

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

MALINI RAO,

Defendant-Appellant.

No. 289343
Oakland Circuit Court
LC No. 2008-219989-FH

ON REMAND

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority. I write separately to express my view that Malini Rao is actually innocent based on newly acquired x-ray evidence demonstrating that her fractures were not caused by trauma. See *People v Rao*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 289343). To the extent that defense counsel had any realistic ability to obtain the additional x-ray evidence while the child remained in state custody, I believe that defendant's counsel was constitutionally ineffective for not having done so.

While the Supreme Court majority opinion suggests that the trial court might have granted a defense motion for additional x-rays at the time of trial, the prosecution's expert witness unequivocally testified that repeated x-ray exposure would pose a real and substantial danger to the child. In the face of his testimony and in the context of a trial about child abuse, it is inconceivable to me that the trial court would have entered an order even potentially imperiling the child.

Defendant has repeatedly argued that her counsel did not pursue this avenue because of the prosecution's strong opposition and the utter unlikelihood that a request for an x-ray examination would be availing, not out of any fear that the evidence could implicate defendant. The prosecution has never disputed this. While the Supreme Court majority accuses this Court of not being "fully cognizant" of the record discussion of the importance of additional x-ray evidence, *People v Rao*, 491 Mich 271, 286; 815 NW2d 105 (2012), I posit that the record simply does not support the Supreme Court's conclusion that counsel strategically elected against obtaining updated x-ray evidence. But in the event I am incorrect about his motives for

forebearing, defense counsel's failure to file a motion that was overwhelmingly likely to be denied constitutes ineffective assistance.

/s/ Elizabeth L. Gleicher