STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERSKIN ROBERTSON, JR.,

Defendant-Appellant.

UNPUBLISHED
May 3, 1996

No. 168536
LC No. 92-060521-FC

Before: Corrigan, P.J., and Bandstra and W. A. Crane,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and sentenced to a term of twenty to forty years' imprisonment. He appeals as of right. We affirm.

This matter involved the death of a child, Brianna Hutcherson, who was left in defendant's care by the child's mother. The medical evidence showed that Brianna died as a result of blunt force trauma to her chest. There were no eyewitnesses to explain how Brianna was injured; all the evidence adduced was circumstantial. The prosecution theorized that defendant physically abused the child and caused her death because he was the only person who was with the child at the time she was injured.

I

Defendant first argues that the trial court erred in denying his motion to suppress his statement made to the police on October 31, 1992, because that statement was obtained in violation of defendant's Fifth Amendment rights.[1] Defendant argued to the trial court that when he made the statement to the police on October 31, 1992, he was in custody. Therefore, he maintained that the police officers' failure to administer *Miranda* warnings required suppression of any statement he made at that time. After conducting an evidentiary hearing, the trial court ruled that defendant was not in custody, nor could he have reasonably believed that he was not free to leave, at the time he spoke to the police.

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*Circuit judge, sitting on the Court of Appeals by assignment.

This Court will not disturb a trial court's ruling after a suppression hearing unless the ruling is clearly erroneous. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993). However, where the issue involves the strict application of a constitutional standard to uncontested facts, the trial court's decision is not afforded the same deference as factual findings. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

Under *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, 706 (1966), statements made by an accused during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda* warnings must be given when a person is in custody or otherwise deprived of freedom of action in any significant manner. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). The totality of the circumstances must be examined to determine whether the defendant was in custody at the time of the interrogation. The critical question is whether the accused reasonably could have believed that he was not free to leave. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993).[2]

The evidence at the suppression hearing established that defendant agreed to talk to the police while defendant was at the hospital. He was transported to the police station to make a statement because it was less disruptive than circumstances at the hospital. Before defendant was taken to the station, he was told that he was not under arrest and that he did not have to go to the police station. When defendant arrived at the station, the officer that drove him there placed defendant in the turnkey unit because he apparently did not know where the detectives wanted defendant to be placed. The turnkey unit was locked and defendant would not have been free to leave. When the detectives learned that defendant had been placed in the turnkey unit, he was released and the detectives apologized to defendant. Defendant was again assured that he was not under arrest before he gave his statement.

Defendant's interview was conducted in a room primarily used for coffee breaks. There were no locked doors. Defendant was again assured that he was free to leave during the course of the interview. At the time the police talked to defendant, they were not sure what had caused the victim's death because the autopsy had not been completed. Therefore, defendant was not the focus of the investigation at the time he gave his statement.

On the facts produced at the suppression hearing, the trial court's finding that defendant was not in custody at the time he gave his statement was not clearly erroneous. *People v Faucett*, *supra*, 442 Mich 170. The court considered all of the relevant facts produced at the suppression hearing. Furthermore, no evidence adduced at the hearing supports defendant's argument that he was asked to make a statement while he was held in the turnkey unit or that his statement was not voluntarily made. Defendant agreed to make a statement to the police while he was at the hospital, not while he was in the turnkey unit. After defendant was released from the turnkey unit, he again was told he was free to leave and that he was not under arrest, but he agreed to speak with the police. Compare *People v Roark*, 214 Mich App 421; ___ NW2d ___ (1995), lv pending.

The record does not support defendant's argument that the trial court erred as a matter of law by incorrectly believing it had no legal basis to decide that defendant was in custody. The trial court's comments involved its factual findings based upon the evidence produced at the suppression hearing. Defendant did not testify or present any witnesses at the suppression hearing. The court thus had only the police officers' version of what occurred. Because the court found that the officers' testimony was credible, it logically denied defendant's motion to suppress. The trial court therefore did not err in denying defendant's motion to suppress his statement.

II

Defendant next claims that the evidence was insufficient to sustain the jury's verdict of second-degree murder beyond a reasonable doubt. He contends that the circumstantial evidence did not show that defendant committed this crime or, even if defendant was involved, that he had an intent to harm the child.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The elements of second-degree murder are that the defendant caused the death of the victim and that the killing was done with malice without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *Id*. Malice may be inferred from the facts and circumstances of the killing. *Id*.

The prosecutor is not required to negate every reasonable theory of innocence. The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce. *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991). The prosecution conceded that it could not prove that defendant acted with an intent to kill. Therefore, its case focused on the other two possible states of mind. The prosecution presented sufficient evidence of the necessary intent for second-degree murder based upon the child's injuries. Brianna suffered severe blows to her chest area that caused her death. The possible accidents that might have occurred (a fall down carpeted stairs or being hit by the closet door) could not explain away her injuries, even if she suffered more than one accident. It could only be concluded from the injuries Brianna actually suffered that someone struck her with multiple blows. Viewing the evidence in a light most favorable to the prosecution, no other reasonable inference from this evidence could explain the victim's injuries.

The circumstantial evidence was also sufficient for the jury to find beyond a reasonable doubt that defendant caused the fatal blows. Defendant was the only person with the child when the fatal injuries were inflicted. The child's mother was at work. No evidence suggested that someone broke into the house and caused the injuries. Blood and fecal stains on defendant's shirt and the presence of

fecal matter in the house also repudiated defendant's version that he found the child at the bottom of the stairs. There was evidence that someone tried to clean up both the victim and the house before the paramedics arrived. Defendant also gave inconsistent accounts of what occurred. His guilty intent can be inferred from this evidence. Defendant's reputation as a nonviolent person did not overcome the weight of the circumstantial evidence of the prosecution's proofs. Viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence allowed a rational trier of fact to conclude defendant inflicted the fatal blows.

III

Defendant argues that the prosecutor used improper impeachment techniques when cross-examining defendant. We disagree. Defendant urges error in the prosecution's use of a police report to cross-examine defendant. Because defendant failed to object below, we have reviewed the record to determine whether manifest injustice would result from our failure to provide further review. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). We find no manifest injustice when defendant admitted that the majority of the report was accurate and he provided his own version of the event. Because the report itself was not made a part of the record, we cannot conclude that the prosecution used the substance of the report in bad faith to impeach defendant's character witnesses.

Defendant also contends that the prosecutor failed to lay a proper foundation for cross-examination about his prior statements when the transcripts of his prior statements were not shown to defendant. MRE 613(a) does not require that a witness be shown a written copy of a prior statement or that its contents be disclosed unless there was a request for the same by defendant. Defendant failed to make a request for the transcript. Defendant has not carried his burden to show error.

IV

Defendant next claims error in the jury instructions. After reviewing all of defendant's arguments, we find no error requiring reversal. First, the trial court did not err in declining to follow the standard criminal jury instructions when the Michigan Supreme Court has not sanctioned the use of those instructions. *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Instead, the trial court properly tailored its instructions to the facts and issues of this case.

We find no error in the court's decision not to instruct on an intent to kill as an element of second-degree murder. Because the prosecution conceded that it could not prove an intent to kill, the trial court properly omitted this state of mind from the instructions and also properly informed the jury that the prosecution did not have to prove an intent to kill. The intent to kill is not an essential element of second-degree murder when two other possible states of mind suffice to establish this crime. *People v Bailey*, 207 Mich App 8, 9; 523 NW2d 798 (1994), lv gtd 449 Mich 852 (1995); *People v William Johnson*, 187 Mich App 621, 629; 468 NW2d 307 (1991). Because the intent to kill was not an issue on the evidence, it would have confused the jury to instruct on intent to kill in the absence of evidence.

Defendant has failed to cite any authority requiring an instruction on intent to kill in the absence of evidence.

Defendant also argues that the court should have given an instruction for involuntary manslaughter on the basis of gross negligence. Again, this instruction was not supported by the evidence. There was no evidence that defendant injured the victim by carelessly performing a lawful act that manifested a reckless disregard for life. The improper performance of CPR alone would not have supported an instruction on this form of manslaughter because improperly performing CPR does not manifest a reckless disregard for life. *People v Datema*, 448 Mich 585, 596-597; 533 NW2d 272 (1995). Moreover, the trial court instructed the jury regarding the performance of CPR, that if the jury believed defendant injured the victim while he was performing CPR, it should acquit. Therefore, even if error arose, it was harmless. *People v Considine*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992).

Defendant also argues that the trial court failed to instruct the jury on involuntary manslaughter upon the performance of an unlawful act (in this case, striking the child). However, the record shows otherwise: the court instructed the jury on involuntary manslaughter after defendant objected. Because defendant did not object to the court's additional instructions on involuntary manslaughter, we find no manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant also failed to request a cautionary instruction regarding the prosecution's impeachment of defendant with a police report, as discussed in Issue III, *supra*. The trial court was not under a duty to instruct the jury on the limited use of this evidence absent a request. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Basinger*, 203 Mich App 603, 606; 513 NW2d 828 (1994). Defendant's failure to request an instruction forfeits appellate review. *People v Puroll*, 195 Mich App 170, 171; 489 NW2d 159 (1992).[3]

V

Defendant also argues that the jury's verdict was against the great weight of the evidence. Because defendant withdrew his motion for a new trial on this ground before the trial court could address the merits of the motion, we decline to review it, other than to state that the jury's verdict was not against the great weight of the evidence.

VI

Defendant next argues that the trial court erred in scoring Offense Variables 3 and 4. A trial court may determine the points to be scored under the guidelines, provided that the record adequately supports a particular score. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). This Court will not intervene in the trial court's scoring decision if any evidence supports the decision. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The trial court was required to score Offense Variable 3 at twenty-five points because that score was consistent with the jury's verdict. *People v LeMarbe (After Remand)*, 201 Mich App 45, 48-49; 505 NW2d 879 (1993). Defendant

has not shown error. Defendant did not produce other evidence that the jury did not hear and that supported scoring this variable at only ten points. The trial court also properly scored Offense Variable 4 at twenty-five points. The victim suffered ten blows to her body, although only two of these blows caused her fatal injury. Therefore, the evidence supported finding that the victim suffered aggravated physical injury. *People v Daniels, supra*, 192 Mich App 674-675.

Defendant also argues that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) because the trial court sentenced defendant to a term near the top of the sentencing guidelines. We disagree. Because defendant's sentence fell within the guidelines, his sentence is presumptively proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Defendant has failed to overcome the presumption of proportionality. Defendant's lack of a serious criminal record was considered in the scoring of the guidelines. In light of the trial court's thoughtful and thorough sentencing decision, defendant's sentence does not violate the principle of proportionality.

VII

Finally, defendant argues that the trial court erred in denying his motion to delay sentencing until all trial transcripts could be prepared so that defendant's new counsel could acquaint himself with what occurred at trial. Defendant contends that the trial court's ruling denied him counsel of his choice. We disagree. The trial court did not abuse its discretion in denying defendant's motion for a continuance. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant failed to explain why his trial counsel could not properly represent him at sentencing. Defendant also delayed in seeking a change in counsel. He had almost two months to retain new counsel, but waited, at most nine days before the scheduled sentencing hearing to advise the court that he wanted new counsel. While defendant did not previously seek adjournments, he has not demonstrated prejudice from the court's ruling. Defendant's trial counsel performed competently at the sentencing. Defendant has not shown any errors his counsel made at sentencing. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

The trial court properly exercised its discretion in refusing to adjourn sentencing until the trial transcripts could be produced. Defendant has not shown that he was deprived of his right to counsel of his choice. When the trial court refused to adjourn the sentencing until the entire trial record could be produced, defendant's new counsel voluntarily chose not to represent defendant at sentencing. The trial court also suggested some options, such as a shorter adjournment or both attorneys serving as co-counsel at sentencing. Defendant's new counsel refused to accept these terms. The trial court ruling did not deny defendant his right to counsel. The trial court properly balanced defendant's right to counsel of his choice under the Sixth Amendment with the public's interest in concluding this matter. *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

Affirmed.

/s/ Maura D. Corrigan
/s/ Richard A. Bandstra
/s/ William A. Crane

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[1] Defendant has cited some facts concerning his statement of November 3, 1992, in his brief on appeal. However, because his argument on the issue of custody concerns only his statement of October 31, 1992, we have confined our review of this issue to his statement of October 31, 1992.

[2] Defendant incorrectly asserts that he was entitled to *Miranda* warnings because the investigation had focused on him at the time he gave his statement. As the text notes, focus is no longer the governing test. Rather, we must determine if defendant was in custody or reasonably believed he was not free to leave at the time he gave his statement. *People v Hill*, *supra*, 429 Mich 391.

[3] Because *People v Dorrikas*, 354 Mich 303, 325-326; 92 NW2d 305 (1958) was decided before the Michigan Rules of Evidence were adopted, we decline to follow it on this issue.