

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE EARL ZAVODA,

Defendant-Appellant.

UNPUBLISHED

January 18, 2002

No. 222305

Genesee Circuit Court

LC No. 98-002850 FC

Before: K.F. Kelly, P.J. and Hood and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (“CSC”), MCL 750.520b, first-degree child abuse, MCL 750.136b(2), and first-degree felony murder, MCL 750.316(b). He was sentenced to concurrent terms of twenty to thirty years’ imprisonment for the first-degree CSC conviction, ten to fifteen years’ imprisonment for the first-degree child abuse conviction, and life without parole for the first degree felony murder conviction. He appeals as of right. We affirm but vacate defendant’s conviction and sentence for first degree child abuse.

I. Ineffective Assistance of Counsel

Defendant first argues that the trial court erred when it concluded that, despite deficient representation by one of his attorneys, he was not deprived of a fair trial. This issue was preserved by a post-trial hearing on defendant’s claim that he was denied the effective assistance of counsel. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

In *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), the Court summarized the standard for reviewing an ineffective assistance of counsel claim

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his

counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 167.

At trial, defendant was represented by two different attorneys, both of whom testified at the *Ginther* hearing. A principal issue at the hearing concerned the effectiveness of the medical testimony that was presented as part of defendant's defense. Defendant presented the testimony of Werner Spitz, a forensic pathologist, who disagreed with several of the conclusions of the prosecutor's experts. Defendant also argued that his trial attorneys were ineffective because they should have focused more on the credibility of the lay witnesses rather than offering a battle of the medical experts.

Following the hearing, the trial court found that defendant's medical expert relied on "preposterous" and outdated treatment procedures which, in essence, left defendant without a viable defense. The trial court agreed that retained trial attorney Swartout was deficient in his representation of defendant. However, because of previously expressed concerns over Swartout's pre-trial representation and availability for trial, the trial court appointed another attorney, Beauvais, to serve as lead counsel in the case. The trial court found that Beauvais effectively represented defendant at trial. The trial court also considered both defendant's and Spitz's post-trial testimony and concluded that there was not a reasonable probability that the result would have been different had that testimony been presented at trial.

We agree with the trial court that defendant failed to demonstrate a reasonable probability that the result would have been different had this testimony been presented at trial. Thus, notwithstanding any deficient representation by attorney Swartout, defendant has failed to establish the requisite prejudice to prevail on his claim that he is entitled to a new trial due to ineffective assistance of counsel.

II. Sufficiency of Evidence

Defendant further contends that the trial court erred when it denied his motion for a directed verdict. Defendant maintains that the evidence was insufficient to prove that he abused the child, thereby causing her death. We disagree. In reviewing this issue, we must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged offense were proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The elements of first-degree felony murder are:

(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, [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any

of the felonies specifically enumerated in the statute. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

The elements of first-degree child abuse are:

(1) the person, (2) knowingly or intentionally, (3) cause[d] serious physical or mental harm to a child. With regard to the second element, . . . defendant who specifically intended to cause serious physical or mental harm to a child may be convicted of first-degree child abuse¹. *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997).

In this case, the evidence established that the child was healthy and unharmed when she was left in defendant's care. However, when defendant returned her after midnight, she had bruises on her face, chin and knees, her head was hanging at an awkward angle, and her breathing was labored. Witnesses testified that they observed defendant hit and kick the child in the head on the day that she was injured. The medical evidence indicated that the child's air passages were cut off, for at least thirty to forty seconds. There was also evidence suggesting sexual abuse. Before the child was taken to the hospital by her mother, defendant refused to let her use the telephone to call 911 and then refused to go to the hospital. After the child was taken to the hospital, defendant refused to cooperate with medical personnel, who were attempting to determine how the child was injured. When he was told about the child's extreme condition, defendant remarked, "well, I guess we'll have a dead daughter." Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find, beyond a reasonable doubt, that defendant caused the child's death due to the commission of first-degree child abuse. Hence, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant also claims that the evidence was insufficient to support his conviction for first-degree CSC. We disagree. The pediatrician and the pathologist both testified that the bruise around the child's anal opening was indicative of sexual penetration with an object or finger. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find, beyond a reasonable doubt, that defendant sexually penetrated the child. MCL 750.520a(m); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).

III. Prior Bad Acts

Next, defendant argues that a new trial is required due to the admission of prior bad acts evidence, contrary to MRE 404(b), and because the prosecutor failed to provide the required pre-trial notice of his intent to admit the prior bad acts evidence. Because defendant did not object to the challenged evidence at trial, this issue is not properly preserved for appellate review. Therefore, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹ A defendant's intent may be inferred from his actions, *Gould*, *supra* at 87, and his words, *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

In the case at bar, the evidence that defendant hit and kicked the child on the day and evening prior to her death was admissible for a proper purpose under MRE 404(b), that is, to show a system of acting towards the child and to show the absence of mistake or accident. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 444 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Indeed, these acts were connected to the events that followed and were necessary for the jury to hear the “complete story.” *Hawkins, supra* at 448-449. (Citation omitted.) The evidence was relevant because it had a “tendency” to show that it was more probable than not that the injuries that led to the child’s coma and death were not accidental and were inflicted by defendant. *Hawkins, supra* at 449. Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Sabin (After Remand), supra* at 55-56.

We further find that the prosecutor’s failure to provide the notice required by MRE 404(b)(2) does not require reversal. The essential objectives of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. *Hawkins, supra* at 454-455. Here, the evidence in question was admissible for a proper purpose under MRE 404(b)(1). Further, defendant’s appointed attorney admitted at the post-trial *Ginther* hearing that he was aware of the evidence and he too believed that it was admissible. Thus, there is no indication that defendant was surprised or otherwise taken aback by the evidence. On appeal, defendant does not suggest how he would have reacted differently to the evidence had he received the requisite prior notice. We conclude, therefore, that any plain error in failing to comply with the notice requirement contained in MRE 404(b)(2) did not affect defendant’s substantial rights.

IV. Rebuttal Testimony

Next, defendant argues that he was denied a fair trial by the admission of improper rebuttal testimony. Because defendant failed to object to the testimony in question, he must demonstrate a plain error that affected his substantial rights. *Carines, supra* at 763.

Rebuttal evidence is admissible to “contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.” *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citing *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947)). The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination. *Id.* The prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter. *People v Losey*, 413 Mich 346, 351-353; 320 NW2d 49 (1982). Contrary to what defendant argues, the mere fact that the testimony overlapped testimony presented in the prosecution’s case-in-chief does not render it improper. *Figgures, supra* at 399.

The testimony presented by the prosecutor’s rebuttal witness, Dr. Guertin, was responsive to the testimony presented by defendant’s expert, Dr. Perrigo. Dr. Guertin testified that Dr. Perrigo’s opinions and recommendations were based on procedures, medications and treatment that had not been used since the late 1970s, or early 1980s.

Dr. Guertin also testified as to several different possibilities that could have caused the bruises on the child's face and forehead, and her seizures. He rebutted Dr. Perrigo's contention that the mistaken placement of the endotracheal tube caused any problems by testifying that this happens all of the time and is usually immediately corrected and would not have harmed the child in this case because she did not have a lung disease.

Defendant neither identified any specific improper testimony or otherwise indicated where Dr. Guertin's testimony went beyond the legitimate rebuttal of Dr. Perrigo. Thus, defendant has failed to show that a plain error affected his substantial rights.

V. Double Jeopardy

Finally, we agree with defendant that his dual convictions for both first-degree felony murder and the underlying felony of first-degree child abuse violates his constitutional right against double jeopardy. *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981); *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). The proper remedy is to vacate the underlying conviction for first-degree child abuse and remand for correction of the judgment of sentence. *Id.* at 242.

The prosecutor invites us to disregard long-established Michigan law in this area, and instead urges this Court to conduct an independent analysis of the law of other jurisdictions which have held that it is not a double jeopardy violation to permit dual convictions for felony murder and the underlying felony. We reject this invitation. Where Michigan law is silent on an issue, we may turn to the reasoning of other jurisdictions for guidance. *People v Kaslowski*, 239 Mich App 320, 327; 608 NW2d 539 (2000). However, where, as here, the law in Michigan has long been established, it is not necessary to look to the law of other jurisdictions. See *People v Kirby*, 440 Mich 485, 495; 487 NW2d 404 (1992).

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff