STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DANIEL MITCHELL,

Defendant-Appellant.

UNPUBLISHED
February 7, 1997

No. 190281

Cass Circuit Court
LC No. 95-8355-FC

Before: Hoekstra, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, for the death of his two-month-old son. He appeals as of right. We affirm.

Defendant first claims that there was insufficient evidence to support a first-degree murder conviction. Specifically, he contends that there was insufficient evidence of premeditation and deliberation. We disagree. When reviewing a sufficiency of the evidence claim, this Court must consider the evidence, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the prosecution has proven the essential elements of the charged crime beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). In reviewing a sufficiency of the evidence claim, this Court must not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

"Premeditation and deliberation require sufficient time to allow the defendant to take a second look. . . . Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Anderson*, 209 Mich App

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

527, 537; 531 NW2d 780 (1995). Here, defendant's cellmate and two other inmates at the Cass County correctional facility testified that defendant stated that he killed the child in order to avoid paying child support and that he placed padding around the child's head to avoid inflicting marks. Further, defendant stated to them that he contemplated obtaining an insurance policy on the child; however, he decided against it because it would appear suspicious. Thus, viewed in the light most favorable to the prosecution, the evidence presented at trial was sufficient to permit a rational jury to conclude beyond a reasonable doubt that the killing was premeditated and deliberate.

Defendant next argues that the trial court violated MRE 404(b) by erroneously admitting evidence that he had previously abused his stepdaughter. We disagree. Our Supreme Court, in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994), held that to be admissible under MRE 404(b), bad acts evidence must satisfy four requirements: (1) it must be offered for a proper purpose; (2) it must be relevant to an issue or fact of consequence at trial; (3) its prejudicial effect must not substantially outweigh its probative value; and (4) upon request, the trial court shall instruct the jury that similar acts evidence is to be considered only for the purpose for which it was admitted.

First, the prosecutor must offer the other bad acts evidence for a proper purpose, i.e., for something other than proving character or propensity for committing the conduct in question. *Id*. at 74. Here, because defendant asserted that he did not intend to kill the child, intent was a proper purpose. With respect to relevance, evidence is logically relevant if it has any tendency to make the existence of any fact which is of consequence to the action more or less probable than it would be without the evidence. *Id.* at 60; MRE 401. In this instance, the consequential fact at trial was defendant's intent. In addition to being instructed as to first-degree murder, the jurors were also instructed that they may consider whether defendant was guilty of second-degree murder, voluntary manslaughter, or involuntary manslaughter.

This Court, in *People v Biggs*, 202 Mich App 450; 509 NW2d 803 (1993), addressed the admission of prior child abuse evidence under MRE 404(b). In *Biggs*, the defendant was convicted of second-degree murder for killing her two-year-old child. *Id.* at 451. The trial court admitted evidence that the defendant had previously burned the child and had given him an overdose of a drug. *Id.* at 452-453. The panel in *Biggs* held:

> Other instances when defendant deliberately injured her child are probative of malice. That is, of defendant's intent to kill or cause great bodily harm, or of her willful and wanton disregard for the natural consequences of her action. [*Id.*]

Thus, evidence of defendant's prior abuse of his stepdaughter is logically relevant and probative of the necessary intent to support a first-degree or second-degree murder conviction.

The prior bad acts evidence must also survive the MRE 403 balancing process. *VanderVliet, supra* at 74-75. "[A] 'determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of

proof and other facts appropriate for making decision[s] of this kind under Rule 403.'" *Id.* at 75, citing 28 USCA, p 196, advisory committee notes to FRE 404(b). Here, the prior bad acts evidence is highly probative of defendant's intent. Furthermore, given defendant's admissions regarding the incident, the danger of unfair prejudice from the evidence does not substantially outweigh its probative value. *Biggs, supra* at 453. Finally, the jury was instructed twice as to the purpose for which the prior bad acts evidence was admitted. *Id.* Accordingly, we find no error in the admission of the prior bad acts evidence under MRE 404(b).

Defendant also argues that the trial court erroneously permitted defendant's wife to testify in violation of the marital communications privilege. We disagree. We review alleged errors in the admission of evidence for an abuse of discretion. *People v McAlister* 203 Mich App 495, 505; 513 NW2d 431 (1994). MCL 600.2162(3); MSA 27A.2162(3) provides that "[e]xcept as otherwise provided in subsection (1), a married person may be examined, with his or her consent, as to any communication made between that person and his or her spouse during the marriage regarding a matter described in subsection (1)(a) to (g)." Among the exceptions listed in subsection (1) are prosecution for a crime committed against the children of either or both spouses. MCL 600.2162(1)(c); MSA 27A.2162(1)(c). Thus, a spouse is not barred from testifying regarding communications made during the marriage provided he or she has consented to such testimony.

Here, although defendant's wife did not expressly consent to testifying as to marital communications, she did so impliedly. As noted by this Court, "[i]mplied consent has been defined as 'that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.'" *Osner v Boughner*, 180 Mich App 248, 266; 446 NW2d 873 (1989), citing Black's Law Dictionary (5th ed), p 276. Because defendant's wife did not object to testifying as to marital communications made between her and defendant, she is presumed to have consented. See *Benson v Morgan*, 50 Mich 77, 79; 14 NW 705 (1883). We therefore find no abuse of discretion in the admission of her testimony into evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley