

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIA S. PURCELL,

Defendant-Appellant.

---

UNPUBLISHED

January 7, 1997

No. 183796

Kent County

LC No. 93-064173-FH

Before: Hood, P.J., and Neff and M.A. Chrzanowski\*, JJ.

PER CURIAM.

Defendant was charged and convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553. The conviction arose from the death of defendant's nine-month-old son owing to malnutrition and dehydration. Defendant was sentenced to three to fifteen years in prison. She appeals as of right, and we affirm.

The decedent was the smallest of prematurely delivered twin boys. It is undisputed that the surviving twin was always larger, developed better, and ate better than the decedent. Defendant submitted evidence that decedent, since birth, had eating problems; he typically vomited while drinking from his bottle. He also frequently had diarrhea. Defendant's infant son was found dead in his crib on the morning of July 6, 1993. The cause of death was dehydration, with starvation as a secondary factor. Defendant testified that her child had diarrhea, was vomiting, and refused most of the food offered him the day and evening before his death.

First, defendant argues that the prosecution failed to present sufficient evidence to find her guilty beyond a reasonable doubt of involuntary manslaughter. She claims that because there was evidence that she fed her child and that he had eaten, her conviction should be reversed. However, because defendant not only had a duty to provide proper nutrition to her child, but also the duty to provide him with proper medical care, we disagree with her position.

---

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

When reviewing a claim of insufficient evidence, we consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the charged offense proved beyond a reasonable doubt. *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996). To prove guilt of involuntary manslaughter, the prosecution must establish that the defendant acted “in a grossly negligent, wanton, or reckless manner, causing the death of another.” *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). Where a charge of involuntary manslaughter is premised on the failure of a defendant to perform a duty, the prosecutor is required to submit evidence: (1) of the existence of a legal duty; (2) of defendant’s knowledge of that duty; (3) that the defendant neglected or refused to perform the duty; (4) that the failure was grossly negligent of human life; and (4) that the victim’s death was caused by the defendant’s failure to perform her duty. *People v Giddings*, 169 Mich App 631, 634-635; 426 NW2d 732 (1988).

A finding of gross negligence requires evidence that [the] defendant[] had knowledge of the danger [her] failure to act would cause the child, the ability to avoid the harm, and that [she] failed to use care and diligence to prevent the danger when, to the ordinary mind, it must have been apparent that the result was likely to cause harm to the child. [*Id.* at 635.]

Defendant knew that the decedent had diarrhea and had been vomiting the day before his death. The physicians who testified stated that a child in the decedent’s condition would have appeared listless, lethargic and in need of medical attention. In fact, defendant herself testified that during the day before his death, the decedent appeared extremely tired. Although not entirely unusual for the decedent, he slept a great deal on that day. He drank a bottle at approximately 9:30 a.m. on July 5, 1993, but vomited often while drinking it. After waking from his nap at 5:00 p.m., the decedent refused solid food, and defendant was not certain how much he drank from the bottle she gave him. Shortly before 9:30 p.m., after he had been sleeping approximately 1.5 hours, defendant straightened a blanket that was under her son and woke him, but he merely opened his eyes and moved his head. She offered him a bottle of formula, but he refused it and she laid it in his crib. Defendant testified that it was dark in the room and she could not tell whether her son looked ill. Expert witnesses testified that the decedent was severely malnourished and his condition indicated dehydration. One of the witnesses testified that the appearance of a child in the decedent’s condition would cause an average person to seek medical attention for the child.

Based on the evidence, which we must view in a light most favorable to the prosecution, we find that the elements of involuntary manslaughter were proved beyond a reasonable doubt. The evidence demonstrates that defendant knew she had a duty to provide proper medical care for her child, she neglected to provide such care, which was grossly negligent of the life of her child, and her son died because of her failure to provide him with proper medical attention.

Defendant next argues that the trial court erred in introducing photographs of the decedent taken several hours after his death. She asserts that the photographs were misleading and prejudicial. Some of the photographs depicted a diaper rash, which darkened after death, and thus did not appear as it

would have while the child was living. These photographs, defendant argues, should not have been admitted because they could have led the jurors to erroneously believe that her child was physically abused. Other photographs showed dirt in the creases of the child's skin, which defendant asserts was irrelevant. Moreover, according to defendant, the photographs were misleading and not relevant to the child's appearance before his death and were not probative of whether she fed her child before his death.

The trial court has the discretion to admit photographic evidence. *People v Mooney*, 216 Mich App 367, 377; 549 NW2d 65 (1996). Photographs are admissible when they are "substantially necessary or instructive to show material facts or conditions." *Id.* We conclude that the admission of the photographs was not an abuse of discretion.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. To be relevant and material, a fact "need not be an element of a crime or cause of action or defense but it must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." *People v Mills*, 450 Mich 61, 68; 537 NW2d 909, modified and remanded 450 Mich 1212; 539 NW2d 504 (1995), quoting *United States v Dunn*, 805 F2d 1275, 1281 (CA 6, 1986).

Although the photographs were not probative of whether defendant fed the decedent before his death and thus did not speak to the immediate cause of death, whether defendant provided proper care and medical attention to her child was also at issue. The photographs of the dirt in the creases of the decedent's skin, the severe rash on the decedent's body and the way the decedent was discovered by paramedics were probative of this issue because they depicted the decedent's condition at his death, which indicated he was in need of medical care.

We also find that the probative value of the photographs was not substantially outweighed by unfair prejudice and therefore need not have been excluded under MRE 403. Testimony supported the fact that the photograph of the decedent taken when he was discovered by the paramedics accurately depicted how he appeared at death. And, the jury was fully apprised that the photograph did not purport to convey the decedent's appearance while he was living. Although unpleasant, this photograph was extremely probative of this condition. In this same sense, the photographs depicting dirt in the creases of the decedent's skin and his severe diaper rash were extremely probative of whether he was receiving proper care. Finally, any misleading aspects of the photographs were explained to the jury. Defendant also claims that the photographs of dirt in the creases of the decedent's skin and of decedent's severe diaper rash did not accurately portray the decedent's appearance before his death and provided a false impression that the decedent was physically abused. However, again, the jury was aware that these photographs were taken during the autopsy. Moreover, all the doctors who testified in this case explained that the decedent did not suffer from physical abuse and that his appearance in the photographs was due to discoloration since the time of his death.

Next, defendant argues that the prosecution improperly used evidence of defendant's prior "bad acts" to attack her character. Specifically, defendant argues, the evidence of the child's severe diaper rash and dirt in the creases of his skin and the unkempt bedroom and house were used by the prosecution to demonstrate that defendant failed to provide proper care of her child and home, the "bad acts," and thus portray defendant as a bad mother. Defendant asserts that the trial court erred in admitting this evidence. We disagree.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b). However, where the alleged "bad acts" are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime" they are admissible. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964); *People v Williamson*, 205 Mich App 592, 596; 517 NW2d 846 (1994). This rule, termed the "res gestae" exception to 404(b), has also been defined as allowing those "facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

The prosecution proceeded on the theory that defendant neglected to give her child the appropriate medical care, as well as provide proper food. The prosecutor's evidence indicated that defendant failed to attend to a severe diaper rash and allowed the decedent to lay in his own feces long enough that it adhered to his skin. The challenged evidence was relevant to the prosecution's theory. This evidence was part of the entire circumstances surrounding the decedent's death and the trial court did not abuse its discretion in admitting it.

Defendant next argues that the paramedic's statement that the decedent "looked like a concentration camp person" was highly prejudicial and violated her right to a fair trial. She claims that the description improperly invoked a comparison of defendant to a Nazi war criminal. Defendant failed to object to the question or move for mistrial based on the witness' unresponsive answer, and "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Moreover, the photograph of the decedent when he was discovered and seen by the witness indicates that the witness' statement was not an altogether inaccurate statement: the decedent appeared severely malnourished in the photograph. The jurors saw the photograph and had an independent basis from which to draw their own conclusions regarding the decedent's physical condition. The statement does not warrant reversal of defendant's conviction.

Defendant also contends that the prosecutor engaged in misconduct. Specifically, defendant argues that the prosecutor improperly (1) vouched for defendant's guilt by telling the jurors that she consulted with experts regarding what charges should be brought; (2) injected prejudicial statements regarding "child abuse"; (3) misled the jury by suggesting that defendant's other children were removed from her care after the decedent's death; and (4) improperly argued that the photograph taken of the

decedent at the time he was discovered represented how he looked before his death. We find no error requiring reversal.

In reviewing a claim of prosecutorial misconduct, we must determine whether the defendant was denied a fair and impartial trial. *People v McElhane*y, 215 Mich App 269, 283; 545 NW2d 18 (1996). We must examine the portion of the record in question and consider the prosecutor's remarks in context. *Id.*

First, defendant asserts that the prosecutor personally vouched for defendant's guilt by remarking that the prosecution consulted certain physicians who reviewed the evidence to determine what the charges should be. Because she failed to join in her co-defendant's objection to this remark, "review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction." *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). A prosecutor may not vouch for a witness' credibility or suggest that the government has special knowledge that the witness' testimony is truthful. *People v Mezy*, 453 Mich 269, 285-286; \_\_\_ NW2d \_\_\_ (1996). The prosecutor's remark, reviewed in context, was an attempt to set the stage as to how her theory of the case developed from the facts. Any error arising from this comment could have been cured by an instruction, and we find that any error had very little influence on the verdict and was therefore harmless. *Id.*

Next, defendant challenges several statements by the prosecutor as arguing facts not in evidence, injecting unfounded prejudicial innuendo, and misstatements of the evidence. Again, we find no error.

Prosecutors are generally given great latitude with regard to their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are given the freedom to "argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case," *Id.*, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989), but may not argue facts that were not admitted into evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

The references to child abuse were not improper. The prosecution proceeded on a theory of neglect, and the references related to findings in cases of child abuse, which encompasses neglect. No evidence of physical abuse of the decedent was admitted, and in fact there was testimony that the evidence did not indicate physical abuse. Moreover, the references were not inconsistent with the fact that the decedent died of dehydration and malnourishment. We find no error requiring reversal arising from these references.

Defendant also contends that the prosecutor improperly elicited misleading prejudicial testimony that defendant's four other children were taken away from her when they were not. The prosecutor never suggested that defendant's children were taken away from her by the state. Moreover, the prosecutor questioned a DSS worker regarding his decision to leave defendant's children in her custody throughout the trial. Finally, the prosecutor's comments, over defendant's objection, regarding the

decendent's appearance before his death were reasonable because the jury was made aware of the time frame in which the evidence was taken and could have easily deduced that the photograph was not an exact representation of the way the decedent looked before his death.

Next defendant argues that her trial counsel was ineffective in light of his failure to object to the above contested evidence and alleged misconduct. Because defendant failed to move for a *Ginther*<sup>1</sup> hearing or new trial on this issue, our review is limited to errors apparent on the record. *People v McGrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). The defendant bears the burden of demonstrating that her trial "counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that the" right to effective assistance of counsel was violated. *People v Johnson*, 215 Mich App 658, 675; 547 NW2d 65 (1996). The defendant must also overcome the presumption that her counsel's action was sound trial strategy. *Id.* As noted previously, we find most of defendant's alleged errors to be meritless. To the extent that defendant's claims have merit, defendant has not provided sufficient evidence to overcome the presumption that her trial counsel's actions were matters of trial strategy. Defendant has not established that she was denied effective assistance of counsel.

Finally, defendant argues that the trial court's sentence violated the principle of proportionality. Defendant maintains that although the trial court's sentence was within the guidelines range, it was excessive because it was greater than that received by her husband who had shared responsibility for the decedent. We disagree.

We review a trial court's sentencing of a defendant for an abuse of discretion according to the proportionality standard. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence should have an appropriate relationship to the circumstances of the offender and the offense. *Id.* at 636. A sentence that falls within the recommended range under the guidelines is presumed proportionate, and the defendant must present evidence of "unusual circumstances" that render the sentence disproportionate to overcome that presumption. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). Moreover, a defendant's sentence must be individualized and the sentencing court need not consider the sentence given to a codefendant. *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991).

The trial judge noted that, having sat through the trial, he was not convinced of defendant's guilt until she testified. The trial court pointed out that defendant was home with the decedent on the day before his death and that she failed to adequately monitor his feeding habits after he had vomited and even though he had diarrhea and appeared very tired. Although defendant's husband was also responsible for the decedent's death, defendant admitted that she was the parent who was monitoring the decedent's feeding habits and, therefore, she was the one who was in the best position to notice his degenerating condition. In light of these circumstances, we find that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Harold Hood  
/s/ Janet T. Neff  
/s/ Mary A. Chrzanowski

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).