# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 31, 2002 |
| v | No. 230447<br>Macomb Circuit Court |
| JOSEPH SALVATORE ALES,<br><br>Defendant-Appellant. | LC No. 99-002441-FC |

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

A jury convicted defendant Joseph S. Ales of second-degree murder[1] for killing his seven-month-old daughter. The trial court sentenced Ales to twenty to forty years in prison for the crime. He appeals as of right. We affirm.

## I. Basic Facts And Procedural History

In June 1999, Ales and Lisa Szalkowski lived with their two daughters, infant Taylor Marie Ales and two-and-a-half-year-old Brittany Rose Szalkowski,[2] in a trailer in Clinton Township. On June 15, Szalkowski arrived home at around 10:00 p.m. Her infant daughter, who was regularly fussy and had been teething, had been fed and put to bed for the night.

Early the next morning, Szalkowski left for work at Colonial Dodge while her infant, who appeared "fine," was still sleeping, leaving both little girls in Ales' care. Szalkowski signed into work before 7:00 a.m. and apparently worked uninterrupted until shortly after noon[3] when Ales called her, she believed from a pay telephone near the clubhouse in their neighborhood, to say that the infant was not breathing; Ales was crying and sounded scared. Shocked, Szalkowski signed out of work and rushed home. The drive home took her approximately fifteen to twenty minutes, during which time it dawned on her that she should have called 911.

[1] MCL 750.317.

[2] The record does not make clear whether Ales is Brittany Szalkowski's father. We assume that he is her father because she was born after he and Szalkowski had been a couple for a number of years.

[3] Szalkowski looked at the clock on her desk, which said 12:14 p.m., but her clock ran fast.

Arriving at her home, Szalkowski found her infant "lifeless" with Ales performing rescue breathing on her. The family had two cellular telephones that used prepaid minutes, but because Ales and Szalkowski had used all the minutes for both their telephones, Szalkowski did not call 911. Instead, she grabbed her children, put them in their car seats, and drove to the nearest hospital – Mt. Clemens General Hospital – at about fifty-five to sixty miles per hour. Ales, who was riding as a passenger in the car, did not attempt to resuscitate the infant during the trip.

Triage nurse Janet Knowlton, R.N., was the first person to see Szalkowski, Ales, and the infant at Mt. Clemens General Hospital. As she remembered it, Szalkowski walked into the emergency room carrying a car seat that also served as a baby carrier. She looked "dazed" and "said somebody help my baby, she's not breathing[.]" Knowlton immediately noted that the infant was unconscious, not breathing, and had bluish skin, which meant that the infant needed immediate help. Knowlton struggled to unstrap the infant from her car seat. A doctor came to her aid and, after successfully extricating the infant from her seat, carried her in his arms as he ran to a treatment room. The trauma team immediately tried to revive the infant, using cardiopulmonary resuscitation and a bag to ventilate the infant, before intubating her and placing her on a ventilator.

While they were waiting for news about their infant, Ales told Szalkowski that that morning he got up to feed the infant at around 7:30 a.m. or 8:00 a.m. He fed the infant, who looked fine, and put her on blankets on the floor to nap, ostensibly because the couple was missing the proper screws to assemble the crib they had for their daughter. Ales then went back to sleep. When he got up to check on her, he saw that she was not breathing.

Szalkowski and Ales, though reportedly upset, also spent a considerable amount of time talking to medical personnel, social workers, and even the police. Szalkowski found it "aggravating" to have to answer so many questions from professionals instead of having the professionals concentrate on treating her daughter. Szalkowski eventually deduced that the professionals involved in the case were suspicious about what had happened to her infant, though Ales did not urge her to avoid talking to them.

Sue Besheers, a clinical social worker at Mt. Clemens General Hospital, was one of the first individuals to speak with Ales and Szalkowski. Medical staff had summoned Besheers to the emergency room to speak with the couple because the infant's situation was grave. Her purpose in speaking with them was to gather whatever medical information the parents might have and, if necessary, "to give referrals" or "file a child Protective Services report."

Besheers started by asking the couple what had happened. She found that the "events were difficult for her to understand." At first, Ales said that the infant had been sick with "flu-like symptoms" and "lethargic" for several days, but had slept well the previous night. Ales indicated that the infant was fine through breakfast, but was not responsive when he checked on her later in the morning. Ales reported that he started rescue breathing, but he had no telephone and that none of his neighbors were at home, so he could not call for help. Besheers did not understand Ales' next statement, which was that he either expected Szalkowski to return home soon after he discovered the crisis or that she had come home. Then, in the timeline of events, ten or fifteen minutes passed in which Besheers could not determine from the couple what had happened. But she learned that Szalkowski did arrive at home, apparently with a cellular telephone, and then the couple decided that they needed to take the infant to the hospital.

According to Szalkowski, a train delayed their trip to the hospital. During this interview, Ales appeared "[v]ery upset. He was obviously shaken, seemed to be somewhat shocked himself, did a lot of pacing, ringing of his hands, so did mom." Besheers described Szalkowski as also "very upset," but she "appeared appropriate for the circumstances." Hospital charts did note a telephone number for the couple, but Besheers never tried to call the number to see if it was in service, or whether it was a cellular telephone number. After the medical staff at the hospital revived and stabilized the infant, they informed Szalkowski and Ales that they had to transport her to Beaumont Hospital in Royal Oak by helicopter to receive more advanced treatment.

At Beaumont Hospital, Bessam Gebara, M.D., the Director of the Pediatric Intensive Care Unit, began treating the infant as soon as she arrived. When Dr. Gebara first saw the infant she was "close to death." Dr. Gebara quickly learned that the infant had arrived at Mt. Clemens General hospital in cardiac arrest, it took thirty-eight minutes to resuscitate her using "lots of medication," and during these efforts the infant started "bleeding from the gastric tube requiring blood transfusion, so forth." Dr. Gebara's examination of the infant revealed that

> she was in a deep coma. She had no response to painful stimulation. She had no response to environment. She had fixed and dilated pupils. This is usually quite a bad prognosis. She had [an] extensive amount of bleeding in the back of the eyes, and she was in what we call shock. That means low perfusion, mottled, requiring a certain amount of medication to keep the blood pressure up.

Additionally, the infant did not have any bruising that looked like it had been "inflicted." Nor did she have any broken bones.

The "extensive amount of" bleeding Dr. Gebara saw behind both of the infant's retinas provided critical information, indicating that "there was a significant traumatic injury . . . call[ed] shaken impact injury." The medical staff performed a CT scan on the infant, discovering that she had "significant bleeding" in her brain as well as serious swelling that caused her brain to "migrate." This was also a "pretty bad sign" for the infant's prognosis. Suspecting that the infant had been shaken, Dr. Gebara attempted to get the infant's medical history from Ales and Szalkowski. Ales reportedly told Dr. Gebara about his morning routine with the infant and that he went to check on her around 11:30 a.m., discovering at that time that the baby did not seem to be breathing. Dr. Gebara reported that Ales said that he started rescue breathing and called for help from a neighbor. As he remembered the story, Dr. Gebara indicated that the neighbor had called Szalkowski at work to come home, and the couple took the infant, who was in cardiac arrest, to the hospital.

At the same time that Dr. Gebara was trying to assess and treat the infant, medical resident Steven Gelfand, M.D., who was working under Dr. Gebara's direction, attempted to get the infant's medical history from her parents. Ales told Dr. Gelfand that the infant had been irritable at times during the preceding three or four days, which he thought was because she was teething. Ales said that that morning the infant woke up, he fed her, and put her back to sleep, which was unusual. When he returned a number of hours later, he picked up his daughter and she was "floppy," so he "screamed out the window for his neighbor to call his wife" because he did not have a telephone. When Dr. Gelfand asked the parents to explain the infant's injuries, they were vague, only saying that their daughters played with each other and that the infant might have "gotten her head stuck somewhere[.]"

Szalkowski and Ales also spoke with Patricia Bolda, a protective services worker for the Family Independence Agency (FIA). Bolda had conferred with Dr. Gebara, and he had informed her that the baby girl was in "very critical condition." In speaking with Ales, Bolda learned that he had followed his morning routine with the infant, getting her up, feeding her a bottle, and putting her in her crib in the bedroom to play with her toys. Ales indicated that the baby seemed fine during these morning activities. He also fixed breakfast for himself and his older daughter before they watched cartoons for about two hours. Ales told Bolda that when he went to wake the infant he found her having difficulty breathing, which is when he said he panicked and ran to a neighbor's home to call Szalkowski. Bolda did not ask Ales why he had not called the police about the emergency. Bolda had the impression from speaking with Ales and Szalkowski that Ales first saw that his infant was in distress around 11:15 a.m., but did not call Szalkowski until about 11:45 a.m. In light of Szalkowski's statement that she received the call from Ales at about 11:45 a.m. and that it took her about ten minutes to get home, Bolda inferred that Szalkowski arrived home around 11:55 a.m. When she asked Szalkowski how the infant looked when Szalkowski placed her in her car seat, Szalkowski said that the infant's hands were cold and she was "grasping [sic] for air."

Despite the best efforts of the hospital staff, the infant died. Clinton Township Police Detective James Hall spoke with Ales shortly after the infant died. Ales' cheeks were red, as if he had been rubbing them, but his eyes were not bloodshot and he did not appear to be crying, which struck Detective Hall as "peculiar." In contrast, Szalkowski seemed "very upset, visibly shaken, crying." Ales "was very, very talkative at that point[.]" He kept trying to get close to Detective Hall, trying to touch him, and said that he appreciated Detective Hall "being sensitive." Despite being defensive initially, Ales also told Detective Hall that he wanted to speak with him, saying "I want to get this off my back, it's hard for me to grieve, I got to get this off my back." Like numerous other individuals Ales and Szalkowski saw on June 16, Detective Hall asked Szalkowski to tell him about what happened. Szalkowski told Detective Hall basically the same story she had already told a number of times: she had left that morning around 6:00 a.m. to go to work and left Ales with the children. She knew that her infant was fine when she left home that morning because, she said, the infant had been smiling.

The next day Detective Hall began investigating the circumstances surrounding the infant's death. He obtained Szalkowski's time card from work to verify the times she claimed she had reported for and left work on June 16, finding that she had signed into work at 6:49 a.m. and signed out at 12:11 p.m. He determined that the Mt. Clemens General Hospital was approximately five or six miles from where Ales and Szalkowski lived. Pursuant to a search warrant that allowed him into the couple's home, on June 17 Detective Hall had photographs taken revealing a cellular telephone and charger in the trailer living room and a box belonging to another cellular telephone. Detective Hall had this particular focus on the cellular telephones because he was attempting to verify Ales' story that he had called to a neighbor for help because he did not have a working telephone and the neighbor called Szalkowski to summon her home. Working with Detective Hall, Detective Lieutenant Terry Waldoch dialed 911 on the cellular telephone and found out that a person using the telephone could reach the central police dispatch in metro Detroit, which is where all such calls in the area are routed. Before Detective Lieutenant Waldoch conducted this test, Detective Hall did not know whether it was possible to call 911 on a prepaid cellular telephone that did not have any unused minutes.

Detective Hall did not determine whether there was a pay telephone in the neighborhood that Ales could have used, which is how Szalkowski claimed Ales called her. While interviewing the couple's neighbors, Detective Hall could not find anyone who recalled hearing Ales shout for help. Nor could he confirm that there was a neighbor that Ales asked to call Szalkowski. Detective Hall also obtained photographs showing the blankets on the living room floor and an unassembled crib, casting doubt on the version of events that Ales told Bolda. While searching the trailer, Detective Hall did not find any other evidence of what went on between 8:00 a.m. and approximately noon while Ales was caring for the infant. Dr. Gebara's information concerning the infant's medical condition at her death was what convinced Detective Hall that the infant's death was a murder.

Before the infant's death, Szalkowski and Ales had been experiencing problems in their relationship. Szalkowski attributed these problems to Ales' unemployment, which forced her to work two jobs to support their family. Nevertheless, the couple married thirteen days after their infant daughter died.

The prosecutor subsequently charged Ales with second-degree murder and this case proceeded to trial on August 24, 2000. One of the first tasks the trial court and attorneys tackled was selecting a jury. The trial court gave the members of the venire preliminary instructions and had the court clerk randomly select the first individuals to undergo voir dire. The trial court asked the preliminary questions regarding each venire member's background and knowledge of the case, but then allowed the attorneys to ask their own questions. When the attorneys were finished, the trial court asked the attorneys whether they wished to challenge anyone for cause. When both attorneys declined the invitation, the trial court asked the prosecutor whether he wanted to exercise one or more peremptory challenges. The prosecutor thanked and excused two jurors at the same time, prompting the court clerk to draw the names of two venire members to replace the individuals who had been excused. The trial court then followed the same pattern of asking preliminary questions of the new individuals sitting in the jury box before allowing the attorneys to ask questions. At the next pause, the trial court asked both attorneys whether they wished to challenge anyone for cause, the attorneys again declined. The trial court then asked defense counsel whether he wished to exercise any peremptory challenges. Like the prosecutor, defense counsel thanked and excused two prospective jurors at the same time and the court clerk called two more individuals to replace them. This process of voir dire, challenges for cause, alternating peremptory challenges, and prompt replacements for all those excused continued. At the end of the process, both attorneys expressly stated that they were satisfied with the jury. In total, the trial court excused five individuals for cause, the prosecutor exercised six peremptory challenges, and defense counsel exercised six peremptory challenges.

With the jurors selected, the trial court had the court clerk administer the oath to the jury and the trial court issued additional instructions to the jury before the prosecutor commenced his opening statement. The prosecutor's theory of the case consisted of three simple premises. First, the infant had sustained a fatal injury when being shaken violently or otherwise suffering trauma to her head. Second, the infant's injury was inconsistent with an accident or illness. Third, Ales was the only person who could have inflicted that injury.

The defense had a dual strategy revealed during opening statements. First, defense counsel asked the jury to view the evidence critically, especially with respect to the evidence of intent, which defense counsel claimed was lacking in the prosecutor's case. Second, defense

counsel urged the jury to remember that Ales had tried to save his baby and had not tried to flee or hide, but had merely panicked at the situation, which was understandable. In essence, defense counsel asked the jurors not to view the evidence with the enhanced perspective of hindsight, but to look at what happened as if they were parents in the middle of the crisis acting in the best way they knew how to act.

At trial, the jury heard testimony from Szalkowski and some of the many professionals involved in the events of June 16, 1999. In addition to her discussions with the couple, Bolda indicated that during her brief investigation into the case, she contacted Szalkowski's stepfather, Craig Henry. Henry indicated that he had never liked Ales, who was lazy and had a temper, but that he had never seen Ales physically or verbally abuse the children in the four-and-a-half years he had known Ales. Bolda had no other evidence that either of the children had been abused in the past. She specifically indicated that Ales and Szalkowski gave consistent accounts of what had happened and that she did "not know what happened to the child."

Knowlton commented that, while working with the trauma team, she noticed that the infant had an abrasion on her nose, upper lip, and chin reminiscent of a rug burn. This was inconsistent with the parents' explanation that resuscitation efforts had caused the injury, as a social worker told Knowlton. Another observation of the infant that Knowlton found odd was the fact that the infant had been strapped into the car seat even though she was not breathing. Knowlton, as a nurse, knew not to do this because it would prevent continuing resuscitation attempts. Still, she allowed that others without medical knowledge would not necessarily think about this issue. She added that a natural reaction from a parent would be not to waste time strapping a child into a safety seat in such an emergency, but to hold the child. While bringing equipment to the trauma treatment room, Knowlton also noticed that Ales had a cellular telephone, which she did not reflect on until she heard that the parents had not called 911. She explained, however, that she did not know whether the telephone was functional.

Dr. Gebara was one of the prosecutor's key witnesses. The trial court, without objection, qualified Dr. Gebara as an expert in pediatric medicine. In Dr. Gebara's expert opinion, the infant died because of "[n]on-accidental injury, shaken baby syndrome." As he explained it:

> An infant's head proportionate to the body size is bigger [than in an adult]. They don't have good neck support, so they can wobble back and for[th] . . . much more easily. . . . The brain itself is well developed, but the function is still in maturation phase. But the anatomy inside is fairly similar [to an adult's brain], but the proportion of the neck movement which is more – you can get more movement in the neck than you can in an adult.

As a result of this physical characteristic, children who are shaken can sustain serious injuries, which depend on

> how the child is shaken and [with] what force. You know, minimal shaking doesn't do much. Minimal shaking, nothing really happens. With these kind [sic] of injuries, he was violent shaking [sic]. When there's violent shaking, usually the infant is held from underneath the armpit and moved back and forth. So, basically what happens, the brain inside of the skull just moves back and forth and there's veins actually connected called bridging veins on top of the skull. These

> can get stretched and they can bleed. When they bleed, we get intracranial bleeding and what we call subdural hematoma, subarachnoid bleed, that can happen.
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> * * *
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> The problem in a situation where there is a subdural bleeding in a shaken baby situation, it is complicated. It's not just the bleed, but there's still dysfunction of the brain. There's also usually hypoxic injury. That means what happens is if the infant as a rule start crying – usually the problem [occurs when someone wants] to stop the crying. The shaking starts to stop the crying. Baby stops crying, is thrown on the bed or so and then the baby stop breathing, and when the baby stops breathing, you get low oxygen to the brain and the rest of the body and you get more brain injury. So, it's more complicated. It's not just the bleed issue; it's really the bleed and a low oxygen problem and dysfunction of cells.

Dr. Gebara directly discounted the notion that the infant could have sustained her injuries by falling, whether from a crib or bed, or down stairs, drawing his conclusion from the extensive retinal bleeding. Similarly, he had no knowledge of any injury the infant might have sustained while being transported to the hospital that would account for the bleeding. Though similar amounts of retinal bleeding can be found in concert with certain medical conditions babies can have, such as leukemia, Dr. Gebara did not find any of these other conditions in the infant. He also concluded from diagnostic imaging that the infant's injuries were recent and apparently from a single shaking episode, or more than one shaking episode committed somewhat close in time to another episode. He added that these injuries had to have been inflicted by an adult; a two-year-old child, like the couple's other child, could not inflict injuries this severe. Though he had discussed shaken baby syndrome at length, Dr. Gebara acknowledged that it was "possible" that the infant could have sustained her injuries if she were thrown against a wall or the floor.

When asked what he made of the information that the infant seemed fine at breakfast, Dr. Gebara responded that that information was "quite significant" because it helped rule out a "preceding" illness as the cause of death. Indeed, had the infant sustained the brain injuries any time earlier than breakfast, she would have experienced a "depressed mental status . . . immediately" and would not have seemed fine at breakfast. In other words, she would not have been "awake, alert, wouldn't be able to take her breakfast, bottle too well." Though not necessarily exhibiting any other symptoms, "[s]he would look sleepy, maybe even affecting breathing with the usual category of events."

Dr. Gelfand agreed with Dr. Gebara that the infant's condition indicated that she had been shaken violently. To his knowledge, babies who fall from great heights, even from a two-story building, do not exhibit the distinctive retinal bleeding that the infant had, which is consistent with shaken baby syndrome. Nor does this sort of injury result from minor falls or minor car accidents. Only car accidents involving a "very, very significant amount of sheer force" could cause this sort of injury, which Dr. Gelfand did not think happened in this case. Dr. Gelfand did believe that blunt head trauma caused the infant's injury.

Bernadino Pacris, M.D., a medical examiner for Oakland County, explained to the jury the findings he made when conducting an autopsy on the infant. Aside from marks clearly associated with efforts to revive and treat the infant, he identified numerous injuries to the infant: two bruises on the inner lining of the infant's skull; two bruises on her forehead and parietal skull; faint bruises on her jaw; subarachnoid hemorrhages in the brain; swelling in the brain; recent bruises to the brain; a speck of bleeding in one of her retinas, but significant bleeding in the other retina; and minor bleeding in her stomach that was secondary to the shock the infant experienced. He did not find evidence of an external injury that caused these injuries. Nor did he find any injuries to the infant's neck muscles, abdomen, or liver. As far as he could tell, the infant's respiratory, lymphatic, endocrine, skeletal, and cardiovascular systems were normal, though she had minor congestion and pulmonary edema detectable at a microscopic level.

In Dr. Pacris' expert opinion, the infant died from blunt force head trauma and related complications. In other words, the infant suffered "impact" on the right side of her head. Unlike Drs. Gebara and Gelfand, Dr. Pacris did not believe that the infant had suffered from shaken baby syndrome. He explained that during the autopsy, he had examined the infant's shoulder and chest area, which did not exhibit the bruising that is common to children who have been shaken that results from the way adults hold children under their arms. Though he agreed that shaking a baby can cause retinal hemorrhaging, Dr. Pacris did not think that shaken baby syndrome would cause the sort of bruising he observed on and in the baby's skull and brain. In fact, he said that most medical examiners do not "believe in" shaken baby syndrome. In his opinion, it took considerable force to inflict the injuries that killed the infant, which was impossible for a two-year-old to commit. Rather, the force could be from a "flat surface or a – looking at the type of the bruises, it could be from a knuckle of an elderly [person]."

Clinton Township Police Officers Andrew Hadden and Jeffrey Wallace, who had been with Detective Hall at Beaumont Hospital on the night the infant died, generally corroborated Detective Hall's version of what occurred around the time of the infant's death. Officer Wallace, like Detective Hall, described Szalkowski sobbing and also recalled that Ales had not been crying, but had red cheeks. Officer Wallace and another officer also assisted Detective Hall in canvassing the couple's neighborhood the next day. Office Wallace, who thought that the trailers in the neighborhood were situated between twenty-five and forty feet apart from each other, said that he could not find anyone who had heard Ales calling for help. Inside the couple's trailer, Officer Wallace could not find an assembled crib, but he did find a cellular telephone in its charger. Officer Wallace did not specifically search the neighborhood to determine whether there was a pay telephone, but also did not recall seeing one. Detective Lieutenant Waldoch and evidence technician Shannon Von Slambrock also assisted the other officers at the mobile home park.

The prosecutor also called Patricia Kott, who lived in the same mobile home park as Ales and Szalkowski. According to Kott, at around 11:30 a.m. on June 16, 1999, she was walking from her trailer to a friend's home. She noticed "two kids and a man and wife in their car," who had departed from Ales' and Szalkowski's trailer. Apparently, the adults had put a toddler in the back seat of the car while the woman held the baby in the front seat. The man, who was driving, turned and looked at Kott. The couple then drove their car to the nearest exit from the mobile home park. They appeared simply to sit in the car for between one and two minutes before driving away slowly. Kott did not suspect any urgency about their actions and never heard

anyone call for help. She did not, however, spot the person she had seen in the car in the courtroom while she was testifying. Nor did she know Ales and Szalkowski.

After the prosecutor rested his case in chief, defense counsel moved for a directed verdict of acquittal. Defense argued that even though the evidence suggested Ales was present during the time the infant sustained her fatal injuries, there was no evidence that Ales had any relevant criminal intent. The trial court denied the motion.

Outside of the jury's presence, defense counsel asked the trial court to instruct the jury on the law of involuntary manslaughter, in addition to voluntary manslaughter and second-degree murder. The prosecutor did not object to the voluntary manslaughter instruction or to the instruction on the charged offense. Rather, the prosecutor contended that the evidence did not support the involuntary manslaughter instruction. The trial court challenged defense counsel to explain how the record supported the instruction, and defense counsel contended that there was no legal distinction between the two forms of manslaughter. After the trial court and the prosecutor expounded on the differing elements of these three different forms of homicide, defense counsel responded that the instruction was appropriate because there was no evidence that Ales had done anything to the infant. When the trial court countered that there was an injury, defense counsel argued that there was "no evidence that he really did anything; if he did anything, it was unintentional." The trial court rejected this argument, stating that it did not "see any facts in the record to support it," and denied the motion for the additional instruction. The defense rested without calling any witnesses, including Ales, who decided not to testify. After closing arguments and instructions to the jury, the jury returned a verdict finding Ales guilty of second-degree murder.

The presentence investigator's report (PSIR) recommended that the trial court impose a sentence of 120 to 240 months in prison on Ales. At sentencing, defense counsel argued that the recommended sentence was too high because the conduct in this case was more akin to voluntary manslaughter than murder. Instead, defense counsel asked the trial court to impose the ninety-month minimum sentence that he claimed the legislative sentencing guidelines recommended, especially because Ales did not have a criminal history. The prosecutor asked the trial court to depart upward from the guidelines' recommendation of a minimum sentence of 90 to 150 months, arguing that this crime was heinous because of the nature of the injury, the age of the victim, and the victim's relationship to Ales. In the prosecutor's view, this case went beyond simply exploiting the infant's young age, society had a legitimate interest in punishing this crime seriously, and the guidelines did not consider the seriousness of a defendant killing his own child. Defense counsel responded that the guidelines did, indeed, cover the circumstances, which therefore did not merit an upward departure. Ales' mother spoke on his behalf, informing the trial court that Ales loved children and could not have committed this crime. The trial court then read into the record two letters written by "the maternal" grandparents, evidently Szalkowski's mother and stepfather. According to the letters, the infant's death had left an "empty dark hole" in the heart of the infant's older sister, who would hold a picture of the infant and cry that she wanted "my Taylor." The rest of the family shared in this pain and loss. In the letters, the grandparents asked the trial court to keep Ales in prison for the rest of his life because there could be no justice for the infant's death.

In the trial court's view, the sentencing guidelines were

> woefully inadequate as scored. I believe properly scored they fall within a range of 90 to 150 months. I'm ashamed of the guidelines. I think that for a charge of murder in the second degree – well this is shameful that they score the way they score, but I also believe that they are woefully inadequate because they have not addressed the point that was raised by the prosecutor, that not only was it an exploitation of the victim as addressed in offense variable number ten, but you were her father; the father murdering their child. And that's not addressed, that is not contemplated in these guidelines.
>
> But I also think that the guidelines are woefully inadequate as they address the psychological injury to the victim's family.
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> Under the guidelines as written, offense variable number five is psychological injury to a member of the victim's family. 15 points are assessed if serious psychological injury requiring special treatment occurred to a homicide victim's family. That was left at zero because I believe at this point there's no professional treatment being sought. The guidelines are woefully inadequate because they do not address the loss to the entire family of Taylor. The grandparents are feeling a loss of the unborn child. I understand that your wife [Szalkowski] is pregnant with another child – will feel the loss of a sister that she never knew – he or she never knew. The child that is still alive and existing is obviously suffering a loss of the baby sister. That is not addressed anywhere in these guidelines that these people will suffer for the rest of their lives thinking about the seven month old that was taken from them.
>
> It is not addressing the injury to your wife. She's indicating that she is depressed over the death of her child. Of course, she doesn't believe that you are responsible, but it does not address the depression that she's feeling or the injury that it's caused the family just as a result of the charge and the conviction; they're woefully inadequate.
>
> If that 15 points had been scored, the guideline range would have increased to 144 to 240 months. I think that that's much more appropriate in light of this case.

The trial court then praised the jury for reaching the correct verdict before imposing a twenty to forty year sentence, with credit for time Ales had already served.

## II. Jury Selection

Ales first argues that the trial court committed error requiring reversal when it allowed "group selection" of jurors by filling all open seats in the jury box when either the prosecutor or defense counsel exercised more than one peremptory challenge at a time. However, Ales waived any appellate objection to the procedures used to impanel the jury when defense counsel

expressed satisfaction with the jury without ever challenging the method used to seat prospective jurors for voir dire and without exhausting the available peremptory challenges.[4]

## III. Involuntary Manslaughter Jury Instruction

### A. Standard Of Review

Ales next argues that the trial court erred in denying his motion to instruct the jury on the law of involuntary manslaughter, which would have offered the jury the opportunity to convict him of that lesser offense. We review a trial court's decision that the facts in evidence do not support a criminal jury instruction, and therefore the instruction should not be issued, to determine whether the trial abused its discretion.[5]

### B. Cognate Lesser Offense

Involuntary manslaughter is a cognate lesser offense of murder.[6] "If the evidence presented would support a conviction of a cognate lesser offense, the trial court, if requested, must instruct on it."[7] The elements of involuntary manslaughter are "[a]n unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately causes death."[8] This crime has also been described as

> "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty."[9]

The negligence underlying manslaughter "is something more than ordinary or simple negligence, however, and is often described as 'criminal negligence' or 'gross negligence,' 'wilfulness, or of wantonness and recklessness.'"[10]

On appeal, as in the trial court, Ales does not point to any specific evidence in the record that would support this charge. Rather, he notes the absence of eyewitness testimony to the acts causing the infant's fatal injuries. He contends that the facts of this case suggest that the fatal

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[4] See *People v Russell*, 182 Mich App 314, 326; 451 NW2d 615 (1990) (Sawyer, J., dissenting), adopted 434 Mich 922; 456 NW2d 83 (1990); see also *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996).

[5] See *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

[6] *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990).

[7] *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998).

[8] See *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997).

[9] *People v Clark*, 453 Mich 572, 578; 556 NW2d 820 (1996), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923) (citation omitted in *Clark*).

[10] *Clark*, *supra* at 578 (citations omitted).

injuries the infant sustained could have been the product of an accident just as easily as they could have been inflicted intentionally. However, there was no evidence of accident or negligence presented to the jury. All the medical testimony, though in disagreement concerning the label to give the injuries, supported the prosecutor's theory that the infant's wounds were inflicted intentionally, not negligently or accidentally. Specifically, Dr. Gebara, Gelfand, and Pacris each testified to the tremendous force necessary to cause the sort of retinal bleeding observed in the infant's eyes. Drs. Gebara and Gelfand also explicitly ruled out numerous accident theories, including that the infant had fallen or that her sister, a toddler, could have harmed her. Dr. Pacris concurred in their observation that the sister could not have caused this degree of injury. Further, Dr. Gelfand, perhaps the only person to ask Szalkowski and Ales to explain the injuries their infant sustained, never received a direct answer. He was told only that the infant and her older sister liked to play and that the infant might have "gotten her head stuck somewhere[.]" This was pure speculation, at best, and certainly insufficient to support the jury instruction, which only had to be given if the evidence was sufficient to support conviction of the cognate offense.[11] This evidence made it impossible to say that the infant died of injuries she sustained because of a lawful act committed negligently, or an unlawful act done without the intent to kill or inflict great bodily harm. Therefore, the trial court did not abuse its discretion in declining to issue this instruction.

## IV. Sentencing

### A. Standard Of Review

Ales finally argues that the trial court erred in imposing on him a sentence that was an upward departure from the sentence identified in the legislative sentencing guidelines, which he claims his crime did not merit. We review a trial court's factual determination that there are substantial and compelling reasons to depart from a sentence under the guidelines to determine if the trial court abused its discretion.[12]

### B. Minimum Sentence

On appeal, the prosecutor does not concede that the trial court imposed a sentence that was an upward departure from the legislative sentencing guidelines. Rather, the prosecutor contends that the trial court corrected the manner in which the presentence investigator calculated the appropriate sentence range under the guidelines, actually imposing a sentence within the new, accurate range. Having reviewed the transcript of the sentencing hearing, we see why the prosecutor makes this argument. The trial court did comment on how the guidelines were calculated, noting that it believed that it could not assess an extra fifteen points for offense variable five because no one in the family was receiving treatment for the psychological harm caused by the crime. Had it been able to assess these extra points, the trial court remarked, the guidelines would have increased the minimum sentence to 144 to 240 months in prison, coinciding with the minimum sentence the trial court actually imposed. However, the trial court

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[11] See *Sullivan*, *supra* at 517-518.

[12] See *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000), adopting standard of review articulated in *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

acknowledged that it believed that the presentence investigator had correctly scored the minimum sentence range as 90 to 150 months under the legislative guidelines. Clearly, the trial court knew that it was imposing a sentence that departed upward from the recommendation under legislative the guidelines, and intended to do so.

MCL 769.34(3) sets forth the rules that govern sentence departures:

> A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> (a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Ales does not contend that the trial court's reasoning implicated any of the circumstances that MCL 769.34(3)(a) or (b) bars a trial court from considering when deciding to depart from the guidelines. He argues, instead, that the sentencing guidelines have already "taken in account" all the factors that are relevant to sentencing him for this crime.

The guidelines suggest that the trial court could have imposed an additional fifteen points for offense variable 5 because the instructions reveal that those extra points are appropriate "if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." Consequently, the fact that Ales' family had yet to seek treatment for the psychological injuries they sustained did not affect the trial court's ability to assess these fifteen points under offense variable five.

Nevertheless, in reading the trial court's comments at sentencing, we think that it was concerned about more than what might be considered the ordinary range of psychological injury resulting from a heinous crime. Rather, the trial court was looking at the effect that this crime had in terms of dividing Ales' family, and the resulting harm. The in-laws were pitted against each other in terms of their individual hopes for sentencing. Ales' older daughter was mourning for her sister and, perhaps, was confused about her relationship with her father, who was convicted of this crime. Ales' pregnant wife had an uncertain future that she faced without the support of a husband. While it is impossible to underestimate the psychological effects of any murder, that the perpetrator in this case was also the victim's father is a serious circumstance not taken into consideration in offense variable five.

The trial court assessed Ales ten points under offense variable ten for exploiting his victim's "youth," which some might interpret to include the familial relationship in this case. However, from the medical testimony in this case, we gather that the role "youth" played in this case was related to the fatal injury inflicted, which was possible in part because of the physical characteristics associated with a baby's young age, regardless of the relationship to the perpetrator. Additionally, though offense variable ten allows the trial court to assess points for an "abuse of authority status," the definition of that term in the guidelines requires the victim to have a reaction involving "fear" or "deference" to the defendant's behavior. While we could speculate about the range of emotions and understanding an infant as young as the victim in this case could have, the facts on the record do not demonstrate that Ales was able to harm his infant because she capitulated to any fear of or deference to him. Further, the "domestic relationship" the guidelines mention in offense variable ten does not appear to acknowledge the special, trusting, and *protective* relationship a parent should have with his infant that transcends the mere fact that they might reside with each other. The violence inflicted in this case was the antithesis of this ideal, and offense variable ten fails to account for the way Ales violated this special relationship.

Despite the clear guidance the Legislature has provided with the new sentencing guidelines, some cases will naturally stray from the range of circumstances that merit a sentence complying with the guidelines. The Legislature was "well aware" of this likelihood and provided a mechanism for sentencing departures.[13] The standard of review we apply to this problem is deferential[14] to the trial court's close view of the evidence leading to a defendant's conviction, the victim impact comments at sentencing, the societal concerns the prosecutor brings to the trial court's attention for the purpose of crafting an appropriate punishment, and the defendant's comments during allocution. In light of that standard of review, and given the trial court's rational explanation of the factors it believed to be unaccounted for in the guidelines while also being substantial and compelling support for a longer sentence, we conclude that there was no error requiring reversal.[15]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

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[13] See *Babcock, supra* at 77.

[14] See, generally, *People v Hansford (After Remand)*, 454 Mich 320, 329; 562 NW2d 460 (1997).

[15] To the extent that Ales also argues that his sentence is disproportionately long in comparison to the severity of his crime, *Babcock, supra* at 78, settles that we are not able to reach this issue.