

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY JAY MUNGER, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 27, 1997

No. 192038

Delta Circuit Court

LC No. 95-005801-FH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Defendant was found guilty by a jury of manslaughter, MCL 750.321; MSA 28.553, and second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3). For those respective convictions he was sentenced to ten to fifteen years' imprisonment and two to four years' imprisonment. He appeals as of right. We affirm.

Defendant called an ambulance when he found his three-month old daughter, Katelynn, dead. He claimed to have fed her and put her on the sofa to sleep, and when he awakened two hours later, she was not breathing. At trial, plaintiff's expert testified that the infant's autopsy revealed a number of fractured ribs in various stages of healing and that, in his opinion, the death was a homicide. Defendant introduced an expert's testimony that the victim was likely afflicted with "temporary brittle bone disease," and would be susceptible to easily fractured bones. Defendant also introduced evidence of his epilepsy, in particular myoclonic epilepsy, which causes brief but intense muscle spasms. The jury found defendant guilty of manslaughter and second-degree child abuse.

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine 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 (1992), amended 441 Mich 1201 (1992).

The jury convicted defendant of manslaughter, MCL 750.321; MSA 28.553, and second-degree child abuse, MCL 750.136b(3); MSA 28.331(2)(3). The offense of involuntary manslaughter requires a showing that the defendant acted in a grossly negligent, wanton, or reckless manner that caused the death of another. *People v Price*, 214 Mich App 538, 543; 543 NW2d 49 (1995). The trial court defined gross negligence for the jury as: that defendant knew of a danger, that he could have avoided the injury by the use of ordinary care, and that he failed to use ordinary care. Second-degree child abuse is defined by the statute as follows:

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. [MCL 750.136b(3); MSA 28.331(2)(3).]

In this case, the prosecution offered sufficient evidence that defendant injured Katelynn. Expert testimony showed that Katelynn's death was a homicide, and that defendant was the last person to care for her. Moreover, a reasonable juror could have concluded from the evidence presented that defendant acted in a grossly negligent or wanton manner for continuing his care of Katelynn even when he knew of the danger posed to her by his potential for seizures.

Next, we find that the trial court did not abuse its discretion in admitting testimony relating to the prior acts of defendant. To be admissible under MRE 404(b), prior acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). In the instant case, the evidence was relevant to defendant's identity as the perpetrator. *People v McMillan*, 213 Mich App 134; 539 NW2d 553 (1995). We also find that the probative value of the evidence was not outweighed by its potential for prejudicial effect. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Moreover, defendant placed at issue his character. The first series of questions on cross-examination of plaintiff's first witness related to his fitness as a parent. Defendant opened the door at trial to the character evidence. Once he did so, it was "proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Johnson*, 409 Mich 552, 558; 297 NW2d 115 (1980).

As to defendant's sentencing issues, application of the sentencing guidelines presents an appealable issue only if: (1) the factual predicate is wholly unsupported, or (2) the factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Review is not available for claims of scoring errors or errors of misinterpretation. *Id.* at 176-177. We therefore decline review of defendant's argument regarding the scoring of the guidelines. We also find defendant's manslaughter sentence, which is within the guidelines

recommended range, to be proportionate. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant's lack of criminal history and minimal culpability are not unusual circumstances which overcome the presumptive proportionality of his sentence. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994); *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Robert P. Young, Jr.