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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

SHAWQUANDA BOROM

Defendant-Appellant.

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Supreme Court No. _____

Court of Appeals No. 313750

Lower Court No. 12-4559-01 F

Opn
12-19-13

Wayne CrI
L. Parker

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

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MOTION FOR IMMEDIATE CONSIDERATION OF APPLICATION
FOR LEAVE TO APPEAL

State

PROOF OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

- I. **DOES A PARENT’S FAILURE TO ACT TO PREVENT HARM TO HIS OR HER CHILD SATISFY THE REQUIREMENT FOR A KNOWING OR INTENTIONAL ACT UNDER THE FIRST-DEGREE CHILD ABUSE STATUTE, MCL 750.136B(2), IN LIGHT OF MCL 750.136B(3) THAT SEPARATELY PUNISHES**

OMISSIONS AND RECKLESS CONDUCT AS SECOND-DEGREE CHILD-ABUSE; IN ADDITION, THE COURT OF APPEALS' DECISION DOES NOT COMPORT WITH THIS COURT'S DECISION IN *PEOPLE V MAYNOR* THAT TO BE GUILTY OF FIRST-DEGREE CHILD ABUSE THE DEFENDANT MUST INTEND TO COMMIT AN ACT AND INTEND FOR, OR KNOW THAT, HARM WILL RESULT FROM THAT ACT?

Trial Court "Made No Answer".

Court Of Appeals Answered, "No".

Defendant-Appellant Answers, "Yes".

II. DID THE COURT OF APPEALS ERR IN HOLDING THERE IS A BROAD COMMON LAW DUTY OF A PARENT TO PREVENT INJURY HIS OR HER CHILD; RATHER, IT IS A LIMITED DUTY TO PREVENT INJURY ONLY WHEN THE PARENT IS AWARE OF IMMEDIATE DANGER TO THE CHILD?

Trial Court "Made No Answer".

Court Of Appeals Answered, "No".

Defendant-Appellant Answers, "Yes".

III. DID THE COURT OF APPEALS ERR IN HOLDING THERE IS A BROAD COMMON LAW DUTY OF A PARENT TO PREVENT INJURY HIS OR HER CHILD; RATHER, IT IS A LIMITED DUTY TO PREVENT INJURY ONLY WHEN THE PARENT IS AWARE OF IMMEDIATE DANGER TO THE CHILD?

Trial Court "Made No Answer".

Court Of Appeals Answered, "No".

Defendant-Appellant Answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Shawquanda Borom seeks leave to appeal from the December 19, 2013 decision of the Court of Appeals affirming the trial court's decision to bind over Ms. Borom for trial.

This matter centers on the untimely death of Ms. Borom's 16-month old son, Davion. This is an issue of first impression, and the prosecution candidly admits the novelty of its theory: "I don't think Wayne County has ever charged a situation like this before and I don't think it's on the books from any county in the state" (PE III 44). The prosecution is attempting an end-run around Michigan statute and common law by charging Ms. Borom with first-degree child abuse and felony murder based on her alleged failures to act, where the first-degree child abuse requires an affirmative act, not an omission.

This Court ordered the Court of Appeals to address four specific questions.¹ The court erred in its answers to all but one and its opinion is internally inconsistent. This Court should grant leave to appeal to clarify that such a novel prosecution does not comport with Michigan statutory or common law.

First, the court engaged in legal gymnastics to hold that a failure of a parent to act to prevent harm to his or her child can qualify as first-degree child abuse. The court ignored the clear intent of the Legislature by holding that omissions can constitute first-degree child abuse, even though the second-degree child abuse statute separately punishes omissions and reckless acts.

In addition, the court misconstrued this Court's holding from *People v Maynor*, 470 Mich 289; 683 NW2d 565 (2004). While the court cited the correct holding, it did not acknowledge

¹ The Order stated: (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 750.136b(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. Ms. Borom is appealing the Court of Appeals' decision on questions (1), (3) and (4).

that there was no failure to protect claim, but rather an affirmative act when the defendant left her children in a car on a hot day. The court similarly erred in relying on *People v Portellos*, 298 Mich App 431; 827 NW2d 725 (2012), because the defendant there also engaged in a series of affirmative acts. As such, both cases the court below relied on are inapplicable to the matter at hand. Even if Ms. Borom was present at the time Davion sustained any of his injuries, she did not engage in any affirmative acts intended to harm her son.

Second, the Court of Appeals misstated the holding of this Court in *People v Beardsley*, 150 Mich 206; 113 NW 1128 (1907) and its own holding in *People v Giddings*, 169 Mich App 631; 426 NW2d 732 (1988), by holding there is a broad common law duty of a parent to prevent injury to his or her child. In both of the cited cases, the parents were faced with the risk of immediate danger to their children. Ms. Borom was not aware of any immediate danger to her son. Any alleged failure to protect Davion was not the immediate and direct cause of death, or cause of injury to her son.

Third, the Court of Appeals erred in determining that aiding and abetting can be proven where the defendant failed to act according to a common law duty, but provided no other form of assistance to the perpetrator of the crime of first-degree child abuse. The court misapplied this Court's precedent from both *People v Burrel*, 253 Mich 321, 322; 235 NW 170 (1931) and *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982), which require active and overt participation in the offense to be an aidor and abettor.

In sum, the Court of Appeals' opinion is a rife with misapplied precedent and the faulty application of principles of statutory construction. This Court should grant Ms. Borom's application for leave to appeal.

STATEMENT OF FACTS

At the time of the incident giving rise to this appeal, defendant Shawquanda Borom, 21-years old, was living in Detroit with her family: her two younger brothers and mother, Evette Gaddes, a health care worker. (PE I 22-23, 29, 75).² Ms. Borom's only child, 16-month old Davion Fisher, also lived in the home (PE I 22-23). In addition, Ms. Borom's boyfriend, Daniel McCullough, 17-years old at the time, lived with the family (PE I 23-24). Mr. McCullough was not Davion's father (PE I 122-123, 139).

When Ms. Borom was 14, Child Protective Services removed her and her siblings from Ms. Gaddes' care (PE I 74, 116, 170). Ms. Borom was in many different foster homes (PE I 121). Ms. Borom has learning difficulties and attention deficient hyperactivity disorder (ADHD) (PE I 71-72). She did not finish high school and has trouble understanding big words (PE I 71-72).

On July 28, 2011, seven days after Ms. Borom turned 21, Davion died as a result of severe head injuries. Ms. Borom sometimes left Davion in the care Mr. McCullough, and Davion suffered three injuries while being supervised by Mr. McCullough. The last injury caused Davion's death.

The prosecution's theory in charging Ms. Borom with felony-murder is that "the child's health and safety is the Defendant's 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, serious injuries while the child was in Daniel McCullough's care during a 16-day period" (PE III 32-33).

² Transcript citations are as follows: PE I – 4/26/12 Preliminary Examination; PE II – 5/1/12 Preliminary Examination PE III – 5/11/12 Preliminary Examination; MH – 11/8/12 Motion Hearing.

The Injuries

Throughout the preliminary examination, the prosecution referred to three specific injuries Davion suffered while under Mr. McCullough's care.

The first incident occurred on July 9, 2011, when Davion fell off the side of the stairs inside the house leading to the basement, which did not have a railing or wall for safety, onto his shoulder, while Mr. McCullough stated he was cleaning and doing laundry (PE II 32-34; PE III 12). Mr. McCullough told the police he was alone with the child when this incident occurred (PE III 12).

Ms. Gaddes learned of the injuries when she picked Davion up and he yelled, and then she noticed his swollen shoulder (P I 27-28). Ms. Gaddes dropped Ms. Borom, Mr. McCullough and Davion at the Annapolis Hospital emergency room to be treated for the injuries to his humerus³ (PE I 27-31, 51, 72-73; PE II 32). The prosecutor dismissed the count of first-degree child abuse stemming from this incident (PE III 26-27), but stated this incident put Ms. Borom "on notice that either Daniel McCullough does not properly supervise this child or that he's being abusive to this child" (PE III 28).

Approximately two weeks later, the second incident occurred, which was a burn to Davion's head (P I 32, 36, 41). Mr. McCullough told the police he was alone with Davion at the time of the injury (P III 12-13). Mr. McCullough told police that he placed Davion in the bathtub and started to run water, then left the room to get a change of clothes for him (PE III 12). He heard Davion scream, and when he reached him, he saw that Davion had turned on the hot water and burned himself in the process (PE III 12-13).

³ The humerus is the "long bone of the upper part of the arm, extending from the shoulder to the elbow." *The American Heritage Dictionary of the English Language, New College Edition.*

Ms. Gaddes knew that Davion could turn the bathtub water on himself and she had witnessed him doing so (PE I 40-41, 68).

The medical examiner testified these were second and third-degree burns (PE II 11, 25). Because Davion had no burns on his hands or elsewhere besides the back of his head, the medical examiner opined that Davion was facing the floor with hot water applied to the back of his head (PE II 29-30).

After Ms. Borom told Ms. Gaddes that she was the one giving Davion a bath and he had turned the hot water on himself, Ms. Gaddes warned Ms. Borom that Davion would be taken by CPS for having the second injury, the burn to his head, if she took him to the hospital (P I 39-43, 74-75). Ms. Borom followed the advice of the mother, a health care worker, and treated Davion's burns with salve and bandages supplied by her mother, and scheduled a doctor's appointment for Davion (P I 42-43, 73-77).

The third and final incident in question occurred on July 26, 2012. Ms. Gaddes had dropped Ms. Borom off at her grandmother's house in Inkster around 1:00 p.m. that day (PE I 50-54). Mr. McCullough told police he was the sole caretaker for Davion at the time of the incident (PE III 13). According to Mr. McCullough, Davion fell off the porch and down several concrete steps as he pursued his ball, which had fallen onto the driveway (PE III 13).

That evening, Ms. Borom called Ms. Gaddes and told her that Davion would not wake up (PE I 44). Ms. Gaddes spoke with Mr. McCullough, who told Ms. Gaddes that Davion had fallen while the two were outside playing (PE I 82-83). Ms. Gaddes told Mr. McCullough twice, on phone calls 15 minutes apart, to call 911 (PE I 44-47, 83-84). Ms. Gaddes did not call 911 herself (P I 83-84). Ms. Borom called 911 and an ambulance arrived shortly thereafter (P I 8 (911 call), 14). EMS took Davion to Children's Hospital (PE I 18). He died two days later (PE I 48-49).

The medical examiner opined that the injuries to Davion's brain were not the result of a short fall from the front steps, but more likely the result of being thrown against a hard object or being shaken (PE II 15-18). The cause of death was blunt force trauma to the head and the manner of death was a homicide (PE II 23).

Conflicting Statements

There is no dispute that Ms. Borom made conflicting statements regarding who was with Davion at the time of each incident.

As to the first incident (the broken humerus), Ms. Borom initially told a CPS psychiatrist that she was home, but not in the basement; it was later that she revealed that Mr. McCullough was alone with Davion (PE I 164-165).

As to the second incident, Ms. Borom told her mother and a CPS psychiatrist that she was home (PE I 32-42, 165, 167), as well as Detroit Police Officer Don Dent (PE I 139).

Ms. Borom made several statements regarding the third incident. She denied knowledge of any incident that led to the head trauma (PE II 64). She also stated she was with Davion and he followed her up the porch steps, and that she was in the kitchen when she heard him scream outside (PE I 8 (911 call), 14-16, 164, 168, 136). Ms. Borom did not tell the 911 operator about Davion's injured humerus or burns from the bathtub water (PE I 8), nor did she tell the paramedic who arrived at the house that Davion had fallen (PE I 9).

Mr. McCullough told Detective Tim Larion that he was alone with Davion for all three incidents (PE III 12-13). During a reenactment of all three incidents, Mr. McCullough also admitted to Wayne County Medical Examiner Patricia Tackitt that he was alone with Davion for all three incidents (PE III 25-26).

Procedural History

On November 16, 2012, after written and oral arguments, the trial court denied defense counsel's motion to quash the bindover.

On January 31, 2013, this Court denied defense counsel's application for leave to appeal the denial of the motion to quash.

On May 29, 2013, the Michigan Supreme Court remanded the 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 750.136b(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.

On December 19, 2013, the Court of Appeals issued its opinion, affirming the trial court's decision to bind over Ms. Borom for trial. The Court held that:

(1) a parent's failure to act to prevent harm to his or her child, with knowledge that serious physical or mental harm will result, satisfies the requirements of the first-degree child abuse statute, which does not require an affirmative act; (2) the failure to prevent a person who may be dangerous to the child from having contact with the child does not violate the first-degree child abuse statute; (3) there is a common law duty of a parent to prevent harm to his or her child; and (4) aiding and abetting first-degree child abuse may be proven where a parent breaches his or her duty to prevent injury to his or her child with knowledge that the child will be seriously harmed [*People v Borom*, unpublished opinion per curiam of the Court of Appeals, decided December 19, 2013 (Docket No. 313750)].

Ms. Borom now seeks leave to appeal the decision of the Court of Appeals.

- I. A PARENT'S FAILURE TO ACT TO PREVENT HARM TO HIS OR HER CHILD DOES NOT SATISFY THE REQUIREMENT FOR A KNOWING OR INTENTIONAL ACT UNDER THE FIRST-DEGREE CHILD ABUSE STATUTE, MCL 750.136B(2), IN LIGHT OF MCL 750.136B(3) THAT SEPARATELY PUNISHES OMISSIONS AND RECKLESS CONDUCT AS SECOND-DEGREE CHILD-ABUSE; IN ADDITION, THE COURT OF APPEALS' DECISION DOES NOT COMPORT WITH THIS COURT'S DECISION IN *PEOPLE V MAYNOR* THAT TO BE GUILTY OF FIRST-DEGREE CHILD ABUSE THE DEFENDANT MUST INTEND TO COMMIT AN ACT AND INTEND FOR, OR KNOW THAT, HARM WILL RESULT FROM THAT ACT.

Standard of Review

The bindover decision of a magistrate is reviewed for an abuse of discretion. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

The review of a circuit court analysis of a bindover process is de novo. *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000).

The interpretation of a statute is reviewed de novo. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

Discussion

There is no dispute that Davion was injured three times in a 16 day period. The two counts of first-degree child abuse were predicated on the burn to his head and the blunt force trauma that led to his death. Only the final incident involving the blunt force trauma served as the underlying predicate for the felony murder charge.

However, charging Ms. Borom with felony-murder and first-degree child abuse is unwarranted and an overreach, as the prosecutor admitted during the preliminary examination. "I don't think Wayne County has ever charged a situation like this before and I don't think it's on the books from any county in the state" (PE III 44).

Statutory Language and Construction

The Legislature differentiated between first- degree child abuse and second-degree child abuse as follows:

(2) 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. . . .

(3) A person is guilty of child abuse in the second degree if any of the following apply:

(a) The person's ***omission*** causes serious physical harm or serious mental harm to a child or if the person's ***reckless act*** causes serious physical harm or serious mental harm to a child.

(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

MCL 750.136b (emphasis added).⁴

Because the second-degree child abuse statute punishes omissions and reckless acts, a parent's failure to act to prevent harm to his or her child cannot satisfy the knowing or intelligent requirement of first-degree child abuse, under well-known principles of statutory interpretation.⁵

The court's goal "in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.'" *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Further "[j]udicial

⁴ Second-degree child abuse *cannot* be used as the underlying felony for a felony-murder charge. MCL 750.316(1).

⁵ Ms. Borom in no way concedes she is guilty of second-degree child abuse, or of any criminal activity, and nothing in this brief is intended to act as such a concession.

construction is not permitted.” *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

In reading the language of a statute to determine legislative intent, a court must consider several important principles of statutory construction.

First, absent a definition included in the statute, “words and phrases shall be construed and understood according to the common and approved usage of the language.” MCL 8.3a.

Second, words cannot “be ignored, treated as surplusage, or rendered nugatory,” *Robertson, supra*, at 748, and “effect should be given to every phrase, clause, and word in the statute.” *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

Third, “the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. In defining particular words within a statute, we must consider both the plain meaning of the crucial word or phrase and its placement and purpose in the statutory scheme.” *Id.*

While the rules of statutory construction are many, there is one premise that underlies all of them: “It is the role of the judiciary to interpret, not write, the law.” *Schaefer, supra*, at 430.

Application: People v Maynor and People v Portellos

This Court must first look to the plain language of MCL 750.136b to determine that any alleged failure to act on behalf of Ms. Borom to prevent harm to Davion does not satisfy the “knowing” or “intentional” requirement of a first-degree child abuse charge.

This Court has already engaged in a statutory review of MCL 750.136b(2) in *People v Maynor*, 470 Mich 289; 683 NW2d 565 (2004).

In *Maynor*, the defendant left her two children—ages three and ten months—in her car while she went to a beauty salon. *Id.* at 291. The defendant belted the children in the car,

engaged the child-safety locks, and parked the car in “an unshaded, asphalt parking lot.” *Id.* at 291-292. The temperature was in the eighties. *Id.* at 291. The defendant was in the salon for over three hours; she had her hair done, she had a massage, she tried on a dress and she bought a snack. *Id.* at 292. The defendant did not tell anyone about her children, and never left to check on them. *Id.* Upon leaving the salon, the defendant found her children dead; they had died of heat exposure. *Id.* The defendant then “drove around for several hours before driving to a hospital emergency room.” *Id.*

The prosecutor charged the defendant with “two counts of felony murder, with first-degree child abuse as the underlying felony.” *Id.* at 293. The district court found there was insufficient evidence to bind the defendant over on felony murder, and instead bound her over on two counts of involuntary manslaughter. *Id.* The circuit court reversed, and reinstated the felony murder charges. *Id.* The defendant filed an interlocutory appeal in the Court of Appeals, and the court affirmed the bind over on felony murder. *Id.* at 294. This Court granted the prosecution’s application for leave to appeal, “limited to the issue whether it is sufficient to instruct the jury using the statutory language regarding intent . . . or whether it is also necessary to instruct the jury regarding ‘specific intent.’” *Id.*, quoting *People v Maynor*, 468 Mich 946 (2003) (order granting leave to appeal).

This Court determined that the plain language of the first-degree child abuse statute “requires more from defendant than an intent to commit an act.” *Id.* at 295. This Court held that “pursuant to the current language of the statute, first-degree child abuse requires 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 the defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act.” *Id.* at 291.

The prosecution was required to “prove that by leaving her children in the car, the defendant *intended* to cause serious physical or mental harm to the children or that she *knew* that serious mental or physical harm would be caused by leaving them in the car.” *Id.* (emphasis added). This Court affirmed the decision of the Court of Appeals, and remanded to the trial court to proceed to trial on charges of felony murder. *Id.* at 297.⁶

This Court was correct in its interpretation of the first-degree child abuse statute and that the defendant engaged in a series of affirmative acts: Ms. Maynor belted and locked her children in a car; Ms. Maynor parked the car in an unshaded, asphalt parking lot; Ms. Maynor went to a beauty salon, knowing her children were locked in a car and it was hot outside; Ms. Maynor stayed in the salon for over three hours, knowing her children were locked in a car and it was hot outside; Ms. Maynor got a massage, tried on clothes, and ate a snack, knowing her children were locked in car and it was hot outside; Ms. Maynor never checked on her children in three-and-a-half hours, knowing her children were locked in a car and it was hot outside. It was appropriate for Ms. Maynor to face trial on felony murder, with the predicate felony of first-degree child abuse, because of her affirmative acts.

Similarly, the Court of Appeals’ reliance on its opinion in *People v Portellos*, 298 Mich App 431; 827 NW2d 725 (2012) is also misplaced. The defendant was convicted after a jury trial of first-degree child abuse and second-degree murder, as a result of the death of her newborn child. *Id.* at 441.⁷ On appeal, the defendant claimed there was insufficient evidence to support the first-degree child abuse conviction. *Id.* at 444. In affirming her convictions, the Court of Appeals listed a series of affirmative acts taken by the defendant, which led to the death of her child: she

⁶ Ms. Maynor pled guilty to two counts of second-degree murder and is currently incarcerated in the Michigan Department of Corrections.

⁷ The defendant in *Portellos* was originally charged with first-degree pre-meditated murder and first-degree felony murder with first-degree child abuse as the predicate felony. *Portellos*, 298 Mich at 440-441.

knew she was pregnant for weeks; she hid her pregnancy; she decided to give birth to the baby at her home, alone; after determining the baby was breech, she called her coworkers and boss to explain her absence from work, but did not call for medical help; she wrapped her newborn baby tightly in a towel; and finally, she placed the newborn baby in a garbage bag. *Id.* at 444-445.

The Court of Appeals reasoned that “[a] reasonable juror could infer from these facts that Portellos knew that the natural and probable consequence of those *actions* included death or serious injury to Baby Portellos” and that “sufficient evidence supports Portellos’s convictions of first-degree child abuse and second-degree murder because a reasonable juror could find that Portellos intentionally took actions that caused the baby’s death and *knowingly took those actions* with a wanton disregard of the risks.” *Id.* at 445-446 (emphasis added). It was appropriate that the court affirmed Ms. Portellos’ convictions, based on affirmative acts.

Here, what the Court of Appeals failed to recognize is that the holdings in *Maynor* and *Portellos* did not turn on the defendants’ failure to protect their children, but rather on their multiple affirmative acts. The facts of both cases are in stark contrast to the facts of the present matter.

Ms. Borom was not present at the time of Davion’s fatal injury. She left Davion in the care of Mr. McCullough. Using the language from *Maynor*, the prosecution would have to prove that by leaving Davion under Mr. McCullough’s care, Ms. Borom *intended* to cause serious physical or mental harm to Davion, or that Ms. Borom *knew* that serious mental or physical harm would be caused by leaving Davion under Mr. McCullough’s care. Probable cause to bind Ms. Borom over on felony murder does not exist because there was no affirmative act to support probable cause for first-degree child abuse.

Similarly, Ms. Borom was not present at the time Davion suffered burns in the bathtub. Even if, contrary to all evidence presented at the preliminary examination, Ms. Borom was present when Davion was burned (which Ms. Borom does not concede), the prosecution would still have to prove that by failing to supervise Davion for the entire time he was in the bathtub, Ms. Borom *intended* to cause serious physical or mental harm to Davion, or that Ms. Borom *knew* that serious mental or physical harm would be caused by failing to continuously supervise a 16-month old child.

Ms. Borom cannot be found guilty of first-degree child abuse in either scenario, let alone charged with first-degree child abuse and felony murder. This is not a question of fact for the jury. The plain meaning of the statute does not allow for a failure to protect to be included in the definition of “knowingly” or “intentionally.” At best, Ms. Borom’s failures were reckless, which is covered under the second-degree child abuse statute. Ms. Borom’s failures cannot be compared to the series of intentional, knowing, and affirmative acts taken by the defendants in *Maynor* and *Portellos*, where first-degree child abuse charges were appropriate.

Interplay with the second-degree child abuse statute

In addition, the above analysis assumes the reading of MCL 750.136b(2) in isolation. This is not proper. *Jackson, supra*, at 791.

Section three of the same statute provides the definition of second-degree child abuse. Specifically, MCL 750.136b(3)(a) enumerates the exact conduct the prosecutor seeks to punish here as first-degree child abuse. “(3) A person is guilty of child abuse in the second degree if . . . (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.”

The Legislature's inclusion of "omission" and "reckless act" as conduct punishable as second-degree child abuse cannot be ignored. See *Robertson, supra*, at 748. If the Legislature had intended for the failure to protect one's child to be punishable as first-degree child abuse, the Legislature could have included the language from MCL 750.136b(3)(a) under the first-degree child abuse umbrella. Because the Legislature did not do this, and specifically defined the conduct involved in this matter (no matter which factual scenario is adopted), its intention was plain and this Court can engage in no further construction. See *Robertson, supra*, at 748.

This Court should presume, following all rules of statutory construction, that the Legislature "intended the meaning it has plainly expressed." *Robertson, supra*, at 748; *Hardy, supra*. The Legislature intended for graduated levels of culpability based on two primary factors: (1) the intent of the person with custody over the child; and (2) the extent of the injuries suffered by the child. Based on the plain meaning of the words in the statute, and the statute as a whole, a parent's failure to act to prevent harm to his or her child does not satisfy the knowing or intentional act under MCL 750.136b(2).

Other Jurisdictions

Most states have penal statutes that address child neglect and abandonment.⁸ These statutes are part of legislative schemes that separate intentional and neglectful conduct, with penalties that differ widely between the two. The distinction is clear and unambiguous:

Child abuse statutes generally appear in two forms: commission statutes, which are used to convict those who actually inflict abuse (active abusers), and omission statutes, which criminalize the passive conduct of those who expose a child to a risk of maltreatment or fail to protect or care for a child when they have an affirmative duty to do

⁸ See Nat'l Clearinghouse on Child Abuse & Neglect Info., Child Abuse and Neglect State Statutes Elements, *available at* <http://www.hawaii.edu/hivandaids/Criminal%20Child%20Abuse,%20Neglect%20and%20Abandonment.pdf>. Michigan's statute appears to have been inadvertently omitted.

so (passive perpetrators) [Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 Hastings Women's LJ 67-68 (1995).]

Michigan's statutory scheme fits this common pattern. MCL 750.123(b)(3) criminalizes *omissions* and *recklessness* that cause serious harm to the child. MCL 750.136(b)(2) criminalizes the actual, intentional infliction of abuse on a child.

The Supreme Court of Wisconsin faced the parallel situation in *State v Rundle* and prevented the prosecution from undermining legislative intent by blurring these two categories. 500 NW2d 916 (Wis 1993). The Wisconsin statutes 948.03(2) and 948.03(2) proscribed several types of intentional or reckless conduct while 948.03(4)(a) proscribed the failure to act by those responsible for the child's welfare. In *Rundle*, the prosecution charged a parent who had failed to protect a child from its mother with aiding and abetting intentional abuse. *Rundle, supra*, at 918. The court reversed the trial court's conviction, noting that "[t]he obvious purpose" of the two separate subsections was "to deal separately with intentional and reckless acts which cause bodily harm or great bodily harm and the failure to act to prevent another from inflicting such harm." *Id.* at 921-922. The court pointed out that the prosecution's interpretation made the failure to act statute "redundant and meaningless." *Id.* at 923.⁹

The court in *Rundle* interpreted the interaction of the state's omnibus aiding and abetting statute with its child abuse statute. This closely resembles the current matter, because Ms. Borom

⁹ Oddly, the prosecutor in its pleadings relies on two Wisconsin cases in support of its position. The first, *State v Williquette*, 370 NW2d 282 (Wis Ct App 1986), interprets a statute no longer on the books. Indeed, the Supreme Court in *Rundle* specifically disavowed the continued relevance of *Williquette* on just the question presently before the Court due to the statute's repeal. *Rundle, supra*, at 997. The second case cited, *State v Long*, 1996 WL 593547, No. 03-3253-CR (Wis Ct App 1996), is an unpublished decision from the Wisconsin Court of Appeals and has no precedential value, even in Wisconsin. However, the holding is compatible with *Rundle* and, indeed, cites *Rundle* several times for authority. *See, e.g., id.* at *6.

is charged with first-degree child abuse, and the crux of the prosecution's argument is that Ms. Borom "took steps to aid and abet McCullough in his abuse of her son." While none of the Wisconsin cases are binding on this Court, the *Rundle* decision is persuasive authority that courts should not subvert legislative intent by blurring together two parts of a statutory scheme.

Similarly, in *State v Cabezuela*, 265 P3d 705, 711 (2011), the New Mexico Supreme Court also rejected a prosecutorial attempt to blur the distinction between statutes that forbid the commission of child abuse and those that forbid the failure to stop it. The jury convicted a woman of child abuse resulting in the death of a child, but the New Mexico Supreme Court vacated the conviction, finding that the jury instructions mistakenly folded in both intentional and negligent conduct. *Id.* at 713. The court looked at the New Mexico statutes that criminalized both negligent and intentional conduct and "conclude[d] that the Legislature did not intend to lump within intentional child abuse other forms of abuse committed with a lesser degree of intent, specifically failure to act to prevent another from abusing the victim child." *Id.* at 712 (internal quotations removed). Crucial to the court's reasoning was that, as in Michigan, the legislature's different statute that covered negligent rather than intentional conduct carried a more lenient penalty. *Id.* at 712.

In another similar case in South Carolina, a man who had failed to intervene when his girlfriend killed her child was acquitted of child abuse but convicted of aiding and abetting child abuse. *State v Lewis*, 743 SE2d 124, 128 (SC Ct App 2013). The South Carolina Court of Appeals overturned the conviction, finding that "an overt act is required to be held liable for aiding and abetting, which necessarily excludes the possibility of being held liable for a failure to act." *Id.* at 130. Once again, a court was preventing the prosecution from finding a way to charge a failure to act as intentional child abuse.

In sum, Ms. Borom cannot be held criminally liable for first-degree child abuse or felony murder under Michigan law. The Legislature has addressed an omission as it relates to child abuse and categorizes it as second-degree child abuse. The Legislature explicitly enumerated the felonies required under the felony murder statute and second-degree child abuse is not listed. As such, the charges against Ms. Borom must be dismissed.

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II. THE COURT OF APPEALS ERRED IN HOLDING THERE IS A BROAD COMMON LAW DUTY OF A PARENT TO PREVENT INJURY HIS OR HER CHILD; RATHER, IT IS A LIMITED DUTY TO PREVENT INJURY ONLY WHEN THE PARENT IS AWARE OF IMMEDIATE DANGER TO THE CHILD.

In Michigan, there is a limited common law duty of a parent to prevent injury to his or her child in certain, narrow situations. However, the duty has not been applied in the criminal context beyond the recognition of a parent's duty to attempt to rescue or seek medical attention for a child who is in immediate danger. Moreover, Michigan's child abuse statutes operate to prevent expansion of the duty.

In 1907, our Supreme Court recognized the existence of a common law duty of parents to rescue their children in peril:

If a person who sustains to another the legal relation of protector, as husband to wife, [or] parent to child ... knowing such person to be in peril of life, willfully or negligently fails to make such reasonable and proper efforts to rescue him as he might have done without jeopardizing his own life or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies.

People v Beardsley, 150 Mich 206, 209; 113 NW 1128 (1907) (citation omitted).

The court acknowledged that "literature upon the subject is quite meagre and the cases few," but held a person may be criminally liable for omission of a duty when there is a contractual or legal relationship between the parties. *Id.*

Nevertheless, the *Beardsley* court was careful to note that the duty was not broadly applied. Rather, "the omission to perform the duty must be the *immediate* and *direct* cause of death" *Id.* (emphasis added). Thus, the common law duty does not extend beyond a situation where the child is in immediate danger, and the failure to act directly causes the death. *See, e.g., People v Gilbert*, unpublished opinion per curiam of the Court of Appeals, decided April 4, 2000

(Docket No. 212118) (applying the *Beardsley* rule to a father's failure to rescue his daughter from a burning car).

Moreover, while the duty may encompass the failure to seek medical attention, the common law duty is breached only in emergency situations, when the failure directly causes the death, and when such a failure is accompanied by a wicked intent. *See Beardsley, supra*, at 211-13 (“if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter.”)

The Court of Appeals' reliance on *People v Giddings*, 169 Mich App 631; 426 NW2d 732 (1988) is misplaced. First, the Court misstated the holding of *Giddings* by implying that there was no immediate injury present in *Giddings*, but that the parents “had a legal duty to their child and their failure to provide nourishment caused the child's death.” *People v Borom*, unpublished opinion per curiam of the Court of Appeals, decided December 19, 2013 (Docket No. 313750). However, in *Giddings*, in affirming the bindover of the defendant on involuntary manslaughter charges, the court found there was a “legal duty . . . to act on behalf of the child,” but that “the testimony describing the child's emaciated appearance, as well as the doctors' testimony that anyone seeing the child should have realized that the child's condition was not normal, was sufficient to support an inference that defendants were grossly negligent.” *Giddings, supra*, at 635. As such, there was the risk of immediate injury—starvation—that should have been apparent to the defendant parents. *Giddings* does not stand for the proposition the Court of Appeals asserted in its opinion here.

Furthermore, as early as 1970, the legal duty parents owed to their children in the criminal context was grounded in statute. *See People v Ogg*, 26 Mich App 372, 381; 182 NW2d 570 (1970) (“The duty of a parent to provide necessary care for a child's health and well-being,

which defendant was lawfully obliged to perform, the negligent omission in the performance of which properly gives rise to a charge of involuntary manslaughter...is set forth in MCLA § 712A.2....”)

Such is the case here. Michigan’s child abuse statute creates a standard of care for parents and caregivers, and imposes liability for certain actions and omissions well beyond the common law duty noted in *Beardsley*. Thus, common law duties do not apply to this case. “Where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.” *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987).

Finally, the common law duty first articulated in *Beardsley* does not apply to the facts of this case. Ms. Borom accompanied Davion to the emergency room for treatment for his injuries to his humerus (PE I 27-31, 51; PE II 32). She followed the advice of the mother, a medical worker, and treated Davion’s burns with salve and bandages (P I 42-43, 73-77). Neither the burns nor the humerus injury were life threatening (P II 42). Finally, Ms. Borom phoned her mother, and eventually called 911, when Davion suffered head injuries and would not wake up (P I 8 (911 call), 14). Any failure to perform her common law duty was not the *immediate* and *direct* cause of death. The immediate and direct cause of Davion’s death was his head injury, not Ms. Borom’s failure to immediately call 911 or remove Davion from the home. Furthermore, “wicked intent” cannot be inferred from her choice to phone her mother before calling paramedics. The immediacy, direct causation, and intent requirements from *Beardsley* do not apply to the facts of this case.

III. UNDER A COMMON LAW DUTY TO PREVENT INJURY TO ONE'S CHILD, AIDING AND ABETTING UNDER MCL 767.39 CANNOT 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.

MCL 767.39 is the aiding and abetting statute in Michigan and provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Violation of MCL 767.39 is not a “separate substantive offense,” but rather a “‘theory of prosecution’ that permits the imposition of vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999).

Our Supreme Court noted three required elements a prosecutor must prove beyond a reasonable doubt to sustain a conviction under and aiding and abetting theory:

(1) The crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) 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.

Id., quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). In addition, the statute “neither expressly nor impliedly limits the persons or crimes encompassed by its terms. The language of the statute applies to ‘every person’ who commits ‘an offense.’” *People v Moore*, 470 Mich 56, 68; 679 NW2d 41 (2004).

*The Second Element*¹⁰

Our Supreme Court interpreted the second element in *Moore*: “[t]he phrase ‘aids or abets’ is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *Id.* at 63.

The court was explicit in further defining the actions that constitute aiding and abetting:

Aiding and abetting means to assist the perpetrator of a crime. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by his conduct makes clear that he is ready to assist the perpetrator if such assistance is needed.

Id., quoting 21 Am Jur 2d, Criminal Law, § 206, p. 273.

The prosecutor here must demonstrate that Ms. Borom “specifically aided the commission of” first-degree child abuse. *Moore, supra*, at 70. “[T]he amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant ‘performed acts or gave encouragement that assisted.’” *Id.*, quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (internal citations omitted).

Even if Ms. Borom had a duty at common law to prevent injury to Davion, the failure to act according to this duty does not meet the requirements of being an aider and abettor. This Court noted in *Moore* that there must be “active encouragement” by “word or deed . . . or . . . conduct.” *Moore, supra*, at 63.

¹⁰ Based on the language of the order, this Court can assume, for the purpose of this argument alone, that Mr. McCullough committed a crime. The order specifically states “...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.” While it does not indicate what “crime,” was committed, because Ms. Borom and Mr. McCullough were charged with first-degree child abuse, it is assumed the “crime” referred to in the order is first-degree child abuse.

Over 80 years¹¹ ago, this Court recognized that to be found guilty as an aider and abettor, defendants must act. In *People v Burrel*, the defendant had driven his friend and an underage girl to a deserted road, and parked the car while his friend had sex with the girl. 253 Mich 321, 322; 235 NW 170 (1931). Even though the defendant was present during the commission of a statutory rape and was charged as an aider and abettor, this Court reasoned there was no record evidence that he knew the crime was occurring, or intended the crime to occur, and reversed his convictions. *Id.* at 323. This Court held that “[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abetter [sic] or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent.” *Id.*, quoting 1 Cyc. Crim. Law (Brill), 233.

Similarly, “[s]ome form of *active, overt* participation toward the accomplishment of the offense is required, as is a completed crime and a guilty principal.” *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982) (emphasis added). The *Carter* court, in distinguish aiding and abetting from conspiracy, quoted the United States Supreme Court: “[a]iding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he *consciously* shares in a criminal act, regardless of the existence of a conspiracy.” *Id.* at 580-581, quoting *Pereira v United States*, 347 US 1, 11; 74 S Ct 358; 98 L Ed 435 (1954) (emphasis added).

Under any view of the facts, Ms. Borom did not provide the type of active encouragement required under MCL 767.39 and this Court’s long-standing precedent to be found liable as an aider and abettor to first-degree child abuse.

¹¹ “Michigan’s aiding and abetting statute has been in force and substantively unchanged since the mid-1800s.” *People v Robinson*, 475 Mich 1, 7-8; 715 NW2d 44 (2006).

Even if Ms. Borom was present at home during the injuries to Davion, her mere presence is not enough. *Burrell, supra*, at 323 Even if Ms. Borom knew “that an offense [was] about to be committed or [was] being committed,” that is not enough to be guilty as an aider or abettor. *Id.* at 323. Nor is “mental approval . . . passive acquiescence or consent.” *Id.*

Ms. Borom would have had to engage in “active, overt participation” toward the accomplishment of Mr. McCullough committing first-degree child abuse to be found liable as an aider or abettor. *Carter, supra*, at 580. The facts simply are not present to sustain such a theory.

The Third Element

This Court interpreted the third element of aiding and abetting in *People v Robinson, supra*:

A defendant is criminally liable for offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. [T]he prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Robinson, supra, at 15.

The question presented by this Court is if the third element should be expanded to include the failure to act according to a legal duty as a basis for aiding and abetting, regardless of intent. This expansion runs contrary to well-over a century’s precedent regarding the requirement of intent or knowledge on behalf of the aider and abettor. The Court of Appeals erred in holding that “[t]he second and third elements are satisfied if the defendant breaches his or her duty to prevent harm to the child by leaving the child with the person with knowledge that the person

intends to commit first-degree child abuse.” *People v Borom*, unpublished opinion per curiam of the Court of Appeals, decided December 19, 2013 (Docket No. 313750).

In *People v Nix*, this Court specifically addressed the interplay between a legal duty, the failure to act, and the aiding and abetting statute. 453 Mich 619; 556 NW2d 866 (1996). There, the defendant was charged with felony-murder, with the underlying felony being kidnapping, and first-degree premeditated murder. *Id.* at 621. The defendant’s boyfriend kidnapped the decedent and locked her in a trunk. *Id.* at 621-622. While the focus of the appeal was a Double Jeopardy claim, the dissent dedicated a portion of its opinion to analyzing one’s legal duty to act. *Id.* at 637-641. The majority responded:

The prosecution’s case . . . rested entirely on the allegation that defendant acquired knowledge that the victim was confined in the trunk and became complicit in the criminal endeavor when she failed to act to free or otherwise aid the victim. And if guilt can accompany a failure to act—that is, guilt by omission—then, obviously, it can only be so because the guilty party had an obligation to act in some way, was legally compelled to act in some way, had a duty to act in some way.

Id. at 627.

As such, even if Ms. Borom had a legal duty to prevent injury to Davion, that duty does not necessarily translate into a duty to act, when it was not clear she was obligated or compelled to do so.

The prosecutor’s case rests on the assumption that Ms. Borom knew, after the first two injuries to Davion, that Mr. McCullough may be dangerous (PE III 28). However, this is a faulty assumption. Davion went to the hospital after the humerus injury, and it was in the process of healing (PE I 27-31). The medical examiner admitted kids have accidents like this (PE II 35). At this point, Ms. Borom had fulfilled any common law duty to prevent injury to Davion, as she obtained care for him at the hospital and his injury was healing. She had no duty to act further.

In addition, even after the second incident, Ms. Borom had still fulfilled any common law duty to prevent injury to Davion. Ms. Borom listened to the advice of her mother, a medical worker, applied treatment at home, and scheduled a doctor's appointment (PE I 42-43, 73-77). The medical examiner testified that the burns were in the process of healing (P II 42). And, importantly, Davion could turn the water on by himself (PE I 40-41, 68).

Ms. Borom did not have further "obligation to act in some way," nor was she "legally compelled to act" further. *Nix, supra*, at 627. There was no indication that Ms. Borom knew, at that point, that Mr. McCullough may have been engaging in the first-degree child abuse of Davion. Children have accidents, and this child specifically could turn on the water himself. Ms. Borom treated his injuries. She had no further duty to act.

In sum, because Ms. Borom did not actively encourage the commission of first-degree child abuse, and because any legal duty to prevent injury to one's child cannot translate into an affirmative duty to act, aiding and abetting cannot be proven in this case.



SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse the trial court's decision to deny her motion to quash the bindover, vacate all charges against her, and release her.

Respectfully submitted,

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