

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF Michigan
Plaintiff-Appellee,

MSC No: 150857

-vs-

COA No:
314579

Ingham County Circuit Court
No: 11-0565FC

YUMAR ANTONIO BURKS
Defendant-Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

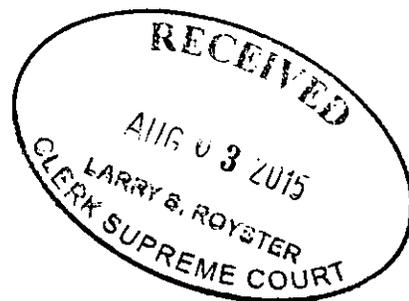
ON APPLICATION FOR LEAVE

PROOF OF SERVICE

Daniel J. Rust
P.O. Box 40089
Redford, Michigan 48240

Nicole Matusko, Assistant Prosecuting Attorney

Stuart J. Dunnings, III
Prosecuting Attorney
303 West Kalamazoo Street
Lansing, Michigan 48933



STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
PLAINTIFF-APPELLEE,

Michigan Supreme
Court No: 150857

-vs-

Court of Appeals No:
314579

YUMAR ANTONIO BURKS
DEFENDANT-APPELLANT.

_____/

INGHAM COUNTY CIRCUIT COURT NO: 11-0565FC

_____/

STUART DUNNINGS, III
INGHAM COUNTY PROSECUTING ATTORNEY
ATTORNEY FOR PLAINTIFF-APPELLANT

_____/

DANIEL J. RUST (P32856)
ATTORNEY FOR DEFENDANT-APPELLEE

_____/

APPELLANT'S SUPPLEMENTAL BRIEF
ON APPLICATION FOR LEAVE

DANIEL J. RUST
P.O. BOX 40089
REDFORD, MICHIGAN 48240
(313) 837-7734

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**STATEMENT OF JURISDICTION
AND RELIEF SOUGHT**

Following Appellant's jury trial conviction in the Ingham County Circuit Court on September 25, 2012, and subsequent sentencing on October 24, 2012, for felony murder and first degree child abuse, Appellant's convictions were affirmed by the Michigan Court of Appeals in a published split Opinion on December 2, 2014.

Appellant filed an Application for Leave with this Court on January 16, 2015.

On June 5, 2015, this Court, by Order, directed the parties to file supplemental briefs addressing whether the trial court erred in declining to instruct the jury on second degree child abuse as requested by defense.

The Application should be granted or the Court of Appeals decision should be reversed and the dissent position be adopted.

STATEMENT OF QUESTIONS PRESENTED

- I. WAS THE FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY AS TO SECOND DEGREE CHILD ABUSE HARMLESS ERROR?**

Court of Appeals Answer: Yes

People Answer: Yes

Defendant Answers: No

STATEMENT OF FACTS

Following a jury trial, Judge Clinton Canady, III, presiding, Appellant Yumar Burks was convicted of felony murder, MCL 750.316 and first degree child abuse, MCL 750.136b(2), in the death of his six-month old son, Antonio Yumar Burks..

He was sentenced to the mandatory term of life without parole and 50-180 months respectively.

At trial, the evidence presented to the jury revealed Defendant and Antonio's mother, Sheretta Lee, had lived at an apartment in Lansing with two other children. She was working; defendant was not. The other two children were at day care, while defendant would watch Antonio.

She had recalled an incident a few weeks previously when defendant, who was driving her to work with her two children, was frustrated because he had been unable to find a job and provide for the family, and had threatened to drive off a cliff. After she was dropped off at work, she told her supervisor, who called the police, who checked on her children. Everything was fine. (III¹, 112-116).

While she never saw defendant slap or punch Antonio, when Antonio was three months old, he began giving Antonio hickies on his cheeks and she told him to stop. It appeared to her that many times defendant seemed frustrated in dealing with Antonio, so she would have a friend watch the child while defendant took a break. (III, 116-125).

¹ Transcript references are as follows: **Volume I**, 09/17/12; **II**, 09/18/12; **III**, 09/20/12; **IV**, 09/21/12; **V**, 09/24/12; **VI**, 09/25/12; **ST**, Sentencing, 10/24/12.

On March 24, 2011, when she woke up in the morning, Antonio was crying. She made breakfast for the family, described the child's routine (he would generally sleep for few hours and they would take turns taking care of him during the night).

While defendant was upset and had punched holes in a wall because he missed taking a test for a job, he had calmed down before she left for work that day, around 2:00pm, dropping her two children off at daycare.

At 11:00pm, she picked up her children from her mother's house, arriving home around midnight. Her children were sleeping in the car; she and defendant put the children to bed in the same bedroom she and defendant used. When she was getting ready for bed, she saw Antonio lying on his back on a topleless mattress, with two covers up to his lip. The room was dark, with just the light of a television. Defendant told her not to wake Antonio. (III, 125-136).

She did not think anything was unusual. She changed and went to bed. Defendant told her he was going to a friend's house to finish a game. This was around 12:35am.

When she woke up around 3:00am, she saw defendant pacing in the room. She told him to stop and he left the room. She went back to sleep, waking up around 8:00am.

She realized Antonio was not crying. She had heard the other children downstairs and thought defendant had Antonio, so she went back to sleep, waking around 10:00am. She did not hear Antonio, and when she looked, she saw he was lying on his stomach and the blankets were off. He had not developed to the point where he could roll himself over in the night. She saw defendant looking out a window. When she touched Antonio. He was cold, very cold. (III, 136-144).

She went into shock, thinking Antonio passed away. She was trembling; defendant turned the child over, picked him up and she saw bruises. Defendant started screaming, told her

to call 911 and helped her to do so. She relayed instructions to defendant on how to perform CPR² on a baby by using only two fingers.

Although she told defendant to stop, he continued to use adult CPR on Antonio. She was still on the phone when the police arrived. Defendant had ripped down the blinds and put holes in the wall while the officers performed CPR. She did not try to calm him down. Antonio was taken to the hospital. (III, 147-157).

When she got to the hospital, she saw defendant had been restrained. After she left the hospital, she was interviewed at the police station and then went to her mother's house because she did not want to go back home. She met defendant at her mother's house; he was screaming loudly and crying, but calmed down. Defendant never told her what happened to Antonio. (III, 157-165).

A second police interview was conducted a few months later. In this interview, she told the officers she had rubbed Antonio's back and he appeared fine. She did not recall telling the officers Antonio had fallen out of bed, that he was not feeling well and had been throwing up that day, or that she had called defendant three times during the time she was at work. She denied telling the officers at the scene that Antonio was breathing at 1:00am.

She had known this interview had been recorded and admitted she listened to it with the prosecutor prior to her testimony. She admitted she had been arrested on child abuse charges after the second interview. (III, 165-197).

Mr. Travis Parris, defendant's friend and neighbor, had testified defendant had come over to play video games at around 5:00pm that day. A few hours later, he told defendant to go home and check on Antonio. He called defendant several times after he left, but defendant did not answer. Defendant later returned around midnight, but defendant did not say anything or play

² Cardio-Pulmonary Resuscitation

the game, but just sat there on the couch, leaving when he thought defendant's wife came home. The next time he saw defendant was when he picked him the next day at a gas station. (III, 58-69).

Responding officers and medical personnel found defendant still performing adult CPR on Antonio. The first officer to respond saw defendant yelling from a window. After entry to the apartment, one officer pulled defendant off Antonio so that he could perform infant CPR, but Antonio was cold and lifeless. Another officer, Sexton observed injuries on the body. He did not see bruising in the area where defendant was performing CPR. A responding firefighter testified when he removed the diaper, he noticed the diaper was dry and Antonio had been freshly powdered, which he found unusual because the bowels and bladder generally release upon death. (II, 4-18).

East Lansing Police Officer Sexton saw defendant punch two holes in the apartment's drywall. He drove defendant to the hospital. During the drive, defendant was on his cell phone, and appeared very upset, screaming loudly, and crying. Defendant had indicated he had given the child a bath around 11:00pm, and then a bottle. There was no indication the child went underwater or he tried to resuscitate him at that time.

While at the hospital, defendant continued to talk on his phone. Approximately five minutes later, a security guard and nurse talked to defendant and the officer separately, about concerns they had regarding the child's temperature and injuries. He kept the information from defendant while both he and defendant watched the doctors treating the child. (II, 92-112).

When the doctor informed defendant the child was deceased, defendant began yelling he wanted to see his son and had to be restrained to the point where he had to be strapped down on a gurney, but calmed down after 15-30 minutes. (II, 114). The doctor showed the officer several bruises on the body, and indicated a full autopsy would likely be done.

The officer interviewed Ms. Lee at the police station along with Officer Ivey. She gave him permission to search the apartment. He also interviewed Mr. Pariss. (II, 112-121).

After Antonio was taken to the hospital by paramedics, Dr. Romero, the treating emergency physician, attempted several lifesaving measures without success. There appeared to be several recent injuries including bruising to the abdomen and other injuries/bruises on the lower extremities as well as possible internal bleeding. He determined the child was without circulation for between 12-24 hours. He informed defendant of the results and contacted the medical examiner for an autopsy. (III, 4-39). At the hospital, Defendant did not indicate there was an accident and appeared upset.

His notes indicated the child may have had a fever that day, that defendant's reaction was a normal one. He agreed his review was external only. In his opinion, some of the child's injuries were not the result of the improper administration of CPR, but did concede it was possible that improper CPR could cause the injuries. (III, 40-57).

He estimated the time of death to be anywhere from a few hours to 12 hours. He noticed the clean diaper and indicated a bowel movement or urination and defecation could occur anywhere from immediate to several hours after death. (III, 40-57).

The forensic pathologist, Dr. Bechinski, noticed bruises, contusions, and a laceration. There was a linear scrape on the right forehead, bruises on the right cheek, right temporal scalp, contusion on the left upper lip, laceration of the upper frenulum, along with at least 20 round oval irregularly shaped bruises on the chest and abdomen, two bruises on the lower back, and one on front upper left thigh. (III, 217). The injury to the lip (frenulum) was indicative of someone trying to prevent a child from crying by forcing something over the child's mouth.

With regards to the bruising of the torso, it was consistent with someone picking up an infant with their hands and applying enough pressure with fingertips to cause the contusions. (III, 202-223).

An internal examination revealed bleeding under the scalp's frontal region, a full thickness tear of the superior vena cava, close to the heart, bruises on the surface of the lungs and bleeding within the lungs, lacerations to the liver, lacerations to the spleen, bleeding into the abdominal cavity, the left testicle was surrounded by thick hemorrhage, bruises on the diaphragm thymus, colon, and duodenum. The right adrenal gland was fragmented and bleeding around the right adrenal gland. (III, 228-229). They were life threatening injuries, but he was unable to tell how long someone would survive such injuries. Toxicology tests were negative. The cause of death was multiple blunt force trauma. (III, 223-236).

In his opinion, many of the injuries were not the result of improperly performed CPR. The injuries occurred within the previous 24 hours, not after death. Squeezing, punching, and shaking could all have contributed to the trauma. There was no water in the lungs. (III, 236-248).

Michigan State University Police Officer Fadley briefly talked to defendant at the hospital for background information, and then interviewed him later that same day at the precinct.

The next day, March 26, defendant was arrested. Defendant indicated he wanted to talk to the officer again, which he did after being advised of his *Miranda*³ rights. The interview lasted approximately 6 hours. Initially, defendant had indicated he did not want to talk, but then agreed to do so because some of the statements in the initial report were incorrect and he wanted it to be changed. Defendant again was advised his rights, which he waived.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

He explained to the officer about sucking on his son's cheek, that the child had fallen several times under his care, that Antonio did not die from the bath. (V, 17-35).

A third interview was conducted on March 28. Defendant was again advised of his rights. This time there were two officers because the officer believed he was not receiving the truth as to what had happened. How many times he went over to Travis' house changed, as did the time he went; this time defendant said he was lying next to the child and rolled on top of him for about 15 minutes (Antonio was covered by a blanket and had a bottle in his mouth).

Defendant informed him he had noticed Antonio's eyes rolling in the back of his head, so he panicked, started to go crazy and started to shake Antonio to wake him up. He put him on the ground, punching him more than 15 times in order to get him to breathe. (IV, 35-48).

Defendant gave him a bath in an attempt to wake him up. Defendant admitted to hitting the child in the face while he was in the bathtub, that Antonio slipped out of his hands, landed on the side of the tub, hit his ribs and then flipped onto the floor. (IV, 48-50).

Defendant also indicated he wiped blood and stool from his son's mouth, put a diaper on him and put him in bed. He did not call 911 because he loved his son and wanted to be the one to bring him back. He did not call his wife because he was hoping the child would be okay and in the morning would take him to 'Ready-Care'. He did not tell his wife anything had happened and had gone over to his friend's house, and was hoping his son would be okay in the morning. (IV, 50-57).

He slept through the night and thought everything was okay, until his wife said Antonio looked funny, so he started doing CPR and told her to call 911. He described his reaction at the hospital. Defendant denied putting on a show for the officers. (IV, 57-63).

The officer agreed this information was more consistent with his own information and the facts. (IV, 63-119).

During discussion of the jury instructions, defense requested the jury be instructed on second-degree child abuse, submitting the jury could find defendant's actions had only been reckless. The trial court denied the request, finding that the pathologist's testimony had indicated blunt force trauma caused Antonio's death and defendant had admitted intentionally striking the baby. Therefore, the court reasoned, defendant's act resulting in death was intentional.

The trial court concluded given these findings, there was no evidence that any reckless act by defendant resulted in serious injury to Antonio, and that, therefore, the jury should not be instructed on second-degree child abuse. (V, 219-225, VI, 12-14).

The jury was instructed on first degree child abuse, felony murder, second degree murder, and involuntary manslaughter.

As noted, the jury convicted defendant of felony murder and first-degree child abuse.

On direct appeal in the Michigan Court of Appeals, defendant Burks raised two issues: whether there was sufficient evidence to find for the offense of first degree child abuse and whether he was entitled to a new trial where the trial court declined to instruct the jury as to second degree child abuse as requested by the defense, where there was evidence to support such instruction.

In a published split opinion issued on December 2, 2014, the Court of Appeals affirmed his convictions⁴.

Appellant Burks subsequently filed an Application for Leave with this Court.

⁴ COA No: 314579.

ARGUMENT

I. THE FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY AS TO SECOND DEGREE CHILD ABUSE WAS NOT HARMLESS ERROR.

Standard of Review

This case involves whether the failure to properly instruct a jury in its deliberations as to second degree child abuse as requested by the defense and supported by the evidence was harmless error.

As such, Defendant submits the standard of review involves a question of law which is reviewed de novo. *People v. Osantowski*, 481 Mich 103; 748 NW2d 799 (2008), cert denied 555 US 1015; 129 S Ct 574; 172 L Ed 2d 435 (2008).

However, a decision of the Court of Appeals is reviewed for clear error. MCR 7.302(B)(5).

Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Since defense had requested the instruction, this non-constitutional error was preserved. *People v Hawthorne*, 474 Mich 174; 713 NW2d 724 (2006).

A preserved non-constitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative, id est., the error undermined reliability in the verdict. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Argument

Defendant submits the majority decision of the Court of Appeals in finding that the failure to give the requested jury instruction on second degree child abuse was harmless error was incorrect.

The facts of the case were clear. Defendant had custody of his biological son, Antonio. During that custody he intentionally committed an act or acts which were likely to cause serious physical harm to Antonio, harm which impaired the child's health or his physical well being. However, while the acts were intentional, he did not know his actions were reckless and would cause serious harm, resulting in Antonio's death.

Defendant first notes the panel unanimously agreed the jury should have been instructed as to second degree child abuse⁵.

The question then to be resolved is whether the failure to do so was harmless or not, given the evidence submitted to the jury.

As noted by the majority opinion, two elements distinguish first-degree child abuse⁶ from second-degree child abuse⁷: harm and the offender's state of mind.

⁵ M Crim JI 17.20 Child Abuse, Second Degree (Reckless Act)

The defendant is charged with second-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

First, that Yumar Burks is the parent of Antonio Yumar Burks.

Second, that the defendant did some reckless act.

Third, that as a result, Antonio Yumar Burks suffered serious physical harm. By "serious physical harm" I mean any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

Fourth, that Antonio Yumar Burks was at the time under the age of 18.

⁶ MCL 750.136b(2).

⁷ MCL 750.136b(3)(a).

There was no question defendant's intentional acts resulted in harm to Antonio.

However, in regards to his state of mind, or mens rea, the majority found defendant failed to sustain his burden that if properly instructed, it was more probable than not that the jury would have convicted him of second-degree child abuse. The majority found defendant's inconsistent explanations insufficient to account for Antonio's injuries because Antonio was not fine after being in his care since the injuries were too extensive, including internal injuries.

As such, the majority found it was not more probable the jury would have convicted him of second degree child abuse under MCL 750.136b(3)(a) because 'the jury was unlikely to believe defendant's inconsistent explanations.' (Majority, Slip Op, 8).

In contrast, the dissent did not dispute the result, but rather the process by which the jury reached the result in this case resulted in a miscarriage of justice.

The dissent found the majority misapplied the 'substantial evidence' test of *Cornell*, supra, by sanctioning a judicial assessment regarding the probability of outcomes on the basis of the evidence at trial, utilizing a judicial assessment of a defendant's credibility.

Defendant agrees with this position.

To find for first degree child abuse, a specific intent offense, the prosecution is required to establish beyond a reasonable doubt not only that defendant **intended** to commit the charged act, but also that he **intended** to cause serious physical or serious mental harm to the child or knew that serious physical or serious mental harm would be caused by the act. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); MCL 750.136b(2); M Crim JI 17.18.

To find for second degree child abuse, a general intent offense, there must be evidence to show a person knowingly or intentionally commits an act likely to cause serious physical or mental harm to the child regardless of whether harm resulted. MCL 750.136b(3)(b); M Crim JI 17.20.

As noted, one of the critical differences in the two offenses is the intent, the mens rea, of the offender, whether or not defendant acted with a wrongful purpose⁸. There must be a specific intent on the part of the offender to cause harm to a child to satisfy the requirements of first degree child abuse.

This intent must be decided by the trier of fact, a jury. See US Const, Am VI, XIV; Mich Const 1963, Art 1, §§14, 20.

This was confirmed in *People v Wolfe*, 440, Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992), which held the jury and not judges decide the facts of a case. It is the responsibility of the jury alone to determine the weight and credibility of all testimony and witnesses, including a defendant's intent.

While a reviewing court may utilize the harmless error test in *Lukity*, supra, to preserved non-constitutional errors, defendant submits the majority misapplied the test to defendant's state of mind.

In *Lukity*, this Court reiterated its position taken in *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), which held that a reviewing court is not to find non-constitutional preserved error harmless simply because it concludes the jury reached the right result. Disregarding errors that do not affect substantial rights, the reviewing court is to 'examine the record as a whole and the actual prejudicial effect of the error on the factfinder in the case at hand'. *Lukity*, at 492, quoting *Mateo*, at 206.

As noted by Justice Brickley: 'Our cases agree that the phrase "miscarriage of justice" means "prejudicial," and this means simply that the error *influenced the verdict* (emphasis added). *Lukity*, supra, at 503. See also *Mateo*, supra, at 215

⁸ *Black's Law Dictionary*, 4th Ed. Rev, p 1137.

Here, the trial court's denial of the instruction to the jury deprived the jury its determination of defendant's state of mind. This denial necessarily influenced the verdict. The jury was not afforded the opportunity of determining whether or not defendant lacked the specific intent, which went to the heart of the defense.

While defendant intentionally committed acts which led to his child's death, it was also equally clear that he did not believe his actions would cause Antonio's death. When he realized what had happened, it was too late to do anything. But the jury was precluded from considering this position. Without the proper instruction, the jury could not determine whether defendant committed either second degree murder or voluntary manslaughter. Once they decided he was guilty of first degree child abuse, since he admitted to his acts and were not able to consider whether they were reckless, they had no recourse but to find him guilty of felony murder.

Defendant submits regardless of what evidence was submitted to the jury, the fact that the jury was foreclosed from considering whether or not defendant's actions in this case, regardless of the evidence of the forensic pathologist, regardless of the evidence from the officers and medical personnel, regardless of defendant's varying statements to the police, which he freely admitted were incorrect in certain aspects, negated the proper function of the jury, which was to determine his intent.

Interestingly, the majority also concluded that defendant's theory of second degree child abuse was a necessarily included lesser offense of first-degree child abuse, and a rational view of the evidence in the case would have supported a jury instruction on second degree child abuse.

Whether an instruction on a lesser offense is warranted is also a question of law, reviewed de novo. *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

Nonetheless, the majority opinion usurped the role of the jury. They reviewed the evidence and found even though a rational view of the evidence supported the instruction, they

determined for themselves defendant's state of mind at the time the injuries occurred and found defendant could not have been guilty of second degree child abuse. In so doing, defendant submits the majority failed to recognize this Court's determination that a court is not permitted to act as a thirteenth juror.

As noted in *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), 'It is the province of the jury to determine questions of fact and assess the credibility of witnesses.'

In this case, both the trial judge and majority of the Court of Appeals did just that. They assessed defendant's credibility, compared his testimony with the rest of the evidence, determined for themselves that he was not credible, and therefore in their opinion, possessed the necessary specific mens rea required for first degree child abuse.

As a result, the appellate majority incorrectly found it more probable than not that the failure to properly instruct the jury was not outcome determinative.

As this Court noted in *Cornell*, when there is substantial evidence to support the requested instruction, an appellate court should reverse the conviction. *Cornell*, supra, 466 Mich at 365.

There was substantial evidence presented by defendant which supported his theory of the case, that although he did acts which caused harm, they were not done with the intent to cause harm, which satisfied the requirements of second degree child abuse.

For example, his reaction at the hospital, where he became so agitated, he had to be restrained; his willingness to talk to the police, freely correcting his statements. If the jury believed his testimony or had a reasonable doubt regarding his mental condition, they could have found him guilty of second degree child abuse, but were precluded from doing so.

The point is not whether defendant's evidence as presented to the jury would be believed by them, but whether the jury was foreclosed from considering whether he possessed the proper

mens rea, a function reserved for the trier of fact. To hold otherwise, would beg the question of why have juries, when a judge may decide whether or not a defendant possessed the specific required intent.

Even the majority noted:

(D)efendant's statements to the police and his testimony at trial that the baby was fine after defendant rolled over him while they were sleeping, and after defendant had momentarily left the baby alone in the bath, were evidence that, if believed, could have supported a jury verdict finding defendant guilty of second-degree child abuse under MCL 750.136b(3)(b). Likewise, defendant's testimony that he struck Antonio while performing CPR to try to get him to breathe, if believed by the jury, could have supported a jury verdict finding defendant guilty of second-degree child abuse under MCL 750.136b(3)(a). (Majority, Slip Op, 7-8).

Thus to uphold this decision would negate the ruling of *Cornell*, and effectively permit trial judges to review the evidence presented before a jury and make their own determination on whether the evidence presented was credible or not, regardless of whether a defense properly requests a jury instruction supported by the evidence.

Defendant is mindful of the judge's role in deciding motions for directed verdicts, but he submits that that is a different standard.

In a directed verdict motion a trial court is required to take the evidence up to the time the motion is made in a light most favorable to the non-moving party, in criminal cases, the prosecution, and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. See *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979), cert den sub nom *Michigan v Hampton*, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980).

In this case, even though the motion for directed verdict was denied, the jury nonetheless was required to determine what defendant's intent was.

The panel conceded the jury should have been instructed as to second degree child abuse. Thus did the improper instructions render a questionable verdict? The answer to that question must be in the affirmative.

Taken as a whole, the instructions did not clearly present the case and applicable law to the jury for their consideration. Even though requested, the failure to properly instruct the jury failed to fairly present defendant's case to the jury, nor did they adequately protect his right to present a defense, resulting in a miscarriage of justice. The error influenced the verdict. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *Lukity*, supra, at 503.

The Dissent was correct. '(I)t was error warranting reversal for the trial court to refuse to instruct on second-degree child abuse where substantial evidence supported convicting on that offense if the jury either believed defendant's testimony or harbored reasonable doubt regarding his mental state'. (Dissent, Slip Op, 2).

The failure of the jury to be properly instructed was not harmless error. The majority improperly sat as the trier of fact, reviewed the evidence submitted and even though the jury should have been instructed as to second degree child abuse determined defendant's evidence was not credible.

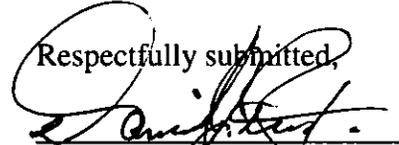
The dissent was correct: Defendant's credibility was for the jury, not the trial judge, nor the appellate judges to determine. The majority failed to recognize and apply the requirements of *Lemmon*.

The Application should be granted, reaffirming this Court's decision in *Lemmon*, supra, or the Court of Appeals decision should be reversed and the dissent position adopted.

SUMMARY AND RELIEF SOUGHT

For the foregoing reasons, Defendant-Appellant respectfully requests this Honorable Court adopt the Court of Appeals dissent or grant the Application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel J. Rust", written over a horizontal line.

DANIEL J. RUST
P.O. Box 40089
Redford, Michigan 48240
(313) 837-7734

DATED: July 31, 2015

Clerk, Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

July 31, 2015

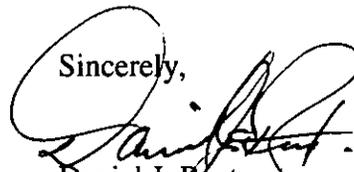
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People v. Yumar Antonio Burks
MSC No: 150857
COA No: 314579
Ingham County Circuit Court No: 11-0565FC

Clerk:

Enclosed, please find the original, proof of service and seven copies of Appellant's Supplemental Brief on his Application in the above entitled matter.

Thank you for your cooperation in this matter.

Sincerely,



Daniel J. Rust
Attorney for Appellant
P.O. Box 40089
Redford, Michigan 48240

Encl.
DJR/jaz

