

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs.

CODIE LYNN STEVENS,

Defendant.

File No. 15-041275-FH-3
COA Docket #337120
SC Docket #160264

SAGINAW COUNTY PROSECUTOR'S OFFICE
BY: JOHN A. MCCOLGAN, JR., P37168
111 South Michigan Avenue
Saginaw, Michigan 48602
989-790-5330

ROBERT J. DUNN, P33726
Attorney for Defendant
3741 Wilder Road, Ste. D4
Bay City, Michigan 48706
989-894-1110

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

ROBERT J. DUNN
Attorney for Defendant
CODIE LYNN STEVENS
MDOC #980664
3741 Wilder Road, Suite D4
Bay City, Michigan 48706
989-894-1110
rjdunn928@yahoo.com

TABLE OF CONTENTS

TABLE OF CONTENTSi

INDEX OF AUTHORITIES ii

STATEMENT OF BASIS OF JURISDICTION.....iii

STATEMENT OF QUESTIONS PRESENTED iv

STATEMENT OF FACTS..... 1-10

ARGUMENT 1 11

ARGUMENT II 15

ISSUE 1: 11

**WAS THERE INSUFFICIENT EVIDENCE TO SUPPORT MS. STEVENS'S SECOND -
DEGREE CHILD ABUSE CONVICTION BECAUSE THE OMISSION AT ISSUE IS
NOT PROSCRIBED BY MCL 750.136b(3)?**

ISSUE II: 15

**THE COURT OF APPEALS DID NOT COMMIT ERROR IN RULING THAT
DEFENDANT’S CONVICTION COULD NOT BE BASED UPON A WILLFUL
ABANDONMENT THEORY UNDER MCLA SECTION 750.136B(3) BECAUSE
FAILING TO SEEK A CERTAIN TYPE OF MEDICAL CARE DID NOT FALL
WITHIN THE SCOPE OF THE STATUTORY PHRASE OF WILLFUL
ABANDONMENT.**

Summary and Request for Relief 18

Certificate of Service19

INDEX OF AUTHORITIES

Dunn v United States, 442 US, 442 US 100, 112-113 (1979) 16

Frank v Linkner, 500 Mich 133; 894 NW2d 574, 580 (2017). 12

In re Winship, 397 US 358 (1970) 11

Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980) 11

Jennings v Rodriguez, 138 S. Ct. 830 (2018) 13

People v Babcock, 469 Mich 247, 666 NW 2d 231 (2003) 11

People v Barbee, 470 Mich 283; 681 NW2d 348 (2004) 12

People v Hampton, 407 Mich 354, 368 (1979) 11

People v Murphy, 321 Mich App 355 (2017) 14, 15

People v Williams, 475 Mich 245, 250; 716 NW2d 208 (2006) 12

People v Wolfe, 440 Mich 508, 515 (1992) 11

Ratzlaff v United States, 510 US 135 (1994). 17

Yates v United States, 135 S. Ct. 107 (2015) 17

OTHER AUTHORITIES

MCL 750.135. 17

MCL 750.136b(3)(a) 10, 11, 12, 13, 14

MCL 750.136b(3)(b). 11

MCL 750.136(1)(c) 11, 12, 13, 15

STATEMENT OF BASIS OF JURISDICTION

The jurisdictional basis of this appeal MCR 7.303(B)(1) and MCR 7.305(C)(2)(9).
Defendant was sentenced in the Saginaw County 10th Circuit Court on June 14, 2016.

STATEMENTS OF QUESTIONS PRESENTED

ISSUE I

I. 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).

ISSUE II.

II. THE COURT OF APPEALS DID NOT COMMIT ERROR IN RULING THAT DEFENDANT'S CONVICTION COULD NOT BE BASED UPON A WILLFUL ABANDONMENT THEORY UNDER MCLA SECTION 750.136B(3) BECAUSE FAILING TO SEEK A CERTAIN TYPE OF MEDICAL CARE DID NOT FALL WITHIN THE SCOPE OF THE STATUTORY PHRASE OF WILLFUL ABANDONMENT.

STATEMENT OF FACTS

Roegan Krukowski was born December 6, 2014 to parents Codie Stevens and Dane Krukowski. (T 5/4/16 34). Because the couple's first child was delivered by cesarean section, Roegan was also scheduled to be delivered by cesarean section on December 18. However, Ms. Stevens went into labor on December 6 and went to the hospital. (T 5/4/16 147). The delivery was a difficult one. Ms. Stevens endured near constant vomiting during labor. (T 5/4/16 35). Rather than take her immediately, the procedure was repeatedly delayed while other patients went first. (T 5/4/16 36). Ultimately, Ms. Stevens labored for 19 hours. (T 5/4/16 34).

When Ms. Stevens was finally able to hold Roegan, he was bruised from forehead to mid-chest. (T 5/4/16 38) When his grandmother, Shawn Stevens, first saw Roegan, she first noticed "His head was huge. . . . His head was very big." (T 4/28/16 236-237). His grandmother also remarked on the bruising. (T 4/28/16 239). Shawn Stevens asked hospital staff for Roegan to be x-rayed because she was concerned about the bruising and enlarged head, but she was ignored. (T 4/28/16 240).

Roegan couldn't hold down formula or breastmilk. (T 5/4/16 38). He continued to have problems keeping his formula down, and Ms. Stevens and Mr. Krukowski tried several types before they found one he seemed to tolerate. (T 5/4/16 39). They were discharged from the hospital on December 9, and went to see pediatrician Dr. Dawis on December 11. (T 5/4/16 39).

Ms. Stevens told Dr. Dawis Roegan was not keeping his formula down, and that he was generally unhappy. (T 5/4/16 40). Roegan cried with great distress, and could only be comforted for short periods of time. (T 5/4/16 40-41). He continued to vomit. (T 5/4/16 41).

Dr. Dawis remarked Roegan was a bit jaundiced, but only suggested he should get sunlight and plenty to eat. (T 5/4/16 44). Dr. Dawis concluded Roegan was a well baby in all respects, including his head. (T 4/28/16 21). There was a return visit on February 9, 2015 (T 5/4/16 45) but by then Roegan became less fussy and “not too overbearing,” by Ms. Stevens’s account. (T 5/4/16 45).

February 7 was a Saturday and the family was at home. (T 5/4/16 49). Mr. Krukowski often bathed Roegan, and he decided to give him a bath that day. (T 5/4/16 162). While Mr. Krukowski was taking him out of the tub, Roegan jerked, slipped from Mr. Krukowski’s grasp and fell. (T 5/4/16 50, 165). Roegan hit his head and fell into the water, and Mr. Krukowski scooped him out and called to Ms. Stevens. (T 5/4/16 166). Ms. Stevens dried him, dressed him, and checked him over. (T 5/4/16 50). Ms. Stevens checked to see if Roegan’s eyes would follow her finger, and he did. (T 5/4/16 50, 172). She checked to see if Roegan would grasp her finger, and he did. (T 5/4/16 50, 172). She also checked his feet for reaction, and he responded. (T 5/4/16 50, 172).

Ms. Stevens noticed “slight swelling, and then a – I think it was like a tiny little dot, and it was, like, yellow. It wasn’t like, black or blue” on Roegan’s head. (T 5/4/16 51). Mr. Krukowski thought “it just looked a little red from where, you know, I had dropped him.” (T 5/4/16 168). Mr. Krukowski said a “dime-sized” bruise developed. (T 5/4/16 170). Shawn Stevens, Codie Stevens mother, saw Roegan that day and said he had a “dime-sized bump,” with only a slight shadowing in terms of discolorization. (T 4/28/16 221). Shawn Stevens advised the couple she would take Roegan to be seen by a doctor, but didn’t specify her opinion as to a need for it to be done immediately. (T 4/28/16 222). Shawn Stevens also explained her rationale as “my suggestion is I would – just to be safe than sorry, I would take

him in.” (T 4/28/16 223). She went on, “I suggested to her. But to me, you know, to be safe than sorry; not that I felt he was in danger, because the bump on his head was not hardly there. It was so miniscule. Parental discretion.” (T 4/29/16 102-103). They wrapped a small bag of frozen peas in a towel and put it on his head. (T 5/4/16 75). On Sunday, February 8, Roegan was awake and smiling. There was nothing abnormal about his breathing or behavior. (T 5/4/16 76). He ate regularly. (T 5/4/16 76). Mr. Krukowski set up and stuffed animals for Roegan. (T 5/4/16 52).

On Monday, February 9, Ms. Stevens took Roegan back to the pediatrician for the regularly scheduled follow-up. (T 5/4/16 52). Ms. Stevens informed the doctor that Roegan was still somewhat fussy, that he was better about keeping formula down, and about the tub fall.¹ (T 5/4/16 53). Dr. Dawis recommended taking Roegan to a chiropractor, and Ms. Stevens made an appointment for that day. (T 5/4/16 53-55).

Roegan had appointments with a chiropractor on February 9th, 10th, and 18th. (T 5/4/16 48-49). On February 9, Dr. Dense saw Roegan. (T 5/4/16 55). No x-rays were taken, but Dr. Dense put Roegan between his legs and adjusted his neck. (T 5/4/16 55). Ms. Stevens reported a cracking sound, like when a person cracks their fingers. (T 5/4/16 55). Dr. Dense then hung Roegan upside down and “twisted”, and “proceeded to lay him on the medical bed, and his neck went from left to right and it cracked.” (T 5/4/16 56; 4/28/16 122). Ms. Stevens brought Roegan back the next day, and he was seen by Dr. Barrigar. (T 5/4/16 57). Dr. Barrigar did the same things, cracking Roegan’s neck and hanging him upside down. (T 5/4/16 57; 4/28/159). Ms. Stevens was still skeptical, but she said “I didn’t say anything,

¹ Dr. Dawis denied being informed of the tub fall. (T 4/28/16 27)

"putting my trust into a doctor." (T 5/4/16 57). Ms. Stevens brought Roegan back to see Dr. Barrigar on February 18, and the treatment was the same. (T 5/4/16 58). Ms. Stevens also took Roegan with her to get formula from WIC two or three times, and each time they measured his head and weighed him. (T 5/4/16 97).

From February 19 to 21, Roegan behaved normally, according to Ms. Stevens. (T 5/4/16 59). On the February 21, Roegan vomited after a bottle, but Ms. Stevens first thought was that the flu might be the cause. (T 5/4/16 59). People at the pharmacy told her it had been going around. (T 5/4/16 59). Roegan continued to vomit that afternoon, so Ms. Stevens made him a bottle of peppermint water and he kept that down. (T 5/4/16 59-60). Roegan took and tolerated another bottle of peppermint water before going to bed and sleeping through the night. (T 5/4/16 60). Dr. Dawis had recommended peppermint water for Ella when she was a baby. It worked then, and Ms. Stevens followed the advice again. (T 5/4/16 79).

Sunday morning, February 22, Ms. Stevens heard Roegan whimpering at about 8:30 or 9 a.m. (T 5/4/16 62). She went to check on him, and his arm was twitching. (T 5/4/16 62) Ms. Stevens woke up Mr. Krukowski and he held Roegan for a bit. (T 5/4/16 63, 176). Roegan smiled and Ms. Stevens started to run some bath water. (T 5/4/16 63, 176). Then, the twitching continued and they decided to take Roegan to the hospital. (T 5/4/16 63, 176). Ms. Stevens told hospital staff she thought Roegan was having seizures and they took him back right away. (T 5/4/16 88). It was 7 to 10 minutes from when they noticed twitching until they left for the hospital. (T 5/4/16 172). At that point Roegan did not have any outward signs of trauma to his head, or to his chest or abdomen. (T 5/4/16 95). He didn't have any bruises or abrasions. (T 5/4/16 95). Roegan's eyes appeared fine. (T 5/4/16 178).

Covenant Hospital nurse Sara Markle agreed that there were no signs of trauma when

Roegan was admitted. (T 4/27/16 191). When Roegan arrived, his heart rate and respiratory rate were normal. (T 4/27/16 201). Roegan's temperature was also normal. (T 4/27/16 202).

Hospital staff administered Ativan intravenously to stop the seizures. (T 5/4/16 64). During that procedure, Ms. Stevens and Mr. Krukowski saw staff bend Roegan's hand back dramatically to insert the IV needle. (T 5/4/16 89, 181). Then Roegan's heart rate dropped dramatically. (T 5/4/16 91). Roegan had a "glazed" look in his eyes. (T 5/4/16 91). Shortly after that Mr. Krukowski left to take Ella to Ms. Stevens's mother's house so she wouldn't have to be at the hospital. (T 5/4/16 65).

Emergency Room doctor Jessica Kiry agreed there were no obvious signs of trauma when Roegan was admitted. (T 4/28/16 58-59). She said Roegan had "no abrasions, no bruising, no obvious signs of external trauma, at the time of the exam." (T 4/28/17 59). Roegan's temperature was normal, (T 4/28/17 77) heart rate normal was and there were no visible signs of distress such as chest pounding, (T 4/28/17 77) respiration was normal (T 4/28/17 78), and he was fully oxygenated. (T 4/28/17 78). Dr. Kiry said there was nothing in the white part of the eye that would indicate trauma. (T 4/28/17 80). Roegan's neck was normal, (T 4/28/17 81) and chest sounds fine. (T 4/28/17 81). He did not have a distension in abdomen, (T 4/28/17 81) or coughing or choking. (T 4/28/17 81-82).

Because of Roegan's seizures, Dr. Kiry suspected low sodium or electrolyte abnormality. (T 4/28/17 59). She ordered lab tests which ruled this out, so suspected trauma or bleeding in the brain and ordered a CT and an MRI. (T 4/28/17 60-63). Those tests revealed bleeding, and Dr. Kiry suspected non-accidental trauma. (T 4/28/17 65, 67-68).

Ms. Stevens stayed with Roegan while he was given an MRI. (T 5/4/16 67) Shortly thereafter, they took Roegan for x-rays, detectives arrived and separated Ms. Stevens and Mr.

Krukowski for interrogation. (T 5/4/16 67-68).

Dr. Gerard Farrar, a radiologist, testified he read Roegan's MRIs. (T 4/28/16 97). Dr. Farrar saw a subdural hygroma, evidence of an old bleed, and acute blood, evidence of a more recent bleed. (T 4/28/16 98-99). Dr. Farrar testified the old bleed might be a couple of weeks old, and the new bleed a day or two old. (T 4/28/16 100) Dr. Farrar testified the injuries could have been caused by a bathtub fall, or by being shaken. (T 4/28/16 105-106).

Ophthalmologist Dr. Majed Sahouri testified he used a RetCam on Roegan to look through his pupil and see the back of the eye. (T 4/27/16 215). Dr. Sahouri observed numerous hemorrhages in the back of Roegan's eyes. Based the RetCam views, Dr. Sahouri testified "Hemorrhages of this severity usually – I would characterize as non-accident." (T 4/27/16 220). Dr. Sahouri testified hemorrhages of this kind were cause by "shaking," and could not be caused by blunt force trauma. (T 4/27/16 220).

Dr. Frank Schinco is a neurological surgeon who also treated Roegan. (T 4/29/16 134). Dr. Schinco would opine at trial that with the combination of hematomas and retinal hemorrhages, "it would indicate a very significant probability and likelihood that the child had been shaken in a typical manner. When you see retinal hemorrhages of that type, what we see, subdural hemorrhages or – that are of different ages, that is highly diagnostic of shaken baby syndrome." (T 4/29/16 139). Dr. Schinco ultimately inserted a catheter into Roegan's skull to relieve pressure on the brain. (T 4/29/16 146). Dr. Schinco would testify the catheter drained 10 ounces of fluid from Roegan's skull. (T 4/29/16 148).

Dr. Kristin Constantino, a radiologist, interpreted Roegan's skeletal survey, a series of x-rays of every bone in the body. (T 4/28/16 179). The x-rays were taken March 1. (T 4/28/16 200). The survey was not done as a part of Roegan's initial treatment, but triggered

because of suspected non-accidental trauma. (T 4/28/16 180). Dr. Constantino found evidence of a fracture in Roegan's skull, (T 4/28/16 184) a fracture in his forearm (T 4/28/16 192) and healing fractures in his ribs (T 4/28/16 197-198). Dr. Constantino concluded the skull fracture could have been caused by a bathtub fall. (T 4/28/16 214-215). Dr. Michael Fiore specializes in pediatric critical-care and he treated Roegan at the hospital. Regarding the interaction of the skull fracture and swelling in Roegan's brain, Dr. Fiore said "the skull gets fracture, and it's like a crack, and the swelling of the brain causes that crack to split open." (T 4/29/16 57-58).

Despite it all, Roegan fully recovered. He was discharged March 3, 2015. (T 4/29/16 45). Although Roegan continues to do well, when he was re-evaluated four months after discharged, there was evidence of yet another hemorrhage which occurred while he was in foster care. *See Guertin Report, Appendix A*, at 2.

Charges of child abuse were filed against Mr. Krukowski and Ms. Stevens, and both were bound over at the preliminary exam. (T 5/5/15 74). On July 6, 2015, trial counsel moved for appointment of a neurologist and an ob-gyn specialist. (T 7/6/15 5). Trial counsel explained they required the experts to consult regarding the implications of the bathtub fall, as well as the implication of the complicated child birth. (T 7/6/15 5). Trial counsel also noted the Michigan Supreme Court's then-recent opinion in *People v Ackley*, 497 Mich 381 (2015), which was decided just a week before. (T 7/6/15 6). The prosecution said "[a]lthough I'm ready for trial, I don't want to try this case unnecessarily if there's going to be a claim later that they were ineffective for – for seeking it. So think you should consider [the motion for appointment of an expert]." (T 7/6/15 9). The Circuit Court found there was a basis for an expert to review Roegan's medical records, and that there might be a basis for an expert to

review the records regarding the birth as well. (T 7/6/15 13). The court authorized \$1,000.00 and told counsel it might authorize more if it was needed. (T 7/6/15 14).

On November 10, 2015, trial counsel again asked for funding for an expert to review the birth records. (T 11/10/15 14). The Circuit Court noted funds had already been provided, and trial counsel said “I think you said we could employ an expert that was done through the family court, and kind of use that doctor.” (T 11/10/15 14). The court said:

The previous stipulation and order was to secure all medical records; as well as the medical expert on behalf of the defendant, to review the medical records and reports. So I – I don’t understand why that hasn’t been done by now. [(T 11/10/15 15)].

The prosecution responded that was done by Dr. Guertin, who was employed in the family court termination of parental rights case. (T 11/10/15 15). Trial counsel said an expert was “not very easy to find, in light of this being a local doctor,” and the court advised “Well, I think you’ve got to go non-local, I would think.” (T 11/10/15 16). Trial counsel expressed approval to use Dr. Guertin as his independent medical examiner. (T 11/10/15 16). The court asked for an additional motion, if further consultation was required. (T 11/10/15 17).

On February 1, 2016, the Circuit Court noted that no motion had been made for additional funds for an expert. (T 11/10/15 14). The court said it would adjourn trial and entertain such a motion. (T 11/10/15 14). Trial counsel said he did not plan to call any expert witnesses. (T 11/10/15 14). The prosecution offered a plea agreement, and the Circuit Court offered a *Cobbs* evaluation. The prosecution agreed to a reduced charge of attempted second degree child abuse, and a no-contest plea in return for dismissal of the original charges. (T 11/10/15 8). The Court advised it expected to sentence probation with no incarceration under that deal. (T 11/10/15 8). Mr. Krukowski rejected the offer. (T 11/10/15 10).

Trial began on April 27, 2016 and the prosecution opened by saying as follows:

What will not be proven, in this case . . . 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 her or him.

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.

What will be proven, in this case, however, is that no matter how these injuries occurred, they – they, as parents – failed or mitted to provide the necessary medical treatment in a timely way that would alleviate this child’s pain and suffering, prevent worsening of the symptoms in these injuries, and minimize the very real possibility the baby could have died of those injuries, imminently, they finally took the baby, on the 22nd. [(T 4/27/16 175)].

In closing, the prosecution encouraged the jury to “visualize” Mr. Krukowski shaking Roegan:

Are you now, or during this trial as you heard evidence from the doctors and nurses, or anyone else, trying to visualize did Dane grab that baby and shake that baby? Did Dane cuff that baby? Instead of it slipping out of his arms, did he get angry because that baby squealed like it did all the time when it came from the warm water into the cold and he just had enough? . . . Did he do something in one or two seconds, or a half a second?

But that’s not the burden of proof in this case. We don’t have to prove beyond a reasonable doubt that either of them, and for your benefit, Dane, because you’re his jury, did he do that? Even though the doctors said this is not accidental. This baby was abused. This is nonaccidental. This is child abuse. [(T 5/5/16 66-67)].

The jury found each Defendant guilty of second degree child abuse. (T 5/6/16 3). Ms. Stevens was sentenced to 18 months in prison. (T 6/14/16 26).

After filing a timely Notice of Appeal, the Court of Appeals granted Defendant's request on May 19, 2017 for remand to conduct an evidentiary hearing on the issue of Ineffective Assistance of Counsel.

In the Ginther hearing, the defense presented two experts, Doctors Williams and Rundell who strongly refuted the prosecution’s theory regarding the child’s injuries having

been as a result of the shaken baby syndrome. Both defense counsel also testified. Mr. Bush, on behalf of Defendant Stevens, testified that he did not make any search for any medical witness who might present an alternative theory regarding the shaken baby syndrome. He also testified that it would have been appropriate to bring into the trial either Dr. Guertin or another medical expert to testify about the chiropractor's actions causing the child's injuries. He had funds approved for a defense expert if he would have located one. Mr. Bush did not want to speculate on what an expert might say regarding the evidence despite being aware of the controversy over that theory and he admitted he could have found the information he needed to lead him to a possible expert witness on the Internet.

Judge Boes denied the motion to vacate the conviction holding the shaken baby evidence was only a minor part of the evidence. (4-2-18 hearing page 19). She further found that the attorneys "work together to obtain information to develop strategies", and they did not think Dr. Gordon would be helpful. (4-2-18 hearing p. 20) She also found that the lawyers argued that the injuries could have been caused either by the difficult birthing experienced by Defendant Stevens or by the actions of a chiropractor. (4-2-18 hearing page 22). Defendant now appeals of right from the judge's findings.

The Court of Appeals then on August 1, 2019 reversed Defendant Stevens' conviction holding that the statutory language of willful abandonment in MCL 750.1366(1)(c) was unclear but that the definition does not include the failure to provide medical care and further that failing to seek a certain type of medical care is not equivalent to withdrawing protection.

This Court then granted leave and directed the parties to brief two particular questions:

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.

ISSUE I

I.. WAS THERE INSUFFICIENT EVIDENCE TO SUPPORT MS. STEVENS'S SECOND -DEGREE CHILD ABUSE CONVICTION BECAUSE THE OMISSION AT ISSUE IS NOT PROSCRIBED BY MCL 750.136b(3)?

ARGUMENT I

An appellate court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); People v Wolfe, 440 Mich 508, 515 (1992); People v Hampton, 407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. Wolfe, 440 Mich at 515.

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

The interpretation and application of statutes is a question of law and is reviewed de novo. People v Babcock, 469 Mich 247, 666 NW 2d 231 (2003). A court's primary purpose in construing a statute is to ascertain and give effect to the Legislature's intent. People v

Williams, 475 Mich 245, 250; 716 NW2d 208 (2006). The most relevant starting point for discerning legislative intent lies in the plain language of the statute. *Id.* "When the language of a statute is clear, it is presumed that the Legislature intended the meaning expressed therein." Frank v Linkner, 500 Mich 133; 894 NW2d 574, 580 (2017) (citations and quotation marks omitted). If the Legislature uses clear and unambiguous language, courts must enforce the statute as written. People v Barbee, 470 Mich 283; 681 NW2d 348 (2004). Cody Stevens was convicted of second-degree child abuse based on the theory she failed to obtain proper medical care. This omission is insufficient to sustain his conviction for second-degree child abuse because the only statute only proscribes willful failures "to provide food, clothing, or shelter necessary for a child's welfare of willful abandonment of a child." MCL 750.136b(1)(c). The second degree child abuse statute, MCL 750.136b(3), has three subsections. Each section criminalizes different forms of child abuse. A person may be convicted of second-degree child abuse if any of the following circumstances apply:

- (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
- (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
- (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

Cody Stevens was charged with violating MCL 750.136b(3)(a). As described above, to violate this statute, an individual must either (1) commit an omission as defined by MCL 750.136b(1)(c) that causes serious physical or mental harm to a child; or (2) commit a reckless act that causes serious physical or mental harm to a child. The prosecution primarily relied on an omission theory at trial and only relied on the reckless act provision as an alternative

theory.

Here, the prosecution's theory at trial was premised upon Cody Steven's failure to take action and provide medical treatment for her child. In other words, the prosecution was based on an omission. Indeed, in their opening statement, the prosecution conceded that they would not be able to prove any intentional act by Stevens. Instead, they argued it was his failure "to provide the necessary medical treatment in a timely way" that established his guilty under MCL 750.136b(3)(a):

What will not be proven, in this case . . .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 her or him.

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.

...

What will be proven, in this case, however, is that no matter how These injuries occurred, they - they, as parents - failed or omitted to provide the necessary medical treatment in a timely way that would alleviate this child's pain and suffering, prevent worsening of the symptoms in these injuries, and minimize the very real possibility the baby could have died of those injuries, imminently, they finally took the baby, on the 22nd. [(T 4/27/16 175)]

This theory, and the evidence presented to support it, is simply insufficient to support Steven's conviction for second-degree child abuse because, as stated above, a failure to provide medical treatment is not covered under the definition of omission in MCL 750.136b(1)(c).

The evidence is insufficient to establish Cody Stevens committed a reckless act because the failure to seek medical treatment for a child is an omission, not an act.

In addition to failing to present evidence of an omission covered by the second-degree

child abuse statute, the evidence is also insufficient to establish Stevens committed a reckless act for purposes of MCL750.136b(3)(a). This is so because failing to take action is, by definition, an omission.

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

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

This definition falls directly in line with the prosecution's theory at trial - that Cody Stevens failed to perform or neglected her duty as a parent when she failed to seek medical treatment for her child. Her conduct (or lack thereof) is more accurately described as an omission.

This Court recently addressed a similar issue in People v Murphy, 321 Mich App 355 (2017). In Murphy, this Court addressed the issue of whether there was sufficient evidence to sustain Kimberly Murphy's conviction for second degree child abuse where it was the prosecution's theory that Ms. Murphy committed an act when her child died of ingesting morphine and the evidence showed the home was in a filthy condition, prescription morphine pills were in the home, and she failed to clean to ensure the morphine pills were removed. *Id.* at 357-358.

This Court concluded the evidence was insufficient because Ms. Murphy did not commit an act by failing to protect her child or provide a safe home environment. The Court explained "[s]imply failing to take action does not constitute an act." Murphy, therefore,

provides published authority for the proposition that "failing to take action does not constitute an act." *Id.* at 360-361.

Murphy provides published support for the proposition that a failure to seek medical care for a child is an omission, not an act. This is precisely at issue in Steven's appeal because the prosecution argued her conviction for second degree child abuse should be sustained under a reckless act theory due to Steven's failure to seek medical attention for her child. Murphy provides the only binding authority on this issue and, as a result, this Court should reverse.

ISSUE II

ISSUE II: THE COURT OF APPEALS DID NOT COMMIT ERROR IN RULING THAT DEFENDANT'S CONVICTION COULD NOT BE BASED UPON A WILLFUL ABANDONMENT THEORY UNDER MCLA SECTION 750.136B(3) BECAUSE FAILING TO SEEK A CERTAIN TYPE OF MEDICAL CARE DID NOT FALL WITHIN THE SCOPE OF THE STATUTORY PHRASE OF WILLFUL ABANDONMENT.

ARGUMENT II

In its order of March 6, 2020, this Court directed the parties to address what the phrase "willful abandonment" in MCLA 750.136b (1)(c) encompasses a parent's failure to timely seek professional medical care for his or her child.

Courts have often resorted to long time regularly accepted dictionaries for assistance in defining statutory terms. As the People point out in their brief, the Court of Appeals did so here in utilizing the definition of the term "abandon" in *Merriam Webster's Collegiate Dictionary, 11th Edition*. In its order this court with the language it used did not include the word "any" when it simply referred to the parents failure to seek on a timely basis professional medical care.

This omission presents a second question whether the Defendants in choosing the doctor they did and following what was recommended by that doctor could be included within the statutory definition of abandonment, or whether abandonment means failure to see any doctor or seek any type of medical care is required. Is the choice of one type of medical remedy enough to satisfy abandonment when most doctors might agree that another course of action would have been the better plan? Should this determination simply be left to the courts to decide or should the legislature has reflecting the values of the community will be the proper form for determining the definition. This Counsel suggests the latter. The trial record does not establish but the sentence failed to seek any type of medical treatment for their child

In addressing the question posed by this court in its order and its argument made by the People, a federal constitutional issue of the Rule of Lenity is brought to bear. The Rule of Lenity goes all the way back to the Blackstone Commentaries and Chief Justice Marshall in the Wiltberger case of 1820. The US Supreme Court has repeatedly held that the Rule of Lenity, which resolves ambiguity and statutes in favor of a reasonable interpretation that would benefit the Defendant, is a necessary part of the due process clause of the fifth amendment. Dunn v United States, 442 US 100, 112-113 (1979)²

Of course, the rule of lenity stems from the Defendant's right to fair notice of conduct which is criminal before he engages in the conduct. As Professor Lawrence Solan points out, if the criminal statute does not clearly outlaw private conduct then private conduct cannot be penalized. Lawrence N. Solan *Law, Language, and Lenity*, 40 *William and Mary Law Review*, 57, 58 to 60, (1998). In recent years the Rule of Lenity seems to be returning the favor with

² This Counsel promises he had nothing to do with that case since even though he's old he was not yet licensed to practice law in 1979.

the US Supreme Court since it was cited in the Defendants favor in Jennings v. Rodriguez 138 S. Ct.830 (2018) and Yates v. United States 135 S. Ct.107 (2015).

Most compellingly with regard to the application of the rule to this issue, is the Supreme Court case of Ratzlaff v United States, 510 US 135 (1994). There, the Court found that the Rule of Lenity meant that Congress, by inserting a requirement of willfulness in the money laundering statute, meant that willfulness of the particular act committed could not result in a conviction. They further held that the unclear language of the statute meant that the court was required to interpret it as requiring that it must be shown Defendant knew he was violating the law at the time of the act.

After stating that *Black's Law Dictionary* doesn't provide much help on this issue, the People admit in their brief that there is "lack of clarity" in the law with regard to the definition because the "criminal statute is complex and difficult to apply in practice because it does not provide a clear standard for what constitutes willful abandonment". Peoples brief, pages, 38-39. This conclusion amounts to an admission that the Rule of Lenity should be applied here when they also acknowledge that multiple interpretations, some favorable to the prosecution and some defense, are possible.

The People cite the child endangerment statute, MCL §750.135 in support of their argument but that statute provides specific acts and locations the actors committed to meet its definition of abandonment. While that statute has a definition section it does not define abandonment.

The People again cite the 1907 Beardsley decision and also add two cases almost as old. This Counsel dares to say that the minimum standards in the community for properly caring for children have changed drastically from the time of the Roosevelt-Taft presidencies to the

modern times when the legislature drafted the child-abuse statutes. The People would have Michigan courts require the legislature to be thinking back between 1907 and 1910 when they were adopting modern statutes. This Court certainly should not so hold.

To the contrary, in a much more recent definition, the Michigan Governor’s task force on child abuse and neglect defines abandonment as leaving a child because the parent does not want to or is unable to take care of the child’s health and welfare. The evidence at the trial does not establish that Cody Stevens had any such intent.

Therefore, the Court of Appeals did not err in its interpretation of the statutory term as not criminalizing a decision that might not have been the best course of medical treatment making it fit the definition of abandonment.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court affirm the decision of the Michigan Court of Appeals.

Dated: September 3, 2020

Respectfully submitted,
s/Robert J. Dunn, P33726
ROBERT J. DUNN
Attorney for Defendant
3741 Wilder Road, Ste. D4
Bay City, Michigan 48706
989-894-1110
rjdunn928@yahoo.com

CERTIFICATE OF SERVICE AND FILING

I hereby certify that this Defendant-Appellee's Brief on Appeal was electronically filed on this date, and electronically served to all parties of the case and mailed by U.S. 1st Class mail to Codie Lynn Stevens at her address on file.

Dated: September 3, 2020

s/Cynthia L. Eigner
Legal Assistant to Robert J. Dunn
3741 Wilder Road, Ste. D4
Bay City, Michigan 48706
989-894-1110
rjdunn928@yahoo.com