STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

SHAWQUANDA BOROM

Defendant-Appellant.
_____/

Supreme Court No. 148674

Court of Appeals No. 313750

Lower Court No. 12-4559-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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SUPPLEMENTAL BRIEF ON APPEAL – ORAL ARGUMENT REQUESTED

STATE APPELLATE DEFENDER OFFICE

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Court of Appeals answers "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

This is an interlocutory appeal from the Wayne County trial court's order denying a motion to quash the charges of first-degree felony murder[1] and two counts of first-degree child abuse[2]. This Court entered an Order on April 25, 2014, granting oral arguments and ordering supplemental briefing regarding "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." *Order*, attached.

Introduction

Shawquanda Borom,[3] 21-years old, and her son, 16-month old Davion Fisher, lived with her mother, Evette Gaddes, a health care worker. Ms. Borom's two younger brothers also lived in the home. (PE I 22-23, 29, 75). [4]At the time of the injuries giving rise to this case, Ms. Borom's boyfriend, Daniel McCullough, 17-years old at the time, lived with the family (PE I 23-24). Mr. McCullough was not Davion's father (PE I 122-123, 139).

On July 28, 2011, Davion died as a result of severe head injuries. Ms. Borom sometimes left Davion in the care of Mr. McCullough.

The prosecution's theory in charging Ms. Borom with felony-murder is that "the child's health and safety is the Defendant's responsibility. . . . She aided and abetted Daniel McCullough by allowing him to have access to her child knowing that the child had one, if not two, serious injuries while the child was in Daniel McCullough's care during a 16-day period" (PE III 32-33).

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[1] MCL 750.316
[2] MCL 750.136b(2)
[3] When Ms. Borom was 14, Child Protective Services removed her and her siblings from Ms. Gaddes' care (PE I 74, 116, 170). Ms. Borom was in many different foster homes (PE I 121). Ms. Borom has learning difficulties and attention deficit hyperactivity disorder (ADHD) (PE I 71-72). She did not finish high school and has trouble understanding big words (PE I 71-72).
[4] Transcript citations are as follows: PE I – 4/26/12 Preliminary Examination; PE II – 5/1/12 Preliminary Examination PE III – 5/11/12 Preliminary Examination; MH – 11/8/12 Motion Hearing.

The Injuries

Throughout the preliminary examination, the prosecution referred to three specific injuries Davion suffered while under Mr. McCullough's care.

The first incident occurred on July 9, 2011, when Davion fell off the side of the stairs leading to the basement, which did not have a railing or wall for safety, onto his shoulder, while Mr. McCullough stated he was cleaning and doing laundry (PE II 32-34; PE III 12). Mr. McCullough told the police he was alone with the child when this incident occurred (PE III 12).

The prosecutor dismissed this count of first-degree child abuse (PE III 26-27), but stated this incident put Ms. Borom "on notice that either Daniel McCullough does not properly supervise this child or that he's being abusive to this child" (PE III 28).

Approximately two weeks later, the second incident occurred, which was a burn to Davion's head (P I 32, 36, 41). Mr. McCullough told the police he was alone with Davion at the time of the injury (P III 12-13). Mr. McCullough told police that he placed Davion in the bathtub and started to run water, then left the room to get a change of clothes for him (PE III 12). He heard Davion scream, and when he reached him, he saw that Davion had turned on the hot water and burned himself in the process (PE III 12-13).

The medical examiner testified these were second and third-degree burns (PE II 11, 25). Because Davion had no burns on his hands or elsewhere, the medical examiner opined that Davion was facing the floor with hot water applied to the back of his head (PE II 29-30).

Ms. Borom followed the advice of her mother, a health care worker, and treated Davion's burns with salve and bandages supplied by her mother, and scheduled a doctor's appointment for Davion (P I 42-43, 73-77).

The third and final incident in question occurred on July 26, 2011. Ms. Gaddes had dropped Ms. Borom off at her grandmother's house in Inkster around 1:00 p.m. that day (PE I 50-54). Mr. McCullough told police he was the sole caretaker for Davion at the time of the incident (PE III 13). According to Mr. McCullough, Davion fell off the porch and down several concrete steps as he pursued his ball, which had fallen onto the driveway (PE III 13).

That evening, Ms. Borom called Ms. Gaddes and told her that Davion would not wake up (PE I 44). Ms. Gaddes spoke with Mr. McCullough, who told Ms. Gaddes that Davion had fallen while the two were outside playing (PE I 82-83). Ms. Gaddes told Mr. McCullough twice, on phone calls 15 minutes apart, to call 911 (PE I 44-47, 83-84). Ms. Gaddes did not call 911 herself (P I 83-84). Ms. Borom called 911 and an ambulance arrived shortly thereafter (P I 8 (911 call), 14). EMS took Davion to Children's Hospital (PE I 18). He died two days later (PE I 48-49).

The medical examiner opined that the injuries to Davion's brain were not the result of a short fall from the front steps, but more likely the result of being thrown against a hard object or being shaken (PE II 15-18). The cause of death was blunt force trauma to the head and the manner of death was a homicide (PE II 23).

Conflicting Statements

As to the first incident, the arm injury, Ms. Borom initially told a CPS psychiatrist that she was home, but not in the basement; it was later that she revealed that Mr. McCullough was alone with Davion (PE I 164-165).

As to the second incident, the burn to the head, Ms. Borom told her mother, a CPS psychiatrist and Officer Dent that she was home (PE I 32-42, 139, 165, 167).

Ms. Borom made several statements regarding the third incident. She denied knowledge of any incident that led to the head trauma (PE II 64). She also stated she was with Davion and

he followed her up the porch steps, and that she was in the kitchen when she heard him scream outside (PE I 8 (911 call), 14-16, 164, 168, 136). Ms. Borom did not tell the 911 operator about Davion's injured humerus or burns from the bathtub water (PE I 8), nor did she tell the paramedic who arrived at the house that Davion had fallen (PE I 9).

Mr. McCullough told Detective Tim Larion that he was alone with Davion for all three incidents (PE III 12-13). During a videotaped reenactment of all three incidents, Mr. McCullough admitted to Wayne County Medical Examiner Patricia Tackitt that he was alone with Davion for all three incidents (PE III 25-26).

Procedural History

Defense Counsel moved to quash the bindover based on the absence of any evidence "to support that she [Ms. Borom] knowingly and intentionally caused harm to the child." (MH 11). The prosecution responded that: "there is no specific case on these similar facts. And this case, I believe, will make new law in Michigan." (MH 11-12). On November 16, 2012, after written and oral arguments, the trial court denied defense counsel's motion to quash the bindover and defense counsel filed an interlocutory application for leave to appeal from that decision.

On January 31, 2013, the Court of Appeals denied trial counsel's application for leave to appeal the denial of the motion to quash.

On May 29, 2013, this Court remanded the case to the Court of Appeals for consideration of four questions:

> (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.

On December 19, 2013, the Court of Appeals issued its decision, affirming the decision of the trial court to bind over Ms. Borom for trial. *People v Borom*, unpublished opinion per curiam of the Court of Appeals, decided December 19, 2013 (Docket No. 313750).

On April 25, 2014, this Court ordered oral arguments and supplemental briefing regarding "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." *Order*, attached.

I. WHERE THE DEFENDANT FAILED TO ACT ACCORDING TO A LEGAL DUTY, BUT PROVIDED NO OTHER FORMS OF ASSISTANCE TO THE PERPETRATOR OF THE CRIME AIDING AND ABETTING UNDER MCL 767.39 CANNOT BE PROVEN AS THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AFFIRMATIVE ACTION

Issue Preservation

Trial counsel moved in the Wayne County Circuit Court to quash the bindover. (See, MH). The trial court denied the motion. Lower Court Records, Order

Standard of Review

The interpretation of statutes is a question of law and is reviewed de novo. *People v Moore*, 470 Mich 56, 61; 679 NW2d 41 (2004).

Discussion

This Court asked the parties to address whether Michigan's aiding and abetting statute should be read to include the failure to act according to a legal duty as a basis for aiding and abetting, regardless of intent and despite the absence of any affirmative action. If Michigan's aiding and abetting statute were interpreted in this manner, it would be an expansion that runs contrary to well-over a century's precedent regarding the requirement of intent or knowledge on behalf of the aider and abettor and violates basic principles of statutory construction.

A. The Plain Language of the Statute Indicates the Legislature, since 1927, has Required Affirmative Action in Order to Impose Criminal Liability as an Aider and Abettor.

A court's goal "in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.'" *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "[W]ords and phrases shall be construed and

understood according to the common and approved usage of the language." MCL 8.3a. Further "[j]udicial construction is not permitted." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). "It is the role of the judiciary to interpret, not write, the law." *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005).

This Court must begin with the plain language of the statute. The Michigan Legislature has spoken clearly as to what constitutes aiding and abetting:

> Every person concerned in the commission of an offense, **whether he directly commits the act** constituting the offense **or procures, counsels, aids, or abets in its commission** may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39 (emphasis added)].[5]

This Court has noted that "Michigan's aiding and abetting statute has been in force and substantively unchanged since the mid-1800s." *People v Robinson*, 475 Mich 1, 7-8; 715 NW2d 44 (2006). The Legislature amended the statute in 1927 to its current form, "which substitutes 'procures, counsels, aids, or abets' for 'aid and abet.'" *Id.* at n 17.

The Legislature originally specified four *actions* by which an individual who aids and abets the commission of a crime can be charged as if the individual directly committed the offense: *procures*, *counsels*, *aids* or *abets*. In order to determine the intent of the Legislature, it is necessary for this Court to examine the plain language of the statute, and the definition of the words specifically chosen.

In 1927, the definition for each of these four words required action:

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[5] Violation of MCL 767.39 is not a "separate substantive offense," but rather a "'theory of prosecution' that permits the imposition of vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). In addition, the statute "neither expressly nor impliedly limits the persons or crimes encompassed by its terms. The language of the statute applies to 'every person' who commits 'an offense.'" *People v Moore*, 470 Mich 56, 68; 679 NW2d 41 (2004).

Procure: I. To bring about or effect by care, contrivance, or special agency . . . hence, in general, to bring about, produce, or cause; also, to obtain or get by care, effort, or the use of special agencies or means.

Counsel: I. To give counsel or advice to; advise; also, to urge the doing or adoption of; recommend (a plan, etc.). II. To give counsel or advice; also, to take counsel.

Aid: I. To help; assist; afford support or relief to; second (efforts); facilitate (a process); II. To give help or assistance.

Abet: To encourage by approval or aid, esp. in wrongdoing; urge or help on mischievously; instigate; foment.

[*The New Century Dictionary*, 1927].

In *Robinson*, this Court noted that the 1927 amendment to the statute did not change the substance of the aiding and abetting statute, because the terms "procure" and "counsel" are synonyms to "aid and abet." *Robinson*, *supra*, at 8 n 17. At common law, "aid and abet" was defined as "'to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about or encourage, counsel, or incite as to its commission.'" *Id.*, quoting Black's Law Dictionary (5th ed.), p. 63. Both the common law definitions and the 1927 dictionary definitions require ***affirmative action***.

Importantly, the current dictionary definitions have changed little since the statute's enactment, and still require action:

Procure: 1. To obtain by care, effort, or the use of special means. 2. To bring about, esp. by complicated or indirect means

Counsel: 7. To give advice to; advise. 8. To urge the adoption of, as a course of action; recommend

Aid: 1. To provide support for or relief to; help; 2. To promote the progress of; facilitate; 3. To give help or assistance

> *Abet*: To encourage, support, or countenance by aid or approval, usu. in wrongdoing.
>
> [*Random House Webster's College Dictionary*, 1997].

Based on the plain language of the statute and the definitions of those plain terms, the failure to act cannot be a basis for aiding and abetting. The language used by the Legislature in the statute requires ***affirmative action***, and has for the past eighty-seven years. This is in stark contrast to the statutes of several other jurisdictions, and the language of the Model Penal Code. *See, infra*, Part I.C.

Given the statutory language of Michigan's aiding and abetting statute the answer to the Court's question is that aiding and abetting cannot be proven where a defendant fails to act according to a legal duty but provides no other form of assistance to the perpetrator of the crime.

B. <u>This Court's Precedent Requires Affirmative Action and Intent in Order to be Held Criminally Liable as an Aider and Abettor</u>.

In 2006, this Court noted that "there has been little case law from this Court interpreting *the language* of this statute." *Robinson*, *supra*, at 8 (emphasis in original). However, there are three required elements a prosecutor must prove beyond a reasonable doubt to sustain a conviction under an aiding and abetting theory:

> (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 that [the defendant] gave aid and encouragement.

Id. at 6, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

The Second Element[6]

While this Court did not specifically define the language used in the statute, this Court interpreted the second element in *Moore*, *supra*: "[t]he phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *Id.* at 63.

This Court was explicit in further defining the actions that constitute aiding and abetting:

> Aiding and abetting means to assist the perpetrator of a crime. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime, or by his conduct makes clear that he is ready to assist the perpetrator if such assistance is needed.

Id., quoting 21 Am Jur 2d, Criminal Law, § 206, p. 273.

"[T]he amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant 'performed acts or gave encouragement that assisted.'" *Id*, quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (internal citations omitted).

The prosecutor here must demonstrate that Ms. Borom "specifically aided the commission of" first-degree child abuse by "perform[ing] acts," encouraging, supporting, or inciting Mr. McCullough to abuse Davion. *Id.* at 70. However, a *failure* to act according to this duty does not meet the requirements of being an aider and abettor. There must be "active encouragement" by "word or deed . . . or . . . conduct." *Moore*, *supra*, at 63.

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[6] Based on the language of the order, this Court can assume, for the purpose of this argument alone, that Mr. McCullough committed a crime and the first element is satisfied. The order specifically states "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." While it does not indicate what "crime," was committed, because Ms. Borom and Mr. McCullough were charged with first-degree child abuse, it is presumed the "crime" referred to in the order is first-degree child abuse.

Over 80 years ago, in *People v Burrel*, this Court recognized that to be found guilty as an aider and abettor, defendants must *act*. 253 Mich 321; 235 NW 170 (1931). In *Burrel*, the defendant had driven his friend and an underage girl to a deserted road, and parked the car while his friend had sex with the complainant. *Id.* at 322. Even though the defendant was present during the commission of a statutory rape and was charged as an aider and abettor, the court reasoned there was no record evidence that he knew the crime was occurring, or intended the crime to occur, and reversed his convictions. *Id.* at 323. This Court held that "'[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abetter [sic] or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent." *Id.*, quoting 1 Cyc. Crim. Law (Brill), 233.

Similarly, "[s]ome form of *active*, *overt* participation toward the accomplishment of the offense is required, as is a completed crime and a guilty principal." *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982) (emphasis added). The *Carter* court, in distinguishing aiding and abetting from conspiracy, quoted the United States Supreme Court: "[a]iding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he *consciously* shares in a criminal act, regardless of the existence of a conspiracy." *Id.* at 580-581, quoting *Pereira v United States*, 347 US 1, 11; 74 S Ct 358; 98 L Ed 435 (1954) (emphasis added).

Under any view of the facts, Ms. Borom did not provide the type of active encouragement required under the plain language of MCL 767.39 and this Court's long-standing precedent to be found liable as an aider and abettor to first-degree child abuse.

Even if Ms. Borom was present at home during the injuries to Davion, her mere presence is not enough to be an aider and abettor. *Burrell*, *supra*, at 323. Even if Ms. Borom knew "that an offense [was] about to be committed or [was] being committed," that is not enough to be guilty as an aider or abettor. *Id.* at 323. Nor is "mental approval . . . passive acquiescence or consent." *Id.* Ms. Borom would have had to engage in "active, overt participation" toward the accomplishment of Mr. McCullough committing first-degree child abuse to be found liable as an aider or abettor. *Carter*, *supra*, at 580. The facts of this case do not show any active participation by Ms. Borom, as a failure to act is not active participation.

The Third Element

This Court interpreted the third element of aiding and abetting in *People v Robinson*, *supra*:

> We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. [T]he prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Robinson, *supra*, at 15.

In *People v Nix*, this Court specifically addressed the interplay between a legal duty, the failure to act, and the aiding and abetting statute. 453 Mich 619; 556 NW2d 866 (1996). There, the defendant was charged with felony-murder, with the underlying felony being kidnapping, and first-degree premeditated murder. *Id.* at 621. The defendant's boyfriend kidnapped the decedent and locked her in a trunk. *Id.* at 621-622. The defendant was in the car with the boyfriend and

knew the decedent was in the trunk. *Id.* at 621-622, 641. While the focus of the appeal was a Double Jeopardy claim, the dissent dedicated a portion of its opinion to analyzing one's legal duty to act. *Id.* at 637-641 (Boyle, J., dissenting). The majority responded:

> The prosecution's case . . . rested entirely on the allegation that defendant acquired knowledge that the victim was confined in the trunk and became complicit in the criminal endeavor when she failed to act to free or otherwise aid the victim. And if guilt can accompany a failure to act—that is, guilt by omission—then, obviously, it can only be so because the guilty party had an obligation to act in some way, was legally compelled to act in some way, had a duty to act in some way.

Id. at 627.

Given the lack of a Michigan decision on point with the facts of this case, a review of statutes of other states, the federal statute and the Model Penal Code are instructive guides for any further analysis.

C. The Model Penal Code, and the Statutes of Several Other States Include Specific Language Imposing Accomplice Liability for the Failure to Act According to a Legal Duty, whereas the United States Supreme Court Interpreted the Federal Aiding and Abetting Statute, which is Substantially Similar to Michigan's, to Require Affirmative Action.

Unlike Michigan, several states have explicit statutory provisions imposing accomplice liability if a person fails to act when they have a legal duty and several also include an additional intent to promote/assist in the commission of the crime.

> Ala Code § 13A-2-23: A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense: (1) He procures, induces or causes such other person to commit the offense; or (2) He aids or abets such other person in committing the offense; or (3) **Having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.**

Ark Code § 5-2-403: (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:
(1) Solicits, advises, encourages, or coerces the other person to commit the offense; (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or (3) **Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.**

Del Code tit 11, § 271: A person is guilty of an offense committed by another person when: (2) Intending to promote or facilitate the commission of the offense the person: a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or c. **Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.**

Haw Rev Stat § 702-222: A person is an accomplice of another person in the commission of an offense if: (1) With the intention of promoting or facilitating the commission of the offense, the person: (a) Solicits the other person to commit it; or (b) Aids or agrees or attempts to aid the other person in planning or committing it; or (c) **Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do.**

Ky Rev Stat § 502.020: (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or (c) **Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.**

NJ Stat § 2C:2-6: c. A person is an accomplice of another person in the commission of an offense if: (1) With the purpose of promoting or facilitating the commission of the offense; he (a) Solicits such other person to commit it; (b) Aids or agrees or attempts to aid such other person in planning or committing it; or (c) **Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or**

ND Cent Code § 12.1-03-01: 1. A person may be convicted of an offense based upon the conduct of another person when: a. Acting with the kind of culpability required for the offense, he causes the

other to engage in such conduct; b. With intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, **having a statutory duty to prevent its commission, he fails to make proper effort to do so**; or c. He is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.

Or Rev Stat § 161.155: A person is criminally liable for the conduct of another person constituting a crime if: (2) With the intent to promote or facilitate the commission of the crime the person: (a) Solicits or commands such other person to commit the crime; or (b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or (c) **Having a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make**.

Tenn Code § 39-11-402: A person is criminally responsible for an offense committed by the conduct of another, if . . . : (3) **Having a duty imposed by law** or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, **the person fails to make a reasonable effort to prevent commission of the offense**.

Tex. Penal Code § 7.02: (a) A person is criminally responsible for an offense committed by the conduct of another if: (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense; (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) **having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense**.

(emphasis added).

The Model Penal Code § 2.06 (2001) has a similar provision:

(3) A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or commit it, or (iii) **having a legal duty to prevent the commission of the offense, fails to make proper effort so to do**.

In *Rosemond v United States*, 134 S Ct 1240; 188 LE2d 248 (2014), the Supreme Court of the United States interpreted the federal aiding and abetting statute, which is similar to Michigan's statute: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 USC § 2 (2014). The Court noted that "§ 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Id.* at 1245. There are two components to the federal aiding and abetting statute: a person "(1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* Simply put, the two requirements are "*affirmative* act and intent." *Id* (emphasis added).

The Court specifically pointed out that "Congress used language that 'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'" *Id.* at 1246-1247, quoting *Reves v Ernst & Young*, 506 US 170, 178; 113 S Ct 1163; 122 LEd2d 525 (1993). Regarding the intent component, the Court noted that "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Id.* at 1248, quoting *Nye & Nissen v United States*, 336 US 613, 619; 69 S Ct 766; 93 L Ed 919 (1949).

A person must "*actively* participate[] in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 1249 (emphasis added). Thus, while the facts of *Rosemond* did not involve a question of a failure to act according to a legal duty, § 2 is substantially similar to Michigan's statute, and the Supreme Court's analysis makes it clear that ***affirmative actions*** and intent are required for accomplice liability.

Similarly, other states with statutes similar to Michigan, i.e. with no explicit provision establishing criminal liability as an aider and abettor based on a failure to act, have held that their statutes do not provide for accomplice liability based on a failure to act.

In *State v Jackson*, 137 Wash 2d 712, 725; 976 P2d 1229 (Wash 1999), the Supreme Court of Washington, sitting *en banc*, interpreted Washington's accomplice liability statute. That statute provided, in pertinent part:

> 3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it; or
>
> (b) His conduct is expressly declared by law to establish his complicity. [*Jackson*, *supra*, at 721-722, quoting RCW 9A.08.020.]

The defendant was the foster mother of the victim and was at work when the foster father was alone with the child when the child died of blunt force trauma to the head. *Id.* 716-718. In addition to the injuries that led to the child's death, there was a previous possible episode of child abuse. *Id.* Both parents were charged with child abuse and felony murder. *Id.* at 719. The trial court gave the following instruction to the jury: "'unless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; *a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so.*" *Id.* at 719 (internal citations omitted; emphasis in original). Both parents were convicted. *Id.*

The Washington Supreme Court held that the instruction regarding accomplice liability was erroneous and reversed the defendants' convictions:

> "It is readily apparent that this statute does not extend accomplice liability to a person, much less a parent or foster parent, based on the person's failure to fulfill a duty to come to the aid of another. Because such a basis for accomplice liability does not appear in the statute, it follows that the trial court's instruction was a notable expansion on the reach of the statute." *Id.* at 722.

The court further noted that "[t]he Legislature's failure to extend liability under our accomplice statute for a parent's failure to act was not, in our judgment, a mere oversight," given that the accomplice statute was based on the Model Penal Code, which does have a provision for the failure to act according to a legal duty as a basis for accomplice liability. *Id.*

In *Martin v State*, 361 So2d 68, 69 (Mo 1978), the Supreme Court of Missouri addressed a case where both a husband and wife were convicted of the manslaughter of their young child. The testimony at trial indicated that the defendant husband was alone with the child. *Id.* at 69-70. The only notice the defendant wife had of any previous abuse was bruises on the child, which she asked the defendant husband about and he provided a "satisfactory explanation." *Id.* at 70.

The court held there was insufficient evidence to convict the defendant wife, and specifically distinguished a 1949 case from Indiana[7]:

> The only evidence connecting appellant with the crime indicated there were some old bruises on the child with the inference that appellant knew about them, and that appellant did not show concern when she saw the child at the Webster County Hospital. The State contends that a parent is charged with the custody, welfare and protection of her child and cites *Mobley v. State*, 227 Ind. 335, 85 N.E.2d 489 (1949). However, that case simply states that to actively countenance

[7] In *Mobley v State*, 227 Ind 335; 85 NE2d 489 (Ind 1949), the Indiana Supreme Court affirmed the conviction of a mother for aiding and abetting the death of her child. Both the mother and the mother's boyfriend were convicted in the death of the child, and both had abused the child in the past. *Id.* at 341-342. The defendant mother admitted that "she was afraid Fagan [boyfriend] would leave her and that she had sacrificed the welfare of her child for the companionship of Fagan and that she knew she was guilty (of killing the child)." *Id.* at 342. The court noted that evidence tended to show that the defendant *actively* contributed to the child's death. *Id.* at 344.

> and support the doing of a criminal act by another is to encourage it within the meaning of the aiding and abetting statute and that a person encouraging the commission of a felony is guilty as a principal. The evidence in the present case does not indicate that appellant encouraged the abuse of her child by Martin, or that she was present, aiding and abetting in any abuse of the child. [*Id.*]

In *Commonwealth v Raposo*, 413 Mass 182, 184; 595 NE2d 773 (Mass 1992), the Massachusetts Supreme Court analyzed its accessory before the fact statute[8]: "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." *Id.* at 184.

The defendant was the mother of a mildly retarded 17-year-old girl. *Id.* at 183. The mother's boyfriend told the defendant that he intended to have sex with her daughter, and did, in fact rape the daughter. *Id.* at 183-184. The defendant was convicted "on the theory that, as the mother of the victim, the defendant had a common law duty to protect her child from harm, and that her failure to take reasonable steps to fulfil this duty is an omission sufficient to make her liable as an accessory." *Id.* at 185.

The Massachusetts Supreme Court noted that even though the defendant knew about the intent of her boyfriend, and did not go to the police, such omissions still were not sufficient to convict her as an accessory, because "what is required to be convicted as an accessory before the fact is not only knowledge of the crime and a shared intent to bring it about, but also some sort of act that contributes to its happening." *Id.* at 185, 188-189. The court reversed the convictions, and declined to "read into our accessory before the fact law the principle that a mere omission by

[8] The accessory before the fact statute has since been amended to a general aiding and abetting statute: "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Mass Gen Laws ch 274 § 2.

a parent to take action to protect a child, without more, is the equivalent of intentionally aiding in the commission of a felony against that child. By its very terms, [the statute] requires more than an omission to act." *Id.* at 188.

In contrast, there are jurisdictions in which the failure to act according to a legal duty, even in the absence of a statute, can serve as the basis for accomplice liability. In *People v Stanciel*, 153 Ill 2d 218, 606 NE2d 1201 (Ill 1992), the Illinois Supreme Court analyzed two consolidated cases, both of which "involve[d] the death of a child, murdered by the boyfriend of the child's mother," and that "in both cases, according to the findings of the trial court, the mother knew of the on-going abuse of the child by the murderer." *Id.* at 232. The court addressed "whether the mother's knowledge of this on-going abuse, coupled with the continued, sanctioned exposure of the child to this abuse, is sufficient to hold the mother accountable for the murder of the child." *Id.*

Illinois' criminal accountability statute (aiding and abetting) states, in relevant part: "A person is legally accountable for the conduct of another when:...(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." *Id.* at 232-233, quoting Il Comp Stat ch 720 § 5/5-2.

The Illinois Supreme Court relied primarily on the criminal law treatise by LaFave and Scott[9] to adopt a duty to act in the context of a parent-child relationship, and that the failure to act can make a parent criminally liable as an aider and abettor. *Id.* at 236. The court held that that both defendant mothers "had an affirmative duty to protect their children from the threat posed by [the boyfriends]. Rather than fulfill that obligation, the defendants entirely ignored the danger posed by these two men, and in doing so aided them in the murders." *Id.* at 237. *See also*

[9] W. LaFave & A. Scott, Criminal Law § 26, at 182 (1972).

State v Walden, 306 NC 466, 476; SE2d 780 (NC 1982) (holding "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed."); *People v Rolon*, 160 Cal App 4th 1206; 73 Cal Rptr 3d 358 (Cal Ct App 2008) (holding that "aiding and abetting liability can be premised on a parent's failure to fulfill his or her common law duty to protect his or her child from attack . . . We emphasize, however, that liability as an aider and abettor requires that the parent, by his or her inaction, intend to aid the perpetrator in commission of the crime, or a crime of which the offense committed is a reasonable and probable outcome."). *But see People v Culuko*, 78 Cal App 4th 307, 330-331; 92 Cal Rptr 2d 789 (2000) (the jury "could not have convicted him or her of felony child abuse *as an aider and abettor* based solely on inaction" (emphasis in original)).

In addition, and perhaps unsurprisingly, the prosecution of individuals under a failure to protect theory disproportionately affects mothers. Murphy, Jane C., *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 Cornell L. Rev. 688, 719-20 (1998). However, there are reasons why a mother may not prevent abuse being committed by another person, including a lack of financial resources, the fear of increased violence to herself and her children, potential criminal liability for leaving or reporting the situation, and the fear of losing custody of her children. *Id.* Such prosecutions may actually deter women from taking positive steps toward ending abuse, as they may be prosecuted as accomplices if they choose to report the abuse. *Id.*

Similarly, failure to protect cases often rely on stereotypes of a "good mother". Fugate, Jeanne A., NOTE, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U.L. Rev. 271 (2001). One particular stereotype revolves around the idea that a mother must

be "all-knowing." If a mother fails to meet these stereotypes, there is a tremendous likelihood that she will be held as equally culpable as the person who actually put hands on a child, regardless of her intent, knowledge, or actual actions. Dressler, Joshua. *Symposium: Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 Santa Clara L. Rev. 971 (2000). Such a result is fundamentally unfair.

A parent has a legal duty to protect her child, and as a society we expect this. See *People v Beardsley*, 150 Mich 206, 209; 113 NW 1128 (1907). Here, however, the prosecutor is attempting to extend the law into a new territory based on a theory of criminal culpability that is not supported by the statute or case law. The prosecution is attempting to criminalize Ms. Borom's failure to act and worse, trying to impose criminal culpability for the most serious offense based on no affirmative action or intent. To acquiesce to the prosecution's novel theory and allow the creation of a new category of criminal culpability without any statutory authority would open up a whole new category of criminal prosecutions where criminal defendants could be tried and convicted without any statutory authority or basis simply because that person did not act according to societal norms.

This Court should issue an opinion reversing the Court of Appeals. Michigan's aiding and abetting statute requires affirmative actions and intent, and there is no evidence of either.

SUMMARY AND RELIEF

WHEREFORE, because there is no statutory authority to support the charging decisions in this case, Defendant-Appellant asks that this Honorable Court issue an opinion reversing the Court of Appeals and vacating the trial court order denying the motion to quash and remanding this case to the trial court to effectuate its decision.

Respectfully submitted,

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August 4, 2014

Clerk
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P. O. Box 30052
Lansing, MI 48909

Re: **People v Shawquanda Borom**
Supreme Court No. 148674
Court of Appeals No. 313750
Lower Court No. 12-4559-01

Dear Clerk:

Enclosed please find an original and seven (7) copies of the Supplemental Brief on Appeal (Oral Argument Requested) and Proof of Service for filing in the above-referenced cause.

Thank you for your attention to this matter.

Sincerely,

Valerie R. Newman
Assistant Defender

VRN/jad
Enclosures

cc: Wayne County Prosecutor
Court of Appeals Clerk
Wayne County Circuit Court Clerk
File

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

SHAWQUANDA BOROM

Defendant-Appellant.
_____/

Supreme Court No. 148674

Court of Appeals No. 313750

Lower Court No. 12-4559-01

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

JULIE DUNDR being first sworn, says that on August 4, 2014, she mailed one copy of the following:

SUPPLEMENTAL BRIEF ON APPEAL

PROOF OF SERVICE

TO:
WAYNE COUNTY PROSECUTOR
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Julie Dundr

Subscribed and sworn to before me
August 4, 2014

Lisa A. Lamarre
Notary Public, Wayne County, Michigan
My commission expires: 6-6-18