

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARNDRA BENITA JEFFRIES,

Defendant-Appellant.

UNPUBLISHED
October 11, 1996

No. 181184
LC No. 94-03706

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, in connection with the death of two-year-old Deshawn Gordon, and was sentenced to twenty to thirty years' imprisonment. We affirm.

I

Lloyd Sims testified that on March 17, 1994, he picked up Deshawn from Deshawn's mother's home. Sims resided with defendant and her four children at 17227 Westphalia in the City of Detroit. On March 20, 1994, before leaving for work, Sims noticed that Deshawn had a small bruise on the back of his head, a bruise on his leg, and an injury to his lip, but did not appear to be in any distress because of these injuries. Later that day, Sims received a message at work to call home. When he called, defendant told him that something was wrong with Deshawn and that Sims should come home. When he arrived home, EMS was there and defendant told him that Deshawn fell while jumping on the bed and hit his head on the dresser or cradle. EMS personnel indicated that Deshawn also had a bruise on his ear. On the way to the hospital, Sims noticed bruises on Deshawn's ear and face which he had not seen earlier. At the hospital, Deshawn's head was shaved and the doctor pointed out to Sims additional bruises on Deshawn's head. Deshawn died the next day. Sims then described the bed from which defendant said Deshawn fell, testifying that it consisted of a mattress and box-spring resting on a single layer of milk crates.

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

Dr. Sawait Kanluen, Deputy Chief Medical Examiner with the Wayne County Medical Examiner's Office, testified that he performed an autopsy on Deshawn, and found numerous bruises on his head, the left side of his back, both buttocks, and the back of his left arm. Dr. Kanluen testified the bruises were consistent with a beating. With respect to his head, Dr. Kanluen testified that Deshawn had ten to twenty bruises at the minimum, many of the bruises were on top of each other and that these injuries were not consistent with having fallen off the bed and striking something. Dr. Kanluen opined that Deshawn died due to multiple blunt force injuries to the head, causing bleeding inside the head, which compressed the brain and caused swelling. These injuries were definitely not consistent with someone shaking Deshawn, but would require that his head strike something or be struck with something. Dr. Kanluen believed that the injuries were inflicted by a blunt object with a soft surface, such as a hand, and not a blunt object with a hard surface. Dr. Kanluen examined the body on March 22, 1994, and estimated that Deshawn's injuries were at most two days old.

Katrina McClellan testified that she was in defendant's home on the morning of March 20, 1994, and witnessed defendant grab Deshawn by the arm, pull him up from the floor and whip Deshawn with a belt, while standing over him. While whipping Deshawn, defendant said to him, "Why didn't you find your clothes?" The beating lasted approximately five or ten minutes. Defendant grabbed Deshawn by the arm and threw him onto the bed. McClellan testified the beating continued in another room and she left. McClellan testified that Deshawn was wearing nothing but underwear but her statement to the police stated he was not wearing anything. At one point, McClellan offered to help Deshawn with his clothes. Defendant responded by snatching the bag out of McClellan's hand, saying "he can find them himself," and added that Deshawn was "acting stupid." McClellan did not testify that defendant hit Deshawn in the head.

Sergeant Ronald Visbara of the Detroit police department testified regarding two statements obtained from defendant. In the first statement, taken on March 21, 1994, at 12:15 a.m., defendant claimed that on March 20 sometime before noon, she was home alone with her children and Deshawn. She heard a loud noise in the bedroom where the children were playing, and went into the room to find Deshawn lying on top of a milk crate. Deshawn said he was all right. Later, defendant called to Deshawn but he did not answer. Defendant found Deshawn in the living room lying on the floor. She picked him up and he urinated on the floor. Deshawn did not respond and she shook him. She later called 911. Defendant admitted that she was upset because Deshawn urinated on the floor and that she had spanked him on March 18 for doing so. Defendant attributed the wound on the back of Deshawn's head to an incident on March 17, 1994, when Deshawn fell out of bed.

Sergeant Visbara obtained the second statement on March 22, 1994, at 11:54 a.m. In that statement, defendant stated that Deshawn was accidentally struck in the head by a bedroom door when defendant came into her bedroom. She denied throwing Deshawn into the door and stated she opened the door fast either because the phone was ringing or her baby was crying. Deshawn fell to the ground crying, but later resumed playing. Defendant stipulated that she gave both statements voluntarily after being advised of her constitutional rights.

At the close of the prosecutor's proofs, defendant moved for a directed verdict, arguing that the evidence was insufficient to establish that she had the intent necessary for second-degree murder. The trial court denied defendant's motion. The defense rested.

II

Defendant first argues that the evidence was insufficient to show that defendant possessed the requisite intent to support a second-degree murder conviction.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the 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. *Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (*Amended on other grounds*, 441 Mich 1201) (1992). The prosecution need not negate every reasonable theory of innocence; it is sufficient for the prosecution to prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence there may be. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

The elements of second-degree murder are (1) defendant caused the death of the victim, and (2) the killing was done with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is the intent to kill or to do great bodily harm, or to create a high risk of death or bodily harm with knowledge that death or great bodily harm will be the probable result. *Id.*

Malice or the intent to kill may be inferred from the facts and circumstances of the killing. *People v Mackey*, 168 Mich App 154m 157; 423 NW2d 604 (1988). In *Mackey*, the defendant was the baby-sitter of a fourteen-month-old child who was found dead in the defendant's care. The defendant claimed that the child fell off a stool and fell from the bed twice. However, a medical examiner testified that the child died of multiple injuries which could not have been sustained in a fall from the bed. The defendant admitted in a statement to police that she was angry with the child and shook her earlier in the day, although she could not remember how many times. This court concluded that the evidence was sufficient to support a finding of malice, and the defendant's conviction was affirmed. *Id.* at 156-157.

In the instant case, Sims testified that when he left his home on the morning of March 20, 1994, Deshawn did not appear to have the injuries from which he suffered when admitted to the hospital. On the morning of March 20, McClellan saw defendant beat Deshawn with a belt for five to ten minutes and throw him onto a bed. It was undisputed that Deshawn was in defendant's care when he suffered the injuries, and his injuries were inconsistent with defendant's versions of events. The medical examiner testified that the cause of death was multiple blunt force injuries to the head, injuries which were inconsistent with a fall from a bed or shaking, and were likely inflicted by a blunt object with a soft surface, such as a human hand. In addition, Dr. Kanluen described many other injuries consistent with beating. Finally, defendant gave at least two different explanations as to how Deshawn's injuries were

inflicted. Defendant told Sims that Deshawn fell off the bed. In her second statement to police, however, defendant claimed that Deshawn was hit in the head by a bedroom door.

Taken in the light most favorable to the prosecution, the evidence was sufficient to support findings that Deshawn died from a beating, that defendant inflicted the fatal beating and that she acted with malice.

III

Defendant next argues that McClellan's testimony that defendant whipped Deshawn with a belt earlier in the day was inadmissible under MRE 404(b), because it described a prior bad act not relevant for any purpose other than to show that defendant acted in conformity with the crime charged, and any probative value was outweighed by the unfairly prejudicial effect of such evidence.

A trial court's ruling on admission of evidence pursuant to MRE 404(b) is reviewed for an abuse of discretion. *People v Biggs*, 202 Mich App 450, 453; 509 NW2d 803 (1993). Under MRE 404(b), evidence of prior similar acts is admissible to show "motive, opportunity, intent, preparation, scheme, plan, or system is doing an act, knowledge, identity, or absence of mistake or accident when the same is material," provided the evidence is relevant to an issue or fact of consequence at trial and its probative value is substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

This rule was applied in *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1993) under circumstances similar to the present case. The defendant in *Biggs* was charged with murder for the smothering death of her two-year-old daughter. At trial, evidence was introduced that on previous occasions the defendant had given the child an excessive dose of heart medicine and had badly burned the child's hand. *Id.* at 451. On appeal, the defendant argued that this evidence should have been excluded under MRE 404(b) because it was not probative of her intent and, even if probative, its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 452. This Court rejected that argument, holding that evidence of the defendant's prior conduct was probative of malice and was material to contradict the defendant's claim that the death was accidental.

As in *Biggs*, the testimony of defendant's beating Deshawn was probative of malice, particularly where the evidence concerned events occurring the same day that the fatal injuries were inflicted. The testimony also undermined defendant's claim that the injuries were accidental. The evidence was thus probative of intent and the absence of accident, and the court did not abuse its discretion in concluding that the danger of unfair prejudice did not outweigh the probative value of the evidence.

IV

Defendant last argues that the trial court's denial of her request to instruct the jury on first-degree¹ and second-degree² child abuse, MCL 750.136b; MSA 28.331(2), which defendant argues are cognate lesser-included offenses of second-degree murder, denied her the opportunity to have the jury consider her theory of the case and thus denied her a fair trial. We conclude that any error in the failure to give the instructions was harmless under the circumstance that the jury rejected the option of convicting defendant of involuntary manslaughter. *People v Beach*, 429 Mich 450, 490-493; 418 NW2d 861 (1988); *People v Datema*, 448 Mich 585, 608; 533 NW2d 272 (1995).

Affirmed.

/s/ Helene N. White

/s/ Michael R. Smolenski

/s/ Richard R. Lamb

¹ 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. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years. [MCL 750.316b(2); MSA 28.331(2).]

“Serious physical harm” is defined as

an injury of a child's physical condition or welfare that is not necessarily permanent but constitutes substantial bodily disfigurement, or seriously impairs the function of a body organ or limb. [MCL 750.316b(f); MSA 28.331(2).]

² A person is guilty of child abuse in the second degree if the person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child. Child abuse in the second degree is a felony punishable by imprisonment for not more than 4 years. [MCL 750.316b(3).]