STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREA JEAN DAVIS,

Defendant-Appellant.

UNPUBLISHED
October 1, 1996

No. 176307
LC No. 93-003103-FC

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Defendant appeals as a matter of right from her jury trial conviction of involuntary manslaughter, MCL 750.317; MSA 28.549, for the drowning death of her four-month-old nephew. Defendant was sentenced to two-and-one-half to fifteen years in prison. We affirm.

Defendant first argues that the trial court erred in denying her motion for a directed verdict because there was no evidence that the victim's death was caused by a criminal agency. We disagree. When reviewing a trial court's ruling on a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). When ruling on a motion for a directed verdict, the Court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

We find that sufficient evidence was presented during the prosecution's case-in-chief from which a rational trier of fact could find that the essential elements of second-degree murder were proven beyond a reasonable doubt. The essential elements of second-degree murder are (1) that the defendant caused the death of the victim, and (2) that the defendant had one of three states of mind: either the defendant intended to kill, the defendant intended to do great bodily harm, or the defendant knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). The evidence

presented by the prosecutor showed that while defendant was baby-sitting her four-month-old nephew, Jakeob, defendant caused Jakeob's death by leaving him unattended in a bathtub with the water running. Defendant's reason for leaving Jakeob in the bathtub was that she needed to make lunch for the older children. Defendant knew she was not supposed to leave an infant in a bathtub unattended because her sister-in-law, Jakeob's mother, yelled at defendant when defendant left Jakeob in the bathtub alone on an occasion two weeks prior to the instant offense. A rational trier of fact could find from this evidence that defendant harbored the requisite malice for second-degree murder because she knowingly created a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the likely result of her actions. The trial court properly denied defendant's motion for a directed verdict.

Defendant also argues that the trial court improperly relied on her confession as the basis for denying her motion for directed verdict. Defendant's argument is that the prosecution failed to prove the corpus delicti of the crime before introducing defendant's inculpatory statement as evidence. In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecution is allowed to introduce the inculpatory statements of an accused. *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). Defendant's argument improperly focuses on defendant's lack of a criminal mind at the time of the offense. The proper focus is whether defendant's *act* of criminality was the cause of the injury. Since it was undisputed that Jakeob died as a result of defendant's act of leaving him in the bathtub with the water running, the prosecution did establish the corpus delicti of the crime. Therefore defendant's statement was properly admitted and the trial court properly relied on it in denying defendant's motion for directed verdict.

Defendant argues next that the trial court erred in admitting bad acts evidence pursuant to MRE 404(b). We disagree. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *Id*.

At trial, the prosecutor was allowed to introduce evidence that defendant left Jakeob in the bathtub alone on an occasion two weeks prior to the instant offense. To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. *Id*. at 60. Defendant was charged with second-degree murder. In order to prove that defendant acted with malice in this case, the prosecutor had to establish that defendant intended to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result. *People v Neal, supra*, 201 Mich App 654. We find that the evidence that defendant left Jakeob alone in the tub two weeks prior to the instant offense and that Jakeob's mother yelled at defendant not to

leave him alone in the bathtub is relevant to whether defendant knew that her conduct of leaving the infant alone would result in death or great bodily harm to Jakeob. In addition, we find that the evidence was offered for the proper purpose of showing defendant's state of mind at the time of the instant offense.

We also find that the probative value of the MRE 404(b) evidence was not substantially outweighed by its potential for unfair prejudice. "Unfair prejudice" does not mean "damaging." Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). We think that the evidence was extremely probative of defendant's knowledge of the consequences of leaving a child unattended in a bathtub, especially since the incident occurred within two weeks of the instant offense. The evidence of the prior incident did not portray defendant as a criminal or a bad person or a poor caregiver. Defendant was allowed to explain that she shut the water off, then merely reached across the hall to grab a towel and that she was not even wholly out of the bathroom at the time. Defendant's attention was diverted from the infant for less than thirty seconds. We do not think that the evidence was more prejudicial than probative.

Next, defendant argues that she was denied the effective assistance of counsel because her trial counsel failed to request CJI2d 4.11, which instruction informs the jury that MRE 404(b) evidence cannot be considered as substantive evidence of guilt. Since defendant neither moved for a new trial or requested a *Ginther*[1] hearing, this issue is not preserved and our review is limited to the record for manifest injustice. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991); *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

To determine if defendant was denied the effective assistance of counsel, this Court must determine if defendant can prove both prongs of the test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which is that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced. The use of Standard Criminal Jury Instructions is not mandated. *People v Mixon*, 170 Mich App 508, 517; 429 NW2d 197 (1988). Defendant admitted that she did leave Jakeob unattended in the bathtub two weeks prior to the instant offense. Defendant explained that she only stepped halfway out of the bathroom for less than thirty seconds to grab a towel and that the water was not running when she did so. This evidence indicates that defendant knew that she could not leave the child alone in the bathtub. Defendant's trial counsel chose not to draw unnecessary attention to the evidence which would have resulted by requesting CJI2d 4.11. We conclude that no manifest injustice resulted.

Defendant's final argument is that her sentencing proceeding was tainted by several errors. We disagree with all of defendant's claims of error. Defendant first claims that her sentence is invalid because the trial court did not consider all of the established sentencing factors when imposing defendant's sentence. Our review of the record indicates that this assertion is simply false. At sentencing, the trial court recited the four sentencing factors set forth in *People v Coles*, 417 Mich 523,

549-550; 339 NW2d 440 (1983), overruled in part on other *grounds People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), which include punishment, deterrence, rehabilitation, and society's protection. The court noted that punishment and deterrence were of primary importance, but also considered that defendant was a significant prospect for rehabilitation and that she did not pose a threat to society. The court stated that punishment was necessary in this case because defendant had a history of not properly caring for children and that defendant needed to understand the seriousness of this offense. Defendant's argument that the trial court did not consider all of the established sentencing factors is without merit.

Next defendant argues that the trial court impermissibly considered a neglect petition filed in juvenile court against defendant and processed by the Department of Social Services regarding an occasion when defendant allegedly left her two-year-old son home alone while she went for a walk. Defendant claims that this information was improperly obtained in violation of confidentiality provided by MCL 722.627; MSA 25.248(7). We disagree. It was proper for the trial court to consider the fact that a neglect petition had been filed against defendant because that petition was part of the probate court file, a public record. MCL 722.627; MSA 25.248(7), provides confidentiality only for records in the custody of the Department of Social Services.

Defendant also argues that the trial court made an independent finding of defendant's guilt of a higher charge than that for which she was convicted and sentenced defendant with that finding in mind. Our review of the record reveals that there is simply no evidence in the record that the trial court sentenced defendant after independently concluding that defendant was guilty of second-degree murder. In fact, the trial court sentenced defendant to 2 1/2 years in prison, whereas the guidelines recommended a minimum term between 2 1/2 and 5 years. Since the trial court sentenced defendant at the lowest end of the guidelines range, there is no evidence that the trial court sentenced defendant as if she was convicted of second-degree murder.

Finally defendant argues that the trial court's sentence violated the principle of proportionality. Again, we disagree. The principle of proportionality requires that the sentence imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn, supra,* 435 Mich 636. Sentences which fall within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant's 2 1/2-year minimum term falls within the recommended guidelines range and therefore is presumptively proportionate. Defendant has not offered any circumstances to overcome that presumption and we therefore find that defendant's sentence is proportionate.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).