

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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Appeal from the Michigan Court of Appeals  
Kurtis T. Wilder, P.J., and E. Thomas Fitzgerald and Jane E. Markey, J.J.

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PEOPLE OF THE STATE OF MICHIGAN	Supreme Court Case No. 150857
Plaintiff-Appellee,	Court of Appeals Case No. 314579
v.	
YUMAR ANTONIO BURKS,	Ingham Circuit Case No. 11-000565-FC
Defendant-Appellant.	

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**BRIEF OPPOSING DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL BY  
THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS  
CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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**QUESTION PRESENTED**

**DID THE TRIAL COURT REVERSIBLY  
ERR IN DECLINING TO INSTRUCT THE  
JURY ON THE LESSER OFFENSE OF  
SECOND-DEGREE CHILD ABUSE?**

Defendant's Answer: "Yes"

People's Answer: "No"

Trial Court's Answer: "No"

Court of Appeals' Answer: "No"

*Amicus Curiae's* Answer: "No"

**COUNTER-STATEMENT OF FACTS**

Sheretta Lee ("Lee") met Yumar Burks ("Burks") in 2009. (Tr. 9-20-12, 102-103). Lee had two young children. (Tr. 9-20-12, 102-104). Lee and Burks began to date and married on February 27, 2010. (Tr. 9-20-12, 103-104). Lee gave birth to Antonio Burks ("Antonio") on August 26, 2010. (Tr. 9-20-12, 104). The family resided at the Deerpath apartment complex in East Lansing at 1261 Deerpath. (Tr. 9-20-12, 104-105).

In late 2010 and early 2011, Lee worked and supported the family. (Tr. 9-20-12, 106-108). Lee's two older children went to daycare. (Tr. 9-20-12, 106-107). Burks was unemployed and stayed home with Antonio. (Tr. 9-20-12, 107-108). In early March of 2011, Lee became a Certified Nurse Assistant and began working a 3:00 p.m. to 11:00 p.m. shift at Dimondale Nursing Home. (Tr. 9-20-12, 109-110). Lee's mother would pick up the two older children from daycare at 4:30 p.m. and watch them at her house until Lee picked them up after work. (Tr. 9-20-12, 110-111).

In mid-March of 2011, Burks became increasingly frustrated with his failure to find a job. (Tr. 9-20-12, 112). During that time, Burks and Lee were in their vehicle with two of the children when Burks told Lee that "he wanted to drop [her] and the kids off, and run the truck off the cliff." (Tr. 9-20-12, 114). Burks was "very wild" and "swerving the car." (Tr. 9-20-12, 114). He dropped Lee off at work, and as she exited the vehicle, he "swerved off." (Tr. 9-20-12, 114-115). Lee was concerned enough to tell her work supervisor what had occurred. (Tr. 9-20-12, 115). The supervisor contacted law enforcement

authorities and the police ultimately confirmed that Burks and the children were unharmed. (Tr. 9-20-12, 115-116).

At around the same time, Lee observed that Antonio had a “cut on the back of his head” and “hickies on his cheek.” (Tr. 9-20-12, 116-117). She attributed the cut to another one of the children throwing blocks at Antonio. (Tr. 9-20-12, 117-118). However, Burks was responsible for the “hickies” on Antonio by “us[ing] his lips to suck on his cheeks.” (Tr. 9-20-12, 118-120). Lee asked Burks “not to do that because it doesn’t look right,” but he continued anyway. (Tr. 9-20-12, 119-120). Burks often had difficulty calming Antonio when he became upset. (Tr. 9-20-12, 125-126).

On March 24, 2011, Lee left for work at about 2:00 p.m., leaving Burks and Antonio in the apartment. (Tr. 9-20-12, 128). Earlier that day, Burks became frustrated with the temp agency he was dealing with, and he “punched holes” in the apartment walls. (Tr. 9-20-12, 129). He told Lee that it “could have been [her].” (Tr. 9-20-12, 130). Before Lee left work, Burks still “seemed a little bit upset,” but he reassured Lee that he was “fine” and could “take care of [his] son.” (Tr. 9-20-12, 130).

Travis Parris (“Parris”) lived in the Deerpath apartment complex in East Lansing at 1207 Deerpath. (Tr. 9-20-12, 58-60). Parris was Burks’s neighbor and friend. (Tr. 9-20-12, 59-60). They often played video games together. (Tr. 9-20-12, 61-62). Burks and Parris played video games at Parris’ apartment during the day on May 24, 2011. (Tr. 9-20-12, 62-63). Burks came over by himself and after a few hours, at Parris’s insistence, Burks left “to go check on

the baby.” (Tr. 9-20-12, 63-65). He told Parris that Antonio “was sleeping” back at his apartment. (Tr. 9-20-12, 64). When Burks did not return to Parris’s apartment to finish their video game, Parris called him. (Tr. 9-20-12, 65). Burks did not return until several hours later, and when he did, he just sat on the couch while Parris played video games. (Tr. 9-20-12, 67, 86-87). After a while, Burks returned to his apartment. (Tr. 9-20-12, 68-69).

In 2011, Brianna Nielsen (“Nielsen”), was 16 years old. (Tr. 9-18-12, 19-20). Nielson babysat for a friend named Bridget Bone (“Bone”), who lived in the Deerpath apartment complex. (Tr. 9-18-12, 8, 19-20). Bone lived in the apartment next door to Burks and his family. (Tr. 9-18-12, 20-21). Nielsen became friendly with Burks and they spoke frequently, both in person and on the telephone. (Tr. 9-18-12, 21-22). On March 24, 2011, around 3:00 p.m., Nielsen was riding the bus home from East Lansing High School. (Tr. 9-18-12, 22). As the bus passed the Deerpath apartment complex, Nielsen called Burks, but he told Nielsen that he would have to call her back. (Tr. 9-18-12, 23). After Burks did not return her call a few hours later, Nielsen called him before it became dark outside. (Tr. 9-18-12, 23-25). Burks was crying and frantic when he answered the call, and he told Nielsen that “[s]omething had happened” and that “he had to get to the hospital.” (Tr. 9-18-12, 24). Nielsen asked if she could help, but Burks hung up. (Tr. 9-18-12, 24-25). She called back numerous times but Burks never answered. (Tr. 9-18-12, 25).

Lee left the apartment on March 24, 2011, and worked her eight-hour shift. (Tr. 9-20-12, 132). She picked up her two older children from her

mother's house and headed back to Deerpath. (Tr. 9-20-12, 133). At her request, Burks met Lee as she parked her vehicle and helped her carry the sleeping children back into the apartment. (Tr. 9-20-12, 134-135). Burks, unlike his usual manner, rushed back into the apartment carrying one of the children and put him into bed wearing his coat and shoes. (Tr. 9-20-12, 135-136). Burks hurried into the bedroom he shared with Lee and Antonio, hopping into their bed. (Tr. 9-20-12, 136-137). Antonio slept on a mattress adjacent to the bed. (Tr. 9-20-12, 138). Lee viewed Antonio "laying on a topless mattress on his back with two covers on him." (Tr. 9-20-12, 136). The bedroom was dark except for the television playing. (Tr. 9-20-12, 136). As Lee started to undress, Burks said in a panicked voice, "Don't wake the baby, don't wake the baby. He has been crying all day don't wake him." (Tr. 9-20-12, 137-138). As Lee went to sleep at around 12:45 a.m., Burks told her he was going to Parris's apartment "to finish the game." (Tr. 9-20-12, 138-139).

Lee awoke at around 3:00 a.m. and "heard [Burks] pacing in the room." (Tr. 9-20-12, 139-140). She told him to "[s]it still" and "stay still," and he left the bedroom. (Tr. 9-20-12, 140-141). Lee awoke again at 8:00 a.m. and heard the older children downstairs. (Tr. 9-20-12, 141). She assumed that Burks had Antonio with him and she went back to sleep. (Tr. 9-20-12, 142). She awoke again at 10:00 a.m. and still did not hear Antonio, but she saw Burks in the bedroom. (Tr. 9-20-12, 142, 149). Usually by 8:00 a.m. Burks would have turned care of Antonio over to Lee. (Tr. 9-20-12, 142-143). She viewed Antonio on the mattress. (Tr. 9-20-12, 142, 148-149). Antonio's face "was turned away

from [Lee]" and he was on his stomach. (Tr. 9-20-12, 142). Antonio had not turned over by himself during the night. (Tr. 9-20-12, 142-143).

Lee touched Antonio and "he was cold, very cold." (Tr. 9-20-12, 143-144, 149). He did not have any blankets on him. (Tr. 9-20-12, 149). Lee "went into shock" and "was trembling." (Tr. 9-20-12, 149-150). She thought that Antonio may "have passed away." (Tr. 9-20-12, 150). Burks turned Antonio over and lifted up his onesie. (Tr. 9-20-12, 150). Antonio "had bruising all over his body." (Tr. 9-20-12, 150). He did not have the bruising when Lee changed his diaper at approximately 2:00 p.m. the previous day. (Tr. 9-20-12, 150, 154). Burks began "screaming" and "going crazy." (Tr. 9-20-12, 151). He started yelling at Lee "to call the cops," and even put Lee's cellular telephone in her hand. (Tr. 9-20-12, 151-152). Lee called 9-1-1 and the operator gave her instructions for performing infant CPR. (Tr. 9-20-12, 152-153). When she saw Burks "trying to do adult CPR," Lee tried to re-direct him, but he ignored her. (Tr. 9-20-12, 153-154).

At 10:30 a.m. on March 25, 2011, Lieutenant Scott Wrigglesworth ("Lieutenant Wrigglesworth") of the East Lansing Police Department ("ELPD"), received a dispatch to 1261 Deerpath regarding a "[s]ix month old baby not breathing." (Tr. 9-18-12, 63-64, 93-94). ELPD Officer Scott Sexton ("Officer Sexton") arrived at the apartment complex at the same time. (Tr. 9-18-12, 64-66, 94-96). As he approached the two-story apartment building, Lieutenant Wrigglesworth viewed Burks hanging out of the upstairs window and screaming at the officers, "He is in here! He is in here!" (Tr. 9-18-12, 64-67, 95-

97). The front door to the apartment building was locked, so Lieutenant Wrigglesworth yelled at Burks to come down and open it. (Tr. 9-18-12, 67, 97). After waiting for 10 seconds, the ELPD officers began to try and kick the door in, but their efforts were unsuccessful and a “couple maintenance workers in a golf cart” pulled up and used a master key to let them into the building. (Tr. 9-18-12, 67-68, 97). The officers raced up the stairs and Lee directed them into a bedroom in the apartment. (Tr. 9-18-12, 68-69, 98-99).

Lieutenant Wrigglesworth saw Burks “basically straddling [Antonio], performing what [he] would call adult CPR on a six-month old baby.” (Tr. 9-18-12, 69-71, 99-100). Antonio was on his back on a mattress on the floor. (Tr. 9-18-12, 70-71, 99-100). Officer Sexton yelled at Burks, “You’re doing it too hard!” (Tr. 9-18-12, 71, 101-102). The ELPD officers then removed Burks “to stop him [from] doing compressions that hard.” (Tr. 9-18-12, 71-72, 101-102; Tr. 9-20-12, 154-155). Lieutenant Wrigglesworth picked up Antonio, who was wearing a diaper and onesie, and “put him onto the adult bed.” (Tr. 9-18-12, 72-73, 76-78, 103). Antonio was “cold to the touch” and “appeared dead.” (Tr. 9-18-12, 73, 102-103). The baby “didn’t have any color” and “was stiff.” (Tr. 9-18-12, 73). Officer Sexton noted that Antonio had “[b]ruising on the cheeks, left and right cheeks,” “bruising around the naval area,” and “a small gouge” about the size of a penny on the left side of his ribcage. (Tr. 9-18-12, 104). The ELPD officers “did two-person CPR.” (Tr. 9-18-12, 73, 102-104; Tr. 9-20-12, 155).

Watching the ELPD officers, Lee “knew that [Antonio] was gone.” (Tr. 9-20-12, 156). Burks, meanwhile, “was going crazy” and “destroying the room.” (Tr. 9-18-12, 74, 105-106; Tr. 9-20-12, 155). He was “yelling at the top of his lungs, something happened to his baby.” (Tr. 9-18-12, 74). Lieutenant Wrigglesworth asked Officer Sexton “to deal with” Burks, so he calmed him down. (Tr. 9-18-12, 74, 80). Burks never said anything about what had happened to Antonio, instead repeating only that “[s]omething was wrong with [his] son.” (Tr. 9-18-12, 75).

That morning, Nathan Gates (“Firefighter Gates”) was working as an East Lansing firefighter. (Tr. 9-18-12, 4-5). At 10:30 a.m., Firefighter Gates, a certified paramedic, was at the fire station when they received a call to 1261 Deerpath “for an infant not breathing.” (Tr. 9-18-12, 6, 29). Firefighter Gates, along with four other paramedic firefighters, including Lieutenant Peter Counsellor (“Lieutenant Counsellor”), arrived at the address within three or four minutes. (Tr. 9-18-12, 6-7, 29-30). The firefighters “were notified en route that CPR had been started by police on scene.” (Tr. 9-18-12, 30).

On scene, Firefighter Gates saw Lee and Burks inside the apartment, and he allowed the ELPD officers “to finish their round of CPR on the infant.” (Tr. 9-18-12, 9-11, 76, 104). Antonio was “on the bed” and “not breathing,” and the approximately six-month-old child weighed only about 20 pounds. (Tr. 9-18-12, 11). Firefighter Gates observed that Antonio “had bruises on his abdomen” and that the abdomen “looked slightly distended.” (Tr. 9-18-12, 14).

He picked up Antonio and began to perform CPR. (Tr. 9-18-12, 9, 11, 76, 104). Antonio was cold to the touch. (Tr. 9-18-12, 14-15).

Firefighter Gates carried the child outside to the ambulance. (Tr. 9-18-12, 9, 30-31). The firefighters placed Antonio on a back board, continued CPR, and put him on a heart monitor. (Tr. 9-18-12, 9, 31, 40-41). The heart monitor showed “no measure electrical activity [i]n the heart.” (Tr. 9-18-12, 9, 13, 32-33). The ambulance drove to Sparrow Hospital (“Sparrow”) as the firefighters continued life-saving measures on Antonio. (Tr. 9-18-12, 9, 14, 32-34). Throughout the drive, Antonio “remained pulseless and not breathing.” (Tr. 9-18-12, 9). Firefighter Gates was never “able to get a response from” Antonio. (Tr. 9-18-12, 14).

During the drive to Sparrow, Lieutenant Counseller unsuccessfully attempted to intubate Antonio. (Tr. 9-18-12, 9, 33-34, 38-39). Lieutenant Counseller observed “more than 10 bruises” on Antonio’s torso, and his abdomen “appeared more distended than normal.” (Tr. 9-18-12, 35). The firefighters endeavored without success to gain IV access by using an “EZ-IO.” (Tr. 9-18-12, 9, 35, 38-39). With this procedure, the firefighters “drill into the bone marrow of the infant” in order to “give [the infant] fluids and medicine through the actual bone.” (Tr. 9-18-12, 35). Antonio was not just cold to Lieutenant Counseller’s touch, but “freezing.” (Tr. 9-18-12, 35-36). He had a sunken fontanel and his eyes were “cloudy.” (Tr. 9-18-12, 37, 42). Further, Lieutenant Counseller found it odd that, given Antonio’s condition, he was “freshly powdered” and wearing a clean diaper. (Tr. 9-18-12, 36-37).

Doctor Martin R. Romero (“Dr. Romero”) was working as an emergency room physician at Sparrow that morning when Antonio arrived. (Tr. 9-20-12, 4-9). Antonio “had absolutely no movement, no spontaneous respiration.” (Tr. 9-20-12, 10). The emergency room staff at Sparrow assumed care of Antonio from the firefighters, while continuing to perform CPR and life-saving measures. (Tr. 9-20-12, 10-11). The physicians and nurses intubated Antonio to provide artificial ventilation and inserted a nasal gastric tube to prevent material in his stomach from being aspirated into his lungs. (Tr. 9-20-12, 10, 13-14). They placed an “interosseous line” in Antonio’s left lower extremity for “administration of medication.” (Tr. 9-20-12, 10, 13-14). Antonio had “an extensive amount of . . . ecchymosis,” meaning bruising “in various stages of resolution.” (Tr. 9-20-12, 13-15). Dr. Romero viewed such a “bruising pattern” as likely caused by “some kind of trauma.” (Tr. 9-20-12, 21). Dr. Romero also observed “purple around the umbilicus,” commonly referred to as “Cullen’s Sign,” which connotes “bleeding from internal sores.” (Tr. 9-20-12, 14-15).

The physicians and nurses were unable to get any response from Antonio’s nervous system and they were unsuccessful in obtaining a body temperature because it was so low. (Tr. 9-20-12, 17-18). They tried to warm him, but were unsuccessful. (Tr. 9-20-12, 18-19). Antonio’s pupils were “fixed, dilated and non-responsive, and [the] corneas [were] beginning to pacify.” (Tr. 9-20-12, 22-23). Given these conditions, Dr. Romero estimated that Antonio “was without circulation for likely a prolonged period of time . . . anywhere from a few hours to several hours, up to 12, 24 hours.” (Tr. 9-20-12, 23, 36).

In Dr. Romero's experience, Antonio's injuries were not of the kind typically caused by improper CPR. (Tr. 9-20-12, 34-36). The emergency room staff employed life-saving measures in treating Antonio for 40 minutes without any improvement in his condition. (Tr. 9-20-12, 19).

The firefighters left Deerpath so quickly that Lieutenant Wrigglesworth was unable to get Burks into the ambulance so that he could ride to Sparrow with Antonio. (Tr. 9-18-12, 78-79, 104-105). Lieutenant Wrigglesworth asked Officer Sexton to give Burks a ride to Sparrow. (Tr. 9-18-12, 79, 105-107; Tr. 9-20-12, 156-157). Lieutenant Wrigglesworth told Lee to "get somebody to watch the kids so she, too, could be going to the hospital to be with her son." (Tr. 9-18-12, 79-80; Tr. 9-20-12, 156-157). Eventually, Lee found a babysitter and left for Sparrow. (Tr. 9-18-12, 80; Tr. 9-20-12, 157-158).

Officer Sexton drove Burks to Sparrow. (Tr. 9-18-12, 107). Burks spent the short ride on his cellular telephone, "screaming loudly . . . and crying." (Tr. 9-18-12, 107-108). To Officer Sexton, it appeared that Burks was "talking maybe to some family or friend, letting them know what had happened." (Tr. 9-18-12, 107-108). Burks told Officer Sexton that he had given Antonio a bath and a bottle around 11:00 p.m. and then put him to bed. (Tr. 9-18-12, 108-109). Later, Firefighter Gates spoke to Burks at Sparrow, and Burks told him that Antonio did not have a medical history and had been acting normally. (Tr. 9-18-12, 11-13). He told Firefighter Gates that Antonio "was fine" when he had checked on him at 11:00 p.m. (Tr. 9-18-12, 13). Burks never informed the

emergency room staff of anything regarding Antonio's medical history, nor did he state how Antonio sustained the injuries. (Tr. 9-20-12, 21).

At Sparrow, hospital security guards escorted Burks and Officer Sexton into the emergency room area and had them sit in a waiting room about 50 or 60 feet away from the trauma room. (Tr. 9-18-12, 109-110). Burks continued to talk on his cellular telephone. (Tr. 9-18-12, 109-110). Within minutes, a hospital security guard and a nurse came into the waiting room "to speak with [Officer Sexton] about concerns they had about the baby." (Tr. 9-18-12, 109-110). This conversation occurred "a significant distance away from [Burks] so he wouldn't hear" them. (Tr. 9-18-12, 110). Based on the nature of Antonio's injuries, they told Officer Sexton that "[t]hey did not want [] Burks to be around the baby." (Tr. 9-18-12, 110). Officer Sexton simply told Burks that he had "to stay out in the waiting room" because the physicians and nurses "were treating the baby." (Tr. 9-18-12, 110-112).

The hospital security guards later permitted Burks and Officer Sexton "into the trauma room" to "watch that they were doing their job attempting to treat" Antonio. (Tr. 9-18-12, 112; Tr. 9-20-12, 19-20). They watched the physicians and nurses attempt to resuscitate him for "at least 15 to 20 minutes." (Tr. 9-18-12, 112). Burks had put away his cellular telephone to watch. (Tr. 9-18-12, 112-113). Ultimately, Dr. Romero indicated that "they were going to stop and they had declared [Antonio] deceased." (Tr. 9-18-12, 113; Tr. 9-20-12, 25-27). Burks began to yell, "I want to see my son! I want to see my son!" (Tr. 9-18-12, 113-114). He was trying to get to Antonio, and

Officer Sexton, along with several hospital security guards and nurses, restrained him by taking him into the hallway and strapping him to a gurney. (Tr. 9-18-12, 113-114). Between 15 and 30 minutes later, hospital security guards allowed Burks to get off the stretcher and join Lee at Sparrow. (Tr. 9-18-12, 114; Tr. 9-20-12, 159-160).

Dr. Romero contacted the county medical examiner after declaring Antonio to be deceased. (Tr. 9-20-12, 27-28, 39). Dr. Romero also conducted an external examination of Antonio. (Tr. 9-20-12, 28-31). He “had bruising on both cheeks, left and right cheek.” (Tr. 9-18-12, 115; Tr. 9-20-12, 31-32). He had “10 to 12 bruises around the naval area.” (Tr. 9-18-12, 115; Tr. 9-20-12, 33). Dr. Romero showed Officer Sexton the “small gouge in the left rib cage are.” (Tr. 9-18-12, 115). The child also had bruises on his back, as well as a laceration on the back of his head. (Tr. 9-18-12, 115-116; Tr. 9-20-12, 31). Inside of his mouth, Antonio’s gums “had been ripped, or somehow detached from his gum area.” (Tr. 9-18-12, 116; Tr. 9-20-12, 31-32). He had extensive bruising “on both of the lower extremities.” (Tr. 9-20-12, 33). Like Lieutenant Counseller, Dr. Romero found it “atypical” that Antonio was wearing a clean, powdered diaper. (Tr. 9-20-12, 37-39). Officer Sexton spoke with Dr. Romero regarding Antonio’s injuries. (Tr. 9-18-12, 114-116).

Lieutenant Wrigglesworth stayed at the apartment “to run that [crime] scene.” (Tr. 9-18-12, 78, 81). Ultimately, he turned the apartment over to the ELPD’s detective bureau, but Lieutenant Wrigglesworth later determined that Lee made the 9-1-1 call. (Tr. 9-18-12, 81-82).

Officer Sexton drove Lee back to the police station. (Tr. 9-18-12, 114, 116-117). He and ELPD Detective Candace Ivey (“Detective Ivey”) interviewed Lee. (Tr. 9-18-12, 116-119, 131-132; Tr. 9-20-12, 160-161). The interview lasted between 30 and 45 minutes. (Tr. 9-18-12, 117, 132). Lee gave the ELPD consent to search the apartment and her vehicle, signing a “consent to search” form for Detective Ivey. (Tr. 9-18-12, 118, 132-134). As a result of this interview, the ELPD officers learned about Parris. (Tr. 9-18-12, 119-120). Subsequently, Detective Ivey, armed with her camera, drove to 1261 Deerpath to search the apartment, and she also photographed the interior. (Tr. 9-8-12, 134-150).

ELPD Detective Sherief Fadly (“Detective Fadly”), the officer in charge of the investigation into Antonio’s death, heard the dispatch regarding Lee’s 9-1-1 call and drove to the Deerpath apartment complex. (Tr. 9-21-12, 4-12). After speaking with Lieutenant Wrigglesworth and other ELPD officers, Detective Fadly went to Sparrow. (Tr. 9-21-12, 11-12). At the hospital, he spoke with Firefighter Gates and some others, including Officer Sexton and a nurse who had been involved in Antonio’s care. (Tr. 9-21-12, 14-15, 19-20). Detective Fadly saw Burks and Lee inside a room in the hospital. (Tr. 9-21-12, 15-16). He asked Lee to step out of the room and began to speak with Burks. (Tr. 9-21-12, 17-18). After obtaining some preliminary information from Burks, Detective Fadly asked him to come to the police station, and Burks went along. (Tr. 9-21-12, 21-22).

Detective Fadly took Burks to a different part of the police station to avoid contact with Lee. (Tr. 9-21-12, 25-27). He spoke with Burks inside an interview room, and the four and one-half hour interview was videotaped. (Tr. 9-21-12, 27-28, 32-34; Tr. 9-24-12, 7). During the interview, Burks admitted to Detective Fadly that he had caused the marks on Antonio's cheeks by biting and sucking them. (Tr. 9-24-12, 12-15). Burks conceded that he had slapped Antonio, and he also told Detective Fadly that he pinched Antonio out of frustration when he would not stop crying. (Tr. 9-24-12, 16). Burks stated that "he would squeeze, pinch the inner thighs." (Tr. 9-24-12, 16). However, he was unable to explain the other injuries sustained by Antonio. (Tr. 9-24-12, 16-17). At the conclusion of the interview, Detective Fadly released him. (Tr. 9-24-12, 17).

The following day, Detective Fadly learned that ELPD officers had returned to the Deerpath apartment "on some type of disturbance . . . between" Burks and Lee. (Tr. 9-24-12, 17-18). As a result, Detective Fadly arranged for ELPD officers to arrest Burks. (Tr. 9-24-12, 18). At the police station, Burks asked to speak with Detective Fadly. (Tr. 9-24-12, 18-19). Back in the same interview room, Detective Fadly read him his *Miranda* rights and Burks agreed to talk. (Tr. 9-24-12, 19-27). During the six-hour interview, Burks described five different falls that Antonio had taken from the bed in his care between early February and March 23, two days before his death. (Tr. 9-24-12, 30-34). Burks told Detective Fadly that Antonio "did not die from the bath" and that Antonio had not had any type of accident on March 24. (Tr. 9-24-12, 34).

ELPD Sergeant James Phelps (“Sergeant Phelps”) secured a search warrant for Burks’s cellular telephone records and obtained them from Nextel Sprint. (Tr. 9-20-12, 90-92). Through the records, Sergeant Phelps learned of Nielsen’s telephone calls with Burks on March 24. (Tr. 9-20-12, 92-93). Sergeant Phelps then interviewed Nielsen at the police station. (Tr. 9-20-12, 93). Burks’s telephone records revealed that Nielsen called Burks at 3:26 p.m., and that the call lasted 14 seconds. (Tr. 9-20-12, 93-94). Nielsen called Burks again at 5:05 p.m., resulting in a call that lasted 58 seconds. (Tr. 9-20-12, 94). Nielsen telephoned Burks two more times that evening—at 6:18 p.m. and at 9:36 p.m.—and both calls went to voice mail. (Tr. 9-20-12, 94).

Sergeant Phelps discovered 13 telephone calls between Burks and Parris during March 24 and 25, 2011. (Tr. 9-20-12, 94-95). Sergeant Phelps, along with Detective Fadly, interviewed Parris at the police station. (Tr. 9-20-12, 80, 94). Early in the day, they exchanged a series of hang-ups or straight-to-voicemail telephone calls. (Tr. 9-20-12, 96-98). Parris telephoned Burks at 3:07 p.m. and they spoke for nine seconds. (Tr. 9-20-12, 97-98). He called Parris again at 5:50 p.m. and the two spoke for 15 seconds. (Tr. 9-20-12, 98). Burks and Parris exchanged eight more calls between 5:50 p.m. and 1:35 a.m., none lasting longer than three minutes. (Tr. 9-20-12, 100).

Detective Fadly spoke with Burks for a third time on March 28. (Tr. 9-24-12, 35). Again, Burks waived his *Miranda* rights. (Tr. 9-24-12, 38-39). Burks continued to provide Detective Fadly with differing accounts of what had occurred leading up to Antonio’s death. (Tr. 9-24-12, 41-63). At first, Burks

stated that one of Lee's sons "must have pulled [Antonio] off the bed and started punching [Antonio]." (Tr. 9-24-12, 41). Subsequently, Burks related a long story to Detective Fadly regarding the events of the night of March 24 during which Antonio stopped breathing, Burks both badly beat Antonio and put Antonio into the bathtub in an effort to revive him. (Tr. 9-24-12, 42-65).

Doctor John Bechinski ("Dr. Bechinski"), a forensic pathologist employed at Sparrow, performed the autopsy on Antonio. (Tr. 9-20-12, 202-205). Antonio was six months old, about 27 inches long, and weighed about 14 pounds. (Tr. 9-20-12, 208, 223). Dr. Bechinski's external examination revealed bruises on both the right cheek and right temporal scalp. (Tr. 9-20-12, 215-217). Antonio had linear abrasions on his right cheek, right lower jaw area, and right temple. (Tr. 9-20-12, 215-217). He had a contusion on the left lower lip, as well a laceration and bruising of the upper frenulum. (Tr. 9-20-12, 217). He had "at least 20 round oval irregularly shaped bruises present on the chest and abdomen." (Tr. 9-20-12, 217). Some of these bruises "were arranged in almost a vertical fashion." (Tr. 9-20-12, 217). Antonio also had "another bruise on the front upper left thigh." (Tr. 9-20-12, 217).

Dr. Bechinski then conducted an internal examination, which revealed "some bleeding under the scalp" in two separate regions of Antonio's head, as well as bruising under the scalp. (Tr. 9-20-12, 224-226). He found a "full thickness tear of the superior vena cava," as well as bleeding in the cavity that surrounds the heart. (Tr. 9-20-12, 227). It takes a "lot of force to produce that injury" and such injuries "are commonly seen in high-speed motor vehicle

collisions.” (Tr. 9-20-12, 227-228). Antonio sustained massive internal injuries to his lungs, liver, spleen, abdomen, testicles, and various other organs. (Tr. 9-20-12, 228-229). Dr. Bechinski determined that these injuries were caused by “[s]ome form of blunt force.” (Tr. 9-20-12, 229-236). He found that Antonio’s injuries appeared to have all occurred at the same time. (Tr. 9-20-12, 242). Dr. Bechinski concluded that the cause of Antonio’s death was “[m]ultiple blunt force trauma.” (Tr. 9-20-12, 236) He declared the manner of death to be homicide. (Tr. 9-20-12, 236). And like Dr. Romero, Dr. Bechinski did not view the injuries as having been caused by improper CPR. (Tr. 9-20-12, 237-238).

After a six-day trial before Ingham County Circuit Court Judge Clinton Canady III (“Judge Canady”), a jury convicted Burks of First-Degree Felony Murder (MCL § 750.316(1)(b)) and First-Degree Child Abuse (MCL § 750.136b(2)). (Tr. 9-25-12, 77-80). Burks appealed as of right, and the Michigan Court of Appeals (“Court of Appeals”) affirmed his convictions. See Opinion (12/2/14) - COA No. 314579. Thereafter, Burks filed an Application for Leave to Appeal in this Court, which directed the parties to file supplemental briefs “addressing whether the trial court erred in refusing the defendant’s request for a jury instruction on the offense of second-degree child abuse. See *People v. Cornell*, 466 Mich 335; *People v. Wilder*, 485 Mich 35 (2010).” See Order (6/5/15) - SC No. 150857.

## ISSUE I

### **THE TRIAL COURT DID NOT REVERSIBLY ERR IN DECLINING TO INSTRUCT THE JURY ON THE LESSER OFFENSE OF SECOND-DEGREE CHILD ABUSE.**

#### STANDARD OF REVIEW

An appellate court reviews de novo a claim of instructional error involving a question of law. *People v. Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, a trial court’s decision regarding whether a requested jury instruction on a lesser offense is applicable under the facts of a particular case will only be reversed upon a finding of an abuse of discretion. *People v. Cornell*, 466 Mich 335, 352-353; 646 NW2d 127 (2002). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v. Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

#### ARGUMENT

After the close of proofs, the defendant’s trial counsel asked the trial court to instruct the jury on the lesser offense of Second-Degree Child Abuse, MCL § 750.136b(3). (Tr. 9-24-12, 219-224). The trial court declined this request, noting that the defendant’s “act of striking [Antonio] . . . was intentional” and “not reckless.” (Tr. 9-24-12, 224-225). The jury convicted the defendant of First-Degree Child Abuse. (Tr. 9-25-12, 77-80). The Court of Appeals affirmed the trial court’s ruling employing a harmless error analysis. See Opinion (12/2/14) - COA No. 314579. This Court has direct the parties to

file supplemental briefs “addressing whether the trial court erred in refusing the defendant’s request for a jury instruction on the offense of second-degree child abuse.” See Order (6/5/15) - SC No. 150857.

The relevant statute, MCL § 768.32(1), provides, in pertinent part, that “upon an indictment for an offense, consisting of different degrees . . . the jury . . . may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment.” In *Cornell, supra*, this Court clarified the law regarding jury instructions on inferior offenses as discussed in MCL § 768.32(1). *Cornell, supra*. The *Cornell* Court observed that the statute “was not intended to be limited only to those [inferior offenses] expressly divided into ‘degrees,’ but was intended to extend to all cases in which different grades of offenses or degrees of enormity had been recognized[,]” including misdemeanors. *Id.* at 353-354. This Court concluded that “the word ‘inferior’ in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense.” *Id.* at 354, quoting *People v. Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997). Put simply, an offense is “inferior” under MCL § 768.32(1) if “all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense.” *Id.* at 355, quoting *Torres, supra* at 419-420.

Thus, because MCL § 768.32(1) only allows a trier of fact to consider inferior offenses, this Court in *Cornell* concluded that instructions on “cognate”

lesser offenses are no longer permitted. *Id.* at 355. Instead, the trier of fact may only be instructed on necessarily included lesser offenses, provided “the charged greater offense requires [it] to find a disputed factual element that is not part of the lesser included offenses and a rational view of the evidence would support it.” *Id.* at 357.

Here, as indicated, the prosecution charged the defendant, in relevant part, with First-Degree Child Abuse. Prior to closing arguments, the defendant’s trial counsel asked the trial court to instruct the jury on the lesser offense of Second-Degree Child Abuse. Thus, the first issue involves whether Second-Degree Child Abuse is a necessarily lesser included offense of First-Degree Child Abuse. The First-Degree Child Abuse statute, MCL § 750.136b(2), states that “[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.” In *People v. Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004), this Court interpreted that statute to “require[] the prosecution to establish, and the jury to be instructed that to convict it must find, not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act.”

The Second-Degree Child Abuse statute, MCL § 750.136b(3), provides that 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 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.

In applying the principles set forth in *Cornell*, the relevant inquiry is whether the elements of Second-Degree Child Abuse are subsumed within the elements of First-Degree Child Abuse. The analysis must further take into account this Court's decision in *People v. Wilder*, 485 Mich 35; 780 NW2d 265 (2010).

In *Wilder*, this Court rejected the Court of Appeals' determination "that third-degree home invasion cannot be a necessarily included lesser offense of first-degree home invasion because one or more of the possible elements of third-degree home invasion are distinct from the elements of first-degree home invasion." *Wilder, supra* at 44. Instead, the *Wilder* Court concluded that "a more narrowly focused evaluation of the statutory elements at issue is necessary when dealing with degreed offenses that can be committed by alternative methods." *Id.* In that regard, "[s]uch an evaluation requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense." *Id.* This Court observed that "[a]s long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense." *Id.*

Moreover, “[n]ot all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense.” *Id.* at 44-45. Thus, the *Wilder* Court determined that “in order to determine whether specific elements used to convict defendant of third-degree home invasion in this case constitute a necessarily included lesser offense, one must examine the offense of first-degree home invasion as charged and determine whether the elements of third-degree home invasion as convicted are subsumed within the charged offense.” *Id.* at 45.

In the case at bar, the Child Abuse statute, MCL § 750.136b, sets forth degreed offenses like the Home Invasion statute, MCL § 750.110a, at play in *Wilder*. Here, unlike *Wilder*, however, the trial court did not instruct the jury on the lesser offense. This distinction between the instant case and *Wilder* provides this Court with a good opportunity to expand upon its holding in *Wilder* and state whether it applies to cases in which the trial court declines to instruct the jury on the lesser offense.

Assuming that that the reasoning in *Wilder* applies equally to cases in which the trial court refused to give a requested jury instruction regarding a lesser offense, the Court “need only examine the elements of [the lesser offense] to determine whether the crime, when committed in that specific manner, is a necessarily included lesser offense of the charged crime . . .” *Wilder, supra* at 45. In making his argument to the trial court for a jury instruction on Second-Degree Child Abuse, the defendant’s trial counsel maintained that his “general

theory [wa]s that [the defendant] engaged in a reckless act.” (Tr. 9-24-12, 220). The trial court itself referred to CJI2d 17.20 [Child Abuse, Second-Degree (Reckless Act)]. (Tr. 9-24-12, 219). This portion of the statute provides that a defendant is guilty of Second-Degree Child Abuse if his “reckless act cause[d] serious physical harm or serious mental harm to a child.” MCL § 750.136b(3). As noted, a defendant is guilty of First-Degree Child Abuse if the defendant knowingly or intentionally causes serious physical or serious mental to a child. MCL § 750.136b(2). Thus, the issue becomes whether these elements of Second-Degree Child Abuse are subsumed within the elements required for First-Degree Child Abuse.

In the years since this Court’s decision in *Cornell*, this issue has arisen repeatedly in the Court of Appeals in unpublished cases without resolution. See *People v. League*, 2003 Mich. App. LEXIS 1698; *People v. Thornton*, 2006 Mich. App. LEXIS 1902; *People v. Badgley*, 2007 Mich. App. LEXIS 103; *People v. Stevens*, 2008 Mich. App. LEXIS 2117; *People v. Gonzales*, 2010 Mich. App. LEXIS 833; *People v. James*, 2012 Mich. App. LEXIS 18. Further, both assistant prosecutors and defense attorneys make requests every day in First-Degree Child Abuse trials in the State of Michigan for jury instructions on the lesser offense of Second-Degree Child Abuse. Moreover, the strategies underlying such requests cut both ways depending on the facts and circumstances of each case. Given the foregoing, this case presents an important opportunity for this Court to clarify this area of the criminal law and provide a roadmap for the future.

That said, a rational view of the evidence in the case at bar did *not* support a Second-Degree Child Abuse instruction. And, as above, this case presents this Court with a vehicle to expand upon what the phrase “supported by a rational view of the evidence” means in *Cornell* and its progeny. Here, in asking for this instruction, the defendant’s trial counsel relied on the defendant’s trial testimony, which was similar to his last account to Detective Fadly. (Tr. 9-24-12, 220-221). But the defendant’s trial testimony, as the Court of Appeals pointed out, was patently ridiculous and demonstrably false when placed in juxtaposition with the testimony from the numerous prosecution witnesses.

As Justice Markman aptly observed in his dissent in *People v. Silver*, 466 Mich 386, 399; 646 NW2d 150 (2001), “[i]t is not the law that *any* theory asserted by a defendant, no matter how preposterous, must be treated as the equivalent of a ‘rational view’ of the evidence, thereby requiring an instruction.” Instead, he pointed out that “[t]rial courts need not suspend their common sense in assessing what constitutes a ‘rational view’ of the evidence.” *Id.* at 399-400. Justice Markman criticized the majority in *Silver* for requiring that there only be a “dispute” and “reading out of the law the requirement that there must be a “rational view” of the evidence in support of such instructions.” *Id.* at 400. The dissent stressed that “[t]he ‘rational view’ requirement makes clear that the trial court must bring some degree of judgment to its responsibilities, and that neither the trial court nor the jury need be infinitely credulous in seeking to ascertain the truth.” *Id.*

