# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 26, 2002 |
| v | No. 223290<br>Ingham Circuit Court |
| DONALD C. MERRIWETHER,<br><br>Defendant-Appellant. | LC No. 99-074682-FH |

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree child abuse, MCL 750.136b(2). We affirm.

On March 9, 1999, defendant's wife, Minnie Merriwether, began to care for her daughter's two children because of her daughter's incarceration. One of the two children, a seven-month old infant, suffered a broken leg on February 28, 1999, and was in a cast. There was also a lump on the infant's head that occurred during her one week stay with the family. On March 16, 1999, Minnie asked defendant to return home and baby-sit the infant while she went to the store with another daughter. Minnie's son, Jerry McKinney, then eleven-years old, and her grandson, two-year old O'Shea, were present in the home with the infant and defendant. Defendant's wife left between 7:00 and 8:00 p.m., and she returned within forty-five minutes to an hour. The infant was asleep on the floor when she left and was in the same position when she returned. At approximately 10:00 p.m., Minnie went to put the infant to bed. The infant made a gurgling noise. Minnie then noticed that the infant was foaming at the mouth and her eyes had rolled back. Minnie instructed defendant to go down the street and call 911. He complied. Minnie did not know how the infant was injured, but testified that she had not been dropped and was not in a car accident that day.

McKinney testified that he was watching television upstairs with O'Shea on March 16, 1999. When he came downstairs, McKinney saw defendant hold the infant by her extended arms and hit her in the head. McKinney got scared after seeing this and went back upstairs. On cross-examination, McKinney indicated that he witnessed the incident at approximately 5:00 p.m. On redirect examination, McKinney admitted that he was confused regarding dates.

On March 17, 1999, at approximately 9:00 a.m., Dr. Steven Guertin examined the infant. She was semi-comatose, breathing on a respirator, and critically ill. Through tests and

examination, Dr. Guertin determined that the infant suffered a bruise to the right side of her head. She also suffered hemorrhages at the back surface of her eyes as the result of a blow or being violently shaken. Her skull was broken in several places. A scan of the brain revealed fresh bleeding, but the left side of her head contained collected fluid, indicating an old injury. The infant's internal organs, including her heart, spleen, liver, and lungs, were bruised or torn. There was also evidence of fresh fractures. Dr. Guertin concluded that the fresh injuries occurred "within minutes or hours" of the time that the infant was brought to the emergency room. Dr. Guertin opined that the extent of the injuries were from "blows." He further opined that the injuries were not the result of a fall, but were consistent with child abuse. If the infant had not received life support, she would have died and would likely remain in a semi-vegetative state for the rest of her life.

Defendant testified that, after a day of job searching, he was at a neighbor's home playing dominoes. Minnie asked him to come home and baby-sit. Defendant returned home and made himself something to eat. Minnie place the infant on a pallet on the floor in the living room near the television. Defendant sat at the table and ate. Minnie returned home in approximately forty-five minutes. Minnie checked on the infant, then they sat and talked. Defendant did not know how any of the infant's injuries had happened. He estimated that Minnie discovered the infant's injuries between 10:30 p.m. and midnight. Defendant admitted that he had been convicted of crimes involving an element of theft or dishonesty. He denied touching the infant, and based his entire defense on the premise that he did absolutely nothing to the infant.

Defendant argues that the trial court erred by failing to provide the instruction for second-degree child abuse, MCL 750.136b(2). We disagree. When reviewing the propriety of a request for a lesser included offense instruction, the type of lesser included offense must be determined. *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996). There are two types of lesser included offenses, necessarily included lesser offenses and cognate lesser included offenses. *People v Marji*, 180 Mich App 525, 530; 447 NW2d 835 (1989). A necessarily included lesser offense is one that must be committed as part of the greater offense. *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000). Stated otherwise, it would be impossible to commit the greater offense without first having committed the lesser offense. *Id*. at 629-630. A cognate lesser included offense shares elements with the greater offense and is of the same class or category as the greater offense, but may contain elements not found in the higher offense. *Bailey, supra*; *Marji, supra*. The court must instruct the jury on necessarily included lesser offenses regardless of the evidence. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997).[1] However, when a cognate lesser included offense is at issue, the evidence must be reviewed to determine if it would support a conviction for the cognate offense. *Id*. The instruction for a cognate offense is required if there is a dispute in evidence that would support a conviction of that charge. *Id*.

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[1] In *People v Perry*, 460 Mich 55, 61 n 17; 594 NW2d 477 (1999), our Supreme Court gave notice that it would consider abandoning this approach to lesser included instructions to comport with the federal model, but held that the appropriate case for change had not presented itself. In *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000), lv gtd 465 Mich 851 (2001), this Court opined that an appropriate case for resolution of this issue had been presented and urged the Supreme Court to revisit the standard applied to lesser included offenses.

First-degree child abuse is a specific intent crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). At the time of the injury to this child, second-degree child abuse did not require a specific intent, but merely a reckless act or omission that caused serious mental or physical harm to the child. MCL 750.136b(2).[2] Because first-degree child abuse requires proof of an intent not required by the second-degree child abuse statute in effect at the time of this offense, second-degree child abuse is a cognate lesser offense of the first-degree offense. See, e.g., *Lemons, supra* at 253-254. Accordingly, an instruction for second-degree child abuse was required only if there was a dispute in the evidence that would support a conviction for that charge. *Id*.

In order to have established defendant's guilt of second-degree child abuse, there must have been evidence to support some reckless act by defendant that caused serious physical harm to the child. The record is totally lacking of any evidence of such reckless conduct or act, and therefore the trial court did not err in refusing to give the requested instruction.

We also find that the trial court did not abuse its discretion when it permitted amendment of the information. Reversal for amendment of an information is inappropriate unless defendant suffered prejudice as a result from a surprise in the nature of the charges brought. Defendant has not only not shown that this happened, but has not set forth any real argument that it did. *People v Perry*, 460 Mich 55, 63; n 19; 594 NW2d 477 (1999).

We also conclude that the trial court did not abuse its discretion when it denied defendant's request for an adjournment to obtain new counsel. Defendant's request was a last minute request for a continuance so that he could, hopefully, hire a new lawyer to replace his lawyer who was able and prepared to go to trial. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

Furthermore, following de novo review of the record, we cannot conclude that prosecutorial misconduct occurred through witness intimidation or otherwise. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), According to the supposedly intimidated witness, McKinney, there were two other witnesses present during his conversation with the investigator. Defendant did not present any evidence from these witnesses to establish intimidation. Additionally, irrespective of the admissibility of the unsworn subsequent statement

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[2] At the time of the charged offense, MCL 750.136b(2) provided, in relevant part: "A person is guilty of child abuse in the second degree if 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 to a child." Effective April 3, 2000, MCL 750.136b was amended and renumbered. MCL 750.136b(3) now governs second-degree child abuse and is divided into three types of conduct, two of which contain a "knowingly and intentionally" requirement.

by McKinney, conflicting testimony is an insufficient ground for granting a new trial. See *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer