

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRUDY LEE O'CONNOR,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 181075

Sanilac Circuit Court

LC No. 94-004088-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN HERBERT ROGERS

Defendant-Appellant.

No. 181884

Sanilac Circuit Court

LC No. 94-004089-FH

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Defendants were convicted by a jury of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). Defendant O'Connor was sentenced to six to fifteen years' imprisonment, and defendant Rogers was sentenced to ten to fifteen years' imprisonment. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

On February 11, 1994, police entered the home of defendants under orders of the probate court to bring in a child believed by that court to be in grave danger. They found the child, nine-year-old Faye Rogers, in what was described as a cold and windowless closet. A length of chain four or five feet long was bolted to the bed at one end and padlocked to Faye's ankle on the other. The wet bedclothes smelled of urine. Faye's hands were covered with socks and the socks were secured

behind her back. Police arrested defendants at the scene. Defendant Rogers, Faye's father, made a statement indicating that he did not know what else to do for the child because she injured herself by masturbating constantly and endangered the family by roaming the house at night.

The facts of this case are undeniably tragic. Defendant Rogers gained custody of Faye after the death of Faye's biological mother. The record showed that he and Faye's maternal grandmother then entered into a bitter custody dispute. Apparently, Faye was sexually abused during this time by an adult woman named "Sandy" who baby-sat for her at the grandmother's home. Defendant Rogers believed that the abuse was the cause of Faye's habitual and compulsive masturbation. The habit progressed to the point where Faye abraded her skin and bled onto her bedclothes and underwear. Rogers also believed that the grandmother's influence caused Faye to misbehave, wander the house at night, endanger the family by turning on the stove's burners and endanger herself by experimenting with household chemicals. After intervention by agencies, defendant Rogers agreed to attend counseling with Faye. After only a few counseling sessions, defendant Rogers concluded that his only solution was to bind Faye's hands and, at a friend's suggestion, to chain her to the bed.

Defendant O'Connor allegedly disagreed with defendant Rogers' handling of Faye and argued with him about it. On two different occasions, she moved with her three children from Rogers' house, only to return. She obviously was aware of the practice of chaining and binding, and had chained Faye to the bed on more than one occasion.

Before trial, the court heard evidence on defendant's motion to suppress evidence, which the court eventually denied. We review that decision for clear error. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994). The probate court may issue a "pick-up" order directing an officer to take a child into custody after presentment of a petition, MCR 5.963(B), or, as in this case, when there is no petition but when "exigent circumstances" exist. MCR 5.961(A). Defendants assert that there were no exigent circumstances permitting the court to issue the "pick-up" order. We disagree.

At the motion hearing, the probate referee who issued the order testified to the events which led to his decision. Late in the day on February 11, 1994, a Department of Social Services worker, a detective, and an assistant prosecuting attorney came to the referee's office. The three presented photographs that showed a bed with a chain attached to it. Based on the review of the photographs, the referee believed that a child was being bound to her bed in some fashion, and that he was faced with an emergency situation where immediate action needed to be taken. He therefore issued the pick-up order.

Defendants argue that the police had sufficient time between the date the alleged abuse was reported and the date they sought the "pick-up" order to have sought a search warrant. Defendants thus contend that any exigent circumstances were created by police delay. However, the evidence shows that, as soon as the police were able to substantiate the reported abuse with photographic evidence, they sought the order as soon as possible. We find that evidence that a child was chained to a bed constitutes exigent circumstances such that there was no clear error on the part of the probate court in issuing the "pick-up" order.

We further find no merit in defendants' argument that the evidence found by the police should have been suppressed. The plain view doctrine allows police officers to seize without a warrant an item in plain view if the officers are lawfully in a position to view the item and if the item's incriminating character is immediately apparent. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996), citing *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990). Pursuant to the "pick-up" order, the police were legally on the premises. Once within the home, the officers seized items such as the chain, the soiled underwear, and the bedclothes, all of which were of an immediately apparent incriminating nature. Our review of the law and the record yields the conclusion that the trial court did not clearly err in denying defendant's motion to suppress evidence. *Bordeau*, *supra* at 92.

Defendants next assert that there was insufficient evidence to convict them. We disagree. A challenge to the sufficiency of the evidence is resolved by considering all of the evidence presented to the time the defendant moved for a directed verdict. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *Jolly*, *supra*, 442 Mich at 446.

The statute under which defendants were convicted states that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." This statute defines child as a person under the age of eighteen. There is no dispute that Faye was a child at the relevant time. Furthermore, both defendant O'Connor and defendant Rogers were persons as defined by the statute: "'Person' means a child's parent or guardian or *any other person* who cares for, has custody of, or has authority over a child *regardless of the length of time* that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(c); MSA 28.331(2)(c) (emphasis added). The statute does not require "legal responsibility," as argued by defendant O'Connor, but requires care, custody, or authority for a period of time. Defendant O'Connor is therefore within the ambit of the statutory definition.

Next, the evidence showed that Faye suffered serious mental harm. "'Serious mental harm' means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(f); MSA 750.331(2)(f). Three experts examined the child, and each opined that the treatment of Faye was the cause of at least post-traumatic stress disorder. Although defendants presented contrary evidence, the evidence is to be viewed in the light most favorable to the prosecution.

Defendants argue that they did not intend to cause mental harm. Defendants asserted at trial that they were actually doing their best to care for Faye and prevent her from harming herself. The question of a defendant's intent is to be left to the jury, and the jury may rely on circumstantial evidence and reasonable inferences drawn therefrom. *Daniels*, *supra*, 172 Mich App at 378; *Safiedine*, *supra*, 163 Mich App at 29. The jury, having heard the testimony, viewed the exhibits and observed the

demeanor of the witnesses, unanimously concluded that defendants acted with the requisite intent. We will not disturb that decision. After a thorough review of the record, and considering the evidence presented by the prosecution in a light most favorable to it, *Jolly, supra*, 442 Mich at 466, we find that there was sufficient evidence to sustain defendants' convictions.

We turn now to defendants' issue regarding jury instructions. After a period of deliberation, the jury indicated that it needed a better understanding of the various degrees of child abuse and the "legal definition" of the terms knowingly and intentionally. The judge repeated the instructions to the jury, but declined to expand upon the definition of those terms. Defendants submit on appeal that the judge's decision was reversible error. We disagree. Jury instructions are reviewed in their entirety to determine whether error requiring reversal occurred. The instructions must include all the elements of the charged offenses. There is no error if the instructions, even if imperfect, fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). In the instant case, the trial judge instructed the jury:

The crime of child abuse in the first degree requires proof of specific intent. This means that the Prosecution must prove not only that the Defendant did certain acts, but that he or she did the acts with the intent to cause a particular result. For the crime of child abuse in the first degree, this means that the Prosecution must prove that the Defendant knowingly or intentionally caused serious mental harm to Faye Rogers. The Defendant's intent may be proved by what he or she said, by what he or she did, how he or she did it, or by any other facts and circumstances in evidence.

After a full review of the instructions, we believe that the trial court acted appropriately. The record shows that the parties went to great lengths to be certain that the jury was properly instructed, and we find that any other decision by the judge could well have led to confusion of the jury.

Next, defendant O'Conner argues that the trial court erred in deciding her motion for a new trial. Where, as here, a defendant moves for new trial on the ground that the verdict was contrary to the great weight of the evidence, the judge is to act "as the thirteenth juror," *i.e.*, he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor." *People v Herbert*, 444 Mich 466, 476; 511 NW2d 654 (1993).¹ The exercise of this judicial power is to be undertaken with "great caution, mindful of the special role accorded jurors under our constitutional system of justice." *Id.* at 477. A trial judge may not take away the jury's right of judgment, and can only set aside a verdict if it is "perverse." *Id.* at 476. However, a judge may grant a new trial after finding the testimony of witnesses for the prevailing party not to be credible. *Id.* In such a case, the trial court is essentially finding that the verdict was against the great weight of the evidence. *Id.*

The court must make an oral or written record of its ruling, MCR 6.431(B), and this Court reviews that decision for an abuse of discretion. *Id.* at 477. In this case, the trial judge stated the following in considering defendant's motion for a new trial:

[The jurors] decided what they decided based upon what they heard from the witnesses, the evidence that they saw, and from the instructions I gave them. I believe

the real standard is: Is there a lack of sufficient evidence such that reasonable minds could not have come to the conclusion that this rises to that level. I think that the jury heard all of the evidence. . . . They were able to judge all those things, to weigh all those things, and they came to their conclusion. Unless I find that there is [a] lack of any sufficient evidence for the jury to have come to the conclusion they did, it's not my place to change what they have done. And I can't find it rises to that level. Therefore, I have to respectfully deny both motions for a New Trial and for a Judgment Notwithstanding the Verdict.

Although the trial court did not use the specific language set forth in *Herbert*, it is clear that the trial court did not find the jury verdict “perverse” or against the great weight of the evidence. Unlike the situation in *Herbert*, the trial court in this case did not fail to recognize its ability to consider the credibility of the witnesses. The trial court properly found that the evidence supported the decision reached by the jury. Accordingly, we find no abuse of discretion in the trial court’s denial of defendant’s motion for a new trial.

Defendant O’Conner next contends that her sentence was not proportionate. We disagree. A sentencing decision is reviewed for an abuse of discretion. A given sentence constitutes an abuse of discretion when the sentence is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). There are no sentencing guidelines for the crime of first-degree child abuse, however the maximum sentence for the conviction is fifteen years’ imprisonment. MCL 750.136b; MSA 28.331(2). Hence, the maximum minimum sentence is ten years. *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972) (“any sentence which provides for a minimum exceeding two-thirds of the maximum is improper”). Defendant O’Connor’s minimum term of 6 years thus equals sixty percent of the maximum minimum.

In an attempt to mitigate her culpability, defendant O’Connor contends that she objected to the treatment of the child, but felt powerless to prevent the abuse. However, the evidence shows that she made little attempt to prevent such treatment, and in fact perpetuated the abuse by her own actions. Although defendant O’Conner claims that mitigating circumstances render her sentence too severe, the trial court was better able to weigh these factors than would be possible by this panel on a cold record. Accordingly, we are unable to find that defendant O’Conner’s sentence was disproportionate, and we cannot say that the trial court abused its discretion in imposing the 6 year sentence.

Similarly, we affirm the sentence of defendant Rogers. Defendant Rogers may not have acted with a sadistic intent, such as was apparent in *People v Biegalski*, 122 Mich App 215; 332 NW2d 413 (1982), wherein the defendant repeatedly doused the child’s wound with rubbing alcohol. Nonetheless, the jury heard the evidence and decided that defendant Rogers knowingly or intentionally inflicted serious mental harm on the victim. The sentencing judge decided that defendant merited the maximum sentence on the continuum from “least to most serious situations.” *Milbourn, supra*, 435 Mich at 654. Despite the mitigating circumstance of defendant’s apparent inability to properly contend with this child’s difficult behavioral problems, his ongoing resistance to community intervention and assistance tends to overshadow the sympathy one might otherwise feel. As the trial judge noted:

Mr. Rogers, it is not as if you have been living in isolation since you have had the custody of your daughter. You were made aware of several complaints which were lodged against your care of Faye. The neighbors where you lived in Marlette complained to the authorities that your child was left outside at odd hours and for long periods of time without any apparent supervision. Two different very concerned teachers in the Marlette school system tried to deal with you directly in regard to several issues of Faye's care, specifically her lack of cleanliness and her apparent hunger. . . . People did attempt to help you change the way you cared for Faye. None of which you were willing to listen to.

We find that the trial court did not abuse its discretion in sentencing defendant Rogers.

We affirm the convictions and sentences of both defendant O'Conner and defendant Rogers.

/s/ Martin M. Doctoroff

/s/ Robert P. Young, Jr.

¹ We note that the Michigan Supreme Court has granted leave to appeal in *People v Joseph Lemmon*, (lv gtd November 6, 1996, S Ct Docket No 105850), a "thirteenth juror" case, to review the *Herbert* principle.