STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 2013
v JOE GUY GALVAN, Defendant-Appellant.	No. 299814 St. Clair Circuit Court LC No. 10-000598-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JENNIFER ANN GALVAN, Defendant-Appellant.	No. 299822 St. Clair Circuit Court LC No. 10-000597-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Following a joint jury trial, both defendants were convicted of first-degree felony murder, MCL 750.316(1)(b), torture, MCL 750.85, and first-degree child abuse, MCL 750.136b(2). Defendant Joe Galvan was also convicted of possession of marijuana, MCL 333.7403(2)(d), second or subsequent offense, MCL 333.7413(2), and felon in possession of a firearm, MCL 750.224f, and defendant Jennifer Galvan was also convicted of possession of marijuana. Defendant Joe Galvan was sentenced as a third habitual offender, MCL 769.11, to life imprisonment for the felony murder conviction, 30 to 50 years for the torture conviction, 20 to 30 years for the child abuse conviction, one to two years for the marijuana possession conviction, and six to 10 years for the felon in possession conviction. Defendant Jennifer Galvan was sentenced to life imprisonment for the felony murder conviction, 23 to 40 years for the torture

conviction, 10 to 15 years for the child abuse conviction, and one year for the marijuana possession conviction. Defendants appeal by right.[1] We affirm.

I. FACTS

Prhaze Galvan died on January 15, 2010. The medical examiner, Daniel Spitz, M.D., concluded that the death was a homicide and that she died of "multiple blunt force head injuries." More specifically, Dr. Spitz concluded that she died of "impact involving the right side of the head," which resulted in "injury to the brain, bleeding over the surface of the brain, and then the reaction of the brain to that bleeding which is brain swelling." Dr. Spitz noted that Prhaze had injuries and bruising all over her body in various stages of healing. The injuries included pattern injuries, several of which were caused by "a white plastic spatula type spoon with a fairly long handle." Dr. Spitz estimated that there were 20 or more injuries to her head and neck. Defendants initially reported that Prhaze had fallen in the bathroom and hit her head. However, Dr. Spitz and a pediatric expert both concluded that the bathtub injury story "didn't fit" and could not account for the type of trauma that existed.

Other evidence indicated that the abuse had been unrelenting. Defendant Jennifer Galvan's sister, Kathleen LaFave, had on one occasion seen Prhaze with two black eyes, on another with one black eye, and on still another saw her with a bruise that covered her whole butt cheek. On another occasion she discovered Prhaze in the shower in her clothes; defendant Jennifer Galvan explained that she had wet her pants. Another sister witnessed a scabbed chin with a mark by her eye, a bruise on her lower back and blackened eyes. John Mugnano, a long-time friend of defendant Jennifer Galvan who sometimes watched Prhaze, said that "[a]nytime that I ever had her her left eye was black or her right eye was black." Further, he once observed Prhaze standing with her nose to the wall for 30 to 40 minutes. Mugnano testified that defendant Jennifer Galvan dropped Prhaze off at his home and asked for masking tape. After Jennifer left his home, he called out to Prhaze, but she did not answer. He found Prhaze with her mouth, arms, and knees taped together. He later made an anonymous report to Child Protective Services because he did not see the couple's treatment of Prhaze improving.

Defendant Jennifer Galvan's mother twice saw Prhaze with black eyes; Jennifer explained that on one occasion she fell in the tub. She also noted a bruise on Prhaze's hip and one on her butt. A babysitter, noted "[b]lack eyes, like horrible bruises like on her head," including "a tennis ball swelling out of her head," and bruising "[o]n her butt. Bruises everywhere," including her arms, legs, thighs and back. On one occasion, Prhaze explained the presence of a bruise by saying she had been spanked with a spoon when she tried to get out of a cold shower. When family members questioned defendant Jennifer Galvan about the condition of the child, she claimed that the child was clumsy and received bruises from playing with the family puppy. Other family members never saw Prhaze after they complained about the child's condition.

[1] This Court consolidated the appeals. *People v Galvan*, unpublished order of the Court of Appeals, issued August 17, 2011 (Docket Nos. 299814, 299822).

There was also evidence that Prhaze was not being fed. She weighed 32 pounds 14 months before her death and 32 pounds at the time of death. Indeed, family members testified that Prhaze frequently woke up at night and would search the home, even the garbage can for food. As a result, defendant Jennifer Galvan would withhold meals from the child as a punishment. The couple would force their children to face a wall as a form of punishment. Witnesses testified that Prhaze was consistently on punishment and for extended periods of time. There was also testimony that defendant Jennifer Galvan's biological children were not dressed or treated the same as Prhaze. Also, witnesses observed Prhaze transform during the course of the ongoing abuse from a happy child to a child who was withdrawn, non-interactive, not playful, and "emotionless."

Defendant Jennifer Galvan was a licensed practical nurse. Her co-workers testified that Jennifer hated Prhaze, referred to the child as the devil, blamed Prhaze for the death of the couple's infant son, and claimed that the child was ruining her marriage. Defendant Jennifer Galvan testified in her own defense and denied the claims raised by family, friends, and co-workers. She asserted that she loved Prhaze and claimed that the witnesses were mistaken or misconstrued her statements. She denied ever calling Prhaze the devil, but rather mentioned that the child would dress as the devil for Halloween. Additionally, she denied withholding meals from the child as a form of punishment or that the duration of time standing at the wall was ever excessive. She also denied ever tying or restraining the child. However, when confronted with a text that she sent to defendant Joe Galvan wherein she purportedly referred to Prhaze as an expletive brat who could walk while tied up, she could not recall what the text meant. Rather, defendant Jennifer Galvan questioned the conduct of babysitters and family members, claiming that one family member left Prhaze on the porch at night. Defendant Joe Galvan did not testify, but his history of abuse with Prhaze's half-brother and others was presented during trial, and his admission to hitting Prhaze with a belt to defendant Jennifer Galvan's co-worker was admitted at trial.

II. BINDOVER

Defendant Jennifer Galvan first argues that the circuit court erred in reversing the district court's determination not to bind her over on a charge of open murder. We disagree. This Court reviews a district court's decision not to bind a defendant over on a charge "de novo to determine whether the district court abused its discretion." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A district court must bind a defendant over where the prosecutor has presented competent evidence sufficient to support probable cause to find both that a felony was committed and that defendant committed it. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

> The prosecutor is not required to prove all elements of the offense charged at the preliminary hearing, but must only produce evidence sufficient for a finding of probable cause. Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to justify binding over a defendant.

[*People v Cervi*, 270 Mich App 603, 616; 717 NW2d 356 (2006) (citations and quotations omitted).]

Here, the district court recited causation as an element and in essence found that defendant Jennifer Galvan did not participate in the abuse that actually resulted in death because she was outside. However, there was circumstantial evidence that gave rise to a contrary inference. Dr. Spitz testified that the recent injuries to the scalp that resulted in the death occurred anywhere between minutes of showing significant clinical symptoms and eight hours of being evaluated by emergency responders. The initial responders indicated that the victim's color was monotone grayish, a "late sign symptom," that her eyes were open, fixed and dilated, and that the sclera (the whites of her eyes) were dry, which one responder had observed only in the deceased. This testimony tends to belie the claim that the fatal injury occurred in the bathroom while defendant Jennifer Galvan was not in the house.[2] Because she was admittedly in the house before she allegedly left to get her other children and some evidence indicated that Prhaze's injury did not occur just before the responders arrived, an inference could be drawn that she was present when the fatal injury was inflicted. When the evidence conflicts or raises a reasonable doubt regarding guilt, the district court must bind the defendant over for trial because the conflict must be resolved by the trier of fact. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). In light of the medical evidence regarding the extent of the abuse and injuries and the credibility of the testimony regarding defendant Jennifer Galvan's location, any conflict in the evidence presented an issue for the trier of fact.

While presence alone would not be sufficient for a bindover, a defendant "who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). To support a finding that defendant aided and abetted the crime, the prosecutor had to show that

> (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. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citations and quotations omitted).]

Dr. Spitz's testimony was competent to establish that someone abused this child causing her death. Moreover, there was evidence giving rise to a reasonable suspicion that defendant Jennifer Galvan encouraged the fatal blow. Accepting for purposes of discussion the version of events that defendants gave to police, Prhaze was injured when she was told to get in the shower after wetting her pants, and defendant Jennifer Galvan was present at this point. There was evidence that Prhaze was punished with cold showers, while clothed, for wetting her pants.

[2] Defendant Jennifer Galvan told police that Prhaze, who had wet her pants, was getting in the shower when she left the house to pick up her other children. She explained that defendant Joe Galvan yelled for her to come back inside while she was by the car getting ready to go, and that she found Prhaze lying in the bedroom not breathing.

Furthermore, defendant Joe Galvan had previously beat her with a belt resulting in welts on her bottom, and the child had injuries in various stages of healing indicative of acute and chronic child abuse. There was testimony that defendant Jennifer Galvan hated Prhaze, withheld meals from the child, forced the child to put her nose against the wall for long periods, forced the child to take cold showers, and bound the child's hands, knees, and mouth with masking tape. There was also evidence that someone had spanked her with a spoon for trying to get out of a cold shower, and that she was repeatedly seen with bruising, including many black eyes. This evidence, coupled with defendant Jennifer Galvan's inferred presence in the home at the time the fatal injury was sustained, was sufficient to create an inference that she was complicit with respect to the "discipline" that led to the fatal injury.

The intent element was also satisfied. In *Robinson*, the Court held that

> a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime. In this case, defendant committed and aided the commission of an aggravated assault. One of the natural and probable consequences of such a crime is death. Therefore, the trial court properly convicted defendant of second-degree murder. [*Robinson*, 475 Mich at 3 (emphasis omitted).]

In *Robinson*, a defendant who was complicit in an assault, but had left the scene before the victim was shot was found to have the requisite intent:

> Defendant was aware that Pannell[, the shooter,] was angry with the victim even before the assault. Defendant escalated the situation by driving Pannell to the victim's house, agreeing to join Pannell in assaulting the victim, and initiating the attack. He did nothing to protect Thomas[, the victim,] and he did nothing to defuse the situation in which Thomas was ultimately killed by Pannell. A "natural and probable consequence" of leaving the enraged Pannell alone with the victim is that Pannell would ultimately murder the victim. That defendant serendipitously left the scene of the crime moments before Thomas's murder does not under these circumstances exonerate him from responsibility for the crime. [*Id.* at 12.]

Presuming defendant Joe Galvan inflicted the fatal injuries, defendant Jennifer Galvan's history of abuse and/or encouragement and tolerance of abuse, coupled with knowledge that defendant Joe Galvan was going to "discipline" the child for wetting her pants in a manner consistent with the past, gave rise to an inference that she had knowledge he intended to abuse or torture Prhaze. A natural and probable consequence of the abuse and torture was that defendant Joe Galvan might escalate the assault into a murder. Thus, there was sufficient evidence for the bindover. *Robinson*, 475 Mich at 3.

II. MOTIONS TO WITHDRAW AS COUNSEL AND TO SEVER THE TRIALS

Defendant Jennifer Galvan's attorney moved to withdraw as counsel in order to testify at trial as a witness. During a meeting with defendant Joe Galvan and his counsel, Joe Galvan allegedly admitted that he whipped Prhaze in the bathtub and she curled up and hit her head, at

which point he hit her one more time. Defendant Joe Galvan's attorney argued that the comments were privileged because they were made during discussions of a plea or pursuant to the attorney-client privilege. The trial court held:

> You have a husband and wife that are being tried together. You have the legal team that's representing them, although one assigned to the other individual and they're meeting with them to discuss the case on the eve of trial. There is every reason to anticipate that the attorney/client privilege is operable, that discussions that are had are confidential, and that a statement made in the presence of the attorneys is not something that would be subject to disclosure either voluntarily or by subpoena by the prosecution.

The trial court also denied a motion to sever, concluding that the evidence would not be admissible in a separate trial because of the privilege. A trial court's denial of a motion to withdraw as counsel, *People v Echavarria*, 233 Mich App 356, 369-370; 592 NW2d 737 (1999), and its "ultimate ruling on a motion to sever," *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005), are generally reviewed for an abuse of discretion.

Although not referenced as such, the trial court was describing the "joint defense privilege." See *United States v Gonzalez*, 669 F 3d 974, 977-978 (CA 9, 2012). However, the determination to invoke the privilege does not rest with the attorney. In *People v Waclawski*, 286 Mich App 634, 694; 780 NW2d 321 (2009), this Court held, "It is well settled that the attorney-client privilege belongs to the client and not the attorney." (citation and quotation omitted). In *Waclawski*, the defendant, an attorney, argued that evidence from his files that included his clientele should have been suppressed based in part on the attorney-client privilege. This Court rejected the argument, holding that the attorney could not assert the privilege. *Id.*

In a severed trial against defendant Jennifer Galvan, defendant Joe Galvan would not have been present to assert the privilege, like the defendant's clients in *Waclawski.* The prosecutor could not have asserted the privilege, and defendant Jennifer Galvan, who may have been eligible as a client of the joint defense, presumably would not have done so. Thus, the trial court's rationale for denying the motion to withdraw and the motion to sever was flawed.

Nonetheless, any purported confession would have been subject to exclusion as hearsay. In a trial against defendant Jennifer Galvan only, she would have sought admission for the truth of the matter asserted. MRE 801(c). There is no hearsay exception in MRE 803 that would apply; it does not appear that the trial judge would have recognized the catchall exception, MRE 803(24), as a basis since it questioned the reliability of the confession. Thus, even though the confession would not have been subject to exclusion based on the joint defense privilege because it presumably would not have been invoked, the statement would not have been admissible. Accordingly, the trial court's denial of the request to withdraw and sever trial to permit admission of the statement did not constitute an abuse of discretion. Moreover, even if defendant Joe Galvan's confession would have been admissible in a trial against defendant Jennifer Galvan, there is no reason that the matter could not have been handled by granting separate juries. However, no such request was ever made.

Defendant Joe Galvan argues that he should have had a severed trial to avoid testimony that defendant Jennifer Galvan had stated she hated Prhaze, had called Prhaze the devil or evil, and had said that she was ruining the marriage, as well as evidence that she had taped Prhaze's mouth, hands, and knees. Alternatively, he argues that counsel was ineffective for failing to move for severance or separate juries. The severance issue is unpreserved. With regard to the ineffective assistance of counsel claim, there was no evidentiary hearing and accordingly, review "is limited to errors apparent on the record." *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

Defendant Joe Galvan was charged with felony murder on the theory that he was either the principal or an aider and abettor. The pervasiveness of the abuse of Prhaze was relevant to a theory that he aided and abetted by tolerating and/or fostering an atmosphere where such abuse was administered. Thus, the evidence would have been admissible against him, and there would have been no reason to sever on this ground. Coextensively, a motion to sever would have been futile. Thus, the ineffective assistance claim must fail. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not required to make meritless motions).

III. MOTION TO CHANGE VENUE

Defendant Jennifer Galvan argues that her motion to change venue should have been granted because of pretrial publicity. The trial court reserved ruling on the motion until after voir dire, and ultimately denied the motion. The court noted that some jurors had been exposed to news stories about the case, but a great many of them had not. The court opined that the larger problem was jurors who were troubled by the nature of the allegations. The court concluded, "So, the concern that publicity was so extensive that they could not remain impartial simply has not been borne out."

An order denying a change of venue is reviewed for a clear and palpable abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). Pretrial publicity, by itself, will not justify a change of venue. *Id.* at 517. To justify a change of venue based of pretrial publicity, "[t]he burden rests on the defendant to demonstrate the existence of actual prejudice or the presence of strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that the jurors could not set aside their preconceived notions of guilt, notwithstanding their statements to the contrary." *People v Harvey*, 167 Mich App 734, 741-742; 423 NW2d 335 (1988).

> Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. [*Jendrzejewski*, 455 Mich at 500-501.]

"The totality of the circumstances, including the content of news accounts and the voir dire examination transcript, should be evaluated on appeal in deciding whether a defendant was deprived of a fair and impartial trial due to local prejudice." *Harvey*, 167 Mich App at 742. In *People v Unger*, 278 Mich App 210, 254-255; 749 NW2d 272 (2008), the Court found that

substantial media attention was neither prejudicial nor inflammatory where the news accounts were primarily factual and not sensational or invidious.

The jury selection in this case took two days. During that time, the court on its own initiative excused every prospective juror who said he or she had heard something about the case and might be influenced by that prior knowledge. The court also excused on its own initiative every prospective juror who indicated that the nature of the proceedings might be problematic. Defendants passed for cause on every juror actually seated. On this record, there is no reason to question the jurors' representations that they would not be influenced by any articles about the homicide. Moreover, there has been no showing or suggestion that the articles were anything other than factual. If defendants found no basis for challenging any individual juror for cause, it does not follow that there was actual prejudice resulting from pretrial publicity or that they were deprived of a fair and impartial trial due to local prejudice. Thus, the trial court did not abuse its discretion in denying the motion for a change of venue. *Jendrzejewski*, 455 Mich at 500.

IV. ALLEGED CLOSING OF THE COURTROOM DURING VOIR DIRE

Defendant Joe Galvan avers that the trial court impermissibly closed the courtroom to spectators during voir dire and that his attorney provided ineffective assistance by failing to object. However, there is no evidence in the record to suggest that the courtroom was closed. Accordingly, we find no merit to this issue.

V. ADMISSION OF POST-MORTEM PHOTOGRAPHS OF THE VICTIM

Defendant Joe Galvan challenges the admission of 40 post-mortem photographs of the victim, arguing that they were gruesome and unnecessary given the medical examiner's and a detective's capable descriptions of the injuries and cause of death. Further, he argues that counsel provided ineffective assistance to the extent he failed to object to their admission. In fact, counsel affirmatively stated that he did not object to the admission of the subject photographs. Review of the evidentiary issue is therefore for plain error affecting a substantial right. MRE 103(d). The ineffective assistance of counsel issue is not suggested by the question presented. Accordingly, it need not be addressed. See MCR 7.212(C)(5); *People v Unger*, 278 Mich App at 262.

Defendant argues that the photographs were irrelevant because he did not dispute the cause and manner of death. However, it was incumbent upon the prosecutor to establish all the elements of the crimes charged regardless of any stipulations. *People v Mills*, 450 Mich 61, 69-71; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). Accordingly, this argument is without merit. Moreover, in addition to the homicide, defendant was charged with torture and first-degree child abuse. These were specific intent crimes. Torture requires "the intent to cause cruel or extreme physical or mental pain and suffering." MCL 750.85(1). First-degree child abuse requires an intent "to cause serious physical or mental harm . . . or that [the defendant] knew that serious mental or physical harm would be caused." *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); see MCL 750.136b(2). The number of injuries depicted in the photographs and the depiction of various stages of healing tended to establish that the injuries were not accidental and that defendant did intend to cause serious physical and/or mental harm.

In addition, the photographs depicted pattern injuries, which were highly relevant to the issue whether the injuries were intentionally inflicted.

Even though relevant, the evidence would be subject to exclusion if "the probative value is *substantially outweighed* by the danger of unfair prejudice." *Mills*, 450 Mich at 75 (emphasis in original). In *Mills*, 450 Mich at 77, the Court stated:

> Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, *if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.* Generally, also, the fact that a photograph is more effective than on oral description, and to the extent calculated to excite passion and prejudice, does not render it inadmissible in evidence. [(citations and quotations omitted; emphasis added).]

In finding that the photographs of burns were admissible in *Mills*, the Court noted that they were "accurate factual representations of the injuries suffered" and the harm caused, and "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78. Further, "the trial court admitted only those photographs that were necessary in furthering the probative force, and omitted those that were repetitive or too gruesome and unfairly prejudicial." *Id.* at 78.

Exhibits 74 to 83 were photographs of Prhaze's face and head. Exhibit 74 showed a large swollen bruise and laceration on the right side of the forehead, a scab in the hairline, a blackened left eye, and blackening under the right eye. Exhibits 75 through 80 showed close ups of these injuries and/or other angles aimed at highlighting the swelling and/or severity. Exhibit 81 appears to have shown an abrasion-type injury to the mouth. Exhibit 82 was taken after Prhaze's head was shaved and showed bruises on the scalp. Exhibit 83 showed the right side of the head and revealed two additional bruises and a laceration.

Exhibits 88 through 122 depicted injuries on the rest of Prhaze's body. Exhibit 88 showed two abrasions and a bruise on the left shoulder. Exhibit 89 showed injuries on the arms and bruises and a pattern injury on the torso. Exhibits 90, 91, and 92 showed multiple bruises on the arms and stomach, and two marks showing a pattern injury. Exhibit 93 showed discoloration of the thighs. Exhibits 94, 95, and 96 showed a pattern injury and two bruises on the left hip, including close-ups. Exhibits 97 through 101 showed the right arm, specifically lacerations and bruising on the back of the arm and a laceration and bruising on the inside of the arm, lacerations to the wrist, a bruise on the index finger, and various discolorations (red, blue, green, purple and brown) showing different stages of healing. Exhibits 102 through 110 showed the left arm, specifically, bruising, lacerations, and different colorations on the back of the arm; bruising of the fingers, the back of the hand, and the wrist going up the arm toward the elbow; and another

pattern injury. Exhibits 111 through 118 showed injuries on the legs and feet, specifically, various colors of bruising, marks on the ankles, scabbing on each toe and an ankle, and a deep laceration on the back of the left leg as well as other lacerations and a pattern injury. Exhibits 119 through 122 showed bruising and an abrasion on the right shoulder, and red marks, discoloration, a scab and bruising, including a two-inch bruise above the buttocks.

Dr. Spitz referred to some of the above photographs during his testimony. He estimated that a bruise depicted on the face in Exhibit 79 was one to two weeks old. He referred to a healing (scabbed) abrasion on the scalp, along with recent bruising and "a large fresh impact site in the form of a bruise," all depicted in Exhibit 83. Further, Dr. Spitz referred to exhibits 91, 116, and 107 in discussing the pattern injuries. Dr. Spitz also estimated, without reference to the photographs, that there were, being conservative, 20 or more injuries involving "the head and face region, the torso and the upper and lower extremities," that the injuries were bruises and abrasions, that it was "very obvious that the injuries were not inflicted all at one time," and that they occurred "from many weeks up to" "within hours or even sooner" of her death.

Doctor Marcus DeGraw, a child abuse pediatrician, reviewed a number of documents including the above-referenced photographs. While he referenced individual pictures, he concluded that all of them demonstrated the abuse because "she really had bruises pretty much everywhere."

The oral descriptions of the photographs indicate that they accurately depicted Prhaze's injuries without enhancement or alteration. They were disturbing because of the sheer number of injuries, but not unduly gruesome. Moreover, it appears that the photographs were numerous, not because of needless repetitive images, but because there were numerous injuries to depict, and some repetition was necessary to show severity or clarity. Thus, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. *Mills*, 450 Mich at 77.

VI. SUFFICIENCY OF THE EVIDENCE

Defendant Joe Galvan challenges the sufficiency of the evidence to convict him of felony murder. Defendant Jennifer Galvan challenges the sufficiency of the evidence to convict her of felony murder, first-degree child abuse, and torture. "In evaluating defendant's claim regarding the sufficiency of the evidence, [the appellate court] reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *Robinson*, 475 Mich at 5. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id.*

A. DEFENDANT JOE GALVAN'S FELONY MURDER CONVICTION

Defendant Joe Galvan seems to be arguing that he could not be convicted of felony murder because his explanation for what happened was not refuted and that, consistent with his explanation, there was no showing that he acted with malice and great disregard for life. However, his explanation—that Prhaze fell in the bathroom—was refuted. Dr. Spitz was asked to look at the fatal injury without reference to the earlier injuries and determine if it could have been accidental. He responded:

> I would, wouldn't conclude this is an accident based on the head injury because the type of accident that would have to account for this is no way even closely reflected in the investigation that went on here. A simple household type fall involving the bathroom or involving a bathtub or toilet in a three year old child doesn't account for the type of trauma that existed here.

Similarly, Dr. DeGraw said that the massive and severe head injury that led to Prhaze's death was inconsistent with a simple fall.

The elements of felony murder are: "(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 any of the felonies specifically enumerated in [MCL 750.316(1)(b) . . .]," *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007), which include first-degree child abuse and torture. Given the pervasive evidence of ongoing child abuse and torture and the evidence that the fatal blow was not accidental, it can be inferred that the fatal blow was inflicted with malice. *Allen*, 201 Mich App at 100.

B. DEFENDANT JENNIFER GALVAN'S CONVICTIONS

Defendant Jennifer Galvan argues that she was not present when Prhaze was murdered, that there is no evidence that she knew defendant Joe Galvan intended to hit Prhaze at that time, and that there were no acts or encouragement that assisted with the fatal blow.

There was sufficient evidence that she was present. Consistent with the preliminary examination testimony, Dr. Spitz testified that the injury was probably within minutes to an hour but could have occurred up to eight hours earlier and that Prhaze would have been symptomatic during this time. The first responder noted that her eyes were "open, extremely dilated, non-moving," that her color was monotone or gray, which is a sign of shock and "a late sign in the body" and "it takes a while to get to that point," and that it "definitely indicates she was down for awhile." The EMT who greeted her at the ambulance did not believe she was alive at first because she was pale, limp, not moving, and had dilated and non-reactive pupils. Also, her sclera was drying. The EMT indicated that the sclera is usually wet in a patient who has just died but will be dry in a patient who has been dead for hours or longer. Defendant Jennifer Galvan indicated to an investigator that she had been home that morning, stating that she had left out toast and jam for Prhaze for breakfast although she did not know if Prhaze ate it. Moreover, she reported to the same investigator that she was getting ready to pick her kids up from school when she heard defendant Joe Galvan screaming and "came back" inside, suggesting she had been home immediately beforehand. Given her own indication that she had been there on the

morning in question, coupled with evidence that the injury occurred well before responders arrived, there was sufficient evidence to give rise to an inference that she was present at the time of the injury. Irrespective of her statement regarding her location at the time of the fatal injury, the credibility of that assertion presented an issue for the trier of fact. *Passage*, 277 Mich App at 177.

Moreover, even if she did not inflict the fatal blow, given the extensive evidence of ongoing abuse in the household and her mistreatment of the child, coupled with her disdain for the child, an inference arises that she was complicit in the abuse, a natural consequence of which would be death. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). There was sufficient evidence to convict defendant Jennifer Galvan of felony murder based on an aiding and abetting theory.

Regarding the other crimes, "[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). "'Serious physical harm' means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f). "'Serious mental harm' means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(g).

With respect to torture, MCL 750.85 provides in relevant part:

> (1) A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.
>
> (2) As used in this section:
>
> (a) "Cruel" means brutal, inhuman, sadistic, or that which torments.
>
> (b) "Custody or physical control" means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority.
>
> (c) "Great bodily injury" means either of the following:
>
> (*i*) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.
>
> (*ii*) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.

(d) "Severe mental pain or suffering" means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:

(*i*) The intentional infliction or threatened infliction of great bodily injury.

Defendant Jennifer Galvan asserts that disdain for Prhaze was not enough to show that she abused and/or tortured Prhaze and/or that she aided and abetted same, and notes that first-degree child abuse requires an intent to harm. The evidence established more than disdain. As noted above, it established that defendant Jennifer Galvan aided and abetted the abuse that led to Prhaze's death. Because subdural hemorrhage or hematoma is a serious physical harm for purposes of first-degree child abuse and an internal injury for purposes of torture, the evidence was sufficient on this basis.

VII. MANSLAUGHTER INSTRUCTION

Defendant Joe Galvan argues that his counsel was ineffective for failing to request an instruction on manslaughter. Without addressing any entitlement to the instruction, we note that "where a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless." *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998). Here, the jury rejected a second-degree murder option. Because a lesser-included manslaughter instruction would not have changed the result, defendant cannot establish an ineffective assistance of counsel claim. See *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

VIII. PRIOR ACTS OF DOMESTIC VIOLENCE

Defendant Joe Galvan argues that it was error to allow evidence of prior domestic violence against Prhaze's mother, Kassandra Lovett, with whom he once lived, as well as prior domestic violence against her son, Alec McGuyver. There was an objection only with reference to Lovett; this issue is reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216. The unpreserved evidentiary issue is reviewed for plain error affecting a substantial right. MRE 103(d).

MCL 768.27b provides that "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant" "in a criminal action in which the defendant is accused of an offense involving domestic violence," unless it should be excluded under MRE 403. "[I]n cases of domestic violence, MCL 768.27b permits evidence of prior domestic violence in order to show a defendant's character or propensity to commit the same act." *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010).

Defendant in essence argues that the evidence was inadmissible under MRE 404(b) to show propensity. However, because it was admissible under MCL 768.27b to show propensity, whether it would have been admissible under MRE 404(b) is irrelevant.

Under the statute, the evidence nonetheless had to satisfy MRE 403, meaning that its probative value could not be substantially outweighed by the danger of unfair prejudice. The evidence was probative because it tended to show that defendant Joe Galvan had a propensity

toward violence with family members. Moreover, it tended to refute his claim that Prhaze was injured when she fell in the bathroom. Nonetheless, it could be unfairly prejudicial if it had a "tendency . . . to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock," or if "marginally probative evidence" were to be given "undue or preemptive weight by the jury." *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). The balance is to be tipped in favor of probative value. *People v Watkins*, 491 Mich 450, 455-456; 818 NW2d 296 (2012).

Here, the evidence was not "marginally" probative. The history of abusing family members and children entrusted to his care made it more probable that defendant Joe Galvan abused Prhaze. Although the evidence was damaging to his position, it was damaging because it was probative, not because it injected other issues into the case. Thus, there was no error in the admission of this evidence.

IX. HEARSAY EVIDENCE

Defendant Jennifer Galvan argues that the trial court erred in allowing evidence of hatred and other instances of abuse that occurred in 2008 and 2009, maintaining they were admitted to show her bad character in violation of MRE 404(b). She either did not object to the subject evidence or objected on other grounds. Accordingly, review is for plain error affecting substantial rights. MRE 103(d).

In essence, defendant Jennifer Galvan relies on *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008). There, a defendant was convicted of felony murder predicated on first-degree child abuse relative to the death of her seven-year-old daughter. The Court found evidence of prior abuse admissible to prove motive—that the defendant harbored anger toward her daughter for making allegedly false accusations of child abuse that resulted in unwanted attention from protective services workers—but also found that it was more prejudicial than probative:

> [I]t was also powerful evidence that defendant was a poor mother who repeatedly neglected and abused her children. As a result, there was a significant possibility that the jury might inappropriately use this evidence to conclude that defendant acted in conformity with her abusive character and poisoned Monique. In addition, the prosecution could have established defendant's motive without resort to proof of the specifics of defendant's involvement with protective services investigations. . . . Furthermore, the testimony included discussions of neglect and abuse that also pertained to defendant's other children. Yet the evidence of abuse and neglect directed toward defendant's other children was—at best—only minimally probative of defendant's motive to kill or harm Monique. [*Id.* at 408.]

Defendant Jennifer Galvan challenges evidence regarding prior injuries including: (1) previous black eyes, (2) evidence that Prhaze was often made to stand with her nose on the "naughty wall" or go to bed very early, (3) evidence that she was punished for sneaking food by withholding the following meal and on one occasion by being put on the "naughty wall" in the middle of the night, (4) evidence that she was found going through trash, (5) evidence that Prhaze was bound with tape that was also used to cover her mouth, (6) evidence that she was

threatened with and given cold showers, (7) evidence that she had described Prhaze as manipulative, and (8) evidence that she hated Prhaze, described her as a devil child, thought she was ruining her marriage, and blamed her for the death of defendant Jennifer Galvan's baby. This evidence was probative on a number of relevant topics. Unlike the defendant in *Yost* who was charged with a single incident, the charge against defendant Jennifer Galvan involved systemic torture and abuse or aiding and abetting the same. Much of this evidence was relevant to establish these crimes. It was not evidence of other bad acts, but evidence of acts demonstrating ongoing abuse and torture and/or a mindset that encouraged the same, and it belied any notion that defendant Joe Galvan's actions were devoid of encouragement by defendant Jennifer Galvan. The jury is entitled to hear the "complete story" surrounding the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Evidence of other criminal events are admissible when so blended or connected to the other crime of which the defendant is accused such that proof of one incidentally involves or explains the circumstances of the other. *Id.* "The more the jurors kn[ow] about the full transaction, the better equipped they [are] to perform their sworn duty." *Id.* Accordingly, there was no plain error in its admission.

X. EXCLUSION OF CO-DEFENDANT'S CONFESSION

During cross-examination of defendant Jennifer Galvan, the prosecutor asked if she had reported everything she knew to a detective at the hospital. She responded: "There was a statement," but said nothing more. On redirect by her own counsel, she said she had not told the detective "[t]hat Joe was going to prison." The prosecutor objected and defense counsel countered that the prosecutor had opened the door to the evidence. Defendant Jennifer Galvan suggests on appeal that she was going to say that defendant Joe Galvan had made inculpatory statements, apparently to her. The prosecutor asserted that she had not opened the door to hearsay statements. The trial court sustained the objection.

Defendant Jennifer Galvan argues that the suppression of her testimony deprived her of a defense and her right to due process. However, any defense must be premised on admissible evidence. She has not put forth any argument to address the hearsay problem. Moreover, there does not appear to be any applicable exception. Accordingly, there was no error in the court's ruling.

XI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Joe Galvan argues that his counsel did not consult with him before trial or share evidence and would not let him provide exculpatory evidence, and that he was not allowed to participate in his defense. Moreover, he claims counsel told him to "shut up," "that makes no sense," and "I'm the lawyer I know what's best." He asserts this constituted ineffective assistance of counsel. Because there was no evidentiary hearing, review "is limited to errors apparent on the record." *Seals*, 285 Mich App at 19-20.

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective

assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Seals*, 285 Mich App at 17.

Defendant Joe Galvan did not make any suggestion during the trial that there had been a breakdown in the attorney-client relationship. Moreover, there is nothing in the record to support this assertion. Also, the alleged demeaning comments, even if made, do not substantiate a breakdown. Being told to shut up on one occasion, while not respectful, does not by itself establish a breakdown and the other two comments cannot even be regarded as demeaning. With respect to defendant Joe Galvan testifying, he expressly stated on the record that he understood he had the right to testify but was not doing so on counsel's advice. This belies the claim that there was disagreement. There is no viable ineffective assistance claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 2013
v	No. 299814 St. Clair Circuit Court
JOE GUY GALVAN, Defendant-Appellant.	LC No. 10-000598-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V	No. 299822 St. Clair Circuit Court
JENNIFER ANN GALVAN, Defendant-Appellant.	LC No. 10-000597-FC

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

Joe and Jennifer Galvan, husband and wife, were each convicted of first-degree felony murder, MCL 750.316(1)(b), torture, MCL 750.85, first-degree child abuse, MCL 750.136b(2), and possession of marijuana, MCL 333.7403. Mr. Galvan was also convicted by plea of possession of a firearm by a felon, MCL 750.224f. I concur with the majority in affirming all of Mr. Galvan's convictions. As to Mrs. Galvan, I agree with the majority that she was properly convicted of the torture and child abuse of her three-year-old stepdaughter Prhaze. I dissent, however, as to Mrs. Galvan's conviction of first-degree felony murder given the lack of evidence that she participated, or assisted, in the assault on January 15, 2010, or that any of the incidents of abuse before that date caused Prhaze's death.

There was extensive testimony describing the ongoing mistreatment of Prhaze over the last 15 months of her life. She was seen with bruises on several occasions by family members and friends. There was testimony that she was made to stand in the corner for hours at a time. On at least one, and likely several, occasions, she was bound and gagged with masking tape. She

was made to sleep on the floor and food was regularly withheld from her. She was punished for "sneaking" food and was forced to take cold showers if she wet herself. At least once, she was struck with a large spoon for attempting to get out of a cold shower. She was also emotionally deprived and treated as a pariah within the family.

Had there been medical testimony that those acts of mistreatment caused Prhaze's death, I would agree that Mrs. Galvan could be properly convicted of first-degree felony murder regardless of the time interval between the mistreatment and death. However, there was no such evidence. Rather, the uncontradicted evidence was that Phraze died on January 15, 2010 due to a subdural hematoma caused by blows to the head intentionally inflicted on that day. The medical examiner, called as a witness by the prosecution, testified that, "the impact that resulted in the fatality was quite close to the time of her death." He testified that the killing blows were most likely inflicted within minutes of Prhaze's death, but allowed for the possibility that they may have occurred as much as eight hours earlier.

In its opening statement and closing argument, the prosecution offered three theories to the jury as to why they should convict Mrs. Galvan of felony murder.[1] First, that Mrs. Galvan was the principal actor, i.e., that she, rather than Mr. Galvan, personally inflicted the fatal injuries on January 15, 2010. Second, that she aided and abetted her husband in his commission of that fatal assault. Third, that the 15-month-long mistreatment of Prhaze created an "atmosphere" that was bound to eventually result Prhaze's serious injury or death and that this was sufficient to make Mrs. Galvan guilty of aiding and abetting the fatal assault. The first two theories fail for lack of evidence. The third fails as a matter of law.

There was not sufficient evidence to prove beyond a reasonable doubt that Mrs. Galvan personally assaulted Prhaze on January 15, 2010. Indeed, the majority does not suggest otherwise. No one testified that they saw Mrs. Galvan assault Prhaze that day. Similarly, no forensic evidence linked her to the fatal assault. Mrs. Galvan testified at trial. She stated that her husband had taken Prhaze into the bathroom to make her take her a shower. Shortly thereafter, she came into the bathroom and discovered Prhaze, unconscious, with Mr. Galvan. Her statements to the police and medical personnel also pointed to Mr. Galvan as the sole possible assailant. Mr. Galvan did not testify and his attorneys conceded that he was alone with Prhaze when she suffered her injury, though they asserted that injury was due to an accidental fall in the shower, not an assault. Thus, the record does not contain sufficient evidence by which Mrs. Galvan could be convicted as the principal defendant.

There is a similar lack of evidence to demonstrate that Mrs. Galvan participated in the January 15, 2010 assault as an aider and abettor. A defendant "who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v*

[1] The district court refused to bind over Mrs. Galvan on first-degree felony murder. However, the circuit court reinstated the charge.

Izarraras-Placante, 246 Mich App 490, 495; 633 NW2d 18 (2001). To establish that defendant Mrs. Galvan aided and abetted Mr. Galvan, the prosecution was required to prove that:

> "'(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.'" [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (alteration by *Moore*).]

Although Mr. and Mrs. Galvan were charged with numerous crimes, "*the* crime charged" for purposes of this analysis was a murderous assault on January 15, 2010. In order to be convicted as an aider and abettor on this basis, Mrs. Galvan must have knowingly assisted or encouraged her husband in some portion of the fatal assault. As already noted, there is no evidence that Mrs. Galvan physically assisted in the assault, nor is there any evidence that she suggested to Mr. Galvan that he assault Prhaze on that day. Indeed, no evidence was presented that Mrs. Galvan even knew that such a beating would be inflicted. Her presence somewhere else in the house is not sufficient. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). While it may be reasonable to infer that Mrs. Galvan knew Mr. Galvan was going to punish Prhaze with a cold shower or even some more injurious abuse after she wet herself, there is no evidence that she knew that this punishment would involve a deadly assault. No evidence was presented that Prhaze had been subject to life-threatening assaults during prior showers or at any other time.[2]

The prosecutor's third theory of guilt did not require proof that Mrs. Galvan inflicted or even aided or encouraged the assault of January 15, 2010. This theory posited that the 15-month-long mistreatment of Prhaze created an "atmosphere" that was bound to eventually result Prhaze's serious injury or death and that participation in this ongoing abuse and "atmosphere" was sufficient to make Mrs. Galvan guilty of aiding and abetting Prhaze's murder by Mr. Galvan.

This argument, that Mrs. Galvan encouraged or condoned a pattern of abuse over months or years such that she should have known would eventually result in serious injury or death, is insufficient as a matter of law to sustain a conviction for first-degree felony murder. The prosecution relies solely on our Supreme Court's opinion in *Robinson*. 475 Mich at 1. In *Robinson*, the Court affirmed the defendant's conviction for second-degree felony murder after he instigated and participated in the specific aggravated assault that resulted in the victim's death. *Id*. at 3-4. The defendant and the principal drove to the victim's home with the express intent to "f*** him up." *Id*. at 4. The evidence demonstrated that the defendant delivered the

[2] The record does not reveal any evidence that Prhaze had suffered any broken bones, organ damage, loss of consciousness, or any other life-threatening injuries prior to January 15, 2010.

first blow to the victim during the assault and struck several subsequent blows. *Id*. Eventually, the principal began to kick the victim. *Id*. The defendant said "that was enough" and returned to the vehicle. *Id*. The principal then shot and killed the victim. *Id*. This Court reversed on the grounds of insufficient evidence, "because there was no evidence establishing that defendant was aware of or shared [the principal]'s intent to kill the victim." *Id*. The Supreme Court reversed this Court's ruling and reinstated the defendant's conviction. *Id*. at 15-16. The Supreme Court held that an individual may be held liable for aiding and abetting a murder even if the individual abandoned a joint assault he had participated in if "the charged offence was a natural and probable consequence of the commission of the intended offense." *Id*. at 15. In *Robinson*, the defendant intended a brutal assault on the victim and participated in that assault which seconds later resulted in the victim's death. *Id*. at 4.

This case is not *Robinson*. There is no evidence that Mrs. Galvan participated in *any* portion of the assault on January 15, 2010. Nothing in *Robinson* stands for the proposition that the intent required to support a felony-murder conviction may be inferred from a defendant's intent to commit separate and distinct criminal acts on previous occasions. While the evidence demonstrated that Mrs. Galvan committed and abetted acts of child abuse and torture on other dates, there was no medical evidence linking any of those actions to Prhaze's death. By contrast, if Prhaze had died of starvation, or some other chronic aspect of the abuse, Mrs. Galvan's conviction would be supported by sufficient evidence even if her actions were remote in time.[3]

We cannot conclude beyond a reasonable doubt that Mrs. Galvan did not assist or encourage the assault in the bathroom that day. It is possible that she did participate in that terrible crime. However, under our system of law, a defendant may not be found guilty of a particular crime because we cannot be certain that she is innocent of it. The issue is not whether we are fully at ease with concluding that defendant is factually innocent of the crime, but whether there is proof beyond a reasonable doubt of defendant's guilt.

Because the prosecution failed the prove beyond a reasonable doubt that Mrs. Galvan was either the principal actor in Prhaze's murder, or aided and abetted Mr. Galvan in the assault of January 15, 2010, I would reverse the jury's verdict and vacate her conviction for first-degree felony murder, MCL 750.316(1)(b).[4] I concur with the majority in affirmance of all other convictions.

/s/ Douglas B. Shapiro

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[3] There was no charge of conspiracy to commit murder, MCL 750.157a.

[4] I would also find that the trial court erred in refusing to allow Mrs. Galvan's attorney to withdraw in order to testify that Mr. Galvan confessed that he struck and killed Prhaze on January 15, 2010. However, that issue is rendered moot if we vacate the murder conviction.