

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 160263

v

Court of Appeals
No. 334320

DANE RICHARD KRUKOWSKI,

Defendant-Appellee.

Lower Court
No. 15-041274-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 160264

v

Court of Appeals
No. 337120

CODIE LYNN STEVENS,

Defendant-Appellee.

Lower Court
No. 15-041275-FH

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF
(ORAL ARGUMENT REQUESTED)

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Statement of Jurisdiction

On August 1, 2019, the Michigan Court of Appeals issued an unpublished opinion vacating defendants' convictions and sentences and remanding both cases for entry of orders of acquittal.¹ The People filed a timely application for leave to appeal in this Court within 56 days of the release of that opinion. On March 6, 2020, this Court entered an order directing the parties to submit supplemental briefs and for oral argument on the application.² This Court has jurisdiction under MCR 7.303(B)(1) and MCR 7.305(C)(2)(a).

¹ *People v Krukowski*, unpublished per curiam opinion of the Court of Appeals, issued August 1, 2019 (Docket Nos. 334320 and 337120).

² *People v Krukowski*, ___ Mich ___, ___; 939 NW2d 281 (2020) (Docket Nos. 160263 and 160264).

Statement of Questions Involved

- I. Did the prosecutor present sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendants committed the offense of second-degree child abuse under MCL 750.136b(3)(a) or MCL 750.136b(3)(b)?

Plaintiff says yes.

Defendants say no.

The trial court said yes.

The Court of Appeals said no.

- II. Does the phrase “willful abandonment” in MCL 750.136b(1)(c) encompass a parent’s failure timely to seek professional medical care for his or her child after the child sustains a traumatic injury?

Plaintiff says yes.

Defendants say no.

The trial court did not answer this question.

The Court of Appeals said no.

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 (App 168a [34-35]). According to the infant's mother, defendant Codie Lynn Stevens, Roegan was bruised from forehead to mid-chest after the delivery (App 169a [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 (App 65a [25-26]), his only issues being difficulty keeping certain formulas down and slight jaundice (App 170a [44]).

On February 7, 2015, while defendant Dane Krukowski was giving nine-week-old Roegan a bath, the infant allegedly slipped out of his hands, striking his head on the side of the bathtub (App 200a [164]). Krukowski explained that the infant fell facedown into over a foot of water, so he reached in and scooped him up (App 207a [192-194]). Krukowski testified that, immediately following the incident, he called Stevens upstairs and told her what had happened (App 201a [167], 172a [50]). 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 (App 201-202a [168-171]). Stevens described the visible injury as a dime-sized circle that was yellowish in color with "slight swelling" (App 177a [172]). Neither Krukowski nor Stevens sought professional medical treatment for Roegan after the fall (App 202a [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 (App 178a [75], 202a [170-171]).³

On February 9, 2015, Stevens and her mother, Shawn Stevens, appeared for a previously scheduled appointment with Roegan's pediatrician, Dr. Elvira M. Dawis (App 170a [45]). Dr. Dawis testified that Stevens reported Roegan was irritable, fussy, and could not be pacified (App 65a [26], 69a [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" (App 172a [53], 178a [77]).⁴ However, Dr. Dawis denied that Stevens told her that Roegan hit his head and did not note any falls in her medical records (App 65a [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 (App 65a [25-26]). Dr. Dawis thus wrote in her medical notes for the appointment that "mom denies any fall" (App 65a [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 (App 66a [29-30]). Stevens brought

³ 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 body, so the infant was not "crushed against the floor or a wall" (App 206a [188-189]).

⁴ 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 (App 140a [76]).

Roegan in for chiropractic treatments on February 9, 10, and 18, 2015. Chiropractor Michael Dense treated Roegan 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 (App 89a [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 (App 98a [159]). Stevens’s mother testified that she heard Roegan’s body “crack” during the first procedure (App 141a [80]). Stevens also testified that she heard a “crack” sound when the chiropractors adjusted Roegan’s back, and again when they adjusted his neck (App 173a [55-58]).

On February 21, 2015, Roegan vomited after Stevens fed him (App 174a [59]). When she attempted to feed him again three or four hours later, he vomited again (App 174a [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” (App 174a [59]). Stevens testified that she believed Roegan might have the flu, so at approximately 5:30 or 6:00 p.m., she made him an eight-ounce bottle of peppermint water, which he was able to keep down (App 174a [59-60]). A few hours later, Stevens made Roegan another four-ounce bottle of peppermint water, which he drank, and then put him down for the night (App 174a [60]). According to Stevens, Roegan slept through the night, but the next morning, she heard him whimpering in his crib (App 174a [60]). Stevens explained that Roegan was “lying on his side, [and] his arm was twitching” (App 175a [62]). When the infant would not stop twitching, Stevens and

Krukowski decided to take him to the emergency room (App 175a [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 (App 37a [190]). Markle said they were concerned because defendants advised that they had been giving the infant water, which she explained can cause electrolyte imbalances and seizures (App 37a [192]). She did not recall Stevens or Krukowski disclosing that Roegan had fallen two weeks earlier (App 39a [197]). Shortly after arriving at the hospital, nurses placed an IV in Roegan's right arm (App 196a [146]). Stevens testified that the nurses had to "completely ben[d] his wrist" to keep the infant still to get the IV in (App 181a [89]). Krukowski testified that the nurse "cranked [Roegan's] arm back . . . far enough you start seeing white" (App 204a [181]).

Dr. Jessica Kirby, the emergency room physician, testified that Roegan did not display any 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 (App 73a [59]). When the laboratory results returned normal, however, Dr. Kirby suspected trauma or bleeding on the brain and ordered a CAT scan (App 73-74a [60-64]), which revealed multiple brain bleeds (App 75a [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 (App 81a [89]). Dr. Kirby explained that, given the young age of the infant, she was immediately concerned about non-accidental trauma (App 75a [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 (App 76a [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 (App 210a [205]).

Shortly thereafter, Roegan was transferred to the pediatric intensive care unit (PICU) (App 76a [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 (App 125a [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 (App 126a [17]). Dr. Fiore explained that, due to the extent of the injuries, Roegan would have died that day without serious medical intervention (App 128a [25-26], 129a [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” (App 134a [52]).

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” (App 82-83a [96-100]). He explained that numerous traumatic events could cause brain hemorrhages, such as shaking, falls out of a crib or down stairs, or

car accidents (App 84-85a [104-105]). He testified that the older brain bleed could possibly be from a rough delivery, but this was unlikely because such bleeding would have resolved within two-and-a-half months (App 85a [107], 86a [111]). Dr. Farrar further testified that it was unlikely the newer bleed was related to any birth injury (App 85a [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 (App 43a [215]). He explained that the infant had retinal hemorrhages that were "too numerous to count" (App 44a [217]). 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 (App 44a [220]). He explained that shaking could cause the injury, but blunt-force trauma could not (App 44a [220]). Dr. Sahouri explained that a baby falling and hitting his head would likely cause a "few hemorrhages, but not to this extreme" (App 45a [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 (App 46a [226-227], 47a [230]). Dr. Sahouri did not believe a single-force incident could cause the injury or that a chiropractic adjustment could do so (App 47a [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 (App 152a [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” (App 152a [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 (App 157a [158-159]).

Radiologist Kristin Constantino explained that she reviewed a skeletal survey x-ray, taken on March 2, 2015, of the infant’s entire body (App 103a [180]). She explained that Roegan had a skull fracture that separated the two bone fragments by roughly half of an inch (App 105-106a [187-189]). The infant had a fracture 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 (App 106a [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 (App 108a [197-199], 111a [210-211]).

Roegan was released from the hospital nine days after he was admitted to the PICU (App 133a [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, by administering home remedies following the child’s known head injury, 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.⁵ 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.⁶

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*⁷ 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.⁸

⁵ Defendants were tried jointly but before separate juries.

⁶ 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 Appeals affirmed the trial court's decision terminating defendants' parental rights. *In re Krukowski*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2016 (Docket Nos. 330868 and 330869).

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁸ *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).

Following oral argument, on August 1, 2019, the Court of Appeals⁹ 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 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 7.

The People timely filed an application for leave to appeal in this Court regarding both cases. On March 6, 2020, this Court ordered supplemental briefing and oral argument on the application, framing the issues as follows:

(1) whether there is sufficient evidence for a rational juror to conclude beyond a reasonable doubt that defendants committed the offense of second-degree child abuse, MCL 750.136b(3)(a) and MCL 750.136b(3)(b); and (2) whether the phrase "willful abandonment" in MCL 750.136b(1)(c) encompasses a parent's failure to timely seek professional medical care for his or her child. [*People v Krukowski*, ___ Mich ___, ___; 939 NW2d 281 (2020).]

⁹ The panel was comprised of Judges TUKEL, SERVITTO, and RIORDAN.

Argument

I. The prosecutor presented sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendants committed the offense of second-degree child abuse under MCL 750.136b(3)(a) and/or MCL 750.136b(3)(b).

“In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in a light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.” *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014). The standard of review is deferential: “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Oros*, 502 Mich 229, 213; 917 NW2d 559 (2018) (quotation marks and citation omitted). “The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Id.* “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

This case also presents issues of statutory interpretation, which this Court reviews de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). “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). 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.*

The second-degree child abuse statute, MCL 750.136b(3), provides:

(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” to mean

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 750.136b(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,¹⁰ the second-degree child abuse statute does not define the word “act” as used the statute. In *People v Murphy*, 321 Mich App 355; 910 NW2d 374 (2017), however, the Court of Appeals

¹⁰ The People will address the third theory under Issue II.

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, there were prescription morphine pills around home, and 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.

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:

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.]

A. Sufficient evidence supported defendants' convictions under an "intentional act" theory; the Court of Appeals rejected this theory because it improperly analogized the case to *Murphy*.

A person commits second-degree child abuse under MCL 750.136b(3)(b) if he or she "knowingly or intentionally commits an act likely to cause serious physical . .

. harm to a child regardless of whether harm results.” The testimony at trial in this case supported that defendants intentionally gave Roegan multiple bottles of water in a short period of time following a known head injury and, according to the medical professionals who testified, this was an act that was “likely to cause serious physical . . . harm” to the infant. MCL 750.136b(3)(b).

Defendants testified at trial that 11-week-old Roegan sustained a head injury, falling multiple feet and hitting his head on the side of a bathtub, on February 7, 2015 (App 200a [164]). Thereafter, Stevens reported that the infant was irritable, fussy, and could not be pacified (App 65a [26], 69a [44]). Stevens testified that, on February 21, 2015, Roegan began vomiting every time she fed him (App 174a [59]). When Roegan could not keep formula down, at 5:30 or 6:00 p.m. that day, she gave him an eight-ounce bottle of water (App 174a [59-60]). A few hours later, Stevens gave Roegan another four-ounce bottle of water (App 17a [60]). According to Stevens, Roegan then slept through the night until she found him the next morning whimpering and seizing in his crib (App 174-175a [60-62]).

At trial, numerous medical professionals testified regarding the dangers of giving a very young infant plain water to drink, including that such an act could cause an infant to experience electrolyte imbalances, low sodium, swelling, and seizure activity. Emergency room nurse Sara Markle testified as follows:

Q. Was there any concern, at that point, even though you may not have seen any external evidence, that the baby had some type of brain or head injury?

A. According to our notes—and we were told the baby came in with nausea, vomiting and no trauma—we were concerned because the

baby was receiving water; and when you give newborns water it messes up their electrolytes, which causes seizures, also. So we really wanted to get the lab work. And when you're having a seizure and have the round head, you're concerned about too much spinal fluid, so a CAT scan was the next place that we needed to go. [App 37a [192].]

Pediatric nurse Tammy Nowaczyk answered, "Yes," when asked, "Would regular water be bad to use in giving this baby medical assistance?" (App 53a [254-255]). And Dr. Michael Fiore testified as follows regarding the dangers of giving a very young infant plain water:

Q. Would water, intake of water, have an affect on a seizure of the kind that this child was undergoing?

A. Drinking large quantities of water can cause seizures; not of the type this baby had, but, right, the large volumes of water can, right.

Q. Would it have—well, a baby that was—what about periodic intake of water?

A. Typically, it's large quantities of water, and it causes very low sodium, which will trigger a seizure in babies. That's a common cause of seizures in babies. [App 134a [51-52].]

Dr. Jessica Kirby explained that, when the infant arrived at the emergency room seizing, she immediately ordered laboratory studies because she suspected low sodium and electrolyte abnormalities:

Q. What did you formulate as a plan, to try to figure out why the baby was behaving in the way the nurses and you observed?

A. Uh-huh. The baby was exhibiting shaking activity and quivering that was suspicious of a seizure. And my initial thought was perhaps the patient's sodium was low and there was some kind of electrolyte abnormality, so we initially ordered laboratory studies.

Q. When you say these things, remember, we're not in your field. What does sodium and electrolytes mean to us?

A. Oh, boy, this is basic science. Let's see. Sodium is a salt in the body that's essential for metabolism and activities of the body, and when it's very low it can cause seizure-like activities, similar to what we witnessed with this child. So when we saw this activity, we were concerned that perhaps the labs were abnormal.

Q. So you had laboratory tests done?

A. We ordered laboratory tests.

Q. And electrolytes were also a concern?

A. Yes, and that's included in the laboratory studies.

Q. And when you got those studies done, did they give you any intuition as to what the baby's seizing activity was from?

A. Those studies were all normal or unremarkable, so at that point, you have to consider other etiologies or other causes of the seizure activity. And we were pretty convinced, on what we were seeing that patient do, that it was, in fact, seizure activity; and so then we were concerned about possible trauma or bleeding in the brain. And so we ordered imaging of the brain. [App 73a [59-60].]

Logically, the danger and likelihood of harm from giving a very young infant multiple bottles of water in a short period of time would only be exacerbated if the infant had recently sustained a major fall and head injury. See *Hardiman*, 466 Mich at 424 (juries may draw reasonable inferences from the evidence adduced at trial).¹¹ In light of the evidence presented at trial, the prosecutor argued that defendants' act of giving the young infant multiple bottles of water¹² was a home remedy that was

¹¹ And "it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* at 428

¹² At trial, the prosecutor also argued that defendants' act of putting a bag of cold peas on the infant's head following his head injury was an act likely to cause serious physical harm to the child under MCL 750.136b(3)(b). Upon further review of the record, however, the People no longer contend that this act was one likely to cause

likely to cause serious physical harm to the infant, regardless of whether harm resulted.¹³ Considering the circumstances in which the water was given and the medical testimony presented at trial, a rational juror could conclude that 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 statute 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). 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 (App 73a [60]). Again, though, the fact that harm did not ultimately result from the act is irrelevant under MCL 750.136b(3)(b). Further, the prosecutor did not need to show that the parents intended harmful

serious physical harm to the infant. The only testimony presented on the subject at trial suggested that applying a cold compress to an area of swelling could possibly work to reduce that swelling (App 137a [61]).

¹³ The trial court instructed the jury consistent with the prosecutor's theory, explaining that, to find defendants guilty of second-degree child abuse under an "intentional act" theory, the jurors would need to find (in addition to finding that defendants were Roegan's parents and that Roegan was under the age of 18) that defendants "knowingly or intentionally did an act likely to cause serious physical harm to Roegan Krukowski, regardless of whether such harm resulted," and that "[t]he intentional act alleged consists of treating Roegan Krukowski with inadequate home remedy for an obvious head injury" (App 220a [146]).

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) (“[S]econd-degree child abuse [under MCL 750.136b(3)(b)] is an example of a general-intent crime”),¹⁴ *aff’d* for different reasons *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

The Court of Appeals rejected the usefulness of defendants’ act of giving Roegan multiple bottles of water 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. To begin, the panel’s position is not supported by common sense. 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; an infant’s body is not equipped to handle a significant quantity of plain water.

Also noteworthy is that, when offering this reason, the panel seemed to speak in terms of a child who would be representative of children *as a whole or on average*. But nothing in the statute suggests that an act “likely to cause serious physical . . . harm to *a* child” for purposes of MCL 750.136b(3)(b) (emphasis added) must be likely to cause serious harm to a child representative of the average, as opposed to a child of the same sort as the child at issue in the case—here, an 11-week-old infant. This Court has recognized in other statutory contexts that use of the indefinite article “a”

¹⁴ See also *People v Whitney*, 228 Mich App 230, 254; 578 NW2d 329 (1998) (“A specific intent crime requires a particular criminal intent beyond the act done, while a general intent crime requires merely the intent to perform a proscribed physical act”).

is often used to mean “any.” See *South Dearborn Environmental Improvement Ass’n v Dep’t of Environmental Quality*, 502 Mich 349, 368; 917 NW2d 603 (2018), citing *Merriam-Webster’s Collegiate Dictionary* (11th ed). The testimony of the medical professionals at trial supported that giving multiple bottles of water *to a very young infant* like Roegan posed a significant risk of harm. This risk of harm would only be exacerbated by the fact the infant recently sustained serious head trauma. That the same act may not pose a serious risk of harm to an older child should not preclude defendants’ convictions here.

Finally, the Court of Appeals erred by analogizing the circumstances of this case to those in *Murphy* to reject the prosecutor’s “reckless act” and “intentional act” theories under MCL 750.136b(3)(a) and (b) because, the panel said, the pertinent “acts” in which defendants engaged were not a sufficient *causative factor* in the serious harm that the infant endured. 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.]

The Court of Appeals' analysis in *Murphy* was not useful to the panel's reasoning here. The issue *Murphy* was that the panel *could not identify* any "act" committed by the child's 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," *Krukowski*, unpub op at 6, but concluded that these acts were not *causally related* to the serious physical harm that the infant endured or to any likelihood of serious physical harm. The issue in *Murphy* and the issues presented in this case are entirely different. The Court of Appeals erred by concluding that *Murphy* controlled and required the court to vacate defendants' convictions.

In sum, 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, 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. 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.

This Court should therefore reverse the Court of Appeals' ruling that defendants' convictions were improper under MCL 750.136b(3)(b).

B. Additional evidence, which the Court of Appeals did not address, supported defendant Stevens's conviction under an "intentional act" theory and/or a "reckless act" theory.

As noted, 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" as used in MCL 750.136b(3)(a) in *People v Head*, 323 Mich App 526; 917 NW2d 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 in *Head* 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 *Head* 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 that, because the father engaged in some "act" that created a situation of greater danger, and harm resulted to his child *in that situation*, his "act" was sufficient to support a conviction for second-degree child abuse under MCL 750.136b(3)(a). 323 Mich App at 536.¹⁵

¹⁵ The published opinions in *Murphy* and *Head* seem to be at odds. 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, 985; 907 NW2d 581 (2018); *People v Head*, 503 Mich 918, 918; 920 NW2d 145 (2018). The different outcomes reached in the two opinions begs the

The Court of Appeals analogized this case to *Murphy*, focusing 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 the Court of Appeals did not address, that created a situation of greater danger for Roegan. Ultimately, Roegan sustained serious physical injury in that situation. First, according to Dr. Elvira 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 (App 65a [26-28]).¹⁶ 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 training,¹⁷ 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 told. A rational jury could reasonably infer from this testimony that Stevens either committed a reckless act that caused serious physical 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

question: when dealing with a criminal harm like that proscribed by MCL 750.136b(3)(a), i.e., "serious physical harm" to a child, how far out from the harm itself can one go to find an "act" sufficient to support a conviction under the statute?

¹⁶ Stevens disputed 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."). Dr. Dawis also explained that she had specifically written in her medical notes for the appointment that "mom denies any fall" (App 65a [26]).

¹⁷ Stevens testified at trial that she had worked at a pharmacy for six years and had medical training from Ross Medical Education Center (App 176a, [69]).

from the act. The Court of Appeals did not discuss these acts or explain why they were insufficient to support Stevens’s conviction of second-degree child abuse under either a “reckless act” theory, MCL 750.136b(3)(a), or a “knowing and intentional act” theory, MCL 750.136b(3)(b). Nor did the panel address or attempt to distinguish the published opinion in *Head*.¹⁸

II. The phrase “willful abandonment” in MCL 750.136b(1)(c) encompasses a parent’s failure timely to seek professional medical care for his or her child after the child sustains a known traumatic injury.

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” to mean “a willful failure to provide food, clothing, or shelter

¹⁸ The People note that the trial court’s jury instructions regarding the prosecutor’s “reckless act” and “intentional act” theories could possibly present an issue regarding whether the jury was permitted to consider acts beyond the home remedies already discussed. 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” (App 220a [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” (App 220a [146]; emphasis added). 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 also on the table or whether such acts went beyond the scope of the trial court’s instructions. The answer could turn on how one 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, Stevens’s acts noted in Issue I.B are arguably consistent and compatible with the home remedy theory before the jury because they represent instances in which Stevens improperly took the child’s treatment into her own hands.

necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c). Importantly, the statute does not define the phrase "willful abandonment."

The scope of the meaning of the statutory phrase "willful abandonment" in MCL 750.136b(1)(c) is a matter of first impression in Michigan caselaw. This Court has recently opined on the meaning of the term "willful:"

The word "willful," whether or not used as a legal term of art, describes an act that is voluntary, deliberate and intentional. *Random House Webster's* (2d ed); *Black's Law Dictionary* (8th ed). But the intent to commit any act does not, by itself, render it "willful." Rather, a "willful" act is one that is taken with the intent to do something specific. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994); cf *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983) (explaining that a willful act is one committed with the specific intent to bring about the particular result the statute seeks to prohibit). [*In re Estate of Erwin*, 503 Mich 1, 10-11; 921 NW2d 308 (2018).]

But the meaning of the term "abandonment," has not been similarly recently defined.

When interpreting statutory language, this Court's goal is to glean legislative intent from the plain language of the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). When a term is not defined by statute, this Court often consults dictionary definitions as the first point of reference to determine the significance of the term. *Erwin*, 503 Mich at 10, citing *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). A lay dictionary may be consulted to define a common word that lacks unique legal meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). In some circumstances, a term may acquire a particular meaning in the law, in which case the common legal usage of the term, and resort to legal dictionaries, may guide this Court's interpretation. *People v Thompson*, 477

Mich 146, 151-152; 730 NW2d 708 (2007).¹⁹

Here, the Court of Appeals ascribed no particular legal significance to the term “abandonment” or “abandon,” relying instead on definitions of the term set forth in *Merriam-Webster’s Collegiate Dictionary* (11th ed). 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 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 exclusio* [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).]

The panel concluded that a parent’s failure to seek medical care is not the “equivalent to withdrawing protection, help, or support from a child,” *Krukowski*, unpub op at 7, but it failed to offer any meaningful reasoning to support this conclusion. Considered further, *Merriam-Webster’s Collegiate Dictionary* (11th ed) offers the following definitions of “abandon:”

1 a : to give up to the control or influence of another person or agent **b :**

¹⁹ When lay and law dictionaries similarly define a term, it is unnecessary for this Court to determine whether the term is a common term or a legal term of art. *Brackett*, 482 Mich at 276.

to give up with the intent of never again claiming a right or interest in <~property> **2** : to withdraw from often in the face of danger or encroachment <~ ship> **3** : to withdraw^[20] protection, support, or help from <he ~ed his family>²¹

From these definitions, it appears two overarching themes are encompassed by the term “abandonment.” The first is that abandonment occurs when a person gives up, often permanently, his or her rights or control over another person or thing (1 a and b). The second is that abandonment occurs when a person turns away from his or her existing course or duty, often in the face of dangerous or dire circumstances (2 and 3). This case falls within the scope of the latter theme.²²

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

²⁰ *Merriam-Webster’s Collegiate Dictionary* (11th ed) defines “withdraw,” in relevant part, as “to take . . . away: REMOVE” and “to turn away.”

²¹ A note to the definition indicates that “ABANDON suggests that the thing or person left may be helpless without protection <*abandoned* children>.”

²² That two different ideas could be encompassed by the lay definitions of “abandon” does not necessarily compel this Court to choose one at the exclusion of the other. As this Court recently explained in *Erwin*, 503 Mich at 19-20:

When consulting a dictionary, this Court does not relinquish its duty to exercise its best interpretative judgment. In this way, the dictionary should be seen as a tool to facilitate those judgments, not conclusively resolve linguistic questions. It is one thing to “knit together” disparate and incompatible definitions It is quite another to insist on a single definition when there are multiple choices with slight shades of different meaning, each of which is reasonably understood to apply to a term in a particular context.

with proper diligence”). Here, when nine-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.²³ Considering the lay definitions of the term “abandon,” the circumstances here should fall within the scope of the phrase “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” could not be encompassed by the phrase “willful abandonment” in MCL 750.136b(1)(c), in light of the semantic canon of *expressio unius est exclusio alterius*, i.e., the express mention of one thing implies the exclusion of another. The panel reasoned that, 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,” the Legislature implied that medical care should be excluded. However, it could be 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 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.

²³ Noteworthy is that, at the time defendants decided not to seek professional medical care for the infant, Stevens herself possessed medical training (App 176a, [69]).

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.]

Considering the scope of the category to which the negative implication pertains, 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 may 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.²⁴ But the situation here presented anything but a normal and expected circumstance in Roegan'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. Defendants' abdication of their parental duty here, in changed dangerous circumstances, therefore arguably goes beyond the category to which the negative implication pertains, arising from the Legislature's express mention of "food, clothing, or shelter."

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

²⁴ 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.

term to “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.” *Krukowski*, unpub op at 7. Thus, reasoned the panel, such an interpretation would render the express mention of “food, clothing, or shelter” mere surplusage. *Id.* If, however, the term “abandonment” means a parent’s turning away from parental duty *in the face of changed or unusual dangerous circumstances*, a parent’s failure to provide food, clothing, or shelter, or the shirking of parental duties generally, 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.

Having discussed the modern lay dictionary definitions of the term “abandon,” over a century ago, this Court discussed the meaning of the term “abandon” in different statutory contexts. At common law, there existed an offense for exposing a child with intent to abandon it. In *Shannon v People*, 5 Mich 71, 91 (1858), this Court explained that, at common law, exposing a child with the intent to abandon the child was a crime only if the child sustained injury as a result. The common law offense thus punished a perpetrator for the harm of the child’s *injury*, not the harm of *exposing* the child to the possibility of injury. *Id.*

In 1857, the Michigan Legislature then enacted a child abandonment statute, now modern-day MCL 750.135, which criminalized acts by certain classes of people that created hazards for a child, regardless of whether harm resulted to that child. The statute made it a felony for

“the father or mother of any child under the age of six years, or any person to whom such child shall have been confided, [to] expose such child to any street, field, house, or other place, with the intent wholly to abandon it[.]” [*Id.* at 81, quoting 1857 CL 5741.]

In *Shannon*, this Court addressed, among other issues,²⁵ “what constitutes the offense of ‘exposing, with the intent wholly to abandon,’ ” a child under 1857 CL 5741.

The *Shannon* Court opined:

No difficulty can arise upon the words relating to the intent. It is obvious that the term “abandon” is here used in its ordinary sense—to forsake, to leave without the intention to return to, to renounce all care or protection of. It refers only to the intention of the party as connected with his own act But to “expose” the child is the substantive act—the “intent to abandon” is the secondary ingredient; both must concur to complete the offense. The difficulty arises upon the word “expose;” and what shall be said to be a sufficient exposure of the child to bring the act within the prohibition of this section, is a question of some difficulty. [*Id.* at 89-90.]

The *Shannon* Court explained that, in the context of the child abandonment statute, the elements of the offense required both a substantive act, i.e., the exposure of the child, and an intent to abandon, which implied some permanent renouncement of all parental/caretaking rights and duties over a child. *Id.*

After *Shannon*, the child abandonment statute sat largely untouched and unaddressed for over a century. In 2002, the Court of Appeals revisited the statute in *People v Schaub*, 254 Mich App 110, 115-116; 656 NW2d 824 (2002), lv den 468 Mich 865 (2003). In large part, the *Schaub* court only reiterated what was said in *Shannon*:

MCL 750.135 has remained basically unchanged since it was first interpreted in 1858, in *Shannon v People*, 5 Mich 71 (1858). We are

²⁵ Also at issue in *Shannon* was whether a defendant could be held legally guilty under an aiding-and-abetting theory when the principal offense could be committed only by a certain class of persons. *Id.* at 85-89.

aware of no other precedential Michigan case that has addressed the statute. In *Shannon*, our Supreme Court explained that once the person that is alleged to have abandoned the child is found to be either the child's parent or guardian, there are two additional elements of the crime of child abandonment. These elements are (1) exposing the child and (2) the intent to wholly abandon the child. *Id.* at 81, 89. According to the *Shannon* Court, "to 'expose' the child is the substantive act-the 'intent to abandon' is the secondary ingredient; both must concur to complete the offense." *Id.* at 89. [*Id.* at 115-116.]

After *Shannon*, some out-of-state courts pointed to the opinion to support that the statutory term "abandon" or "abandonment" refers only to a permanent and total relinquishment or abdication of parental or spousal duties and rights; the term does not apply to a temporary neglect of duty. In *In re Snowball's Estate*, 156 Cal 240, 243-244; 104 P 444 (1909), for instance, the Supreme Court of California opined:

In order to constitute abandonment "there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same." [*Gay v State*, 105 Ga 599; 31 SE 569 (1898); *Shannon v People*, 5 Mich 71 (1858).] There must be more than a mere temporary absence or neglect of parental duty. [*State v Davis*, 70 Mo 467 (1879).]

In *People v Stickle*, 156 Mich 557; 121 NW 497 (1909), this Court also addressed the meaning of the term "abandon" as it was used in 1907 PA 144, § 1, p 182. The statute made it a felony for any person to "desert[] and abandon[] his wife or desert[] and abandon[] his minor children under fifteen years of age and without providing necessary and proper shelter, food, care, and clothing for them[.]" *Id.* at 565. In *Stickle*, this Court held that the trial court committed instructional error, requiring reversal of the defendant's conviction, because the court failed to define the terms "deserts" and "abandons" for the jury:

The charge of the court did not give to the words 'deserts' and 'abandons'

the meaning which the statute imports, and which the respondent was entitled to have given to them in defining that element of the statute offense which consists in the abandonment of the wife. The marital relation implies, not only provision by the husband for the wife and family, but the living together and cohabitation of the parties thereto. Desertion of one by the other means more than going away more than separation. It negatives the idea of a friendly separation or a separation for just cause. ‘Abandonment’ is defined as: ‘The act of a husband or wife who leaves his or her consort willfully and with an intention of causing perpetual separation.’ 1 Bouv L Dict p 2. The same author (*Id.* p 561) defines ‘desertion’ as ‘the act by which a man abandons his wife and children or either of them.’ . . . Respondent was entitled to have the jury instructed, in accordance with his request, that ‘abandonment or desertion under the statute, means to separate from, wrongfully, without intention of again resuming marital relations.’ For the error in the charge and the refusal to charge as requested, the conviction must be set aside. [*Id.* at 560-561.]²⁶

That same year, and interpreting the same statute, this Court again addressed the meaning of the terms “deserts” and “abandons” in *People v Albright*, 161 Mich 400; 126 NW 432 (1910). The *Albright* Court said:

That the term ‘abandonment’ has been defined under this statute as being the act of the husband who leaves his consort willfully, and with an intention of causing perpetual separation. That desertion is used in the same statute, ‘any person who deserts and abandons his wife and children.’ *That these two words ‘desert’ and ‘abandon’ are not synonymous; they do not mean the same thing. **Desertion is the act, and abandonment covers the intent.*** That before the respondent could be convicted the jury must find, beyond a reasonable doubt, that this act of abandonment, at the time, if he did abandon her, was with the intent this it should be perpetual as above defined, and that he intended never to support her, or live with her again, or furnish her with proper shelter, food, etc. [*Id.* at 401 (emphasis added).]

A few years later, this Court again addressed the scope of 1907 PA 144 in *People v Schleske*, 187 Mich 497, 501; 153 NW 781 (1915). There the Court explained:

The definition of abandonment, which is approved in the case of *People*

²⁶ See also *People v Dunston*, 173 Mich 368, 373; 138 NW 1047 (1912).

v Stickle, supra, makes it an essential element of the crime that perpetual separation must be intended; and from the evidence in this case, as long as he was making those contributions we do not think it can be said that he intended to abandon his wife and child.

These opinions support that the term “abandon,” at least as it is/was used in 1907 PA 144 and MCL 750.135, means the permanent and total abdication of all parental rights and duties over a child. But there are two difficulties with applying such a meaning to the phrase “willful abandonment” in MCL 750.136b(1)(c). For one thing, in the context of 1907 PA 144 and MCL 750.135, the word “abandon” was always construed in reference to the *intent* element of an offense, i.e., “exposes . . . with intent . . . to abandon,” MCL 750.135, and “deserts and abandons,” 1907 PA 144. In MCL 750.136b(1)(c), however, it seems clear that the term “willful” addresses the issue of intent. “Abandonment,” therefore, as the term is used in MCL 750.136b(1)(c), must speak to something other than intent, rendering questionable the applicability of this Court’s precedents construing 1907 PA 144 and MCL 750.135.

Second, MCL 750.136b(1)(c) defines “omission” by including two separate, distinct clauses: “a willful failure to provide food, clothing, or shelter **or** willful abandonment of a child.” (Emphasis added.) If “abandonment” in this context means a total and permanent abdication of all parental duties, as this Court’s precedents interpreting 1907 PA 144 and MCL 750.135 might require, such a definition would seemingly subsume the specific mention of a failure to provide “food, clothing, or shelter” in the former clause. Stated another way, if “abandonment” requires a parent to cease, permanently, fulfilling *all* parental duties, that failure would seem necessarily to include a failure to provide “food, clothing, or shelter,” rendering

portions of the statute mere surplusage. And as a general rule, this Court avoids any interpretation of a statute that would render any part of it surplusage or nugatory. *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018).

A survey of out-of-state courts that have interpreted statutes in the criminal and family law context containing the word “abandon” or “abandonment” reveals an interesting split of authority. Several state courts have held that the term “abandon” refers only to a parent’s total and permanent abdication of parental rights and duties. See, e.g., *Gay v State*, 105 Ga 599; 31 SE 569, 570 (1898) (“[T]o constitute . . . abandonment . . . there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same.”), superseded by statute as recognized in *Bailey v State*, 214 Ga 409; 105 SE2d 320 (1958); *State v Wilson*, 287 NW2d 587, 589-591 (Iowa 1980) (the Iowa general assembly used the term “abandons” in “its usual sense of permanency” and it did not “intend to encompass a temporary” neglect of duty where a mother left her eighteen-month-old child unattended in her apartment for ninety minutes); *City of Cincinnati v Meade*, 22 Ohio App 2d 176; 259 NE2d 505, 506 (1970) (holding that a parent cannot be convicted of child abandonment unless it is “proved beyond a reasonable doubt that there was a willful leaving of his or her child . . . with an intention of causing perpetual separation”); *State v Laemoa*, 20 Or App 516; 533 P2d 370, 374 (1975) (“As applied to our child abandonment statute, abandonment means relinquishing all parental claims to a child and foregoing all parental duties to a child.”); *State v Davis*, 70 Mo

467, 468 (Mo 1879) (recognizing that abandonment is a statutory offense that “does not mean a mere . . . temporary neglect of parental duty” but requires “an intention of causing perpetual separation”).

Other state courts, however, have held that the term “abandonment” may apply in circumstances encompassing a temporary or isolated neglect of parental duty. See, e.g., *In re BLM*, 228 Ga App 664; 492 SE2d 700, 700-701 (1997) (affirming a conviction for reckless abandonment of a child when a defendant placed her newborn infant in a trash bag, set it out on the porch, and went to sleep inside the house); *Jones v State*, 701 NE2d 863, 869 (Ind App, 1998) (affirming a conviction for abandonment when a mother left her four-year-old child alone in her apartment for four days and returned to find him dead); *Davis v State*, 476 NE2d 127, 140 (Ind App, 1985) (affirming a conviction for abandonment when a mother left her infant “alone by the side of a deserted country gravel road out of the view of [any] passersby”).

In *Commonwealth v Skufca*, 457 Pa 124; 321 A2d 889 (1974), the Pennsylvania Supreme Court held that a plain understanding of the term “abandon” in the criminal law context did not require a permanent or total abdication of parental duty. “An accepted meaning of the word abandon is ‘to forsake or desert especially in spite of an allegiance, duty, or responsibility.’ Webster’s Third New World Dictionary.” *Id.* at 129. In ruling that the word “abandon” could apply to certain temporary neglects of duty, the Pennsylvania Supreme Court explained that, in the Pennsylvania adoption law context, it had interpreted the term “abandonment” to mean forgoing all parental duties and relinquishing all parental claims:

That the use of the term abandonment in the Adoption Act was not intended to describe the same conduct in the section here under consideration is readily apparent when we consider the difference in the purposes sought to be achieved by the pieces of legislation. In the case of adoptions, we are attempting to describe that type of conduct that should justify the legal involuntary termination of a relationship created by nature. Under this section of the penal code we are simply attempting to define that type of parental neglect that would justify criminal sanction. Wherein, it is understandable that the involuntary termination of parental rights should not turn upon a single incident regardless how heinous, our criminal law is designed to punish single episodes that are repugnant to our concept of an orderly society. [*Id.* at 128-129.]²⁷

Like Michigan's statute, the Pennsylvania law also contained two clauses, making it a criminal offense when a parent either "abandons the child . . . Or willfully omits to furnish necessary and proper food, clothing, or shelter for such child." *Id.* at 129 (emphasis added). The *Skufca* court reasoned that construing the term "abandon" to require a parent to forgo all parental duties and relinquish all parental rights would render the more specific clause "a mere illustration of conduct that would be embraced within the purview" of the abandonment clause. *Id.* at 130. "It is clear that the second clause was not intended as merely an obvious illustration of the conduct prohibited in the first clause but rather an attempt to proscribe distinctly different conduct." *Id.* The court thus held that "the jury was free to find that leaving these minor children of tender years and incapable of protecting themselves unattended for

²⁷ See also *People v Stephens*, 30 Cal App 2d 67, 70; 85 P2d 487 (1938):

Some argument is made that the word "abandons" as used in section 271a of the Penal Code should be given the same meaning as in guardianship proceedings. The difference is manifest. Here the word applies to the act of intentionally failing to supply the needs of the child, while in the guardianship cases cited by appellant it is used to describe an act of complete relinquishment of the right of parental control.

a sustained period, closeted in such a manner that they were denied assistance from without, by a parent who had a duty to provide for their safety,” fell within the conduct prohibited by the statute. *Id.* at 130.

Finally, assuming for the sake of argument that the term “abandonment” as used in MCL 750.136b(1)(c), might be a legal term of art, *Black’s Law Dictionary* (11th ed) doesn’t seem to offer much in the way of clarity. *Black’s Law* offers various definitions of the term “abandon:”

1. To leave (someone), esp. when doing so amounts to an abdication of responsibility.
2. To relinquish or give up with the intention of never again reclaiming one’s rights or interest in.
3. To desert or go away from permanently.
4. To stop (an activity) because there are too many problems and it is impractical or impossible to continue.
5. To cease having (an idea, attitude, or belief); to give over or surrender utterly.
6. To leave (a ship) because of sinking or the threat of sinking.

Black’s Law also offers the following definitions of “abandonment:”

1. The relinquishing of a right or interest with the intention of never reclaiming it. . . .
2. The act of withdrawing or discontinuing one’s help or support, esp. when a duty or responsibility exists. . . .
4. *Family Law*. The act of leaving a spouse or child willfully and without an intent to return. Child abandonment is grounds for termination of parental rights. Spousal abandonment is grounds for divorce. –Also termed (as to a child) *criminal abandonment*, (as to a spouse) *spousal abandonment*, *abandonment of spouse*.

Some of these definitions could support that the legal concept of “abandonment” requires a permanent and total abdication of all parental rights and duties, while others support that abandonment could encompass a temporary failure to help when a duty or responsibility exists. The problem in the context of MCL 750.136b(1)(c) remains that defining “abandonment” to mean either *any* temporary parental neglect of duty, or a *total and permanent* abdication of *all* parental duties,

runs into surplusage issues, given that the Legislature chose to proscribe two distinct categories of culpable conduct: “a willful failure to provide food, clothing, or shelter . . . or willful abandonment of a child.” (Emphasis added.) Interpreting “abandonment” to include the turning away from parental duty *in the face of changed or unusual dangerous circumstances*, however, would seem to avoid these problems. Under such a definition, defendants’ convictions under an “omission/willful abandonment” theory, MCL 750.136b(3)(a), would not be improper.

Summary and Relief Sought

The People respectfully ask this Honorable Court to 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. 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 caselaw. 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 lack of clarity in the law has left prosecutors ill-equipped to make appropriate charging decisions.

Even if this Court concludes that the People are not entitled to relief, the

People would ask the Court to consider issuing an opinion affirming rather than simply denying leave to appeal. This case involves the interpretation of a complex criminal statute that has proved difficult to apply in practice. The existing Court of Appeals' opinion offers little meaningful guidance for future cases because, although the panel addressed novel issues of statutory interpretation, it did not provide a clear standard for what constitutes "willful abandonment" and chose not to publish its opinion as required by MCR 7.215(B)(2). The bench and bar would greatly benefit from further input by this Court.

Respectfully submitted,

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