

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK D. ROBERTSON,

Defendant-Appellant.

UNPUBLISHED
November 9, 2001

No. 223170
Genesee Circuit Court
LC No. 99-003677-FC

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), for the death of his girlfriend's three-year old child. He was sentenced to life imprisonment without the possibility of parole for the first-degree felony murder conviction and a concurrent term of nine to fifteen years' imprisonment for the child abuse conviction. Defendant appeals as of right. We vacate defendant's conviction of first-degree child abuse, but affirm his conviction of first-degree felony murder.

I

Defendant first claims that the trial court abused its discretion by excluding the victim's mother's inculpatory statements made to defendant's grandmother and an investigating police officer, which, according to defendant, tended to exculpate him. Specifically, defendant relies on the fact that, in the two statements, the mother made no mention that she saw any wounds or bruises on the victim when she returned home after having left the child with defendant. He claims that exclusion of this evidence violated his federal due process right to present witnesses in his defense. See *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). We disagree.

Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Hyland*, 212 Mich App 701, 707-708; 538 NW2d 465 (1995), rev'd on other grounds 453 Mich 902 (1996). Hearsay evidence is inadmissible as substantive evidence except as the rules of evidence otherwise provide. MRE 802. MRE 804(b)

states that if a declarant is unavailable, as defined in MRE 804(a), her out-of-court statement against her penal interest may avoid the hearsay rule if certain thresholds are met.¹

In *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996), our Supreme Court held that the determination whether a hearsay statement is admissible as a statement against the declarant's penal interest under MRE 804(b)(3) involves four subissues, each with separate standards of review: “(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement.”

First, whether the declarant was unavailable need not be addressed because this issue is not contested.² Second, the determination whether the statement was against the declarant's penal interest is a question of law and, therefore, review is de novo. *Id.* at 268. The third and fourth determinations, whether a reasonable person in the declarant's place would have believed the statement to be true and whether the circumstances sufficiently indicated the trustworthiness of the statement “depend in part on the trial court’s findings of fact and in part on its application of the legal standard to those facts.” *Id.* at 268-269. The trial court’s findings of fact are reviewed under the clearly erroneous standard and the trial court’s decision to exclude the evidence is reviewed under the abuse of discretion standard. *Id.* at 269. Appellate review of the exclusion of evidence also requires a review of the importance of the declaration to the defendant's defense. *Id.*

To determine whether the “corroborating circumstances clearly indicate the trustworthiness of the statement,” MRE 804(b)(3), the following nonexclusive list of factors favor admission of a statement:

[W]hether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.” [*Id.* at 274.]

¹ MRE 804(b)(3) provides:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

² The victim’s mother asserted her Fifth Amendment right not to testify at defendant’s trial.

In contrast, the following factors favor a finding of inadmissibility:

[W]hether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id.* at 274-275, citation omitted.]

In this case, it is doubtful whether the mother's statement to defendant's grandmother was against her penal interests. Contrary to defendant's suggestion, the statement clearly minimized the mother's role and shifted the blame to defendant. The mother did not state that she harmed her child in any way on the day of the incident. Rather, according to defendant's grandmother, the mother stated that she told defendant to "whoop" the victim, and she then left the house.

Even if the mother's statement qualified as a statement against her penal interest, it lacked corroborating circumstances that clearly indicated trustworthiness. Although the statement was voluntarily given, it was made on the day after the incident, as opposed to being made contemporaneously with the victim's death. Indeed, the statement was made the day after the mother made a statement to the police in which she did not mention that the victim was fine when she returned home. Further, the mother had an apparent motive to distort the truth and minimize her culpability, given the fact that she had authorized defendant to beat her child and failed to obtain medical attention for him after noticing his condition. Accordingly, the trial court did not err in finding that the mother's statement made to defendant's grandmother lacked corroborating circumstances and an indicia of trustworthiness and was not admissible under MRE 804(b)(3).

We likewise find that the mother's hearsay statement made to the investigating police officer was not admissible. In this statement, the mother undoubtedly intended to inculcate defendant for the victim's death, minimize her role or responsibility in the victim's death, and shift all the blame to defendant. In the statement, the mother maintained that she left the child in defendant's custody, that defendant whipped the child and that, after she returned home, the child was unresponsive, grunted when she called his name, and looked sleepy. The mother also stated that, when discussing the victim's condition with defendant, he said, "I'll take all the responsibility for what I did." We find that the trial court did not abuse its discretion in precluding the mother's hearsay statements because they did not meet the necessary criteria for admission under MRE 804(b)(3).

We also reject defendant's argument that the mother's statements were corroborated by the testimony of a witness who observed the victim after the alleged beating and did not notice any abrasions or bruising on the victim. The witness did not testify that the victim had no visible injuries when he saw him after the mother returned home. Rather, he testified that when he went over to the mother's house the first time, he, defendant and the mother were sitting on the bed talking and the victim was lying face down on the bed. He testified that he "just glanced" at the child and "didn't pay it no attention" because the mother told him that the victim was asleep. Although he did not notice any injuries at that time, the witness testified that he thought it was strange that the victim was motionless, did not make any sounds, and did not wake with the loud noise of the television and three adults talking. The witness further indicated that the victim was

lying facedown during his first visit but, during his second visit, he was lying face up. Accordingly, defendant's reliance on this testimony is misplaced.

II

Defendant also claims that his conviction should be reversed because the evidence that he had previously whipped the victim and his eight-year old brother was inadmissible under MRE 404(b). We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment or an exercise of passion or bias. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). We will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights or resulted in a miscarriage of justice. MRE 103(a); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

MRE 404(b) governs the admissibility of evidence of a defendant's other crimes, wrongs, or acts. Such evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

In this case, the trial court did not err in admitting the challenged evidence under MRE 404(b). The evidence was not offered to show that defendant had a bad character. The evidence was probative of defendant's intent to kill, cause 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 See *People v Biggs*, 202 Mich App 450, 452-453; 509 NW2d 803 (1993). In addition, the evidence of the prior whippings was probative of the absence of mistake or accident, and of defendant's common scheme, plan, or system for beating his girlfriend's children.

We also reject defendant's claim that reversal is required because the trial court failed to expressly examine the necessary factors related to MRE 404(b) before admitting the proffered evidence. In allowing the evidence, the trial court specifically stated that the evidence was relevant for the reasons offered by the prosecutor, including to show a pattern, and that it was not being offered to show bad character. *Starr, supra* at 496-497. In addition, it is apparent from the

³ Felony murder consists of the following elements: (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 in MCL 750.316(1)(b). *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

discussion on the record that the trial court considered the prejudicial nature of the evidence pursuant to MRE 403.⁴

Defendant also argues that reversal is required because the prosecutor failed to give proper notice in advance of trial pursuant to MRE 404(b)(2),⁵ and failed to show good cause to excuse the untimely notice. Defendant claims that the prosecutor's intent behind the untimely notice was to gain an unfair advantage by ambushing the defense with the evidence. The purposes of the notice requirement are to force the prosecutor to identify and seek admission of only relevant bad acts evidence, to ensure that the defendant has an opportunity to object to and defend against the evidence, and to facilitate a thoughtful ruling grounded on an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

In this case, the prosecutor made no argument regarding good cause during trial. On appeal, the prosecutor simply states that the untimely written notice was due to neglect. The trial court nevertheless excused the pretrial notice, finding that defendant was not prejudiced because he was aware of the evidence since it was used during the preliminary examination. Given these facts, we conclude that the trial court erred in excusing the prosecutor's untimely notice without first engaging in the relevant discussion regarding good cause. However, this error does not require reversal because it was harmless. "[A] preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 495-496 (citations omitted).

Here, as the trial court noted, the evidence was used during the preliminary examination, which belies defendant's claim that there was unfair surprise or an "ambush." Further, it is not apparent, and defendant has not suggested, how he would have reacted differently to this evidence had the prosecutor provided timely notice. See *Hawkins, supra* at 455-456. Moreover, the evidence was relevant, there is no suggestion from the record that the prosecutor attempted to rely on an improper purpose to justify admitting the evidence, and the evidence was not

⁴ Although defendant does not specifically challenge the prejudicial nature of the evidence, we note that the evidence was not inadmissible simply because it was prejudicial. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crime for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr, supra* at 499.

⁵ MRE 404(b)(2) provides:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, *or during trial if the court excuses pretrial notice on good cause shown*, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. [Emphasis added.]

substantially more prejudicial than probative. *Id.* We conclude that it is more probable than not that any error was not outcome determinative.

III

Next, defendant argues that the trial court abused its discretion in admitting photographic evidence of the child victim from the autopsy. We review a trial court's decision to admit photographic evidence for an abuse discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Here, the photographs provided corroboration for the victim's eight-year-old brother's testimony concerning the duration and method of the beating. The photographs were also relevant to show the results from the method in which the victim was killed, and instructive in depicting the location, nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Contrary to defendant's suggestion, the mere fact that he did not dispute that the victim was beaten does not render the photographs inadmissible. See *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Moreover, relevant photographs are not rendered unfairly prejudicial merely because they are gruesome, vivid or shocking. *Mills, supra* at 76; *Howard, supra* at 549-550. Accordingly, the trial court did not abuse its discretion in admitting the photographic evidence.

IV

Defendant also argues that his convictions of both first-degree felony murder and the underlying felony of first-degree child abuse violate the constitutional protections against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We agree. Convicting a defendant of both felony-murder and the underlying felony violates the constitutional protections against double jeopardy, and the proper remedy is to vacate the conviction and sentence for the underlying felony. *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000). Therefore, defendant's conviction and sentence of first-degree child abuse must be vacated.

However, we reject defendant's claim that the prosecutor's act of charging him with both first-degree felony murder and first-degree child abuse violated his constitutional protections against double jeopardy. At the outset, we note that defendant fails to provide any supporting authority for this claim. A party may not merely announce a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). In any event, a prosecutor has broad discretion to charge in a single information all offenses that arise out of a single criminal transaction or occurrence. *People v*

Goold, 241 Mich App 333, 342-343; 615 NW2d 794 (2000).

Affirmed in part, and vacated in part.

/s/ Richard A. Bandstra

/s/ Martin M. Doctoroff

/s/ Helene N. White