

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ROBERT DANIELS,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 156602

LC No. 91-000594-FH

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b; MSA 28.331(2). He was thereafter sentenced to seven to fifteen years' imprisonment. He appeals as of right and we affirm.

Defendant first contends that the magistrate abused his discretion in binding him over for trial because testimony was elicited from an unqualified expert and was heavily relied upon by the magistrate in binding defendant over for trial. The magistrate's decision to bind defendant over for trial is reviewed for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

Here, testimony at the preliminary examination from the unqualified expert, Dr. Maurer, indicated that the victim's injuries were not inflicted accidentally and bore upon defendant's intent. However, Dr. Maurer's testimony was cumulative because police officer James Hurley testified without objection at the preliminary examination that he believed that the injuries to the victim were inflicted during an attempt to punish her. From this, it may be inferred that defendant possessed the requisite intent to cause serious physical or serious mental harm to a child. See *People v Goodchild*, 68 Mich App 226; 242 NW2d 465 (1976); *People v Todd*, 196 Mich App 357, 360; 492 NW2d 521 (1992).

Because there was sufficient evidence presented at the preliminary examination that a crime was committed and probable cause to believe that defendant committed the crime, the magistrate did not abuse his discretion in binding defendant over for trial. MCR 6.110(E).

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

Defendant next claims that he was denied a fair trial because of prosecutorial misconduct during the cross-examination of Sharon Daniels and during comments made in closing argument. The alleged improper conduct consisted of questions by the prosecutor directed to Sharon Daniel regarding her fitness as a mother and remarks made in closing argument which allegedly suggested that the jury had a civic or moral duty to convict defendant. Consideration of the alleged instances of misconduct, which were not objected to, is limited to whether failure to review the comments would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 527 (1994). Because any possible prejudice could have been cured by a timely instruction from the court, we find no miscarriage of justice. *Id.*

Next, defendant argues that testimony given by Drs. Hahn and Theodorou was improperly admitted. We review a trial court's determination that a witness is qualified for an abuse of discretion. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990). Specifically, defendant contends that because the doctors were not qualified as experts in the behavioral sciences they could not give an opinion regarding the victim's condition or injuries or testify to the truthfulness of the prosecution's allegations, and they could not testify that the victim was a battered child. Defendant argues that this testimony was prohibited by *Beckley*. Here, the victim was physically abused. Moreover, the doctors' conclusions in this case were based upon objective facts obtained from their physical examinations of the victim, whereas in *Beckley*, the expert opinions were based upon observing the victims' behaviors. On this basis, we find that the reasoning of *Beckley* is inapplicable to the present case. Furthermore, Drs. Hahn and Theodorou's testimony was properly admitted under MRE 702. MRE 702 provides that an expert must be qualified, the evidence must either assist in determining a fact in issue or serve to give the trier of fact a complete understanding of the evidence, and the evidence must come from a recognized discipline. Both doctors had impressive credentials, their testimony helped the jury to understand the cause of the victim's injuries, and their fields of specialty, pediatric medicine and neurosurgery, are recognized disciplines. Therefore, the trial court did not abuse its discretion in admitting the testimony of the two expert witnesses.

Defendant next argues that he was denied the effective assistance of counsel. In order to prove a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

We find defendant's argument that trial counsel was ineffective because she attempted to withdraw from the case based upon her inexperience to be without merit. At the *Ginther*¹ hearing, trial counsel explained that she attempted to withdraw from the case because defendant failed to comply with her requests for information regarding the case and because defendant had difficulty compensating her. These were proper reasons to seek withdrawal. MRPC 1.16. Moreover, trial counsel's attempted withdrawal did not, alone, prejudice defendant. Because trial counsel's reasons for attempted withdrawal were proper and because the attempt alone did not prejudice defendant, defendant was not denied the effective assistance of counsel on this basis.

Defendant also contends that he was denied the effective assistance of counsel because trial counsel failed to object to the prosecutor's questioning of Sharon Daniels regarding custody proceedings. Specifically, defendant argues that the jury was confused regarding the prosecutor's burden of proof in criminal cases because the prosecutor questioned Sharon Daniels regarding custody proceedings. Defendant argues that since the burden of proof in custody cases is by a preponderance of the evidence, the jury believed that this same burden was applicable to the case at hand. We disagree. A review of the record reveals that questions regarding custody were asked of the victim's mother to challenge her competence as a parent and trial counsel indicated that her failure to object was a matter of trial strategy. The credibility of a witness may be challenged by any party. See *Stanaway*, *supra*, pp 692-693, n 51. Because the question was proper, an objection to the testimony would have been futile and would only draw further attention to Sharon Daniels' competence as a parent. Therefore, defendant was not prejudiced by counsel's failure to object to the questions.

Similarly, we find defendant's argument that trial counsel should have objected to the prosecutor's remarks involving the jury's civic and moral duty to convict to not require reversal. Arguments based upon a civic duty to convict are generally condemned because they inject issues into the trial that are broader than the defendant's guilt or innocence of the charges and because they encourage jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Trial counsel explained that she generally does not object to the prosecutor's statements, made in opening and closing arguments, as a matter of trial strategy. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987). Further, defendant has not overcome the presumption that the challenged action is sound trial strategy under the circumstances, nor that counsel's performance was deficient or prejudicial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's argument that trial counsel should have objected to the opinions of Dr. Theodorou and Dr. Hahn, because they were never qualified as experts is without merit. A review of the record reveals that defense counsel did object to the opinion testimony of the expert witnesses, and defendant was not denied the effective assistance of counsel on this basis.

Defendant was not denied the effective assistance of counsel where counsel did not object to opinion testimony of Waneta Nugent, where the testimony was rationally based on Nugent's perception and where it was helpful to determine a fact in issue. MRE 701. Because the testimony of Nugent was proper, an objection to the testimony would not have affected defendant's chance for acquittal. *LaVearn*, *supra*, p 216. Therefore, defendant was not denied the effective assistance of counsel on this basis.

Defendant's final claim of ineffective assistance of counsel was that counsel was deficient because she failed to remove a juror who admitted that he was a personal friend of a police officer who testified in the case. Trial counsel indicated that her decision to not remove the juror was a matter of trial strategy to the extent that she was following the wishes of her client. Further, the juror indicated

that despite his friendship with the police officer, he could function as a juror and would treat and weigh the officer's testimony as he would any other witnesses' testimony. The substance of the officer's testimony was necessary to establish the authenticity of photographs, but was not material to defendant's guilt or innocence, because there was already testimony regarding the cause of the victim's injuries. Consequently, we find that defendant was not denied the effective assistance of counsel in this regard.

Finally, defendant claims that his sentence of seven to fifteen years for first-degree child abuse was disproportionate. There are no sentencing guidelines for this offense. However, defendant's sentence will be reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

The circumstances indicate that the two-year-old victim sustained injuries to the brain, a fractured skull, sharp lines on her throat, fresh bruising on her chest, and puncture marks on her left shoulder. An examination of defendant's background reveals two prior misdemeanor convictions as well as a pending charge of possession of cocaine. Considering the seriousness of the crime committed, as well as defendant's background, the trial court did not abuse its discretion in sentencing defendant to seven to fifteen years' imprisonment.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

¹ *People v Ginther*, 390 Mich 436; 212 NW2d (1973).