STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWQUANDA BOROM,

Defendant-Appellant.

UNPUBLISHED
December 19, 2013

No. 313750
Wayne Circuit Court
LC No. 12-004559-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as on leave granted the order denying her motion to quash the bindover on one count of first-degree felony murder, MCL 750.316(1)(b),[1] and two counts of first-degree child abuse, MCL 750.136b(2),[2] relating to the injuries and death of her 16 month old son. This Court initially denied defendant's application for interlocutory leave to appeal; the Michigan Supreme Court remanded as on leave granted to address the following issues:

> (1) whether a parent's failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136b(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and, (4) assuming that there is such a duty under the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime. [*People v Borom*, 494 Mich 859; 830 NW2d 773 (2013).]

[1] This section was amended on June 4, 2013, but the amendment does not affect this case.

[2] The child abuse statute was amended on July 1, 2012, but the amendments do not affect this case.

We conclude that (1) a parent's failure to act to prevent harm to his or her child, with knowledge that serious physical or mental harm will result, satisfies the requirements of the first-degree child abuse statute, which does not require an affirmative act; (2) the failure to prevent a person who may be dangerous to the child from having contact with the child does not violate the first-degree child abuse statute; (3) there is a common law duty of a parent to prevent harm to his or her child; and (4) aiding and abetting first-degree child abuse may be proven where a parent breaches his or her duty to prevent injury to his or her child with knowledge that the child will be seriously harmed. We affirm the trial court's finding that the district court did not abuse its discretion in binding over defendant for trial.

I. A PARENT'S FAILURE TO ACT TO PREVENT HARM TO HIS OR HER CHILD

Defendant contends that a parent's failure to act to prevent harm to his or her child does not satisfy the requirements of the first-degree child abuse statute. We disagree.

This issue involves the interpretation of the first-degree child abuse statute, MCL 750.136b(2). "The interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013).

> "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." The intent of the Legislature is expressed in the statute's plain language. When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. "Statutes must be construed to prevent absurd results." "Criminal statutes are to be strictly construed," and cannot be extended beyond the clear and obvious language. [*Id.* at 341-342 (citations omitted).]

MCL 750.136b(2) provides, in relevant part: "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." This statute requires the prosecution to show that the defendant intended to cause serious physical harm or knew that serious physical harm would be caused. See *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004). The question is whether, by failing to act to prevent harm to his or her child, a parent can be found to have intended to cause serious physical harm or have had knowledge that serious physical harm would be caused.

Defendant argues that the Legislature did not intend for the failure to protect to be covered by the first-degree child abuse statute because the second-degree child abuse statute punishes omissions and reckless acts. The second-degree child abuse statute provides:

> A person is guilty of child abuse in the second degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.

> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b(3).]

"'Omission' means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c).

Defendant's argument is inconsistent with the statutory language. The Legislature's failure to use the term "act" in the first-degree child abuse statute indicates that first-degree child abuse can be committed by an omission. MCL 750.136b(2). Contrary to MCL 750.136b(3)(b) and (c), which both require that the defendant "knowingly or intentionally commits an act," MCL 750.136b(2) requires only that the defendant "knowingly or intentionally causes serious physical or serious mental harm to a child." Thus, first-degree child abuse does not require an affirmative act and may be committed by an omission. However, in order to be guilty of first-degree child abuse by committing an omission, such as by failing to prevent harm to a child, the defendant must have intended to cause serious physical harm or have known that serious physical harm to the child would be caused. See *Maynor*, 470 Mich at 295-297.

Furthermore, the term "omission" in the second-degree child abuse statute is defined by the Legislature. An "omission" includes only a willful failure to provide food, clothing, or shelter, or a willful abandonment. MCL 750.136b(1)(c). An "omission" does not cover the failure to act to protect a child from harm. Thus, MCL 750.136b(3)(a) does not cover the failure to prevent harm to a child. The other parts of the second-degree child abuse statute also do not cover the failure to prevent harm to a child with the intent to cause serious harm or knowledge that serious harm will be caused. The second part of MCL 750.136b(3)(a) punishes reckless acts that cause serious physical or mental harm. A reckless act causing serious harm differs from knowingly and intentionally causing serious harm. MCL 750.136b(3)(b) and (c) also do not cover the conduct at issue because they punish knowingly or intentionally committing an act likely to cause serious harm and knowingly or intentionally committing an act that is cruel, but neither requires that harm resulted.

Precedent from the Michigan Supreme Court and this Court support the conclusion that the failure to prevent harm to a child, with knowledge that serious harm will result, satisfies the requirements of the first-degree child abuse statute. In *Maynor*, 470 Mich at 291-292, the defendant left her two children, ages three and 10 months, in her car for approximately three and a half hours while she visited a beauty salon. The temperature outside was in the 80s that day, and the defendant parked her car in an unshaded, asphalt parking lot. *Id.* at 291. She left one or two windows rolled down one to one and a half inches. *Id.* at 292. Both children died of heat exposure. *Id.* The defendant initially told police that she had been abducted and raped. *Id.* She later admitted that she left the children in the car, but stated that she was too stupid to know that they would die. *Id.* The Michigan Supreme Court concluded that to be guilty of first-degree child abuse, the prosecution had to prove that "by leaving her children in the car, the defendant intended to cause serious physical or mental harm to the children or that she knew that serious mental or physical harm would be caused by leaving them in the car." *Id.* at 295.

In *People v Portellos*, 298 Mich App 431, 434-435; 827 NW2d 725 (2012), the defendant was convicted of second-degree murder and first-degree child abuse relating to the death of her newborn child. In concluding that there was sufficient evidence to support the jury's verdicts, this Court stated:

> Portellos was trained in first aid, CPR, and sudden infant death syndrome. Portellos knew she was pregnant for a few weeks. She hid her pregnancy from her mother and told witnesses that she was afraid that her mother would find out about the pregnancy. Portellos read books on labor and delivery and decided to give birth to her baby at home, unassisted. Portellos had a cellular phone. Even after determining that the baby was being born breech, Portellos did not call for assistance. However, Portellos had the presence of mind to call her supervisor and coworkers to explain her absence at work. And even after the baby did not cry when she was born, but only gasped a little and did not move, Portellos still did not call for medical assistance. She instead wrapped the baby tightly in a towel. Portellos then placed the baby in a garbage bag. [*Id.* at 444-445.]

This Court concluded:

> On the basis of the facts in this case, a reasonable juror could conclude that Portellos intentionally smothered Baby Portellos so that Mary Portellos would not hear the baby cry. A reasonable juror could alternatively conclude that the baby died (1) because Portellos failed to summon medical assistance, (2) from being wrapped tightly in a towel, or (3) from being placed in the garbage bag. A reasonable juror could infer from these facts that Portellos knew that the natural and probable consequence of those actions included death or serious injury to Baby Portellos. We conclude that sufficient evidence supports Portellos's convictions of first-degree child abuse and second-degree murder because a reasonable juror could find that Portellos intentionally took actions that caused the baby's death or knowingly took those actions with a wanton disregard of the risks. [*Id.* at 445-446.]

Accordingly, this Court found that the failure to call for medical assistance, with knowledge that serious harm would result, was sufficient to satisfy the requirements of the first-degree child abuse statute. See *id.* These cases support the conclusion that the failure to act to prevent harm to a child (i.e., leaving a child in a hot car or failing to call for medical assistance), with knowledge that serious physical harm will result, satisfies the requirements of the first-degree child abuse statute.

Defendant's reliance on the Wisconsin Supreme Court's decision in *State v Rundle*, 176 Wis 2d 985; 500 NW2d 916 (Wis 1993), is misplaced. In that case, the court expressly found that the statute at issue proscribed affirmative conduct, while another subsection proscribed acts of omission. *Id.* at 997. Contrarily, Michigan's first-degree child abuse statute covers both affirmative acts and omissions.

II. FAILURE TO PREVENT A PERSON WHO MAY BE DANGEROUS TO THE CHILD FROM HAVING CONTACT WITH THE CHILD

Defendant contends that even if the failure to act to prevent harm satisfies the requirements of the first-degree child abuse statute, the failure to prevent a person who may be dangerous to the child from having contact with the child does not. We agree.

This question also involves the interpretation of the first-degree child abuse statute, MCL 750.136b(2), which we review de novo. *Lewis*, 302 Mich App at 341. As discussed above, in Issue I, *supra*, the failure to act to prevent harm to a child, with knowledge that serious physical harm will result, satisfies the requirements of the first-degree child abuse statute. The question is whether a "failure to prevent a person who may be dangerous to the child to have contact with the child" violates the first-degree child abuse statute. *Borom*, 494 Mich 859.

MCL 750.136b(2) provides, in relevant part: "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2) requires a showing that the defendant intended to cause serious physical harm or knew that serious physical harm would be caused. *Maynor*, 470 Mich at 297. As discussed, this may be satisfied by failing to act to prevent harm to a child.

Applying the plain language of the statute, see *Lewis*, 302 Mich App 341, we conclude that the failure to prevent a person who may be dangerous to the child from having contact with the child cannot constitute knowingly or intentionally causing serious harm. If a parent only knows that a person may be dangerous, then by leaving the child with that person the parent does not intend to cause serious harm or know that serious harm will result, as required to establish first-degree child abuse. See *Maynor*, 470 Mich at 297. In order to knowingly and intentionally cause serious harm, a parent must know that the person will cause serious harm to the child.

III. COMMON LAW DUTY

Defendant contends that there is a common law duty of a parent to prevent injury to his or her child, but it is limited to when the parent is aware of immediate danger to the child. We agree that there is a duty, but disagree that it is so limited.

This question involves the interpretation of common law. The scope and applicability of common law principles are questions of law, which are reviewed de novo. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

The question is "whether there is a common law duty of a parent to prevent injury to his or her child." *Borom*, 494 Mich 859. In *People v Beardsley*, 150 Mich 206, 209-210; 113 NW 1128 (1907), the Michigan Supreme Court stated:

> The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. Although the literature upon the subject is quite meager and the cases few, nevertheless the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the

> omission of which establishes legal responsibility. One authority has briefly and correctly stated the rule, which the prosecution claims should be applied to the case at bar, as follows: "If a person who sustains to another the legal relation of protector, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril, willfully and negligently fails to make such reasonable and proper efforts to rescue him as he might have done, without jeopardizing his own life, or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies." "So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body is bound to execute the charge with proper diligence, and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die." [Citations omitted.]

Accordingly, there is a common law duty of a parent to prevent harm to his or her child. The Michigan Supreme Court stated that the breach of the duty must be the immediate and direct cause of death in order for the parent to be liable for manslaughter. *Id.* at 209. However, there is no indication that the parent need only protect his or her child from immediate injury. In *People v Giddings*, 169 Mich App 631, 635; 426 NW2d 732 (1988), this Court found that the defendants, the parents of the child victim, had a legal duty to their child and their failure to provide nourishment caused the child's death. Thus, the duty is not limited to immediate dangers.

IV. AIDING AND ABETTING FIRST-DEGREE CHILD ABUSE

Defendant contends that under the common law duty to prevent injury to one's child, aiding and abetting cannot be proven where the defendant failed to act according to that duty, but provided no other form of assistance to the perpetrator of the crime. We disagree.

This question involves the interpretation of the aiding and abetting statute, MCL 767.39. "The interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *Lewis*, 340 Mich App at 341.

The question is, assuming there is a common law duty of a parent to prevent injury to his or her child, "whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime." *Borom*, 494 Mich 859. The elements of aiding and abetting are:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement. [*People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (citation and internal quotation marks omitted).]

Accordingly, in order to prove aiding and abetting first-degree child abuse, the prosecution must prove that (1) first-degree child abuse was committed by the defendant or some

other person; (2) the defendant performed acts or gave encouragement that assisted the commission of first-degree child abuse; and (3) the defendant intended the commission of first-degree child abuse or had knowledge that the principal intended the commission of first-degree child abuse at the time the defendant gave aid or encouragement. The second and third elements are satisfied if the defendant breaches his or her duty to prevent harm to the child by leaving the child with a person with knowledge that the person intends to commit first-degree child abuse. By leaving the child with the person, the defendant assists in the commission of the crime. If the defendant also intends or has knowledge that the person intends to commit first-degree child abuse, then the elements of aiding and abetting first-degree child abuse are satisfied.[3]

V. APPLICATION

Applying the above conclusions, we find that the trial court properly found that the district court did not abuse its discretion in binding over defendant for trial. "A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial." *People v Bennett*, 290 Mich App 465, 479; 802 NW2d 627 (2010) (citation and internal quotation marks omitted). "The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it." *Id.* at 480 (citation and internal quotation marks omitted).

It is necessary to consider whether there was probable cause to believe defendant committed first-degree child abuse in relation to both the victim's burns and head injury. With regard to each injury, it is also necessary to determine whether there was probable cause to believe defendant was guilty as either a principal or an aider and abettor. Moreover, as discussed above, a person may be guilty of first-degree child abuse not only by intentionally causing the serious harm, but also by failing to act to prevent harm to a child, with knowledge that serious physical harm will result.

A. SECOND AND THIRD-DEGREE BURNS

With regard to the victim's second and third-degree burns, the prosecution's theories were that (a) defendant intentionally burned the victim, (b) defendant left the victim with McCullough, who intentionally burned him, or (c) defendant failed to seek medical treatment for his burns.

Assuming defendant left the victim with McCullough and he burned the victim, there is no evidence that defendant knew that McCullough would harm the victim. At that point, the victim previously suffered a fractured humerus. Even if defendant knew that the victim was previously injured while in McCullough's sole care, the victim's injured humerus was consistent

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[3] Defendant contends that the child abuse statute has replaced any common law duty. However, we merely conclude that a parent's failure to prevent injury to his or her child, with knowledge that serious harm will result, which violates the common law duty, also constitutes aiding and abetting first-degree child abuse.

with an accident. Accordingly, there was not probable cause to believe that defendant committed first-degree child abuse by leaving the victim with McCullough. Nor is there probable cause to believe defendant committed first-degree child abuse as an aider and abettor by leaving the victim with McCullough. Both findings require that defendant had knowledge that McCullough would harm the victim. See *Maynor*, 470 Mich at 295-297.

With regard to the failure to seek medical treatment, there was also not probable cause to believe defendant knowingly and intentionally caused serious harm. Although she did not take the victim to the hospital, she applied ointment to the burns, as her mother, a medical professional suggested, and she scheduled a doctor's appointment for the victim. Although the medical examiner testified that a physician should have examined the victim, there was evidence that defendant believed she could treat the burns herself.

Nonetheless, there was probable cause to believe defendant was guilty of first-degree child abuse by intentionally burning the victim. There was evidence that on several occasions defendant said she was home when the victim burned himself. There was also evidence that the burns were intentionally inflicted by another individual. On the other hand, the testimony of defendant's mother, Evette Gaddes, suggested that defendant may not have been present when the burns occurred. McCullough said that defendant was not present, and defendant later stated she was not present, although it is unclear to which incident she was referring. However, given the medical examiner's testimony that the burns were intentionally inflicted by another individual and the evidence that defendant was present when they occurred, there was probable cause to believe that defendant knowingly and intentionally caused the burns herself and thus was guilty of first-degree child abuse as a principal.

B. HEAD INJURIES

With regard to the head injuries, the prosecution's theories were that (a) defendant intentionally caused the injuries, (b) defendant left the victim with McCullough, who intentionally caused the injuries, or (c) defendant prevented the victim from receiving treatment.

Assuming defendant left the victim with McCullough and he intentionally caused the head injuries, there was probable cause to find that defendant knew that McCullough would seriously harm the victim. There was evidence that, by that point, defendant knew that the victim was previously injured while in McCullough's care. Although there was evidence that the victim could turn on the hot water by himself, the victim's injuries were not consistent with a self-inflicted injury. Given the burns, the victim's humerus injury also became suspicious. Accordingly, there was evidence that defendant knew that McCullough was abusing the victim. Thus, there was probable cause to believe that defendant committed first-degree child abuse, either as a principal or aider and abettor, by leaving the child with McCullough, with knowledge that he would seriously harm the victim.

There was also probable cause to find that defendant's failure to seek medical treatment for the victim's head injury constituted first-degree child abuse. After the victim was having difficulty breathing and would not wake up, she delayed in calling 911 and lied to medical professionals about his injuries. The medical examiner testified that a layperson would recognize that the victim's slow, sporadic breathing was a problem and that the delay contributed

to the victim's condition. Given the victim's severe condition when he arrived at the hospital, there was probable cause to find that defendant knowingly and intentionally caused serious physical harm to the victim.

Finally, there was probable cause to believe defendant was guilty of first-degree child abuse by intentionally causing the head injuries. Again, defendant stated, at least once, that she was with the victim when he was injured. There was also evidence that the injuries were caused by the victim being thrown or shaken and thrown. On the other hand, Gaddes's testimony suggested that defendant may not have been present when the head injuries occurred. McCullough said that defendant was not present, and defendant later stated she was not present, although it is unclear to which incident she was referring. However, given the medical examiner's testimony that the victim was thrown, and the evidence that defendant was present when it occurred, there was probable cause to find that defendant knowingly and intentionally caused the head injuries.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly