

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHIRIKIANA DRAPER,

Defendant-Appellant.

UNPUBLISHED

February 7, 1997

No. 189423

Oakland Circuit Court

LC No. 95-137978

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, and first-degree child abuse, MCL 750.136b; MSA 28.331(2). She was sentenced to life imprisonment without the possibility of parole for the murder conviction and to 10 to 15 years' imprisonment for the first-degree child abuse conviction. Defendant now appeals as of right. We affirm defendant's first-degree murder conviction, but vacate the first-degree child abuse conviction.

During January and February, 1995, defendant and her husband maintained care, custody and control over four-year-old Daneishia Anderson. On February 19, 1995 Daneishia was taken to a hospital with a very serious head injury. She also had bruises on her face, back and chest. She died the following day. The doctors who treated Daneishia at the hospital and the medical examiner concluded that Daneishia was a battered child who died as a result of her recent head injury. Defendant and her husband were charged and tried separately for causing Daneishia's death.

Defendant first claims that it was error for the trial court to admit certain gruesome color photographs which showed the exposed and injured brain of Daneishia Anderson. We disagree.

The admission of photographic evidence will only be reversed upon finding the trial court abused its discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, remanded on other grounds 450 Mich 1212 (1995). Whether photographic evidence should be admissible at trial is a two part

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

analysis. First the evidence must be relevant under MRE 401 and second, it must be admissible under MRE 403. *Mills, supra* at 74.

First, we find that the photographs at issue were both relevant and material in accordance with MRE 401. The photographs were material because they provided a physical representation of the medical examiner's testimony regarding the nature and extent of the injuries to Daneishia's brain. They also supported the credibility of the medical examiner's testimony. Furthermore, the record also indicates the portions of the medical examiner's testimony were dependent upon distinguishing between the color of the blood and tissue in Daneishia's brain. Thus, it was relevant to introduce the color photographs as opposed to black and white. The use of the photographs was probative because they demonstrated that the injuries suffered by Daneishia were recent in origin and supported the credibility of the medical examiner's testimony.

Moreover, we find that admission of the photographs was not substantially outweighed by the danger of unfair prejudice in accordance with MRE 403. The gruesome nature of the photographs alone need not cause exclusion. *Mills, supra* at 77. The trial court is not expected to protect the jury from all evidence that is somewhat difficult to view. *Id.* at 79. In the present case, the trial court gave all prospective jurors notice that the photographs would be employed during trial. The trial court also gave a cautionary instruction to the jury regarding the photographs. Thus, because there was clear justification supporting the trial court's decision to allow the introduction of the photographs, the trial court did not abuse its discretion.

Defendant's next claim is that the evidence was insufficient to support her conviction for first-degree felony murder as well as for first-degree child abuse. We disagree.

In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). There are three elements for felony murder: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). First-degree child abuse is an enumerated felony under MCL 750.316; MSA 28.548.

Defendant argues that the evidence on record was insufficient because her husband committed any and all purported child abuse, whereas she only slapped and hit Daneishia a few times. First-degree child abuse requires that a person knowingly or intentionally cause any injury to a child's physical condition. MCL 750.136b; MSA 28.331(2). The record indicates that defendant admitted to hitting the child in the mouth too hard, striking her with a paddle, and striking her with a belt. Furthermore, there was testimony that Daneishia's death was as a result of a pattern of abuse. Thus there was sufficient circumstantial evidence to support her conviction for first-degree child abuse.

Alternatively, the jury was instructed as to defendant's potential culpability as an aider or abettor for first-degree child abuse. The record presents abundant evidence to support her conviction on this theory. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that, (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Turner, supra* at 568; *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 505 NW2d 542 (1993). Defendant admitted to first administering the punishment upon Daneishia and subsequently enlisting the aid of her husband. She also admitted that she gave her husband the shoe in order to strike Daneishia. Therefore, we find that the testimony supports defendant's conviction for first-degree felony murder.

Finally, defendant argues that her convictions for both first-degree and felony murder and the underlying felony of first-degree child abuse constitute double jeopardy. We agree. A defendant's right not to be put in jeopardy twice for the same offense is violated when a defendant is convicted and sentenced for both first-degree felony murder and the underlying felony which serves as the predicate for the felony murder conviction. *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981); *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). The remedy for this violation is to vacate the conviction and sentence for the underlying felony. *People v Jankowski*, 408 Mich 79, 96; 289 NW2d 674 (1980); *Passeno, supra*, at 97. Accordingly, defendant's conviction and sentence for first-degree child abuse is vacated.

Affirmed in part, vacated in part.

/s/ Robert P. Young, Jr.

/s/ Peter D. O'Connell

/s/ Wesley J. Nykamp