

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 148674

SHAWQUANDA BOROM,

Defendant-Appellant.

Court of Appeals No. 313750

Lower Court No. 12-004559-01-FC

148674

**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF APPELLATE JURISDICTION

The People agree that the Court has jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

At the preliminary examination, the People only need to establish probable cause to believe a crime was committed and defendant committed it. Defendant continued to place her son under the care and supervision of her boyfriend, who she knew had abused her son in the recent past, and her boyfriend abused the child again, causing his death. Did the district court abuse its discretion in binding defendant over for trial on first-degree child abuse and felony murder?

The Court of Appeals answered: No.

The People answer: No.

Defendant answers: Yes.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In early July 2011, defendant's sixteen-month-old child, Davion, suffered a broken bone in his arm. 4/26, 22, 27-30; 5/1/13.¹ Within a few weeks, Davion suffered third-degree burns on the back of his head and second-degree burns across his face. 4/26, 32-36. Then, two days later, on July 26, 2011, Davion suffered massive head injuries which resulted in his death. 4/26, 11-19.

The 21-year-old defendant and Davion lived with defendant's mother, her brothers, and her 17-year-old boyfriend, Daniel McCullough. 4/26, 23-24. McCullough is not Davion's father. 4/26, 123.

Defendant hesitated before seeking or completely failed to seek medical care for her child after all three incidents. Defendant took the child to the hospital after the first incident only when her mother told her that she had to take him and drove them to the hospital.² 4/26, 27-30. Defendant never sought medical care for the burns on the day they happened. On seeing the child the next day, defendant's mother told her that a hospital visit could result in the child's removal from the home by authorities. 4/26, 42-43. After the toddler's fatal injury, defendant failed to call for an ambulance even though he was unresponsive, rigid, and having obvious trouble breathing. Defendant called her mother for advice, and even though her mother urged defendant and McCullough to call 911 immediately, the couple had yet to call for help when, fifteen or twenty minutes later, the mother again urged them to call immediately. 4/26, 45-48.

¹ Transcripts are cited throughout this brief in the following form: month/day of proceedings, page numbers.

² Defendant's mother testified that she did not tell Davion's father about the broken arm incident because she did not want him to come and exact revenge because someone was hurting his child. 4/26, 123.

Conflicting evidence exists regarding how the three injuries occurred and who was with Davion at the time. Defendant claimed that she was home when the child's arm was broken, though not in the basement when it occurred. 4/26, 164-167. Several times defendant admitted she was present when Davion received the second injury, the burns to his head and face. She told her mother that she had been bathing the child and when she left the room, Davion turned on the hot water faucet. 4/26, 39-41. While Davion was in the hospital after the incident that caused his death, defendant told the Child Protective Services worker that Davion burned himself on the bathtub hose after she left to grab a new diaper. 4/26, 264-165. Two days later, after Davion died of head trauma, the worker was at defendant's home and interviewed defendant a second time about the bathtub incident. Defendant again claimed that she was bathing the child when the burns occurred. 4/26, 167. Defendant also told Detroit Police Officer Don Dent that she was the only one with the child when the child received second- and third-degree burns to his head. 4/26, 139. Later, McCullough claimed that he was the only one with the child when he suffered the arm injury and burns.³ 5/11, 12-13, 17, 25. Defendant's mother testified that she drove defendant to Inkster on the morning of both injuries and that McCullough was left with Davion. 4/26, 50-54.

Regarding Davion's final injury, defendant claimed, at various times, that (1) nothing happened to cause the child's final injuries, the massive head trauma, (2) she was with the child and he was following her up the porch steps when he fell, (3) she was in the kitchen around 4:30 or 5:00 when she heard Davion cry outside, she ran to Davion, and McCullough told her that the child had fallen down the porch steps, but that the child was easily comforted and was fine the rest of the

³ Defendant introduced the evidence of McCullough's statements. 5/11, 8-17, 19-26.

evening, and (4) that she was not at home when Davion was injured. 4/26, 8 (911 call), 14-16, 82-83, 100, 115, 136-137, 163-164, 168.

When defendant finally called for an ambulance, she told the operator that her son was not moving. When asked if the child had any medical history that would explain the problems he was having, defendant said that when the child was born he had swallowed some "poop," but "that was about it," and at some point had been on the verge of bronchitis. Defendant failed to mention the earlier fall, the major burns, or the broken arm. 4/26, 8 (911 call). Defendant also failed to tell the paramedic who arrived at the house that the child had taken a fall earlier in the evening. 4/26, 9. In the emergency room, defendant first told a doctor that she put the child to bed at 7:30 and noticed the child's ill health 20 minutes later. When it was pointed out that she had arrived at the hospital at 10:00 p.m., defendant changed the bedtime to 8:00 and claimed she noticed his problems at 9:30. She did not mention that she had called her own mother at 9:00. 5/1, 64. She specifically denied that the child had suffered any head trauma that day. 5/1, 64.

McCullough claimed that he was not present at the time of the fatal injuries. 5/11, 12-13, 17, 25-26. Defendant's mother testified that she drove defendant to Inkster on the morning of the fatal injuries and that McCullough was left with Davion. 4/26, 54.

The medical examiner found that Davion had second- and third-degree burns on his forehead and both sides of his head in a band-like formation. 5/1, 11. He had third-degree burns on the top and back of his head. There was a separate healing second-degree burn on his left cheek with a finger-like pattern, which was caused by his own hand. 5/1, 11, 26. The severity of the burns decreased from back to front; the third-degree burns were in back, the second degree burns were around the front. 5/1, 25. The burn pattern was consistent with the child's face being toward the

floor and hot water being put on the back of his head and then flowing down both sides of his head.⁴ 5/1, 23-25.

The medical examiner had seen the bathtub in which the child was supposedly burned. He described a hose that was fitted over the water spout. It ran directly into the drain so it had to be lifted to fill the tub. The diameter of the tube was about a finger width. The medical examiner opined that given that the water was hot enough to burn the child's head, the child would have burned his hands if he had pulled the hose over his head. But Davion had no burns on his hands. In addition, if the Davion had the hose over the back of his head while in the tub, the water would have splashed on other parts of his body. No other burns were detected on his body. 5/1, 27-31.⁵ The medical examiner also testified that the third-degree burns could have become infected and killed the child if left untreated. 5/1, 37.

The medical examiner discovered significant injuries to Davion's head and brain. The brain was swollen and there was a massive subdural hematoma (bleeding between the brain and the skull). There was also bleeding on the surface of the brain, a skull fracture, and bilateral retinal hemorrhages. In addition, the medical examiner observed a healing fracture of the left arm. 5/1, 13-24.

The medical examiner watched a video of Daniel McCullough reenacting the child's alleged fall, and opined that the massive injuries to the child's brain were not a result of the short fall from the front steps. 5/1, 14-17. The medical examiner found that the "very, very, very severe and lethal

⁴ There were also two cigarette-size burns on the child's back. 5/1, 39. Defendant told the police that she smoked but McCullough did not. 4/26, 138.

⁵ Defendant's mother testified that it took about three minutes for the water to get hot unless the hot water had been on recently. 4/26, 87.

brain injuries” could be explained if the child had been thrown against a hard object. 5/1, 17-18. The child may also have been shaken as well as thrown against a wall or floor, but a short fall would not have caused the injuries this child received. 5/1, 18. A delay in treatment could have contributed to the child’s death. 5/1, 37-38. By the time the child arrived at the hospital his condition was already extremely severe and he had no chance of survival. 5/1, 46.

The People charged defendant with three counts of first-degree child abuse and felony murder. The district court presided over a preliminary examination held on April 26, May 1, and May 11, 2012.

The prosecutor explained her theory of the case during argument on her motion to bind defendant over for trial:

The bottom line is this, the Defendant is the mother. He, Daniel McCullough, is not the father. The child’s health and safety is the Defendant’s responsibility. The evidence show that she caused and contributed to the child’s burns and head injury. She was in cahoots with Daniel McCullough to seriously injury the child. She lied over and over again about the circumstances of each injury. She protected Daniel McCullough from responsibility. She aided and abetted Daniel McCullough by allowing him to have access to her child knowing that the child had one, if not two, serous injuries while the child was in Daniel McCullough’s care during a 16-day period.

She gave the message to her Co-Defendant that she wasn’t going to stop the abuse, she wasn’t going to report the Defendant, and she would continue to give Defendant McCullough access to her child. And then when it got reported, she lied over, and over, and over again about both of their roles.

This isn’t a case where a mother simply allows a defendant to abuse a child and does nothing to stop it. Her actions in part caused the abuse.

So, our theory as to Count 1, the Felony Murder, as to the head injury, the Defendant either caused the injury herself or aided and abetted her Co-Defendant. It was an intentional act that caused death.

As to the scalding incident, she admits her involvement and she says that she was the one responsible, she makes it out to be an accident, but the Medical Examiner tells us this was no accident, this was intentionally inflicted upon the child.

Your Honor, she had lied so many different times that it’s hard to know in this case what really happened. But if you just throw up your hands and say you

don't really know what happened, that gives you probable cause to believe she's guilty because she's aiding and abetting him in keeping the truth out, and protecting him and herself with all of her lies. [5/11, 32-34.]

The district court bound defendant over for trial on Count 1, 2, and 3. On the People's motion, the Court dismissed Count 4, which stemmed from the arm injury. 5/11, 26.

Defendant moved to quash the Information in Circuit Court.

At a hearing held on November 8, 2012, the prosecutor summarized her theory of aiding and abetting:

Because it says though Ms. Borom says to the defendant, without saying it in words, I know you've been abusing my child, he has two prior injuries in the last two weeks under your care, I don't care, I'm going to continue to let you have access to my child, I'm not going to stop you from abusing him, I'm not going to protect my child from him, feel free to continue to do whatever you want to do and you can rest easy that I won't stop you and then, God forbid if something really bad happens I, will lie for you over, and over, and over again to protect you from being held responsible, that's what the defendant did. [11/8, 15.]

The circuit court denied defendant's motion in an opinion and order issued on November 16, 2012.

The Court of Appeals denied defendant's application for leave to appeal on January 31, 2013.

On May 29, 2013, this Court remanded the case for consideration, as on leave granted, of: "(1) whether a parent's failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136(b)(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and (4) assuming that there is such a duty under

the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime.”

The Court of Appeals affirmed the circuit court in an opinion issued on December 19, 2013.⁶ The Court concluded that a parent’s failure to act to prevent harm to her child, with knowledge that serious harm will result, satisfies the requirements of the first-degree child abuse statute. Next, the Court concluded that a parent’s failure to prevent a person who may be dangerous to the child from having contact with the child does not satisfy the statute. Regarding a common law duty, the Court held that a parent has a duty to prevent harm to his child and that duty is not limited to immediate dangers. The Court then reasoned that a breach of that duty may support a conviction of first-degree child abuse.⁷

Applying those principles to this case, the Court concluded that (1) there was no probable cause to believe that defendant committed first-degree child abuse by leaving the victim with McCullough at the time of the burning incident or by failing to seek medical treatment, but there was probable cause to believe that she committed the offense by intentionally burning the victim herself, and (2) regarding the head injuries, there was probable cause to believe that defendant committed first-degree child abuse by leaving the victim in McCullough’s care, failing to seek medical treatment, or intentionally causing the injuries herself.⁸

⁶ *People v Shawquanda Borom*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2013 (Docket No. 313750).

⁷ *Id.*, slip op at 2-7.

⁸ *Id.* at 7-9.

PREFACE TO ARGUMENT

The Court remanded this case to the Court of Appeals for consideration of four questions: “(1) whether a parent’s failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136(b)(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and (4) assuming that there is such a duty under the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime.”

Those questions were predicated on the assumption that defendant’s culpability rested on the failure to act instead of an affirmative act. The assumption is false. A reasonable view of the evidence demonstrates an affirmative act—defendant’s decision to place Davion under the care and supervision of Daniel McCullough. Unlike the more typical failure to protect situations, McCullough was not Davion’s father and had no right to any contact with him. Nor is this a case in which a member of the household who is not allowed to care for the child seizes on the opportunity presented by his mere presence in the home to harm the child. Defendant’s mother testified that she drove defendant to Inkster on the day of the murder, leaving only McCullough and Davion at the house, and in one of her conflicting statements, defendant maintained that she was not present at the time of the murder. A rational jury could find from that evidence that defendant left Davion in the care of McCullough, which is unquestionably an affirmative act.

The issues in this case, then, are actually ones of causation and knowledge. MCL 750.136b(2) provides that “a person is guilty of child abuse in the first degree if the person knowing or intentionally *causes* physical or serious mental harm to a child.” The term “cause” has an established meaning under Michigan law. It has two components: factual causation and proximate causation. Factual causation exists when but for defendant’s conduct the result would not have occurred.⁹ Proximate cause, of which there can be more than one,¹⁰ requires that the injury be a “direct and natural result” of the defendant’s actions.¹¹

Defendant’s act of placing Davion in McCullough’s care was a but-for cause of the serious physical harm he suffered. His injuries and death were also a direct and natural result of defendant’s intentional act. A jury could easily conclude that defendant was aware that McCullough was abusing Davion. In a short period of time, Davion had twice suffered serious physical harm while in McCullough’s care.¹² A jury would not be bound by the testimony of defendant’s mother suggesting that it was her, not defendant’s, idea to forgo medical assistance for Davion after he was severely burned. A jury could instead conclude that defendant knew that the burns were not the result of an accident and that McCullough had been abusing Davion. Under these circumstances, further serious harm was a direct and natural result of her continuing to leave Davion in McCullough’s care. A jury could therefore conclude that her act caused Davion serious harm.

⁹ *People v Feezel*, 486 Mich 184, 194-195; 783 NW2d 67 (2010).

¹⁰ *People v Tims*, 449 Mich 83, 118; 534 NW2d 675 (1995).

¹¹ *People v Schaefer*, 473 Mich 418, 436; 703 NW2d 774 (2005).

¹² Resolving a conflict in the evidence, a jury could find that McCullough, not defendant, burned Davion.

Defendant need not have intended that harm to support a conviction of first-degree child abuse. In *People v Maynor*,¹³ the Court held that a defendant must have either intended to cause the harm *or* have known that the harm would result from her actions. A jury could find that defendant had the requisite knowledge in this case. By covering up the second incident of abuse, defendant assured McCullough that he could continue abusing Davion without repercussions. A parent who continues to place her child in the care of a known physical abuser is no different from a parent who drops her child off at the home of a known child molester to spend the night alone with him. No one would question a jury's conclusion that the parent knew her actions would result in serious harm to the child under the second scenario. The first scenario is no different.

The Court's first question wrongly assumed that MCL 750.136(b)(2) requires a "knowing or intentional act." The Court of Appeals correctly concluded that it does not. For first-degree child abuse, the statute requires that the defendant *cause* serious harm. Unlike the provision defining second-degree child abuse, it does not require that a defendant "knowingly or intentionally commit[] an act"¹⁴ or a commit a "reckless act."¹⁵ That the second-degree child abuse provision also provides for criminal liability predicated on an "omission" does not evince an intent to preclude a first-degree child abuse conviction predicated on the failure to act to prevent harm because the term "omission" is narrowly defined as meaning a failure to provide the necessities of life.¹⁶ For first-degree child

¹³ *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004).

¹⁴ MCL 750.136b(3)(b) & (c).

¹⁵ MCL 750.136b(3)(a).

¹⁶ MCL 750.136b(1)(c) defines "omission" as "a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child."

abuse, therefore, the question is one of causation, not whether an affirmative act or the failure to act is alleged.

The failure to act to prevent harm may be a proximate cause of the harm. For causation purposes, the issue is whether the harm was a direct and natural result of that failure.¹⁷ One example where the failure to act to prevent harm is a proximate cause of serious physical harm is where a parent¹⁸ stands idly by and watches his small child, who cannot swim, walk toward a pool, fall in the pool, and drown. Serious physical harm was a direct and natural result of the parent's failure to intervene and prevent the child from going into the pool. The same would be true of a parent who does not intervene to remove a child from the presence of someone who threatens to physically harm the child. The issue in those cases would not be whether the failure to act was a proximate cause of the harm, but whether the parent knew serious harm would result.

It is the knowledge requirement of first-degree child abuse that provides the answer to the second question posed by this Court. As the Court of Appeals recognized, if the person who is allowed contact with the child is someone who only "may" be dangerous to the child, the parent would not know that serious harm *would* result from his failure to prevent that contact. A parent could not be convicted of first-degree child abuse under those circumstances.

¹⁷ *Schaefer*, 473 Mich at 436.

¹⁸ Only a "person" may be guilty of child abuse, and the statute defines "person" as a "child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in custody of, or subject to the authority of that person." MCL 750.136b(1)(d).

Regarding the third question, the Court of Appeals correctly held that a parent has a common law duty to prevent injury to his or her child. The general rule, as stated in *Babula v Robertson*,¹⁹ is that “there is no duty to protect against the criminal acts of a third person absent a special relationship between the defendant and the plaintiff or the defendant and the third person.” The parent-child relationship is unquestionably one such relationship.²⁰ A parent’s duty to protect his children is inherent in his common law duty to provide for his children’s safety,²¹ and long ago this Court observed that the “care and protection of infants is one of the most sacred duties imposed upon man by his maker, and the law is solicitous, in various ways, to enforce the performance of this duty.”²²

The Court of Appeals correctly concluded that a parent’s duty is not limited to situations in which a parent is aware of immediate danger to the child. *People v Beardsley*²³ concerned a prosecution for involuntary manslaughter predicated on the defendant’s failure to provide for proper care of an intoxicated woman with whom he had been drinking where he witnessed her ingest drugs and had arranged for accommodations in another residence until she became sober. The Court ruled

¹⁹ *Babula v Robertson*, 212 Mich App 45, 49; 536 NW2d 834 (1995).

²⁰ 1 LaFave, *Substantive Criminal Law* (2d Ed), § 6.2(a)(1), p 437; *Illinois v Staniel*, 153 Ill2d 218, 236; 606 NE2d 1201 (1992).

²¹ *North Carolina v Walden*, 306 NC 466, 475; 293 SE2d 780 (1982).

²² *Shannon v People*, 5 Mich 71, 94 (1858). Even babysitters have a common law duty to use reasonable care in ensuring that a child’s well-being is not endangered. *Babula*, 212 Mich App at 51. A parent’s duty to protect a child is at least coequal with that of a babysitter.

²³ *People v Beardsley*, 150 Mich 206; 113 NW 1128 (1907).

that the defendant owed her no legal duty.²⁴ But before reaching that conclusion, the Court discussed the circumstances in which a breach of duty arising out of the failure to rescue or assist someone in peril would support a charge of involuntary manslaughter. Clearly, *Beardsley*, a case involving a relationship between adults, does not eliminate a parent's general duty to prevent injury to his child.

Nor does the enactment of the child abuse statutes modify a parent's common law duty. In *Dawe v Dr. Reuven Bar-Leuav & Assoc*,²⁵ the Court explained that a clear expression of legislative intent is required before the Court will hold that a statute abrogates the common law:

The common law remains in force until modified. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). The abrogative effect of a statutory scheme is a question of legislative intent, and "legislative amendment of the common law is not lightly presumed." *Id.* Rather, the Legislature "should speak in no uncertain terms" when it exercises its authority to modify the common law.

MCL 750.136b, on its face, does not suggest a legislative intent to define the parameters of a caregiver's duties with respect to a child. The mere criminalizing of particular conduct is not a clear and unequivocal indication of an intent to modify a parent's common law duty to prevent injury to his child.

Turning to the Court's final question, a parent's failure to prevent injury to his child may support a conviction under an aiding and abetting theory. Aiding and abetting describes "all forms of assistance rendered to the perpetrator of a crime."²⁶ Although the Court once referred in dicta to "active, overt participation" as a requirement,²⁷ the Court has since stated that "encouragement" is

²⁴ *Id.* at 213-215.

²⁵ *Dawe v Dr. Reuven Bar-Leuav & Assoc*, 485 Mich 20, 28; 780 NW2d 272 (2010).

²⁶ *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

²⁷ *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982).

sufficient.²⁸ Michigan courts have also recognized the role of psychological encouragement in aiding and abetting cases,²⁹ and courts of other jurisdictions have applied those principles in holding that a parent's failure to act may aid and abet a crime.³⁰

A parent who fails to protect his or her child from a known abuser encourages the abuser by essentially consenting to the crime. In the companion cases of *Illinois v Stanciel* and *Illinois v Peters*,³¹ the Supreme Court of Illinois considered cases similar to the case at bar and determined that the defendants' failure to protect their children from abuse by their boyfriends supported their convictions of murder under an aiding and abetting theory. The court reasoned:

Although both [defendants] argue they did not aid the principals in the pattern of abuse which resulted in the death of the children, the evidence presented against both defendants is sufficient to provide the inference that they both either knew or should have known of the serious nature of the injuries which the victims were sustaining. Under the present circumstances, we hold the defendants had an affirmative duty to protect their children from the threat posed by [their boyfriends]. Rather than fulfill that obligation, the defendants entirely ignored the danger posed by these two men, and in doing so aided them in the murders of [the children].

²⁸ *Carines*, 460 Mich at 757-758.

²⁹ See *People v Smock*, 399 Mich 282, 285; 249 NW2d 59 (1976) (a defendant "contributed to psychological underpinnings that give strength to a 'mob' through the device of mutual reassurance"); *In re Thurston*, 226 Mich App 205, 220 n 16; 574 NW2d 374 (1998), rev'd 459 Mich 923; 589 NW2d 777 (1998) (noting that a jury could find that a defendant provided implicit aid and encouragement by remaining present after he assaulted the victim while others also assaulted her because his action notified the victim that she was helpless and could expect no assistance).

³⁰ E.g. *Walden*, 306 NC at 476 ("the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed"); *California v Rolon*, 160 Cal App 4th 1206, 1219; 73 Cal Rptr 3d 358 (2008) ("parents have a common law duty to protect their children and may be held criminally liable for failing to do so: a parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack").

³¹ *Stanciel*, 153 Ill2d at 236-237.

The Court of Appeals, having answered this Court's questions, concluded that the district court did not abuse its discretion in binding defendant over to circuit court on two counts of first-degree child abuse and one count of felony murder. Because the Court of Appeals' decision is correct, this Court should deny defendant's application for leave to appeal.

ARGUMENT

At the preliminary examination, the People only need establish probable cause to believe a crime was committed and defendant committed it. Defendant continued to place her son under the care and supervision of her boyfriend, who she knew had abused her son in the recent past, and her boyfriend abused the child again, causing his death. The district court did not abuse its discretion in finding probable cause to believe that defendant committed first-degree child abuse and felony murder.

Standard of Review

In reviewing a circuit court's decision on a motion to quash, the Court determines whether the district court abused its discretion in binding defendant over to circuit court.³² A court abuses its discretion when its decision falls outside the principled range of outcomes or it makes an error of law.³³

An appellate court reviews issues of statutory construction and questions of law de novo.³⁴ The goal of statutory construction is to ascertain and give effect to the intent of Legislature.³⁵ The Court of Appeals outlined the approach to determining legislative intent in *People v Waterstone*.³⁶

The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and

³² *People v Goecke*, 457 Mich 442, 462-463; 579 NW2d 868 (1998).

³³ *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010).

³⁴ *People v Nix*, 301 Mich App 195, 199; 836 NW2d 224 (2013).

³⁵ *People v Bragg*, 296 Mich App 433, 446; 824 NW2d 170 (2012).

³⁶ *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012), quoting *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010).

ordinary meaning, unless the undefined word or phrase is a “term of art” with a unique legal meaning.

Discussion

The district court did not abuse its discretion in binding defendant over for trial on felony-murder and two counts of first-degree child abuse. Defendant’s culpability for the murder flows not simply from her failure to prevent harm to her child, but her affirmative act in continuing to place her child under the supervision and care of a known child abuser who had no legal right to have any contact with the child. Her action in placing her child in her boyfriend’s care caused the serious physical harm, and a jury could decided that, in doing so, she knew that harm would result. A rational jury could also convict her of the murder. She assisted McCullough in murdering Davion by allowing him to care for the child, and a jury could find that she acted with malice when she continued to place the child in his care.

A. The District Court Did Not Abuse its Discretion in Finding Probable Cause to Believe That Defendant Committed First-Degree Child Abuse and Felony Murder for Her Role in the Death of Her Son.

The People’s evidence established probable cause to believe that defendant committed first-degree child abuse and felony murder. While the People must present some evidence from which each element of the crime may be inferred,³⁷ the People need not prove guilt beyond a reasonable doubt at the preliminary examination stage.³⁸ The proofs adduced need “only establish probable cause to believe that a crime was committed and probable cause to believe that the defendant

³⁷ *Goecke*, 457 Mich at 469.

³⁸ *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

committed it,"³⁹ and circumstantial evidence and reasonable inferences from that evidence can be sufficient to meet that burden.⁴⁰ "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt."⁴¹

1. Where an Affirmative Act Is Involved, the Degree of Likelihood That Serious Physical or Mental Harm Will Result from a Defendant's Action Differentiates First and Second-Degree Child Abuse.

The elements of first-degree child abuse are that (1) the defendant was the child's parent or guardian or someone who cared for the child⁴² and (2) the defendant "knowingly or intentionally" caused serious physical or mental harm to the child. Under the plain language of MCL 750.136b(2), culpability is not limited to situations where the defendant intentionally causes the harm. Indeed, in *People v Maynor*,⁴³ the Court held that a defendant must have either intended to cause the harm or have known that the harm would result from her actions.

³⁹ *Id.*; see also MCR 6.110(E).

⁴⁰ *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009).

⁴¹ *Yost*, 468 Mich at 126, quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997); see also *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997).

⁴² See MCL 750.136b(1)(d), which defines "person" as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person."

⁴³ *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); see also *People v Portellos*, 298 Mich App 431, 444; 827 NW2d 725 (2012) ("[a] defendant must not only act, but must know that the act will cause serious physical harm").

Second-degree child abuse,⁴⁴ in contrast, may be proven in alternative ways. The statute encompasses (a) omissions⁴⁵ or reckless⁴⁶ acts that cause serious physical or mental harm, (b) knowing or intentional acts that are “likely”⁴⁷ to cause that harm, regardless of whether harm results, and (c) knowing or intentional cruel⁴⁸ acts, regardless whether harm results.

Where a defendant’s act causes serious harm, the difference between first- and second-degree child abuse thus turns on the defendant’s intent or knowledge. If a defendant intends to cause serious harm or knows her act will cause that harm, the defendant is guilty of first-degree child abuse. If a defendant acts carelessly or commits an act that will probably, not undoubtedly, cause serious harm, she is guilty of second-degree child abuse.

2. Probable Cause Exists to Believe Defendant Committed First-Degree Child Abuse When She Left Davion in the Care of Her Boyfriend, Knowing That He Previously Had Caused the Child Serious Physical Harm, and the Child Died as the Result of Additional Abuse.

The People’s evidence established probable cause to believe that defendant committed first-degree child abuse when she left Davion in the care of McCullough on the day of his death, knowing that McCullough had recently caused serious harm to the child. A reasonable view of the evidence is that after the second incident in which Davion was severely burned while in McCullough’s care,

⁴⁴ MCL 750.136b(3).

⁴⁵ MCL 750.136b(1)(c) defines an omission as “a willful failure to provide food, clothing, or shelter necessary for a child’s welfare or willful abandonment of a child.”

⁴⁶ “Reckless” means careless or indifferent to consequences. *People v Gregg*, 206 Mich App 208, 212; 520 NW2d 690 (1994).

⁴⁷ The term “likely” means “probably.” *People v Nix*, 301 Mich App 195, 202; 836 NW2d 224 (2013).

⁴⁸ MCL 750.136b(1)(b) defines cruel as “brutal, inhuman, sadistic, or that which torments.”

defendant was aware that McCullough had been abusing the child. While defendant initially could have accepted McCullough's explanation for Davion's arm injury during the first incident, she surely knew otherwise when Davion was seriously injured so soon thereafter. A trier of fact would not be bound by the claim that she did not seek treatment on her mother's advice. A trier of fact could instead infer that she did not seek treatment because she wanted to cover up the abuse. Knowing of the past abuse, defendant still entrusted Davion to McCullough's care. Davion's death was a direct result of her decision in that regard.

The issue whether defendant knew her decision to have McCullough continue to care for Davion *would* cause Davion serious harm, whether it was likely to cause him harm, or whether it was a reckless act, must be resolved by the trier of fact, not the district court at a preliminary examination. Only by viewing the evidence in a light most favorable to *defendant* could one conclusively reject the possibility that she was aware that McCullough would harm Davion again. But that is not the standard a district court uses to evaluate the evidence at the preliminary examination stage. The court determines whether probable cause exists to believe that the defendant committed the crime, and the court must bind a defendant over for trial if the evidence conflicts or raises a reasonable doubt regarding guilt because the trier of fact must resolve that conflict.⁴⁹ Circumstantial evidence and reasonable inferences therefrom may establish probable cause,⁵⁰ and minimal circumstantial evidence is sufficient to prove intent because of the difficulty of proving a

⁴⁹ *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

⁵⁰ *Greene*, 255 Mich App at 444.

defendant's state of mind.⁵¹ Because the circumstantial evidence in this case was sufficient to establish that defendant knew that her act of placing Davion in McCullough's care would cause him serious harm, the district court did not abuse its discretion in electing to bind defendant over for trial.

3. Probable Cause Exists to Believe Defendant Committed Felony Murder When She Left Davion in the Care of Her Boyfriend, Knowing That He Previously Had Caused the Child Serious Physical Harm, and the Child Died as the Result of Additional Abuse.

In *People v Riley*,⁵² the Court explained that to prove felony murder under an aiding and abetting theory, the People must show that the defendant "(1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony."

The intent element of felony murder under an aiding and abetting theory is not the intent to kill; it is instead malice. Although the oft-recited third "element" necessary for aiding and abetting is that "the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement,"⁵³ the Court

⁵¹ *People v Ericksen*, 288 Mich App 192, 197; 793 NW2d 120 (2010).

⁵² *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

⁵³ *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). The first two elements are: "(1) the crime charged was committed by the defendant or some other person" and "(2) the defendant performed acts or gave encouragement that assisted the commission of the crime." *Id.*

held in *People v Robinson*⁵⁴ that an accomplice need not have the identical intent as the principal to support conviction of felony murder under that theory. The Supreme Court explained:

Under *People v Aaron*, to sustain a felony murder conviction, the prosecution must prove that each defendant had the necessary malice to be convicted of murder. *Aaron* makes clear that one who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal. This principle extends to other crimes: sharing the same intent as the principal allows for accomplice liability. However, sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability. . . .

Malice, the Court stated in *People v Goecke*,⁵⁵ is “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.”

The People’s evidence in this case established probable cause to believe that defendant committed felony murder under an aiding and abetting theory. First, defendant performed an act that assisted in the commission of the murder—she placed Davion under McCullough’s supervision and care.⁵⁶ Second, she created a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. A fact-finder could infer that state of mind from evidence that defendant knew that McCullough had seriously harmed the child in the very recent past, breaking his arm and scalding him with hot water, and yet chose to place Davion in his care again.

⁵⁴ *Id.* at 14 (footnote omitted).

⁵⁵ *Goecke*, 457 Mich 442 at 464.

⁵⁶ Alternatively, defendant’s disregard of her duty to protect Davion assisted McCullough by encouraging him to continue to abuse Davion. *Stanciel*, 153 Ill2d at 237.

Third, she did so while committing first-degree child abuse, a felony listed in the first-degree murder statute.⁵⁷

The district court therefore did not abuse its discretion in binding defendant over for trial on Count 2 (first-degree child abuse) and Count 3 (felony murder). This Court simply cannot find that the decision in that regard was an unprincipled one. The People presented some evidence on all the elements of the offense, and a court could reasonably infer that defendant knew that McCullough would seriously harm Davion when she placed Davion under his supervision and care. In doing so, she acted in willful disregard that the natural tendency of her decision was to cause death or great bodily harm. Because the murder occurred during the perpetration of first-degree child abuse, the district court properly bound defendant over on a charge of felony murder.

B. The District Court Did Not Abuse its Discretion in Binding Defendant over on First-Degree Child Abuse Arising out of the Incident in Which Davion Was Burned.

The district likewise did not abuse its discretion in binding defendant over for trial on Count 1, the first-degree child abuse charge arising out of the incident in which Davion suffered third-degree burns on his head. Dr. Somerset's testimony that it was unlikely that Davion could have turned on the faucet and burned his head in the bathtub without also burning other portions of his body created a factual question regarding whether his injuries were the result of an accident or the intentional act of an adult spraying scalding-hot water on the child's head. Defendant's statements that she was the person giving Davion a bath that day created a factual dispute regarding whether she or McCullough abused Davion. Probable cause therefore existed to believe that defendant knowingly or intentionally caused Davion serious harm.

⁵⁷ MCL 750.316(1)(b).

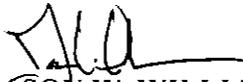
RELIEF

WHEREFORE, the People request that this Court deny defendant's application for leave to appeal.

Respectfully Submitted,

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