

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON ABNER,

Defendant-Appellant.

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UNPUBLISHED

March 25, 2004

No. 241569

Wayne Circuit Court

LC No. 00-005798-01

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), with first-degree child abuse, MCL 750.136b(2), as the predicate offense. The trial court sentenced him to life in prison without the possibility of parole. Defendant appeals as of right. We affirm.

I. Factual Background

This appeal arises out of defendant's conviction for the death of three-year-old Domari Spivey, born May 17, 1996. Domari began living with defendant in August 1999, with the permission of his nineteen-year-old mother Ebony Spivey. Defendant apparently agreed to watch Domari because Ebony Spivey was in the process of moving and had started a new job. Barbara Spivey, Ebony Spivey's mother, was dating defendant. Defendant and Barbara Spivey had a child together, Byron Abner, Jr., but did not live together.

Domari's great grandmother, Mary Jean Carter, testified that Domari and his mother lived with her before Domari went to defendant's house in August. During the time that Domari lived with her, she claimed that she never saw him with any injuries or open wounds to his head. Ebony Spivey testified that the last time she saw her son alive was when he went to stay with defendant in August 1999. Before that time, she claimed that Domari did not have any open wounds or injuries to his head. She told the police that defendant had never mistreated Domari in the past.

On November 2, 1999, defendant called 911 and reported that Domari was unconscious. When the police responded, they found Domari inside the home with several bruises and scratch marks on him. In particular, the police noticed a large sore on Domari's head. Defendant explained to the police that this sore was from an incident that occurred a month earlier when

Domari fell off the porch. When asked whether he ever took Domari to the hospital for his injuries, defendant gave the police conflicting stories and ultimately admitted that he had not taken him to the hospital. He explained to the police that Domari was sleeping when he checked on him around 8:00 p.m. and then later changed the time to 9:00 p.m. Defendant stated that it was not until the following morning that he became aware that Domari was not breathing. Officer Nicole Laubert testified that defendant appeared unconcerned about the situation. Defendant was subsequently placed under arrest.

During his first interview with the police, defendant claimed that Domari was sick the past few days with flu-like symptoms and had not been eating well. When asked how he disciplined Domari, defendant stated that he had whipped him on three occasions with a belt and a few times with his hand. In a second statement to the police, however, defendant recanted his story about Domari falling off the porch and admitted that the injury on Domari's head occurred when defendant whipped him with a belt. Defendant stated that he struck Domari about four times before realizing that the belt buckle was hitting Domari on the head. He claimed that Domari fell down when he was hit with the belt and was bleeding from the top of his head. Defendant did not take Domari to the hospital. He explained that he did not have Domari's insurance card and thought that antibiotic cream would be sufficient. Defendant stated that he lied about the porch incident because he did not want the police to think he would hurt Domari on purpose.

Byron Abner, Jr., Domari's uncle, was nine years of age when Domari died. He testified that he lived alone with defendant and Domari in November 1999. The night before Domari's death, Byron claimed that defendant took him to a friend's house to spend the night because defendant was going shopping for Christmas presents. He was not home the morning of Domari's death and stated that Domari was riding his tricycle the last time he saw him alive.

Byron recalled seeing Domari fall off his tricycle a few weeks before his death. He further stated that he saw the sore on Domari's head and that defendant told him it was from the cat. According to Byron, Domari walked slower and bent forward with the sore on his head. When asked whether he ever saw defendant strike Domari, he replied that he saw defendant hit him with a belt but not with the belt buckle. He also claimed that he saw defendant hit Domari in the chest with his fist and that defendant would hit Domari on the hand with a flyswatter.

Wayne County Deputy Chief Medical Examiner Carl Schmidt performed the autopsy on Domari's body. Domari was 3 feet 4 inches tall and weighed twenty-seven pounds. An external examination of his body revealed a large erosion that covered a considerable portion of Domari's scalp. At its largest point, this wound measured  $4\frac{3}{4}$  x 2 inches. Dr. Schmidt stated that the condition of the wound indicated that it had been inflicted about four to six weeks before Domari's death. But the erosion of the wound occurred about one to two weeks before his death. Dr. Schmidt opined that the original wound could have expanded from repeated trauma to that area and/or neglect. He also observed multiple semi-circular scars throughout Domari's scalp and neck. After examining defendant's belt buckle, which was decorated with several coins, Dr.

Schmidt testified that it could have caused the semi-circular injuries on Domari.<sup>1</sup> Based on the scarring, Dr. Schmidt estimated that Domari sustained four or five blows to the head.

Other external injuries that Dr. Schmidt observed included: parallel linear scars on the left side of Domari's face; a half inch long healing scrape over his right eyebrow; a recent bruise to his lower lip; several scars on his right nipple; a scrape on the middle of his back; a scar on his left buttock; a healing scrape on the back of his right knee; and a scrape on the right knee itself. Dr. Schmidt acknowledged that a cat could have caused the scarring on the right nipple.

The internal examination revealed that Domari suffered from intense cerebral edema or swelling of the brain. Dr. Schmidt explained that Domari's brain had swollen to the point where the sutures<sup>2</sup> of his skull had begun to separate. According to Dr. Schmidt, tremendous violence to Domari's head was needed to cause this condition. He testified that the trauma occurred approximately twelve to twenty-four hours before Domari's death. Further examination revealed a hemorrhage to the sheath of Domari's perioptic nerve. Dr. Schmidt testified that this type of injury is a result of violent shaking or the sudden stop of an individual's head hitting a firm surface. He also noted the existence of a subcutaneous hemorrhage to Domari's left hip and the back of his left leg. Dr. Schmidt stated that both these injuries were recent.

Dr. Schmidt ultimately determined that the wound on top of Domari's head was *not* the cause of his death, but was from a separate event. Rather, he claimed that the swelling in Domari's brain was the cause of death and that it was the result of *repeated* direct blunt force trauma to Domari's head within the past twelve to twenty-four hours. He based this opinion on the diffuse hemorrhaging throughout Domari's scalp. According to Dr. Schmidt, the diffuse hemorrhaging was inconsistent with a single blow to the head or accidental injury from falling off a bike or porch. While he could not say how many blows to the head Domari received or the instrument that was used, Dr. Schmidt expressed certainty that Domari sustained *multiple* blows from a broad-based surface.

## II. Findings of Fact

Defendant essentially argues that the evidence presented at trial does not support his conviction for felony murder. In this regard, he contends that the trial court made erroneous findings of fact and that some of the trial court's findings were inconsistent with its verdict. We disagree. A trial court's factual findings during a bench trial are reviewed for clear error and its conclusions of law are subject to review *de novo*.<sup>3</sup> A finding of fact is "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a

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<sup>1</sup> Susan Greenspoon, a forensic molecular biologist, testified that there was blood on defendant's belt buckle. However, she could not specify whether it was human or non-human blood given the size of the sample.

<sup>2</sup> A suture is defined as "the line of junction of two bones, esp. of the skull, in an immovable articulation." *Random House Webster's Unabridged Dictionary* (1999).

<sup>3</sup> MCR 2.613(C); *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999).

mistake has been made.”<sup>4</sup> An individual’s intent may be inferred from all the facts the surrounding circumstances, “and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.”<sup>5</sup> In matters concerning witness credibility, this Court defers to the trial court’s special opportunity to assess the credibility of the witnesses who appear before it.<sup>6</sup>

Defendant claims that the trial court clearly erred in finding that defendant inflicted numerous and brutal injuries on Domari over a period of time. In this regard, defendant notes that Ebony Spivey never noticed any injuries on Domari after he spent past weekends with defendant. He further claims that the autopsy did not reveal evidence of numerous or repeated serious injuries. Defendant additionally challenges the trial court’s statement that defendant repeatedly hit Domari in the chest. According to defendant, the trial court’s reliance on these allegedly erroneous factual findings was critical to its determination that defendant possessed the requisite intent for felony murder.

To convict defendant of felony murder in this case, the prosecution needed to establish the following beyond a reasonable doubt:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of [first-degree child abuse].<sup>[7]</sup>

Malice may be inferred from the facts and circumstances surrounding the killing.<sup>8</sup> An individual is guilty of first-degree child abuse if they knowingly and intentionally cause serious physical or mental injury to a child.<sup>9</sup> Child abuse in the first degree is a specific intent crime.<sup>10</sup>

After a careful and thorough review of the record in this case, we are not convinced that the trial court’s critical findings of fact were clearly erroneous. Contrary to defendant’s arguments on appeal, there was substantial evidence showing that defendant inflicted several severe injuries on Domari over a period of time. Defendant had physical custody of Domari from the end of August 1999 until his death on November 2, 1999. During that time period, Domari suffered numerous scrapes and bruises and, most notably, a large open wound on his

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<sup>4</sup> *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

<sup>5</sup> *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

<sup>6</sup> *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

<sup>7</sup> *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999); quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).

<sup>8</sup> *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

<sup>9</sup> MCL 750.136b(2).

<sup>10</sup> *People v Maynor*, 256 Mich App 238, 242-243; 662 NW2d 468 (2003).

head. The testimony showed that this wound was allowed to expand over time from repeated trauma to that area and/or neglect. Notably, defendant admitted to causing this wound by hitting Domari on the head with a belt buckle. He stated that Domari would fall down when hit with the belt and that Domari developed welts on his back from the belt. While the record does not support the trial court's finding that defendant hit Domari multiple times in the chest, the record does reveal that he hit him in the chest at least one time.

Moreover, the medical examiner stated with certainty that Domari died from *multiple* blows to his head. The fact that the medical examiner could not quantify the number of blows, other than to it was *multiple* times, or the instrumentality used to create these wounds, is unimportant given the placement of these blows and the degree of force required to inflict Domari's injuries. Indeed, the medical examiner testified the blows were so forceful that they caused Domari's brain to be smashed against the inside of his skull to the degree that the substance of his brain was actually injured. And the location of these blows is significant given that Domari already had a large sore on his head. In any event, striking a twenty-seven pound three-year-old child in the head with such force is sufficient to satisfy the malice and specific intent requirements of felony murder and first-degree child abuse. Accordingly, we find that the record supports the trial court's decision that defendant intentionally acted in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm and that he knowingly and intentionally caused serious physical harm to a child.

### III. Probable Cause

Defendant alternatively argues that the statements he gave at the police station should be suppressed and his conviction reversed because the police lacked probable cause to arrest him without a warrant. We disagree. A trial court's factual findings on a motion to suppress are reviewed for clear error.<sup>11</sup> To the extent a trial court's ruling in this regard "involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."<sup>12</sup>

The law permits a police officer to arrest an individual without a warrant "if a felony has been committed and the officer has probable cause to believe that the individual committed the felony."<sup>13</sup> Probable cause will be found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed.<sup>14</sup>

Here, the police officers were faced with a dead three-year-old child with several bruises and a large wound on his head. Officer Brian Russell testified that it appeared to him that the child had been recently beaten. Further, defendant was the only person in the house, besides

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<sup>11</sup> *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001).

<sup>12</sup> *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

<sup>13</sup> *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998); see also MCL 764.15(1)(c).

<sup>14</sup> *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

Domari, and claimed to have been with Domari since the previous night. This evidence, coupled with defendant's inconsistent stories concerning whether he took Domari to the hospital for his head injury and the time he checked on Domari the night before his death, supports the trial court's decision that the police possessed sufficient probable cause to arrest defendant. Accordingly, the trial court properly admitted defendant's statements into evidence.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood