STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PEGGY GARZA,

Defendant-Appellant.

FOR PUBLICATION
May 6, 1997

No. 192270
Sanilac Circuit Court
LC No. 95-004361-FH

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), one count of third-degree child abuse, MCL 750.136b(4); MSA 28.331(2)(4), three counts of fourth-degree child abuse, MCL 750.136b(5); MSA 28.331(2)(5), one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and three counts of assault and battery, MCL 750.81; MSA 28.276. The charges arose out of defendant's alleged conduct toward her stepdaughters between October of 1994 and July of 1995. The trial court imposed sentences of seven to fifteen years' imprisonment for the first-degree child abuse convictions, five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, one year jail terms for the third- and fourth-degree child abuse convictions, and ninety day jail terms for the assault and battery convictions. Defendant appeals as of right. We reverse defendant's conviction for first-degree child abuse with regard to Count VII of the complaint, remand for entry of a modified order of judgment of conviction of third-degree child abuse and resentencing with regard to this count, and affirm defendant's other convictions and sentences.

Defendant first claims that the trial court abused its discretion when it disallowed defense counsel's questions regarding alleged prior inconsistent statements made by one complainant during her probate court testimony. A party whose evidence is excluded must make an offer of proof to preserve the issue for appeal. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). In this case, defense counsel stated that she "would like to make an offer of proof," but failed to state on the record or otherwise make known to the court the substance of the excluded testimony. Defense counsel merely stated that the complainant was "not giving the same story as she had in

Probate Court," and that it was necessary for the jury to hear what the complainant had said in Probate Court. It is not apparent from the record what the complainant's testimony had been in Probate Court, what questions defense counsel would have asked, or how their omission prejudiced defendant. Accordingly, this issue has not been preserved for review. *Stacy*, *supra*, p 31. Furthermore, in light of the overwhelming evidence of defendant's guilt, any error would not require reversal of the jury verdict. MCL 769.26; MSA 29.1096; see *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

Defendant next contends that the prosecution failed to introduce sufficient evidence of first-degree child abuse. We agree in part and disagree in part. When reviewing a claim regarding the sufficiency of the evidence, we examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996). A person commits first-degree child abuse if she knowingly or intentionally causes serious physical or serious mental harm to a child. MCL 750.136b(2); MSA 28.331(2)(2). Defendant disputes only the "serious physical harm" element of the crime.

In interpreting penal statutes, courts cannot expand the scope of the statutory prohibition. *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995). The courts' construction of the statutory language must further the legislative intent and purpose. *Id.* Here, the statute defines "serious physical harm" to mean "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 750.136b(1)(e); MSA 28.331(2)(1)(e). In comparison, third-degree child abuse occurs where a person "knowingly or intentionally causes physical harm to a child." MCL 750.136b(4); MSA 28.331(2)(4). The statute defines "physical harm" as "any injury to a child's physical condition." MCL 750.136b(1)(d); MSA 28.331(2)(1)(d). Our research has uncovered no case addressing the severity of injury required to support a conviction for first-degree, as opposed to third-degree, child abuse.

Defendant argues that case law interpreting similar language in the no-fault insurance statute should be viewed as instructive in construing the requirement of "serious physical injury" in the child abuse statute. Under MCL 500.3135; MSA 24.13135, an automobile driver or owner is liable in tort for noneconomic damages "only if the injured person has suffered death, serious impairment of body function, or permanent, serious disfigurement." This language is facially similar to the definition of serious physical injury in the child abuse statute, MCL 750.136b(1)(e); MSA 28.331(2)(1)(e), as one that "seriously impairs the function of a body organ or limb."

Statutes are in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or act. *People v Pitts*, 216 Mich App 229, 233; 548 NW2d 688 (1996). One act is not in pari materia with another, even if it incidentally refers to the same subject, if the scope and aim of the two are distinct and unconnected. *Id.* Whereas the no-fault statute deals with negligently caused injuries in a civil context, the child abuse statute deals with intentionally caused injuries in a criminal context. In addition, the State's interest in compensating victims of automobile accidents for noneconomic losses is substantively different than its interest in protecting children from intentional abuse. Because the scope and aim of the two statutes are distinct and

unconnected, they should not be read in pari materia. *Id.* We need not consider cases interpreting the no-fault statute when construing the child abuse statute. See *Reeves, supra*, pp 14-15; *People v Young*, 418 Mich 1, 13; 340 NW2d 805 (1983).

In this case, defendant's convictions for first-degree child abuse arose out of incidents in which she intentionally burned the complainant's hand with a clothes iron (Count I), pushed the same complainant down a flight of stairs and cut her face and hand with a utility knife (Count III), cut her hand across the knuckles with a butcher knife (Count IV), and hit her with a meat tenderizer mallet (Count VII). When the evidence is viewed in a light most favorable to the prosecution, the severe burns and cuts on the complainant's hands and face and the black eyes and bruises which gave rise to Counts I, II, and IV of the complaint were sufficient to satisfy the "serious physical injury" element of first-degree child abuse. The injuries certainly would have impaired the complainant's use of her limbs for several weeks after they were inflicted, in addition to resulting in substantial disfigurement. See MCL 750.136b(1)(e); MSA 28.331(2)(1)(e).

However, the evidence introduced with regard to the incident with the meat tenderizer mallet was insufficient to support defendant's conviction for first-degree child abuse on Count VII of the complaint. Serious physical injury must result in substantial disfigurement or serious impairment of a bodily function or limb. MCL 750.136b(1)(e); MSA 28.331(2)(1)(e). Although bruising at the time of the injury can be inferred from the imprints that remained on the complainant's arm at the time the photographs were taken, the complainant never testified as to the severity of her injuries from being hit with the wooden mallet. She stated only that defendant hit her on the arm and head with the tenderizer and identified photographs showing a pattern of dots in two places on her arm. The other stepdaughter testified only that she saw "marks" on the complainant's arm and at her hairline from the blows. There was no testimony regarding the effect of the injury on the complainant's use of her arm. The marks on her arm and head were gone at the time of trial. Therefore, there was no evidence establishing that the injury was a serious physical injury sufficient to support defendant's conviction for first-degree child abuse with regard to Count VII.

Although the evidence was insufficient to support a conviction for first-degree child abuse with regard to Count VII, the jury necessarily concluded that the prosecution proved the elements of third-degree child abuse when it convicted defendant of first-degree child abuse. See MCL 750.136b(2) and (4); MSA 28.331(2)(2) and (4). In addition, the evidence of physical injury was sufficient to support a conviction of third-degree child abuse. Therefore, we remand the case for entry of a judgment of conviction of third-degree child abuse and resentencing on this count. *People v Hoffmeister*, 394 Mich 155, 162; 229 NW2d 305 (1975).

Finally, defendant contends that the court abused its discretion in sentencing her to seven to fifteen years' imprisonment for the first-degree child abuse convictions. We disagree. A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

It is apparent from the sentencing transcript that the court considered only permissible factors in determining defendant's sentence. The sentencing court properly considered the severity of the crime, the circumstances surrounding defendant's criminal behavior, the effect of defendant's crime on her victims, the protection of society, the State's interest in deterrence, and the necessity of disciplining the wrongdoer. *People v King*, 158 Mich App 672, 679-680; 405 NW2d 116 (1987); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). In addition, the court's comments indicate that it balanced defendant's lack of a criminal history against these factors in declining to impose the statutory maximum. See *People v Cervantes*, 448 Mich 620, 632; 532 NW2d 831 (1995) (Cavanagh, J.); *People v Hughes*, 160 Mich App 117, 120; 407 NW2d 638 (1987). After reviewing the record, we believe that the sentences imposed by the trial court reflect the seriousness of the matter, and do not violate the principle of proportionality. *Houston*, *supra*, p 319.

We reverse defendant's conviction for first-degree child abuse on Count VII of the complaint and remand for entry of a modified judgment of conviction for third-degree child abuse and for resentencing with regard to that count. Defendant's other convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen