

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANE RICHARD KRUKOWSKI,

Defendant-Appellee.

Supreme Court
No. 160263

Court of Appeals
No. 334320

Lower Court
No. 15-041274-FH

PLAINTIFF-APPELLANT'S REPLY

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ARGUMENT

In answer to the People's application for leave to appeal,¹ defendant Dane Richard Krukowski asserts that the Court of Appeals correctly ruled that insufficient evidence supported his conviction of second-degree child abuse because "the omission at issue is not proscribed by MCL 750.136b(3)" (Krukowski Answer, p 12). Krukowski first contends that he was convicted based on the omission of failing to seek proper medical care for his child, but claims this omission was "insufficient to sustain his conviction because the only [sic] statute only proscribes 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)" (Krukowski Answer, p 13). However, Krukowski offers no argument in response to the People's position that a willful failure to seek proper medical treatment in the face of a young infant's traumatic injury falls within the scope of the statutory phrase "willful abandonment" that is part of the statutory definition of the term "omission" in MCL 750.136b(1)(c). See Issue III in the People's Application for Leave to Appeal. Accordingly, the People continue to stand by the position asserted in their application that, even assuming defendants did not engage in any "acts" for purposes of MCL 750.136b(3), the evidence was still sufficient to sustain their second-degree child abuse convictions under the theory that defendants' omission, as that term is defined by the statute, caused serious physical harm to their child. See MCL 750.136b(3)(a); MCL 750.136b(1)(c).

Regarding the remaining issues raised by the People in their application, Krukowski asserts that he was (1) charged only with violating Subdivision (a) of MCL 750.136b(3); (2) the prosecutor conceded in his opening statement that he would not be able to prove an "intentional act" to support a conviction of second-degree child abuse; and (3) if defendants' actions did not constitute an

¹ The People would ask this Court to note the untimely nature of defendant Krukowski's answer. See MCR 7.305(D).

“omission” under MCL 750.136b(3)(a), the only manner of proving their culpability under that subdivision would be to prove a “reckless act,” and failing to seek proper medical care is not an “act.” As to the first issue, Krukowski incorrectly asserts that he was charged only with violating Subdivision (a) of MCL 750.136b(3). The second-degree child abuse statute imposes criminal liability in multiple scenarios:

(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.

(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b.]²

The information in this case did not indicate that defendants were charged only under Subdivision (a) of MCL 750.136b(3), but rather stated that defendants’ actions were “contrary to MCL 750.136b(3)-(4),” i.e., the second-degree child abuse statute generally. Further, the description of the offense in the information encompassed *both* MCL 750.136b(3)(a) *and* (b). Subdivision (b) of the statute was specifically identified by the statement in the information that defendants “knowingly or intentionally commit[ed] an act likely to cause serious physical or mental harm to a child[.]”³ Accordingly, Krukowski incorrectly asserts that the prosecutor only pursued a theory of criminal culpability under Subdivision (a) of MCL 750.136b(3) and that only the “omission” and “reckless act” theories encompassed by that subdivision were before the jury at trial.

Second, Krukowski suggests that the “intentional act” theory under Subdivision (b) of

² MCL 750.136b(3)(d) also provides that it constitutes second-degree child abuse when a “person or a licensee as licensee is defined in section 1 of 1973 PA 116, MCL 722.11, violates section 15(2) of 1993 PA 218, MCL 722.125.”

³ See Felony Information; Tr 4/27/16, 32.

MCL 750.136b(3) was off the table because “in their opening statement, the prosecution conceded they would not be able to prove any intentional act by Mr. Krukowski” (Krukowski Answer, p 14). But this is an inaccurate description of the People’s theory at trial. In his opening statement, the prosecutor explained the following:

[T]his opening statement is for me to tell you what I intend to prove, what evidence you can expect, here. But I want to tip you off right now, what I will not prove, in this case, in the People’s case, when we are calling our witnesses, and before we—evidence, and before we rest, *we will not prove that the skull fracture or a particular broken arm or rib or a particular brain bleed or the resulting fluid buildup from that bleed or a particular retinal hemorrhage in one or the other of the eyes was specifically caused by him or her.*

If the evidence, in this case, could show an intentional act by one or both of them, the criminal charge would be a higher degree. It wouldn’t be second degree, it would first degree; it would be intentionally-caused child abuse or injury.

[Tr 4/27/16, 174-175 (emphasis added), attached as Exhibit A.]

Read in context, the prosecutor’s statement that he would not be able to prove an “intentional act” was in reference to the idea that he would be unable to prove that defendants *intentionally caused the child’s injuries*.⁴ Neither the information nor the prosecutor at trial, however, ever foreclosed the possibility that defendants could be culpable under an “intentional act” theory pursuant to Subdivision (b) of MCL 750.136b(3) (“The person . . . intentionally commits an act likely to cause serious physical . . . harm *regardless of whether harm results.*”), which does not require the occurrence of harm resulting from the intentional act. The information encompassed that theory, which was recognized by the defense attorneys at trial (See Tr 5/5/16, 42-43 “The Information is drawn, essentially these alternatives . . . they have three theories, alternatives here. . . . The third is act likely to cause serious physical harm. Defendant knowingly or intentionally did an act likely to cause serious physical harm to Roegan Krukowski, regardless of whether such harm resulted.”). This “intentional act” theory under Subdivision (b), along with the prosecution’s “reckless act”

⁴ See also Tr 5/5/16, 38 (“The People aren’t claiming that there is *intentional damage done*[.]”).

and “willful abandonment” theories under Subdivision (a), was clearly placed before the jury at trial (See Final Jury Instructions, Tr 5/5/16, 145-146, attached as Exhibit B).

Finally, Krukowski asserts that the evidence was insufficient to establish that he committed a “reckless act” that caused serious physical harm to the child for purposes of MCL 750.136b(3)(a). The People’s response to this argument is simple; we agree. In the application for leave to appeal, the People contended that sufficient evidence supported defendant Krukowski’s conviction of second-degree child abuse under two theories: (1) that Krukowski engaged in an intentional act that was likely to cause serious physical harm to the child, regardless of whether harm resulted, by giving the infant multiple bottles of plain water following a known head injury, MCL 750.136b(3)(b) (Issue I), and (2) that Krukowski willfully abandoned the child by failing to seek appropriate medical care following a traumatic head injury, which constituted an omission and caused serious physical harm to the child, MCL 750.136b(3)(a) (Issue III). The People did not contend in the application for leave to appeal that defendant Krukowski engaged in a “reckless act” that caused serious physical harm to the child for purposes of MCL 750.136b(3)(a).⁵ Accordingly, Krukowski’s assertions regarding the “reckless act” theory, see Krukowski Answer, pp 15-16, are simply unresponsive to the arguments the People raised in the application.

⁵ The People did, however, assert in Issue II of the application that *defendant Stevens* engaged in such acts that would support her convictions of second-degree child abuse.

RELIEF SOUGHT

The People respectfully ask this Court to 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,

JOHN A. MCCOLGAN, JR. (P37168)
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Dated: November 14, 2019



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5 vs. File No. 15-041274-FH-3
6 DANE RICHARD KRUKOWSKI, Volume I
7 Defendant.

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9 PEOPLE OF THE STATE OF MICHIGAN
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12 Defendant.

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14
15 JURY TRIAL
16 BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE
17 Saginaw, Michigan - April 27, 2016

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Official Court Reporter

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1 in conjunction and say the baby was shaken. They don't
2 necessarily try to get to that conclusion or make that
3 assumption. But sometimes the injuries that are seen
4 in a baby beyond those three -- and I mentioned many
5 others already -- are the result of trauma.
6 Blunt-force trauma. Something hitting the baby or the
7 baby being hit over something.

8 Those in the medical field, even with
9 extensive trauma, don't want to jump to the conclusion
10 that whoever is the caregiver and had charge of the
11 baby -- parent or otherwise -- caused those injuries
12 intentionally. What no medical professional who will
13 testify in this case will say, though, is that when you
14 take those three injuries in that triad and put them
15 together with all the other fractures and other things,
16 that you can have a -- what you call an accidentally
17 injured child. It's just too much.

18 The fact that this was recognized almost
19 immediately in the emergency room, and thereafter in
20 the PICU, prompted the involvement -- as they're
21 required to do -- to call protective services. They
22 are what are called mandatory reports; police officers,
23 teachers, counselors, doctors. There's no privilege
24 that the person who is in the professional position has
25 to protect if there's injury to the child. It's the

1 this opening statement is for me to tell you what I
2 intend to prove, what evidence you can expect, here.
3 But I want to tip you off right now, what I will not
4 prove, in this case, in the People's case, when we are
5 calling our witnesses, and before we -- evidence, and
6 before we rest, we will not prove that the skull
7 fracture or a particular broken arm or rib or a
8 particular brain bleed or the resulting fluid buildup
9 from that bleed or a particular retinal hemorrhage in
10 one or the other of the eyes was specifically caused by
11 her or him.

12 If the evidence, in this case, could show an
13 intentional act by one or both of them, the criminal
14 charge would be a higher degree. It wouldn't be second
15 degree, it would be first degree; it would be
16 intentionally-caused child abuse or injury.

17 What will be proven, in this case, however,
18 is that no matter how these injuries occurred, they --
19 they, as parents -- failed or omitted to provide the
20 necessary medical treatment in a timely way that would
21 alleviate this child's pain and suffering, prevent
22 worsening of the symptoms in these injuries, and
23 minimize the very real possibility the baby could have
24 died of those injuries, imminently, when they finally
25 took the baby, on the 22nd.

1 other way around; it's, you must tell, you must advance
2 that information to the department of human services,
3 child protective services division.

4 And the police were also called, because this
5 was going to be a pretty extensive investigation. So
6 detectives are coming in on an off day to meet with the
7 two parents, and to try to talk with them about what
8 happens.

9 And it is a difficult situation. It's
10 difficult for you to hear about it, it was difficult to
11 investigate it, and for the nurses and doctors to deal
12 with the injuries and interact with the parents,
13 because, under most circumstances, common sense would
14 say doctors would look to the parents to be the most
15 interested in the child's welfare. That's the natural
16 first reaction. Until the evidence told them
17 otherwise, and I submit, will tell you otherwise, in
18 this case.

19 On February 22nd, Dane Krukowski and Codie
20 Stevens really had no other options, but to take the
21 child to the ER. The baby could have died. After that
22 day, the intervention is done, the professional work.
23 The miraculous work done prevented that from happening.
24 This is not a homicide case.

25 What will not be proven, in this case -- and

1 I use the word omitted. There are wrongs of
2 commission and omission; and in this case you will hear
3 more about the latter. Omitting to do things.
4 Abandoning the child. Basically, you have a
5 two-month-old baby who has severe injuries, and you
6 know it, and you -- you're the caregivers. You created
7 the child, and you don't take action. And injuries
8 that have occurred worsen or injuries further occur, to
9 the point where the baby doesn't almost make it, is the
10 essence of what's charged here.

11 They lived at the house referred to by the
12 Court when the Information was read here, in Saginaw
13 Township, Saginaw County, Michigan. It happened
14 sometime during those dates indicated; February 7th
15 through February 22nd, 2015. And what you will hear
16 now, when the People start calling witnesses, is the
17 evidence to prove those allegations.

18 Thank you.

19 THE COURT: All right. Mr. Sturtz, did you
20 wish to make an opening, at this time, or reserve it?

21 MR. STURTZ: Judge, I'm going to reserve my
22 opening statement. Thank you.

23 THE COURT: All right. Then with that, we'll
24 need to bring in our other jury, and we'll be able to
25 proceed.

EXHIBIT B

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

vs.

File No. 15-041274-FH-3
VOLUME VI of VII

DANE RICHARD KRUKOWSKI,

Defendant.

PEOPLE OF THE STATE OF MICHIGAN,

vs.

File No. 15-041275-FH-3
VOLUME VI of VI

CODIE LYNN STEVENS,

Defendant.

JURY TRIAL

BEFORE THE HONORABLE JANET M. BOES, CIRCUIT JUDGE

Saginaw, Michigan - May 5, 2016

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1 Dr. Dawis, pediatric medicine; Dr. Kirby, emergency
 2 medicine; Dr. Dense, chiropractic medicine; Dr. Barriger,
 3 chiropractic medicine; Dr. Farrar, neuroradiology; Dr.
 4 Constantino, radiology; Dr. Schinco, neurosurgery; Dr.
 5 Fiore, pediatric critical care medicine.

6 However, you do not have to believe an expert's
 7 opinion. Instead, you should decide whether you believe
 8 it and how important you think it is. When you decide
 9 whether you believe an expert's opinion, think carefully
 10 about the reasons and facts she or he gave for the
 11 opinion and whether those facts are true. You should
 12 also think about the expert's qualifications and whether
 13 the opinion makes sense when you think about the other
 14 evidence in the case.

15 You have heard testimony from witnesses who are
 16 police officers. That testimony is to be judged by the
 17 same standards you use to evaluate the testimony of any
 18 other witness.

19 At the beginning of the trial, I instructed you
 20 concerning the elements of the crime that the defendant
 21 is charged with. At that time, I advised you that it was
 22 possible that these instructions might change at the end
 23 of the trial. In fact, these instruction have been
 24 modified. So you must follow the instructions I am
 25 giving you now, as they supersede the instructions I gave

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1 you at the beginning the trial. Since the preliminary
 2 instructions have been modified, I have instructed the
 3 bailiff to collect the previous instructions. However,
 4 you should keep any notes you have taken during the
 5 trial.

6 You may return a verdict of guilty of child
 7 abuse second-degree, guilty of the less serious crime of
 8 child abuse fourth-degree, or not guilty.

9 You will be provided with a verdict form that
 10 has places to mark each of the three possible verdicts.

11 In a moment, I will be instructing you about
 12 the elements of the crimes of child abuse in the
 13 second degree and child abuse in the fourth degree. Here
 14 are some definitions of words or phrases that are used in
 15 those instructions.

16 "Abandon" means to withdraw one's support or
 17 one's help, especially to do so despite a duty,
 18 allegiance, or responsibility.

19 "Child" means a person who is less than
 20 18 years of age.

21 "Omission" means a willful failure to provide
 22 food, clothing, or shelter necessary for a child's
 23 welfare or willful abandonment of a child.

24 "Person" means a child's parent or guardian or
 25 any other person who cares for, has custody of, or has

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1 authority over a child, regardless of the length of time
 2 that a child is cared for, in the custody of, or subject
 3 to the authority of that person.

4 "Physical harm" means any injury to a child's
 5 physical condition.

6 "Serious physical harm" means any physical
 7 injury to a child that seriously impairs the child's
 8 health or physical well-being, including, but not limited
 9 to, brain damage, a skull or bone fracture, subdural
 10 hemorrhage or hematoma, dislocation, sprain, internal
 11 injury, poisoning, burn or scald, or severe cut.

12 "Reckless" means having disregard of, or
 13 indifference to, consequences, under circumstances
 14 involving danger to the life or safety of others,
 15 although no harm was intended.

16 The defendant is charged with one count of the
 17 crime of second-degree child abuse. The prosecutor has
 18 three alternate theories under which he can prove this
 19 charge. I will be explaining those theories in a moment.

20 The first alternative is based upon an
 21 abandonment theory.

22 The second alternative is based upon a reckless
 23 act theory.

24 The third alternative is based upon the theory
 25 that defendant committed an act likely to cause serious

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1 physical harm.

2 To reach a unanimous verdict of guilty on the
 3 charge of second-degree child abuse, all 12 jurors do not
 4 have to agree on which of the above three alternatives
 5 has been proven beyond a reasonable doubt by the evidence
 6 in the trial, so long as every juror has found that the
 7 evidence has proven at least one of the prosecution's
 8 three theories.

9 To establish the charge of child abuse
 10 second-degree under an abandonment theory, the
 11 prosecution must prove each of the following elements
 12 beyond a reasonable doubt:

13 First, that defendant is the parent of Roegan
 14 Krukowski.

15 Second, that the defendant wilfully abandoned
 16 Roegan Krukowski.

17 Third, that as a result, Roegan Krukowski
 18 suffered serious physical harm. I have already defined
 19 that term for you.

20 Fourth, that Roegan Krukowski was at the time
 21 under the age of 18.

22 To establish the charge of child abuse
 23 second-degree under a reckless act theory, the
 24 prosecution must prove each of the following elements
 25 beyond a reasonable doubt:

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1 First, that the defendant is a parent of Roegan
 2 Krukowski.
 3 Second, that the defendant did some reckless
 4 act, consisting of treating Roegan Krukowski with
 5 inadequate home remedy for an obvious head injury, rather
 6 than seeking professional medical treatment.
 7 Third, that as a result, Roegan Krukowski
 8 suffered serious physical harm.
 9 Fourth, that Roegan Krukowski was at the time
 10 under the age of 18.
 11 To establish the crime of second-degree child
 12 abuse under a theory that the defendant committed an act
 13 likely to cause serious physical harm, the prosecutor
 14 must prove each of the following elements beyond a
 15 reasonable doubt:
 16 First, that the defendant is the parent of
 17 Roegan Krukowski.
 18 Second, that the defendant knowingly or
 19 intentionally did an act likely to cause serious physical
 20 harm to Roegan Krukowski, regardless of whether such harm
 21 resulted. The intentional act alleged consists of
 22 treating Roegan Krukowski with inadequate home remedy for
 23 an obvious head injury, rather than seeking professional
 24 medical treatment.
 25 Third, that Roegan Krukowski was at the time

1 under the age of 18.
 2 You may also consider whether the defendant is
 3 guilty of the less serious crime known as child abuse
 4 fourth degree. To establish this charge, the prosecution
 5 must prove each of the following elements beyond a
 6 reasonable doubt:
 7 First, that the defendant is the parent of
 8 Roegan Krukowski.
 9 Second, that the defendant's omission or
 10 reckless act caused physical harm to Roegan Krukowski.
 11 Third, that Roegan Krukowski was at the time
 12 under the age of 18.
 13 The prosecutor must also prove beyond a
 14 reasonable doubt that the crime occurred on or about
 15 February 7, 2015, to February 22, 2015, within Saginaw
 16 County, State of Michigan.
 17 Possible penalty should not influence your
 18 decision. In Michigan it is the duty of the judge to fix
 19 the penalty within the limits provided by law.
 20 If you want to communicate with me while you
 21 are in the jury room, please have your foreperson write a
 22 note and give it to the bailiff. It is not proper for
 23 you to talk directly with the judge, lawyers, court
 24 officers, or other people involved in the case.
 25 As you discuss the case, you must not let

1 anyone, even me, know how your voting stands. Therefore,
 2 until you return with a unanimous verdict, do not reveal
 3 this to anyone outside the jury room.
 4 When you go to the jury room to deliberate, you
 5 may takes your notes and full instructions.
 6 If you want to look at any or all of the
 7 exhibits that have been admitted, just ask for them by
 8 writing a note and giving it to the bailiff.
 9 As I have already indicated, when you go to the
 10 jury room, you will be given a written copy of the
 11 instructions you have just heard. If you want additional
 12 copies of the jury instructions, you can request them by
 13 having your foreperson write a note and give it to the
 14 bailiff. Please specify how many copies you want.
 15 As you discuss the case, you should not think
 16 about all my instructions together as the law -- as you
 17 discuss the case, you should think about all my
 18 instructions together as the law you are to follow.
 19 When you go to the jury room, you can take with
 20 you the copy of the final instructions and the verdict
 21 form which I have provided for you.
 22 When you commence your deliberations, you
 23 should first choose a foreperson. The foreperson should
 24 see so it that your discussions are carried on in a
 25 businesslike I would and that everyone has a fair chance

1 to be heard.
 2 During your deliberations, please turn off your
 3 cell phones or other communications equipment until we
 4 recess.
 5 A verdict in a criminal case must be unanimous.
 6 In order to return a verdict, it is necessary that each
 7 of you agrees on that verdict. In the jury room, you
 8 will discuss the case among yourselves, but ultimately
 9 each of you will have to make up your own mind. Any
 10 verdict must represent the individual, considered
 11 judgment of each juror.
 12 It is your duty as jurors to talk to each other
 13 and make every reasonable effort to reach agreement.
 14 Express your opinions and the reasons for them, but keep
 15 an open mind as you listen to your fellow jurors.
 16 Rethink your opinions and do not hesitate to change your
 17 mind if you decide you were wrong. Try your best to work
 18 out your differences.
 19 However, although you should try to reach
 20 agreement, none of you should give up your honest opinion
 21 about the case just because other jurors disagree with
 22 you or just for the sake of reaching a verdict. In the
 23 end, your vote must be your own, and you must vote
 24 honestly and in good conscience.
 25 In this case, there are two different crimes