been shaken. On May 4, 2017, the Court of Appeals consolidated the cases and, shortly thereafter, ordered a remand for a *Ginther* hearing. Following the *Ginther* hearing, the trial court denied defendants' motion for a new trial on April 23, 2018. The parties then filed supplemental briefs in the Court of Appeals. In February 2019, defendants moved to amend their briefs on appeal to add an issue in light of the Court of Appeals' published opinion in *People v Murphy*, 321 Mich App 355; 910 NW2d 374 (2017), contending that the second-degree child abuse statute did not encompass defendants' failure or omission to provide medical care. The Court of Appeals granted those motions.[7]

Following oral argument, on August 1, 2019, the Court of Appeals[8] issued an opinion vacating defendants' convictions and sentences and remanding the cases with directions to the trial court to enter orders of acquittal. Relying on *Murphy*, 321 Mich App at 357-359, the panel held that defendants did not engage in any "acts" sufficient to support conviction under either the prosecutor's "reckless act" theory under MCL 750.136b(3)(a) or a "knowing and intentional act" theory under MCL 750.136b(3)(b). *People v Krukowski*, unpublished per curiam opinion of the Court of Appeals, issued August 1, 2019 (Docket Nos. 334320 and 337120), pp 5-7. The panel

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Appeals affirmed the trial court's decision terminating defendants' parental rights. *In re Krukowski*, unpublished opinion per curiam of the Court of Appeals, issued June 21, 2016 (Docket Nos. 330868 and 330869).

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] *People v Krukowski*, unpublished order of the Court of Appeals, entered February 7, 2019 (Docket No. 334320); *People v Stevens*, unpublished order of the Court of Appeals, entered February 28, 2019 (Docket No. 337120).

[8] The panel was comprised of Judges TUKEL, SERVITTO, and RIORDAN.

further held that defendants' convictions could not stand under the prosecutor's "willful abandonment" theory under MCL 750.136b(3)(a) because "fail[ing] to seek a certain type of medical care" did not fall within the scope of the statutory phrase "willful abandonment" in MCL 750.136b(1)(c). *Krukowski*, unpub op at 6-7.

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ARGUMENT

I. The Court of Appeals erred by rejecting the prosecutor's "intentional act" theory on the basis that defendants did not commit an "act" that was "likely to cause serious physical . . . harm" under MCL 750.136b(3)(b) by relying on *People v Murphy*, 321 Mich App 355 (2017), which is distinguishable and did not involve culpability under MCL 750.136b(3)(b), and by adopting a "common sense" position that defendants' act was unlikely to cause serious harm when that position was contradicted by medical testimony.

A. Standards of Review

"Whether conduct falls within the scope of a penal statute is a question of statutory interpretation." *People v Flick*, 487 Mich 1, 8; 790 NW2d 295 (2010). This Court reviews questions of statutory interpretation de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). When interpreting statutes, the goal is to give effect to the Legislature's intent by focusing, first and foremost, on the plain language in the statute. *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). In doing so, appellate courts must examine the statute as a whole "reading individual words and phrases in the context of the entire legislative scheme." *Id.* (quotation marks and citation omitted). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed and the statute must be enforced as written." *Id.*

Additionally, when assessing whether the prosecutor presented sufficient evidence to sustain a conviction obtained at trial, appellate courts "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

B. Background Law

At issue in this case, the second-degree child abuse statute, MCL 750.136b(3), provides, in relevant part, the following:

> (3) A person is guilty of child abuse in the second degree if any of the following 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.

The statute defines "serious physical harm" as

> 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. [MCL 750.136(1)(f).]

At trial, the prosecutor proceeded under three theories of liability: (1) a "reckless act" theory under MCL 750.136b(3)(a); (2) an "knowing or intentional act" theory under MCL 750.136b(3)(b); and (3) an "omission/willful abandonment" theory under MCL 750.136b(3)(a). Relevant to the first two theories, the second-degree child abuse statute does not define the word "act" in used the statute. In *People v Murphy*, 321 Mich 355; 910 NW2d 374 (2017), however, the Court of Appeals endeavored to do so. In *Murphy*, an 11-month-old infant died after ingesting a toxic quantity of morphine from pills she found on the floor. *Id.* at 357-358. The pills originally belonged to the infant's grandmother who had been living in the home but had since passed away. *Id.* at 358. Substantial evidence showed that the home was in a deplorable and filthy condition, that there were prescription morphine pills around home, and that the infant's parents had not cleaned the home after the grandmother died. *Id.* at 358. The prosecutor's theory at trial was that the infant died due her parents' "reckless act" under MCL 750.136b(3)(a) by failing to provide a safe home environment. *Id.* A jury convicted the parents under that theory. *Id.* at 357.

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The infant's mother appealed, and on appeal, the Court of Appeals vacated her conviction and sentence, concluding that the mother had not engaged in any "act" to support the prosecutor's theory under MCL 750.136b(3)(a). The panel reasoned as follows:

> The statute does not define what constitutes an "act" for purposes of MCL 750.136b(3)(a). *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[.]" Thus, in order to constitute a "reckless act" under the statute, the defendant must do something and do it recklessly. Simply failing to take an action does not constitute an act. In this case, the prosecutor presented no evidence that any affirmative act taken by Murphy led to Trinity's death. Instead, she only directed the jury to Murphy's reckless inaction, i.e., her failure to clean her house to ensure that morphine pills were not in Trinity's reach. [*Murphy*, 321 Mich App at 360-361.]

C. Discussion

The Court of Appeals improperly analogized the circumstances here to those presented in *Murphy* and held that defendants could not have been convicted under either a "reckless act" or a "knowing or intentional act" theory under MCL 750.136b(3)(a) or (b) because the pertinent "acts" in which defendants engaged were not a sufficient *causative factor* in the serious harm that befell the child. The panel reasoned as follows:

> As implied by the *Murphy* Court, the "act" alleged must be the causative factor in causing serious harm, MCL 750.136b(3)(a), or in being likely to cause serious harm, MCL 750.136b(3)(b). Here, the prosecutor identified the use of home remedies, specifically using cold peas as a compress and giving the child peppermint water, as the affirmative "acts" at issue. The problem, however, is that there was no allegation that the use of these home remedies is what harmed the child or was likely to harm the child. Indeed, as a matter of pure common sense, applying a cold compress to a child's head or giving the child peppermint water is not likely to lead to seizures and severe swelling of the brain or otherwise lead to harm. It is overwhelmingly clear that the causative factor as alleged by the prosecutor was the *failure to seek professional medical treatment*. . . . The *Murphy* Court has clearly stated that inaction cannot be equated with an "act" for purposes of the child-abuse statute. Accordingly, the "reckless act" and "intentional act" theories set forth by the prosecutor were not encompassed by the language of MCL 750.136b. [*Krukowski*, unpub op at 6-7.]

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The Court of Appeals' analysis in *Murphy* was not useful to the panel's reasoning here, because the issue in *Murphy* was that the panel *could not identify* any "act" committed by the parents. The panel here had no trouble identifying "acts," i.e., "the use of home remedies, specifically using cold peas as a compress and giving the child peppermint water," but concluded that these acts were not *causally related* to the serious physical harm that befell the infant or to any likelihood of serious physical harm. These are markedly different issues.

The evidence at trial supported that defendants' act of feeding the infant multiple bottles of water in a short period of time following a known head injury *was* an act that was "likely to cause serious physical . . . harm" to the baby. MCL 750.136b(3)(b).[9] The Court of Appeals rejected the usefulness of this act to support a conviction under MCL 750.136b(3)(b) because, the panel reasoned, "as a matter of pure common sense, . . . giving a child peppermint water is not likely to lead to seizures and severe swelling of the brain or otherwise lead to harm." *Krukowski*, unpub op at 6. Respectfully, the panel's position is supported by neither common sense nor the testimony that was presented at trial. It is generally understood that very young infants should not be given plain water because an infant's hydration and nutrition needs are met through formula or breastmilk and an infant's body is not equipped to handle plain water. More importantly, however, at trial in this case, emergency room nurse Markle and Dr. Fiore both testified regarding the dangers of giving a young infant plain water, including causing electrolyte imbalances, low

[9] Upon further review of the record, the People no longer contend that the evidence presented at trial supported that defendants' *act of putting a cold compress on the infant's head* was an act likely to cause serious physical harm to the child under MCL 750.136b(3)(b). The only testimony on the subject at trial suggested that applying a cold compress to an area of swelling could possibly work to reduce that swelling (Tr 4/29/16, 61). As will be discussed in greater detail in Section III, however, the People still adamantly contend that defendants' *failure* to seek professional medical care for the infant following the traumatic bathtub fall constituted a culpable omission under MCL 750.136b(3)(a); MCL 750.136b(1)(c).

sodium, swelling, and seizure activity (Tr 4/27/16, 192, 210, 254-255; Tr 5/3/16, 51-52). Dr. Kirby also testified that she quickly ordered laboratory studies when the infant arrived seizing, because she immediately suspected low sodium and electrolyte abnormalities (Tr 4/28/16, 59). Logically, the dangers of giving an infant multiple bottles of water would only be exacerbated if the infant had recently sustained a major fall and head injury. See *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002) (juries may draw reasonable inferences from the evidence adduced at trial). Considering the circumstances in which the water was given and the medical testimony, defendants' act of feeding Roegan multiple bottles of water was an "act," and that "act" was "likely to cause serious physical . . . harm" under MCL 750.136b(3)(b).

Importantly, it does not matter under MCL 750.136b(3)(b) that the excessive water given by defendants was not, in the end, the primary cause of the infant's brain swelling and seizures. The People acknowledge that Dr. Kirby testified that, when the infant was tested for water intoxication, his lab results came back "unremarkable" for sodium deficiencies and electrolyte imbalances that could be causing the brain swelling and seizures (Tr 4/28/16, 60). The statute, however, does not require the occurrence of harm; it requires only that a parent "knowingly or intentionally commits an act that is likely to cause serious physical . . . harm to a child *regardless of whether harm results*." MCL 750.136b(3)(b) (emphasis added). Further, the prosecutor did not need to not show that the parents intended harmful consequences to flow from their actions, only that the *act itself* was intentional. See *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003), affirmed for different reasons *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

To recap, the evidence demonstrated that defendants committed an intentional "act" by feeding Roegan multiple bottles of water within a short period of time and following a recent,

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known head injury. Considering the testimony of the medical professionals and the logical inferences that may be drawn from the evidence presented at trial, that "act" was one that was likely to cause serious physical harm to the infant. The Court of Appeals did not contest that feeding an infant bottles of water is an "act," but rejected the usefulness of this act to support a conviction for second-degree child abuse because the panel believed the act was not, as a matter of common sense, likely to result in serious harm to an infant. However, the panel's position was contradicted by the medical professionals who testified at trial. The Court of Appeals improperly relied on the outcome reached in *Murphy*, without considering the unique circumstances of this case, the differences between MCL 750.136b(3)(a) and (b), or the testimony showing that defendants' act *was* likely to cause serious physical harm. The People would therefore ask this Court to reverse the Court of Appeals' ruling that defendants' convictions were improper under MCL 750.136b(3)(b).

II. In addition to the dangerous act of feeding the infant multiple bottles of water, the Court of Appeals failed to address several other "acts" committed by defendant Stevens and failed to acknowledge or address the Court of Appeals' published opinion in *People v Head*, 323 Mich App 526 (2018), which is at odds with *Murphy*.

A. Standard of Review

The People incorporate here the standard of review identified in Section I. A.

B. Background Law

As earlier discussed, in *Murphy*, 321 Mich App at 360-361, the Court of Appeals held that a defendant did not commit a "reckless act" for purposes of MCL 750.136b(3)(a) by failing to clean her home and ensure that morphine pills were not accessible to her infant daughter because an "act" requires that a defendant "must do something and do it recklessly." A few months after the Court of Appeals decided *Murphy*, however, a different panel also addressed the meaning of the term "reckless act" in MCL 750.136b(3)(a) in *People v Head*, 323 Mich App 526; 917 NW2d

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752 (2018). In *Head*, a father stored a loaded, short-barreled shotgun in an unlocked closet in his bedroom where his children would sometimes play unsupervised. *Id.* at 532. One day, while the defendant's nine-year-old son and 10-year-old daughter were playing in the bedroom, the daughter retrieved the loaded shotgun from the closet and accidentally fired the gun, killing her brother. *Id.* As in *Murphy*, the prosecutor charged the father with second-degree child abuse under a reckless act theory. *Id.* at 535. Although the father was not present when his son was killed, just like the mother in *Murphy*, this time, the Court of Appeals concluded that the father had committed a reckless act for purposes of the second-degree child abuse statute, MCL 750.136b(3)(a). The panel distinguished *Murphy*, reasoning as follows:

> Defendant committed reckless acts by storing a loaded, short-barreled shotgun in his unlocked bedroom closet and then allowing his children to play in the room while unsupervised. Contrary to defendant's argument, the present case is nothing like *Murphy*, in which this Court held that the prosecutor presented no evidence of an affirmative act by the defendant that led to the child's death but instead presented evidence only of the defendant's inaction, i.e., failing to clean her house to ensure that morphine pills were not in reach of the child. *The key evidence here consisted not only of defendant's inaction but of his affirmative acts of storing a loaded shotgun in an unlocked closet of defendant's bedroom and allowing his children to play in that bedroom while unsupervised.* Moreover, defendant knowingly and intentionally committed an act that was likely to cause serious physical harm to a child because defendant stored a loaded, illegal, short-barreled shotgun in a readily accessible location where he allowed his young children to play while unsupervised. [*Id.* at 536.]

In *Head*, then, the Court of Appeals concluded that the father's placement of a loaded weapon in his bedroom closet was a "reckless act" even though that "act" was not the most direct or immediate cause of his son's death; that was the daughter's act of pointing the loaded gun at her brother and pulling the trigger. Nonetheless, the panel concluded, because the father engaged in some "act" that created a situation of greater danger, and harm resulted to his child *in that*

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situation, his "act" was sufficient to support a conviction for second-degree child abuse under MCL 750.136b(3)(a). 323 Mich App at 536.[10]

C. Discussion

The Court of Appeals analogized this case to *Murphy* and focused on defendants' *failure* to seek professional medical treatment after the infant's fall. However, much like the father in *Head*, defendant Stevens engaged in numerous acts, which went unaddressed by the Court of Appeals, that created a situation of greater danger for Roegan. Ultimately, Roegan sustained serious physical harm in that situation. First, according to Dr. Dawis, Stevens *lied* to her at Roegan's February 9, 2015 doctor's appointment when asked whether the child had sustained any fall or injury (Tr 4/28/16, 26-28).[11] Because of that lie, Dr. Dawis was unable to determine why the infant was inconsolable and recommended that the parents seek chiropractic treatment. Stevens then *took the infant for chiropractic adjustments*, despite her medical background, her knowledge that the infant had sustained a serious fall and trauma to his head only two days earlier, and her awareness that Dr. Dawis recommended chiropractic intervention based on the lie Stevens

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[10] The People would ask this Court to take note of the inconsistency between the published opinions in *Murphy* and *Head*. The Court of Appeals in *Murphy* concluded that the defendant did not "do something" sufficient to constitute an "act" for purposes of MCL 750.136b(3)(a) because she only *failed* to clean a filthy home where prescription drugs were unsecured and accessible to an 11-month-old infant. Presumably, however, at some point the defendant in *Murphy* must have made the decision to *move or place* herself and her infant child into that environment and, just like the father in *Head*, expose the child to a situation of greater danger. This Court denied leave to appeal in both cases: *People v Murphy*, 501 Mich 985; 907 NW2d 581 (Mem) (2018); *People v Head*, 503 Mich 918; 920 NW2d 145 (Mem) (2018). The different outcomes reached between these two opinions begs the question: when dealing with a criminal harm like that prohibited by MCL 750.136b(3)(a), i.e., "serious physical harm" to a child, how far out can one go from the harm itself to find an "act" sufficient to support a conviction under the statute?

[11] Stevens contested at trial that she lied to Dr. Dawis, but the truthfulness of Dr. Dawis's testimony to the contrary was a matter for the jury alone to decide. See *People v MacCullough*, 281 Mich 15, 30; 274 NW2d 693 (1937) ("[T]he credibility of the witnesses and the truthfulness of their statements were for the jury.").

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told. A rational jury could reasonably infer from this testimony that Stevens either committed a reckless act that caused serious harm to the infant or committed an intentional act that was likely to cause serious harm to the infant, even if serious harm did not result from the act. Yet, the Court of Appeals did not discuss these acts or explain why they were insufficient to support Stevens's conviction and did not discuss or distinguish the published opinion in *Head*.[12] The People would ask this Court to overturn the Court of Appeals' opinion on the basis of these failures.

[12] The People acknowledge that the trial court's jury instructions on the prosecutor's "reckless act" and "intentional act" theories raise an issue regarding whether the jury was permitted to consider acts beyond the home treatments discussed in Section I as to these theories. Regarding the reckless act theory, the trial court instructed the jury that it must find that defendants "did some reckless act, ***consisting of*** *treating Roegan Krukowski with inadequate home remedy* for an obvious head injury . . ." (Tr 5/5/16, 146; emphasis added). Regarding the intentional act theory, the trial court instructed the jury that it must find defendants "knowingly or intentionally did an act likely to cause serious physical harm to Roegan Krukowski, regardless of whether such harm resulted. *The intentional act alleged* ***consists of*** *treating Roegan Krukowski with inadequate home remedy* for an obvious head injury . . ." (Tr 5/5/16, 146; emphasis added). It is well-established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendants' act of giving the infant bottles of water was before the jury because it fell within the scope of the expressly identified "home remedies," but it is less clear whether Stevens's acts of lying to Dr. Dawis and taking the child for chiropractic treatment were up for grabs or whether such acts went beyond the scope of the trial court's instructions. The People believe the answer to this question will largely turn on how this Court interprets the term "consist." *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "consist," in relevant part, as "to be composed or made up" or "to be *consistent*," which is defined as being "marked by harmony, regularity, or steady continuity" or "marked by agreement: COMPATIBLE." Given these definitions, the People contend that Stevens's acts discussed in Section II are *consistent and compatible* with the home remedy theory before the jury because they are instances in which Stevens improperly took the child's treatment into her own hands. But if this Court disagrees, the People would still ask this Court to reverse on the basis of the issues set forth in Sections I and III, which were clearly before the jury.

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III. The Court of Appeals imposed an overly narrow reading of the statutory phrase "willful abandonment" in MCL 750.136b(1)(c) and improperly applied the semantic canon of *expressio unius est exclusio alterius* to hold that a parent's failure to seek professional medical care following an infant's traumatic injury is not an "omission" for purposes of MCL 750.136b(3)(a).

A. Standard of Review

The People incorporate here the standard of review identified in Section I. A.

B. Background Law

Under MCL 750.136b(3)(a), a person is guilty of second-degree child abuse if "[t]he person's omission causes serious physical harm . . . to a child . . . ." The statute defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). Importantly, however, the statute does not define the statutory phrase "willful abandonment." When seeking to determine the plain meaning of undefined statutory terms, this Court may consult dictionary definitions. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

C. Discussion

The Court of Appeals concluded that defendants' failure to seek professional medical treatment after Roegan sustained his traumatic fall in the bathtub did not come within the scope of the meaning of the phrase "willful abandonment" set forth by MCL 750.136b(1)(c).[13] The panel reasoned as follows:

> *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "abandon," in part, as "to give up with the intent of never again claiming a right or interest in; to withdraw protection, support, or help from." The failure to seek a certain type of medical

[13] The Court of Appeals should have published its opinion in this case on the basis of its interpretation of the phrase "willful abandonment" in MCL 750.136b(1)(c) because there is no binding authority interpreting the scope of this statutory phrase. MCR 7.215(B)(2) (an opinion of the Court of Appeals "must be published" if it "construes as a matter of first impression a provision of a . . . statute . . .").

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> care is not equivalent to withdrawing protection, help, or support from a child, or giving a child up with the intent never to claim an interest in the child.
>
> Moreover, under the doctrine of *expressio unius est exclusion* [sic] *alterius*, the "express mention of one thing implies the exclusion of another." The Legislature has defined omission to encompass the willful failure to provide "food, clothing, or shelter" but does not mention the willful failure to provide medical care. MCL 750.136b(1)(c). Finally, statutes should be interpreted in order to give effect to every term. Under the prosecutor's overarching theory, "abandonment" of a child would encompass not only the failure to provide medical care, but also the failure to provide, for example, food, because both these failures would represent the shirking of parental duties. Yet, this would render the delineation of "a willful failure to provide food" in MCL 750.136b(1)(c) surplusage, which is to be avoided. [*Krukowski*, unpub op at 7 (citation omitted).]

Importantly, the scope of the meaning of the statutory phrase "willful abandonment" as used in MCL 750.136b(1)(c) is a matter of first impression in Michigan caselaw. *Webster's Ninth New Collegiate Dictionary*[14] defines "abandon" as follows:

> **1 a :** to give up to the control or influence of another person or agent < ~ed her baby to fate> **b :** to give up with the intent of never again claiming a right or interest in **2 :** to withdraw from often in the face of danger or encroachment <~abandon ship> **3 :** to withdraw[15] protection, support, or help from <~ed the candidate when the polls went against him>

The panel here concluded that a parent's failure to seek medical care is not the "equivalent to withdrawing protection, help, or support from a child," but it failed to offer any meaningful reasoning to support this conclusion. Considering in more depth the dictionary definitions of the term "abandon," the People believe two central themes are apparent. The first theme is that abandonment occurs when a person gives up, often permanently, his or her rights over another person or thing (1 a and b). The second theme is that abandonment occurs when circumstances

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[14] The Court of Appeals implicitly concluded, and we believe rightly so, that resort to a lay dictionary was appropriate because the term "abandonment" lacks a peculiar and unique legal meaning. See *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010) (a legal term of art exist only when the term has a "settled, definite and well known meaning" in the law).

[15] *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "withdraw," in relevant part, as "to take . . . away: REMOVE" and "to turn away."

become dire, and because of or in the face of those circumstances, a person turns away from his or her existing course or duty (2 and 3). This case falls within the scope of the latter theme.

It has long been accepted that parents owe unique duties to their children in the normal course of things. See *People v Beardsley*, 150 Mich 206, 209-210; 113 NW2d 1128 (1907) (explaining that parents are to their children "the legal relation of protector" and that "one who from domestic relationship . . . has the custody and care of a human being, helpless . . . from . . . infancy . . . is bound to execute the charge with proper diligence"). Yet here, when 11-week-old Roegan fell and struck his head against the side of the bathtub, his circumstances becoming dangerous, defendants turned away from their pre-existing duties of care and diligence, leaving the infant helpless without the aid of professional medical treatment in the face of a traumatic injury. Contrary to the holding of the Court of Appeals, considering the definitions of the term "abandon," this is precisely the kind of circumstance that was contemplated by the Legislature when it included the term "willful abandonment" in the definition of omission under MCL 750.136b(1)(c).

The Court of Appeals panel further reasoned that a "failure to provide medical care" was not encompassed in MCL 750.136b(1)(c) under the semantic canon of *expressio unius est exclusio alterius*, i.e., the express mention of one things implies the exclusion of another, because the Legislature saw it fit to include "food, clothing, or shelter" in the definition of omission in MCL 750.136b(1)(c), but not "medical care." However, the People would submit that the provision of medical care *in circumstances like those presented here* goes beyond the category to which the negative implication pertains. Antonin Scalia and Bryan Garner have explained the following regarding the proper application of *expressio unius est exclusio alterius*:

> Even when an all-inclusive sense seems apparent, one must still identify the scope of the inclusiveness (thereby limiting implied exclusion). Consider the sign

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> at the entrance to a breachfront restaurant: "No shoes, no shirt, no service." By listing some things that will cause a denial of service, the sign implies that other things will not. One can be confident about not being excluded on grounds of not wearing socks, for example, or of not wearing a jacket or tie. But what about coming in without pants? That is not included in the negative implication because the specified deficiencies in attire noted by the sign are obviously those that are common at the beach. Others common at the beach (no socks, no jacket, no tie) will implicitly not result in denial of service; but there is no reasonable implication regarding wardrobe absences *not* common at the beach. They go beyond the category to which the negative implication pertains. [Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul; Thomas/West 2012), p 108.]

In considering the scope of the category to which the negative implication pertains, it seems evident that food, clothing, and shelter have something uniquely in common: they are all necessities required as a regular part of a child's day-to-day life. It would therefore be reasonable to draw the boundaries of the applicable category at provisions needed to care for a child *in the normal, day-to-day course of things*. Thus, if the situation here was that Roegan had Type 1 diabetes and required daily insulin doses to maintain his physical health, but defendants failed to provide that regularly required insulin, the Court of Appeals would have a better argument that the canon of *expressio unius est exclusio alterius* would apply to exclude that failure to provide medical care by negative implication, because the failure would seemingly fall within the applicable category. The situation here, however, presented anything but a normal and expected circumstance in Rogen's day-to-day life; the need for medical intervention arose only due to the infant's unusual multi-foot fall and traumatic head injury. The People would therefore ask this Court to conclude that defendants' failure here went beyond the category to which the negative implication arising from the Legislature's express mention of "food, clothing, or shelter" pertains.

The Court of Appeals also reasoned that, construing the term "abandonment" to include defendants' failure to provide medical care would stretch the scope of the term to "encompass not only the failure to provide medical care, but also the failure to provide, for example, food, because

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both these failures would represent the shirking of parental duties." *Krukowski*, unpub op at 7. Thus, reasoned the panel, such an interpretation would render the express mention of "food, clothing, or shelter" mere surplusage. If, however, this Court interprets the term "abandon" according to its ordinary meaning as supported by the above-mentioned dictionary definitions, again, the term applies to two distinct themes: (1) the willful release, often permanently, of parental rights or interests over a child, and (2) the willful neglect of parental duties *in the face of dangerous circumstances*. If this definition of "willful abandonment" under MCL 750.136b(1)(c) is correct, a parent's failure to provide food, clothing, or shelter, or the general shirking of parental duties, would *not inevitably* fall within the scope of the term "willful abandonment," nor would it render the Legislature's express designation of those items mere surplusage within the statute. The People would therefore ask this Court to reject the Court of Appeals' interpretation of the scope of the phrase "willful abandonment" in MCL 750.136b(1)(c) and to reverse the panel's holding that defendants' convictions were improper pursuant to the prosecutor's "willful abandonment" theory under MCL 750.136b(3)(a).

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SUMMARY AND RELIEF SOUGHT

This case presents jurisprudentially significant questions regarding the proper interpretation and scope of the second-degree child abuse statute. The proper interpretation of the phrase "willful abandonment" in MCL 750.136b(1)(c), and by relation, the scope of the term "omission" in MCL 750.136b(3)(a) is a matter of first impression in Michigan case law. In recent years, the second-degree child abuse statute has presented difficult interpretive issues, as demonstrated by the inconsistency between cases like *Murphy* and *Head* and this Court's recent consideration of cases such as *People v Lee* (Docket No. 157176). The bench and bar would greatly benefit from further input by this Court. The People therefore respectfully request that this Honorable Court intervene, reverse the Court of Appeals' opinion overturning defendants' convictions and sentences, and remand this case to the Court of Appeals to address the remaining issues defendants presented on appeal before that Court.

Respectfully submitted,

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Dated: September 19, 2019

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANE RICHARD KRUKOWSKI,

Defendant-Appellant.

UNPUBLISHED
August 1, 2019

No. 334320
Saginaw Circuit Court
LC No. 15-041274-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CODIE LYNN STEVENS,

Defendant-Appellant.

No. 337120
Saginaw Circuit Court
LC No. 15-041275-FH

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their jury trial convictions of second-degree child abuse, MCL 750.136b(3).[1] The trial court sentenced defendant Dane Krukowski to 36 months to 10 years' imprisonment and sentenced defendant Codie Stevens to 18 months to 10 years' imprisonment as well. We reverse, vacate defendants' convictions and sentences, remand, and direct the trial court to enter judgements of acquittal in both cases.

[1] Defendants had a joint jury trial before separate juries.

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I. BACKGROUND

Defendants are the biological parents of RK. RK was born after a 19-hour labor and, according to Stevens, was bruised from forehead to mid-chest from the cesarean section delivery. A few days after his birth, Stevens took RK to see pediatrician Elvira M. Dawis. According to Stevens, the baby was having trouble keeping formula down and was not easily comforted. Dr. Dawis testified that, despite being slightly jaundiced, RK was a "well-child" with a "normal-sized" head. Over time, RK became less fussy.

On Saturday, February 7, 2015, Krukowski was bathing approximately two-month-old RK in the bathtub. At some point, RK "jerked" and fell from Krukowski's soapy hands. RK hit his head on the side of the bathtub and fell facedown into the water. Krukowski immediately "scooped" him out of the water and called out to Stevens. The couple dried and dressed the baby and checked him for injuries. According to Krukowski, RK's head was "a little red" and "in due time, bruising started and swelling" and a "dime-sized bruise" eventually appeared. Stevens said that she observed "slight swelling" and a "tiny little dot" that was yellow in color on RK's head. Defendants placed a cool cloth on the baby's head and then later a frozen bag of peas. According to Stevens, after the fall RK was a little fussy and would not take a bottle, but his breathing was normal and he ate later that day. Stevens contacted her mother, who advised that defendants take the baby to the hospital "just to be safe." The grandmother visited the home later that day and observed a "dime-sized" bump on the baby's head that was not "really raised up high" with "slight shadowing." Stevens and Krukowski said that the infant was awake, smiling, and acting normal by the next day.

It is undisputed that defendants did not seek medical attention after the bathtub incident on either February 7 or February 8, 2015. On Monday, February 9, 2015, Stevens, accompanied by her mother, took RK to see Dr. Dawis for a previously scheduled appointment. The "bump" on RK's head was gone. Stevens said that she told the doctor that RK was still somewhat colicky and that he would not sleep on his back, but that a new formula was working. According to Dr. Dawis, Stevens reported that RK was fussy, irritable, and could not be pacified. Stevens testified and her mother confirmed that Stevens told the doctor about RK's "incident in the tub" explaining that the baby "had fallen out of [Krukowski's] arms and had hit his head." However, Dr. Dawis denied that Stevens told her about the accident and the doctor's notes from the visit stated that "mom denies any fall."

Because RK was fussy and irritable, Dr. Dawis recommended that he see a chiropractor. Later that day, chiropractor Michael J. Dense performed chiropractic adjustments on the baby. He explained that to treat an infant he suspends the baby by their feet and "give[s] a little pump," which makes "the baby arch its back" and causes the spine to align. He said it would make a sound like "a little click." Dr. Dense said that the baby "seemed to be relieved after the first adjustment" and that he was not crying. The maternal grandmother testified that she was "shocked" at the adjustment and heard RK's back "crack" at least twice; Stevens said she was "skeptical" and also heard RK's back "crack." RK attended a second and third chiropractic appointment with another chiropractor in the practice, Dr. Jason Barrigar, on February 10, 2015 and February 18, 2015. Dr. Barrigar observed RK to be "very happy" and "looking around the room." He said that he was not informed that RK had hit his head and he said that he did not personally observe any bumps or bruises on the baby.

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On February 21, 2016, RK vomited after Stevens fed him. When she attempted to feed him three or four hours later, he vomited again. She laid him in his crib and when she checked on him later he was "covered in vomit." She testified that she was concerned, but thought he might have the flu. She made him a bottle of peppermint water, which he was able to keep down. At 10:30 p.m., she made him a smaller bottle of peppermint water. She said he kept it down and slept through the night, but the next morning she awoke to him "whimpering." RK was "lying on his side, [and] his arm was twitching." She told Krukowski that it looked like the baby was having a seizure. According to defendants, they immediately took RK to the emergency room.

Emergency room nurse Sara Markle testified that RK was alert, his vital signs were stable, and he did not have any outward signs of trauma. She did not recall defendants disclosing that RK had suffered a fall weeks earlier. Dr. Jessica Kirby, the emergency room physician, also said that RK had no obvious signs of trauma, but was exhibiting shaking activity. Her initial thought was that low-sodium levels or an electrolyte abnormality could be causing the seizures. According to Stevens, RK was administered Ativan intravenously to stop the seizures. Krukowski testified that RK's hand or arm was "cranked" back in an "abnormal position" in order to insert the needle.

The baby's laboratory results were normal, so Dr. Kirby ordered a CAT scan, which revealed that the baby's brain was bleeding. Dr. Kirby was concerned that the brain bleeds were caused by "non-accidental trauma" and suspected abuse right away. After defendants were informed of the CAT scan results, they relayed to Dr. Kirby that RK had fallen in the bathtub approximately two weeks earlier. RK was transferred to the pediatric intensive care unit (PICU) where his condition "deteriorated" to the point that he needed a ventilator and a feeding tube and had to have a catheter inserted into his fontanelle to relieve pressure and remove fluid from his skull. Pediatrician Michael Fiore testified that RK had bleeding in the brain, multiple rib fractures, ongoing seizure activity, and retinal hemorrhages, all of which were assessed as being the result of "non-accidental trauma." According to Dr. Fiore, the baby would have died if he had not received medical treatment when he did.

Ophthalmologist Majed Sahouri performed diagnostic testing and took "RetCam" photographs of the back of the baby's eye. He said that RK had multiple retinal hemorrhages that were "too numerous to count" and severe enough to be characterized as nonaccidental. He said that shaking could cause the hemorrhages, but in his opinion, blunt-force trauma could not. He testified that the hemorrhages were "very consistent . . . with non-accidental trauma, and shaking" and that he doubted that chiropractic treatment could cause the hemorrhages. He indicated that some of the hemorrhages appeared darker, which could indicate different ages; however, he could not specify with medical certainty the ages of the hemorrhages.

Radiologist Gerard Farrar testified about MRI images of RK's brain taken on February 22, 2015, which showed "subdural hygroma" or abnormal "fluid around the brain," as well as more recent "acute blood." He said these were from at least two separate injuries. He said there was "a possibility" that either the subdural hygroma or the acute blood could have been caused by the bathtub fall. The prosecutor asked him if he had heard of shaken baby syndrome (SBS) and whether that could have caused the injuries. Dr. Farrar said that SBS could have caused the

injuries. He also said it was possible that the older fluid was caused by a rough delivery, but that the newer fluid was "unlikely" to be from delivery.

Neurological surgeon Frank Paul Schinco testified that the hemorrhages in RK's brain were 36 to 48 hours old. He estimated that the older bleed was at least more than a week old. He said that the blood clots in RK's brain, in conjunction with the retinal hemorrhages, "would indicate a very significant probability and likelihood that the child had been shaken in a typical manner . . . that is highly diagnostic of that shaken baby syndrome."

Radiologist Kristin Constantino interpreted a skeletal survey x-ray of the baby's entire body taken on March 1, 2015. RK had a new fracture on the left side of his skull, an old one on his left forearm, and old ones on multiple ribs. She opined that the skull fracture could "potentially" have been from the bathtub fall.

RK ultimately spent nine days in the PICU. Shortly after he was released, defendants were charged with second-degree child abuse, MCL 750.136b(3). At trial, the prosecution called the child's treating doctors as witnesses, including Dr. Sahouri (ophthalmology), Dr. Dawis (pediatric medicine), Dr. Kirby (emergency medicine), Dr. Dense (chiropractic medicine), Dr. Barrigar (chiropractic medicine), Dr. Farrar (neuroradiology), Dr. Constantino (radiology), Dr. Schinco (neurosurgery), and Dr. Fiore (pediatric critical care). They also called the maternal grandmother. Defendants both testified on their own behalf and police interviews recorded at the hospital were played for the jury. The defense did not call any expert witnesses. At the conclusion of the six-day trial, both defendants were found guilty of second-degree child abuse.

Defendants appealed as of right. On appeal, they both moved this Court to remand for a *Ginther*[2] hearing, claiming that their attorneys were ineffective for failing to obtain an expert to dispute the prosecution's evidence that RK had been shaken. Alternatively, they argued that their attorneys were ineffective for failing to object to the shaking evidence as irrelevant and unfairly prejudicial. We consolidated[3] the appeals and remanded to the trial court for an evidentiary hearing.[4] These matters now return to this Court.

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Krukowski*, unpublished order of the Court of Appeals, entered May 4, 2017 (Docket Nos. 334320; 337120).

[4] *People v Krukowski*, unpublished order of the Court of Appeals, entered May 19, 2017 (Docket No. 334320); *People v Stevens*, unpublished order of the Court of Appeals, entered May 19, 2017 (Docket No. 337120).

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II. SUFFICIENCY OF THE EVIDENCE

In supplemental briefs, defendants contend that there was insufficient evidence to support their convictions because the alleged omission of failing to seek medical attention for RK is not proscribed in the second degree child abuse statute, MCL 750.136b(3). We agree.[5]

We review a challenge to the sufficiency of the evidence de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing such a claim, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* This Court also reviews issues of statutory interpretation de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The statute under which defendants were convicted, MCL 750.136b, states, in relevant part:

> (3) A person is guilty of child abuse in the second degree if any of the following 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.

In addition, MCL 750.136b(1)(c) defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child."

As previously stated, the prosecutor set forth three theories of second-degree child abuse: an "abandonment" theory, a "reckless act" theory, and an "intentional act" theory. During final jury instructions, the trial court also stated that the jurors had three theories to consider in support of second-degree child abuse. It said that the first theory was an "abandonment" theory, and that to convict under this theory, one needed to find that defendants "wilfully abandoned" RK and thereby caused him serious physical harm. It defined "abandon" as "to withdraw one's support or one's help, especially to do so despite a duty, allegiance, or responsibility." The trial court identified the second theory as a "reckless act" theory, and stated that to convict under this theory, one needed to find that the child was seriously harmed because defendants "did some reckless act, consisting of treating [the child] . . . with inadequate home remedy for an obvious head injury, rather than seeking professional medical treatment." The trial court stated that, to convict under the third theory, one needed to find that defendants "knowingly or intentionally

[5] Defendant have raised additional arguments on appeal, but due to our complete resolution of these matters on the arguments based on sufficiency of the evidence, we need not address the additional arguments.

did an act likely to cause serious physical harm to" RK, and that the "intentional act alleged consists of treating [the child] . . . with inadequate home remedy for an obvious head injury, rather than seeking professional medical treatment." Defendants contend that the prosecutor's theories in this case were all theories of *omission*, and that such theories under the facts of the present case do not comport with the wording of MCL 750.136b because of the way that statute defines the term "omission."

People v Murphy, 321 Mich App 355, 357-359, 910 NW2d 374 (2017), provides this Court with guidance on this issue. In that case, the defendant was convicted of second-degree child abuse under MCL 750.136b(3)(a) based on the death of her child, which occurred after the child ingested a toxic amount of morphine. The child's grandmother had been living in the home of the defendant and the child, and the grandmother, who died before the child did, had been prescribed morphine. *Id.* at 358. The prosecutor "argued that a [morphine] pill had likely fallen to the floor and that because [the child's] parents had failed to clean the bedroom, [the child] found the pill and consumed it." *Id.* at 358 n 2. The prosecutor contended that the defendant committed a reckless act because the home was in a deplorable condition and the defendant "failed to clean the home to ensure that the morphine pills were removed . . . ." *Id.* at 358.

This Court noted that the "omission" portion of MCL 750.136b(3)(a) was inapplicable because there was "no evidence that [the defendant] willfully failed to provide food, clothing, or shelter to [the child] or that she willfully abandoned her." *Id.* at 360 n 4. This Court stated that "the only theory on which the jury was instructed" was the theory of "a reckless act causing serious physical harm . . . ." *Id.* at 360. The Court concluded that "[s]imply failing to take an action does not constitute an act" and that "the prosecutor presented no evidence that any affirmative act taken by [the defendant] led to [the child's] death." *Id.* at 361. The Court stated that the prosecutor "only directed the jury to [the defendant's] reckless *inaction*, i.e., her failure to clean her house to ensure that morphine pills were not in [the child's] reach." *Id.* Accordingly, the Court vacated the defendant's conviction of second-degree child abuse. *Id.*

The statutory language encompasses an "act" which is, according to *Murphy*, *id.*, "[s]omething done or performed." (Quotation marks and citation omitted.). As implied by the *Murphy* Court, the "act" alleged must be the causative factor in causing serious harm, MCL 750.136b(3)(a), or in being likely to cause serious harm, MCL 750.136b(3)(b). Here, the prosecutor identified the use of home remedies, specifically using cold peas as a compress and giving the child peppermint water, as the affirmative "acts" at issue. The problem, however, is that there was no allegation that the use of these home remedies is what harmed the child or was likely to harm the child. Indeed, as a matter of pure common sense, applying a cold compress to a child's head or giving a child peppermint water is not likely to lead to seizures and severe swelling of the brain or otherwise lead to harm. It is overwhelmingly clear that the causative factor as alleged by the prosecutor was *the failure to seek professional medical treatment.*[6]

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[6] This is reinforced by the prosecutor's various arguments at trial. In addition, the felony information in each case lists the relevant misdeed as "failing to seek medical treatment after significant trauma which resulted in further or exacerbated physical injuries or deterioration of the child's health and/or intentionally causing physical trauma." And, at the preliminary

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Indeed, the trial court explicitly incorporated this failure to seek professional medical treatment into its instructions for the prosecutor's second and third theories. The *Murphy* Court has clearly stated that *inaction* cannot be equated with an "act" for purposes of the child-abuse statute. *Murphy*, 321 Mich App at 361. Accordingly, the "reckless act" and "intentional act" theories set forth by the prosecutor were not encompassed by the language of MCL 750.136b.

Although defendants do not specifically mention the prosecutor's "abandonment" theory in their supplemental briefs, an argument about this theory is encompassed by way of their argument that "a failure to provide medical treatment is not covered under the definition of omission in MCL 750.136b(1)(c)." Indeed, the prosecutor's allegation regarding the "abandonment" theory was that defendants abandoned the child by failing to provide him with adequate medical care. MCL 750.136b(1)(c) defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b does not define "abandonment." However, unambiguous statutory language must be enforced as written. *Williams*, 475 Mich at 250. In addition, terms not expressly defined in a statute are to be interpreted in accordance with their ordinary meaning and the context in which they are used. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013). It is a stretch to equate the failure to seek medical care with the plain and ordinary meaning of the term "abandonment." And, "when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined." *Id. Merriam-Webster's Collegiate Dictionary* (11th ed.) defines "abandon," in part, as "to give up with the intent of never again claiming a right or interest in; to withdraw protection, support, or help from." The failure to seek a certain type of medical care is not equivalent to withdrawing protection, help, or support from a child, or giving a child up with the intent never to claim an interest in the child.

Moreover, under the doctrine of *expressio unius est exclusion alterius*, the "express mention of one thing implies the exclusion of another." *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n (On Remand)*, 317 Mich App 1, 15 n 6; 894 NW2d 758 (2016) (quotation marks and citations omitted). The Legislature has defined omission to encompass the willful failure to provide "food, clothing, or shelter" but does not mention the willful failure to provide medical care. MCL 750.136b(1)(c). Finally, statutes should be interpreted in order to give effect to every term. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Under the prosecutor's overarching theory, "abandonment" of a child would encompass not only the failure to provide medical care, but also the failure to provide, for example, food, because both these failures would represent the shirking of parental duties. Yet, this would render the delineation of "a willful failure to provide food" in MCL 750.136b(1)(c) surplusage, which is to be avoided. *Id.*

Clear statutory language is to be enforced as written, *Williams*, 475 Mich at 250, and *Murphy* is binding under MCR 7.215(J)(1). Under the factual circumstances in this case, and based on the theories presented, the prosecutor failed to present sufficient evidence under which

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examination, the prosecutor argued for a bindover based on an "omission" theory, and the court authorized the bindover without much explanation regarding its reasoning.

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to convict defendants of second-degree child abuse. Accordingly, defendants cannot be retried for second-degree child abuse, MCL 750.136b(3) as dictated by double jeopardy principles. *People v Mitchell*, 301 Mich App 282, 294; 835 NW2d 615 (2013). See also, *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978) (when an appellate court finds that the evidence is insufficient to sustain guilt, that court determines that the prosecution has failed to prove guilt beyond a reasonable doubt and to permit a second trial would negate the purpose of the Double Jeopardy Clause); *Lockhart v Nelson*, 488 US 33; 33-34; 109 S Ct 285; 102 L Ed 2d 265 (1988) (A reversal for evidentiary insufficiency "is the functional equivalent of a trial court's granting a judgment of acquittal at the close of all the evidence.").

Reversed. We vacate defendants' convictions and sentences, remand, and direct the trial court to enter judgements of acquittal in both cases. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

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