

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LISA GAIL HOLLAND,

Defendant-Appellant.

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UNPUBLISHED

June 24, 2008

No. 275022

Ingham Circuit Court

LC No. 06-000402-FC

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant Lisa Holland was convicted of felony murder, MCL 750.316, and the predicate felony of first-degree child abuse, MCL 750.136b(2). The trial court subsequently vacated the child abuse conviction and sentenced defendant to life in prison without parole. Defendant appeals as of right. We affirm.

I. Facts and Procedural History

This case arises out of the death of defendant's seven-year-old son Richard "Ricky" Holland in July 2005. Defendant and her husband, Timothy "Tim" Holland, accepted Ricky as a foster child when he was three years old. The Hollands subsequently adopted Ricky and his younger siblings. Two Department of Human Services (DHS) employees testified that before Ricky's death, the Hollands received subsidy payments from the state for their adopted children. They received approximately \$450 per month over the standard subsidy rate because of Ricky's special needs.

When the Hollands accepted Ricky as a foster child in 2000, they resided in Jackson, Michigan. In January 2001, defendant enrolled Ricky in a Head Start program for children with special needs. Ricky's teacher, Barbara Patrick, remembered Ricky being well behaved in class and she believed that defendant exaggerated Ricky's improper behavior to his doctors. Susan Honeck, a social services psychotherapist, saw Ricky on a weekly basis in 2001 and 2002. Like Patrick, Honeck observed Ricky exhibiting normal behavior. But, defendant complained that Ricky was defiant at home. In February 2002, Honeck found a deep rope burn on Ricky's wrist. Ricky attributed the burn to "the rope that they [tied him] in bed with at night."

In the fall of 2002, Ricky started kindergarten in the Jackson public school system. At defendant's request, Ricky rode a special education bus and wore a harness. Defendant warned school personnel that Ricky was a "problem child" and asked that they give her written reports of his bad behavior. According to Ricky's bus driver and her attendant, Ricky was always well behaved and they generally removed his harness during the bus ride because, in their estimation, he did not need to wear it. They also gave Ricky food because he said that he did not have enough to eat and they noticed that his lunches generally consisted of plain bread and carrots. Ricky's first grade teacher similarly testified that although Ricky was generally very good, she caught him stealing food two to four times a week. She also testified that defendant asked her to put Ricky in his harness every day before he left the classroom, but she refused to do so. Carol Coxon, a school nurse, testified that she once found nickel-sized bruises across Ricky's chest, shoulders, and back. Defendant said that Ricky's bus harness bruised him, but Coxon did not believe that the harness could have caused the bruising, and she learned from the school's transportation department that Ricky was no longer wearing his harness.

In March 2004, defendant asked the school to place Ricky in a special education program. Although defendant described Ricky in a negative light, the school psychologist and social worker found that he was well behaved, had average intelligence, and that he did not qualify for special education. Shortly thereafter, before the school year ended, defendant removed Ricky from the school. In the fall of 2004, defendant enrolled Ricky in a different elementary school in Jackson. School principal Randall Cook testified that the week before school started, defendant brought Ricky to the school on a leash and said that Ricky would be a difficult student. Within the month, school personnel met with defendant to inform her that Ricky was progressing well and that he did not qualify for special education. A few days later, defendant again removed Ricky from the school system.

Dr. Jerel Del Dotto, an expert in neuropsychology and assessment of children, conducted an assessment of Ricky in February 2001. Defendant indicated that Ricky was defiant, hyperactive, and distracted. But, the doctor and his psychometrist recalled Ricky being pleasant, cooperative, and intelligent. Dr. Del Dotto diagnosed Ricky with a disruptive behavior disorder and did not recommend any medication. Psychiatrist Aurif Abedi treated Ricky from September 2001 to July 2004. In assessing Ricky, Dr. Abedi primarily relied on defendant's representations about him. Dr. Abedi ultimately diagnosed Ricky with attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), bipolar disorder, and an impulse control disorder. Over the years, the doctor also became concerned with Ricky's physical growth. Ricky dropped from having an average weight in 2001 to being in the tenth percentile for weight in 2004.

In May 2005, when Ricky was seven years old, the Hollands moved from Jackson to Williamston, Michigan. Two of the Holland's Williamston neighbors testified that they found Ricky in their kitchen seeking food. On the morning of July 2, 2005, Tim telephoned 911 and reported Ricky missing. Within a few days, police formed a task force dedicated to locating Ricky. Hundreds of law enforcement officers and approximately 1700 civilian volunteers passed out flyers and searched a two to three-mile radius over nine days. A simultaneous search by aircraft covered a 20-mile radius. During the search, the Hollands were interviewed by the media and pleaded on camera for their son's safe return. Over the next few months, investigators continued to search for Ricky without success.

On January 26, 2006, after Tim had filed assault charges against defendant that were later dismissed, two detectives interviewed defendant at her request. During the interview, defendant said that Tim probably killed Ricky on the night he disappeared and she was afraid Tim would blame her for what happened. The next day, Tim told a detective that defendant killed Ricky by striking him twice in the head with a hammer. Tim then led police to Ricky's body in a wetlands area near the Hollands' house. When they reached the site, Tim started to cry, fell to his knees, and said, "Oh, my God, what have I done." Tim was arrested later that night and defendant was charged with open murder and first-degree child abuse.

Crystal Mountain and Krystal Pierce testified that they were in jail with defendant in the spring of 2006. Each of the witnesses had several conversations with defendant. According to Mountain, defendant initially stated that Tim killed Ricky. Later, however, defendant admitted that she hit Ricky in the head with a hammer because he was "whiny," but that she did not mean to hit him as hard as she did. Defendant told Pierce that she did not mean to kill Ricky and that his death was an accident. Defendant said that she threw a hammer at Ricky because he ran through the living room and knocked over her knickknacks. After the hammer hit Ricky, defendant picked up the hammer and hit him in the head a second time. Defendant further indicated that Ricky did not die immediately and that he suffered before his death.

After his arrest, Tim pleaded guilty to second-degree murder and agreed to testify truthfully against defendant. At trial, he testified that defendant had "an immense hatred for Ricky." She frequently backhanded Ricky and struck him in the head and back with a heavy wooden spoon. On numerous occasions, Tim arrived home from work and found Ricky locked in his bedroom or the basement, with his hands, feet, and mouth duct taped and standing in a pool of urine. According to Tim, defendant removed Ricky from school because, in her opinion, Ricky was a "trouble maker," and because he did not qualify for special education. But, Tim never observed Ricky exhibit the negative behaviors defendant reported to others. Tim testified that defendant's only concern was increasing Ricky's subsidy payment rate.

Tim further testified that on June 20, 2005, he left on a business trip. When he returned home on Friday, June 24, he found Ricky in the living room with a "crusty" laceration on the right side of his head. Ricky wore only a diaper. He was dirty and smelly, had difficulty walking, and did not acknowledge Tim when he entered the house. Later that day, Tim confronted Lisa about the laceration. She said that Ricky hit his head in the kiddie pool, but Tim did not see the pool set up. Over the next few days, Ricky's condition worsened. He did not eat or drink and Tim changed his diaper. By Friday, July 1, Ricky stopped speaking, did not acknowledge Tim's presence, and felt stiff and cold to the touch.

On the evening of July 1, Tim put Ricky to bed and then left the house. Upon his return, he found Ricky lying in a fetal position with red vomit on his face. He was colder than before and had no pulse. At that point, defendant repeatedly screamed, "I didn't mean to do it," and instructed Tim to remove the body from the house. Later that night, Tim hid Ricky's body in the wetlands area, a location defendant had recently said would be a good place "to dump a body." The next morning, Tim telephoned 911 and reported Ricky missing. During the investigation, the Hollands recited a detailed, fabricated story about Ricky's disappearance. Then, in December 2005, when Tim attempted to use a tack hammer in the kitchen, defendant stopped him. She said, "That's the hammer that I hit Ricky with."

Dr. Todd Fenton and Dr. Joyce DeJong conducted the autopsy. Dr. Fenton testified that there was no evidence of skeletal trauma to the cranium, but there were fractures in the nasal region, the scapula, and the clavicle. The scapular fractures were consistent with child abuse. Further, although Ricky was almost eight years old when he died, his skeletal development was that of a five or six year old. Based on the condition of Ricky's skeleton and the evidence admitted at trial, Dr. DeJong attributed Ricky's death to complications from a head injury. Dr. DeJong further testified and opined that, based on Ricky's medical records and skeletal development, he suffered from a condition known as failure to thrive (FTT). Dr. Elaine Pomeranz, an expert in emergency pediatric medicine, forensic pediatrics, and child abuse, testified about munchausen syndrome by proxy (MSBP).

Following trial, the jury convicted defendant of felony murder and the predicate felony of first-degree child abuse. The trial court subsequently vacated the separate child abuse conviction and sentenced defendant to life in prison without parole for the felony murder conviction. Defendant now appeals as of right.

## II. Venue

Defendant first argues that the trial court erred in denying her motion for a change of venue based on pretrial publicity and community prejudice. We disagree.

We review the denial of a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A court's action in ordering or refusing a change of venue should not be disturbed on review unless there clearly appears to be a palpable abuse of discretion. *Jendrzejewski*, *supra* at 500.

Generally, a defendant must be tried in the county where the crime is committed. MCL 600.8312; *Jendrzejewski*, *supra* at 499. The court may, however, change venue to another county in special circumstances where justice demands or a statute provides. MCL 762.7; *Jendrzejewski*, *supra* at 499-500. Two approaches have been used to determine whether the failure to grant a change of venue is an abuse of discretion. *Id.* at 500. "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Id.* at 500-501.

Defendant argues that a change of venue was warranted on the basis of pretrial publicity. The existence of pretrial publicity alone does not necessitate a change of venue. *Id.* at 502. In determining whether a defendant has been deprived of a fair trial by virtue of pretrial publicity, the reviewing court must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501-502 (internal quotations and citation omitted). See *Murphy v Florida*, 421 US 794, 798; 95 S Ct 2031; 44 L Ed 2d 589 (1975) (stating that in each of the cases where the Court overturned a state-court conviction based on a presumption of bias due to media coverage, the trial atmosphere had been "utterly corrupted" by

the coverage). The reviewing court must also distinguish between largely factual publicity and that which was invidious or inflammatory. *Jendrzewski, supra* at 504.

On appeal, defendant asserts that more than 130 newspaper articles relating to the case were published in the local area before trial. There were also numerous television broadcasts about the case and a few “blogs” related to Ricky’s disappearance. But, the amount of publicity alone does not result in a presumption of community prejudice. In *People v DeLisle*, 202 Mich App 658, 668-669; 509 NW2d 885 (1993), we rejected the defendant’s argument that the trial court erred in denying his motion for a change of venue based on pretrial publicity when there were more than 100 newspaper articles published over a period of ten months about the case. Analyzing cases where a change of venue was required due to a presumption of community bias, the *DeLisle* Court noted that the relevant question is whether the circumstances surrounding the publicity rendered the possibility of receiving a fair trial by an impartial panel unlikely:

Contrary to defendant’s arguments, these cases “cannot be made to stand for the proposition that juror exposure to information about a state defendant’s prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process” and therefore entitles him to a change of venue. *Murphy*[, *supra* at 799]. Rather, as stated by Justice Marshall, writing for the majority in *Murphy*, those convictions were reversed because “[t]he proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob.” *Id.* Whether a defendant’s conviction will be reversed depends on whether, under the “totality of circumstances,” the defendant’s trial “was not fundamentally fair” and held before “a panel of impartial, ‘indifferent’ jurors.” *Id.*

The Court stressed in *Murphy* that even the existence of preconceived notions regarding guilt or innocence is not enough to rebut the presumption of impartiality where the juror states that those opinions can be set aside and the case can be decided on the evidence presented at trial. *Id.* at 800; see also *Gentile v State Bar of Nevada*, 501 US [1030, 1053-1054; 111 S Ct 2720]; 115 L Ed 2d 888 (1991) (“[o]nly the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court.”) On the other hand, “it remains open to the defendant to demonstrate ‘the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.’” *Murphy, supra* at 800, quoting [*Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961)]. [*DeLisle, supra* at 664-665 (footnote omitted).]

Media coverage of this case was extensive. The media reports covered the circumstances surrounding Ricky’s disappearance, the ensuing police investigation and search for Ricky, and the status of the case after defendant and Tim were arrested, including Tim’s confession before trial. As defendant points out, many of the newspaper articles had headlines such as: “Lisa Holland admitted killing Ricky,” and “Bus driver suspected Ricky Holland was being abused.” But a careful, independent review of the media reports reveals that the publicity was largely factual and was not invidious or inflammatory. In other cases where proper venue or trial

fairness was an issue due to publicity, the media turned the proceedings into a veritable circus resulting in a “kangaroo court;” covered particularly inflammatory topics such as the defendant’s numerous prior convictions or notorious reputation; repeatedly broadcasted a videotape of the defendant’s detailed confession, all but solidifying a consensus of guilt before the trial began; relayed the details of a confession or other evidence that was deemed inadmissible at trial; or actively solicited the public to weigh in on the defendant’s guilt or innocence and the punishment he or she deserved. See, e.g., *Sheppard v Maxwell*, 384 US 333, 338-342; 86 S Ct 1507; 16 L Ed 2d 600 (1966); *Rideau v Louisiana*, 373 US 723, 724, 727; 83 S Ct 1417; 10 L Ed 2d 663 (1963); *Irvin, supra* at 725; *Marshall v United States*, 360 US 310, 312-313; 79 S Ct 1171; 3 L Ed 2d 1250 (1959); *DeLisle, supra* at 664-665. The coverage in this case, however, primarily covered testimony elicited during the preliminary hearing and other facts that were later admitted as evidence at trial.

It is reasonable to conclude that the nature of and manner in which the facts of this case unfolded – wherein a young child’s parents reported their child missing, the community engaged in a massive search to locate the child, and then several months later the father pleaded guilty to second-degree murder and admitted that he and the mother knew all along their child was dead, that the mother hit the child in the head with a hammer, and that he disposed of the body – rendered it nearly impossible for even a factually-based media report not to evoke a reaction in anyone exposed to it. However, that there may be no neutral way to report on this case is not the result of invidious or inflammatory media reporting, but rather, the facts of the case itself. Furthermore, while it is also reasonable to conclude that a number of the members of the community had formed opinions that prevented them from fairly trying this case, the media coverage itself did not rise to the level of invidious or inflammatory publicity such that it mandates a presumption that the entire jury pool, drawn from a population of approximately 275,000 people, was tainted. See U.S. Census Bureau, State & County QuickFacts <<http://quickfacts.census.gov/qfd/states/26/26065.html>> (accessed June 4, 2008) (stating that Ingham County’s population as of 2006 was 276,898).

In determining whether a change of venue was required due to pretrial publicity, the reviewing court should consider not only the “quality and quantum of pretrial publicity,” but must “closely examine the entire voir dire to determine if an impartial jury was impaneled.” *Jendrzewski, supra* at 517. Our Supreme Court has suggested three possible approaches to determine if a potential juror’s impartiality has been destroyed by exposure to pretrial publicity: “1) questionnaires prepared by the parties and approved by the court, 2) participation of attorneys in the voir dire, and 3) sequestered questioning of each potential juror.” *Id.* at 509; *People v Tyburski*, 445 Mich 606, 619, 623-624; 518 NW2d 441 (1994).

In May 2006, defendant moved for a change of venue and the trial court postponed ruling on the motion until after jury selection. In light of the pretrial publicity in this case, the trial court conducted jury selection using all three methods recommended by our Supreme Court for screening venire members. The trial court started with a fairly large pool of 184 potential jurors, and had them fill out a written questionnaire drafted by the attorneys.<sup>1</sup> Of that group, 106 were

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<sup>1</sup> In addition to the initial pool of 184 potential jurors, the court had another 50-member pool fill out a questionnaire, but that group was never utilized.

immediately dismissed based on their answers to the questionnaires without any further questioning or evaluation. Of the remaining 78 venire members, 71 were subjected to sequestered questioning by the trial judge and attorneys over the course of four days. Through that process, 17 were excused for cause due to bias, 16 were excused for reasons other than bias, 10 were dismissed based on the prosecutor's exercise of peremptory challenges, and 12 were dismissed based on defendant's exercise of peremptory challenges. At the end of the questioning, defendant renewed her motion for a change of venue. The trial court denied the motion, stating that it had "gone to great extents," had been "very generous" in dismissing potential jurors for cause and that, in its estimation, a fair and impartial jury had been selected.

On appeal, defendant argues that a change of venue was warranted based on the number of venire members admitting to disqualifying prejudice. "As an indirect means of determining whether community prejudice resulting from publicity may have unconsciously infected the jurors who were seated, the Court has sometimes noted how many non-seated members of the venire admitted to a disqualifying prejudice." *Jendrzewski, supra* at 511, quoting *United States v Morales*, 815 F2d 725, 734 (CA 1, 1987).

Defendant asserts that more than 68 percent of the venire was "excused due to lack of impartiality." Viewing the record, that statistic is not entirely accurate. With respect to the 106 potential jurors who were dismissed based solely on their questionnaires, the screening and elimination process took place off of the record in chambers with the involvement of both the trial court judge and the attorneys. Considering that some of the questions related to knowledge of the area, familiarity with Jackson public schools, and potential hardships, it is improper for defendant to argue that all 106 potential jurors were tainted by pretrial publicity. While review of those questionnaires reveals that the vast majority of persons admitted to having an opinion about the case based on media reports and/or other sources of information, it is also apparent that the questionnaire was drafted so as to thoroughly and liberally vet all persons with preconceived opinions without further questioning or evaluation. Further, our independent review of the record reveals that of the 71 venire members subjected to sequestered questioning, 17 members, or 24 percent, were dismissed because of media exposure or for admitting to disqualifying prejudice.

The often-cited federal case addressing the concept of presumed jury bias due to the number of potential jurors excused for cause – which was the espoused premise upon which defendant moved for a change of venue following voir dire – is *Irvin, supra*. In *Irvin*, the United States Supreme Court reversed a conviction where the jury had been chosen from a panel where almost 90 percent, or 370 out of 420, of the prospective jurors who were asked the question admitted to having an opinion about the case. *Id.* at 727. During voir dire, two-thirds of the jury members who were selected to sit on the case had admitted to having formed an opinion that the defendant was guilty, but claimed to be able to set their opinion aside and render an impartial verdict. *Id.* at 727-728. The Court stated that "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.* at 728. The Court set aside the verdict and held that the "'pattern of deep and bitter prejudice' shown to be present throughout the community . . . was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box." *Id.* at 727 (internal citation omitted).

With regard to Michigan cases that have addressed this issue, in *DeLisle, supra*, 31 percent of the total venire was excused because of bias, yet the *DeLisle* Court concluded that “the number of jurors excused for bias during voir dire was not sufficiently high to presume that the jurors chosen were part of a community deeply hostile to defendant.” *Id.* at 667, 669. More recently, this Court declined to order a change of venue where 36 percent of the total venire was excused for bias. *People v Cline*, 276 Mich App 634, 641; 741 NW2d 563 (2007).

The record in this case supports defendant’s assertion that most of the members of the venire were at least familiar with the basic facts of the case. While this causes some concern when compared to most cases where the potential jurors have no knowledge of the case, as stated in *Irvin, supra*:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse interest in the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [*Id.* at 722-723.]

Further, “[W]here potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue.” *DeLisle, supra* at 662. Indeed, “[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind.” *Jendrzewski, supra* at 519.

Review of the record in this case reveals that while the court took a risk in not initially granting a change of venue after examining the questionnaires, the jury selection process was extremely thorough and well done. We agree with the trial court’s representation that it went to great lengths, and thereby succeeded, in impaneling a fair and impartial jury. During their sequestered questioning, at least six of the 71 venire members said that they had absolutely no knowledge of the case and several others said that they had almost no knowledge. Moreover, each of the jurors ultimately selected to sit on defendant’s jury asserted that they would be able to judge defendant’s case fairly and impartially, notwithstanding any exposure to pretrial publicity about the case. Of the 16 jurors selected to sit on the jury, one had no knowledge of the case, five knew very few facts of the case, and all 16 indicated that they had no opinion about the case. Compare *Irvin, supra* at 727-728 (stating that two-thirds of the jury members selected to sit on the case had admitted to having an opinion that the defendant was guilty).

Given that defendant’s conviction should not be reversed unless, under the totality of the circumstances, she was denied a fair trial before a panel of impartial jurors, and that an order refusing a change of venue should not be disturbed on review unless there is a clear abuse of discretion, we find that the trial court properly exercised its discretion in denying defendant’s motion for a change of venue. *Jendrzewski, supra* at 500-501; *DeLisle, supra* at 655.

### III. “Other-Acts” Evidence

Next, defendant argues that the trial court erred in admitting evidence of her allegedly abusive behavior toward Ricky during the three-year period before his death under both MRE 404(b) and the res gestae exception to MRE 404(b). Specifically, defendant challenges the testimony of the 14 “Jackson witnesses,” including the two DHS employees; psychotherapist Honeck; Ricky’s three teachers and two school principals; the bus driver and her attendant; the school nurse, psychologist, and social worker; and Dr. Del Dotto’s psychometrist.

Before trial, the prosecution moved to amend the information to reflect that the alleged first-degree child abuse occurred between July 2002 and July 2005 and, over defendant’s objection, the trial court granted the motion. [Defendant is not challenging the amendment to the information on appeal.] The prosecution also filed a written notice of intent to admit evidence of defendant’s prior acts of abuse under MRE 404(b) or, in the alternative, as part of the res gestae of the offense. Defendant subsequently filed written objections as to both grounds, but the court did not rule on her objections at that time. During trial, defendant objected to Honeck’s testimony that Ricky was tied to his bed with a rope and that he suffered a rope burn as a result. The prosecution argued that the testimony was admissible under MRE 404(b) or as a part of the res gestae. The trial court admitted Honeck’s testimony under MRE 404(b).

We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). “[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. Questions of law are reviewed de novo.” *People v Dobeck*, 274 Mich App 58, 85; 732 NW2d 546 (2007) (internal quotations and citation omitted).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our courts use three factors to determine the admissibility of “other-acts” evidence. These factors are (1) whether the evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Additionally, our courts may admit evidence of other acts as part of the res gestae of the offense, without regard to MRE 404(b), if the alleged acts are “so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances

of the crime.” *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation marks and citation omitted). This rule, termed the “res gestae exception to 404(b),” has also been defined as allowing those “facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.” *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978). “The principle that the jury is entitled to hear the ‘complete story’ ordinarily supports the admission of [res gestae] evidence.” *Delgado*, *supra* at 83. See also *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981) (stating that the “res gestae has been referred to as the ‘complete story’”).

Defendant argues that the trial court abused its discretion in admitting Honeck’s testimony that Ricky was tied to his bed because it was not admitted for a proper purpose. Evidence of other acts, however, may be admissible for purposes “such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . .” MRE 404(b). We find that, in this case, the challenged evidence was properly admitted to establish intent. The question of intent was an issue at trial because a general denial of guilt puts all of the elements of the charged offense at issue. *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000). A conviction of first-degree child abuse requires that the defendant knowingly or intentionally caused serious physical or mental harm to a child, *People v Gould*, 225 Mich App 79, 84; 570 NW2d 140 (1997), and a conviction of felony murder requires that the defendant killed the victim with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm, *People v Smith*, 478 Mich 292, 318; 733 NW2d 351 (2007).

Honeck testified that in February 2002, she found a deep rope burn on Ricky’s wrist. Ricky, who was four years old at the time, indicated that the burn came from “the rope that they tie me in bed with at night,” and that “the handcuffs were also cold on his legs.” Later, Honeck asked Ricky if he was “still being tied up.” Ricky responded, “No, we made a deal. I won’t pee on the floor, and she won’t tie me up.” The fact that Ricky was in the Hollands’ care in February 2002 and that he referred to a female person tying him up supports the conclusion that defendant was responsible for tying Ricky to his bed. Evidence that defendant restrained Ricky with ropes and handcuffs, and that he suffered a deep a rope burn as a result, makes it more likely that defendant intentionally committed the charged crimes. “The more often a defendant acts in a particular manner, the less likely it is that the defendant acted accidentally or innocently . . . , and conversely, the more likely it is that the defendant’s act is intentional.” *People v McGhee*, 268 Mich App 600, 611; 709 NW2d 595 (2005), lv pending 477 Mich 1303 (2007) (citations omitted).

Defendant next argues that Honeck’s testimony was irrelevant. The prosecutor initially bears the burden of establishing relevance. *Knox*, *supra* at 509. To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the evidence was highly relevant to show intent, which was an issue of consequence at trial. Defendant argues that because Ricky died in July 2005, the challenged evidence was too remote in time to be relevant. But, considering that the information was amended to reflect that the alleged first-degree child abuse occurred between July 2002 and July 2005, and Honeck observed Ricky’s rope burn in February 2002, the challenged act occurred within a few months of one of the charged offenses, i.e., first-degree child abuse.

Moreover, “the remoteness of an act only affects the weight of the evidence rather than its admissibility.” *McGhee, supra* at 611-612.

Defendant additionally argues that the testimony was unfairly prejudicial. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403. Although the challenged evidence may have been damaging to defendant’s position, it was highly probative because it was relevant to an issue of consequence at trial and there is no evidence that the jury gave it preemptive weight. Therefore, defendant has not demonstrated that the probative value of Honeck’s testimony was substantially outweighed by the danger of unfair prejudice.

We also find Honeck’s testimony that Ricky was tied to his bed admissible under the res gestae exception to MRE 404(b). As indicated above, Honeck’s testimony was highly relevant to the issue of intent. The jury had to determine whether defendant had the requisite intent to commit felony murder and first-degree child abuse, and “[t]he more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty.” *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Defendant asserts that “the prosecution is in fact asking this Court to significantly expand the classic understanding of ‘res gestae’” by admitting evidence of acts that occurred more than three years before Ricky’s death as part of the res gestae. But, Honeck observed Ricky’s rope burn within a few months of when the charged first-degree child abuse allegedly began. Moreover, proximity in time is not the only factor to be considered in determining the res gestae of an offense. The challenged evidence helped to give the jury the “complete story” and, therefore, the court did not abuse its discretion in admitting it. *Delgado, supra* at 83.

Additionally, defendant objects to Coxon’s testimony that when Ricky was in first grade, she found nickel-sized bruises across his chest, shoulders, and back and that, on another occasion, Ricky came to school wearing a diaper. Evidence that defendant attributed the bruising to Ricky’s bus harness when three school employees testified that he did not wear the bus harness suggests that defendant was responsible for the bruising. Further, Tim’s testimony that defendant frequently forced Ricky to wear a diaper even though Ricky was completely “potty trained” suggests that defendant sent Ricky to school in a diaper. Defendant further objects to Cook’s testimony that before Ricky started second grade, defendant brought him to school on a leash.

Defendant argues that Coxon and Cook’s testimony was inadmissible under MRE 404(b) and the res gestae exception to MRE 404(b). But, the events described by Coxon and Cook occurred between July 2002 and July 2005, the time period that the charged first-degree child abuse allegedly occurred. Therefore, Coxon and Cook’s testimony that defendant bruised Ricky, sent him to school in a diaper, and brought him to school on a leash does not constitute “other-acts” evidence. Rather, these acts are the very acts of alleged child abuse for which defendant was charged. Whether defendant committed the acts in question and whether the acts constituted first-degree child abuse were questions of fact for the jury. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

The remainder of the testimony defendant objects to on appeal is comprised of the witnesses’ observations of Ricky and their conversations with defendant about Ricky. Ricky’s

behavior and appearance and defendant's statements do not constitute "other-acts" evidence under MRE 404(b). *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), citing *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Therefore, in determining whether the evidence was admissible at trial, the appropriate analysis is whether the evidence was relevant, and if so, whether its probative value outweighed its prejudicial effect. *Goddard, supra* at 518.

At trial, several witnesses testified about the financial assistance the Hollands received for Ricky. The DHS employees testified about the Hollands' subsidy payments and the employees' conversations with defendant about the payments; Patrick testified that defendant asked her whether Ricky would be eligible for Supplemental Security Income (SSI) benefits if he were diagnosed with ADHD or ODD; and Honeck testified that defendant asked her to write a letter stating that Ricky required extra care and additional financial resources. Considering that the Hollands received higher subsidy payments if Ricky required extra care, evidence that defendant frequently complained about Ricky's behavior and inquired about his eligibility for extra financial assistance was relevant to establishing defendant's motive for fabricating or exaggerating Ricky's alleged emotional and psychological disorders. And, according to Dr. Pomeranz's testimony, fabricating or exaggerating a child's symptoms can constitute child abuse. Although motive is not an essential element of first-degree child abuse or felony murder, evidence of motive in a prosecution for murder is always relevant. *People v Unger*, 278 Mich App 210, 223; \_\_\_ NW2d \_\_\_ (2008).

Additionally, all of the "Jackson witnesses" testified about their personal observations of Ricky's behavior and recounted conversations that they had with defendant about Ricky. All of the witnesses indicated that defendant reported Ricky's behavior as being more severe than what they observed, and that defendant repeatedly asked for reports on Ricky's bad behavior, that he be tested for emotional or psychological disorders, or that he be placed in special education programs. This evidence was not only relevant to the question of motive, but to establishing that Ricky suffered serious mental harm, a required element of first-degree child abuse. *Gould, supra* at 84.

We find that the challenged evidence regarding the financial assistance the Hollands received for Ricky, Ricky's behavior, and defendant's representations of Ricky's behavior was relevant and not unfairly prejudicial. The evidence was highly probative because it was relevant to issues of consequence at trial and there is no evidence that the jury gave it preemptive weight. Therefore, defendant has not demonstrated that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See *Goddard, supra* at 518; *Ortiz, supra* at 306.

Moreover, we find that even if the trial court abused its discretion in admitting the testimony of the 14 "Jackson witnesses," defendant cannot establish that the admission of the evidence constituted outcome-determinative error warranting reversal. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Tim testified that defendant always mistreated Ricky. According to Tim, defendant previously threatened to kill Ricky and she frequently struck Ricky, tied him up, and called him names. Tim, Mountain, and Pierce also testified that defendant admitted killing Ricky by hitting him in the head with a hammer, albeit accidentally. Furthermore, the physical evidence collected at the Hollands' home and the results of Ricky's autopsy all complied with Tim's detailed description of the events before and after Ricky's

death. Based on this evidence, defendant cannot establish that, but for the admission of the challenged evidence, she would have been acquitted.

Alternatively, defendant argues that her trial counsel was ineffective for failing to object to the admission of the challenged evidence and to request a limiting instruction. To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied her a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

Considering that defense counsel did in fact object to the admission of the challenged evidence, counsel cannot be deemed ineffective on that basis. Moreover, defendant cannot establish that the admission of the evidence or defense counsel's failure to request a limiting instruction affected the outcome of the case. Defendant has failed to establish her claim of ineffective assistance of counsel.

#### IV. Jury Instructions

Defendant next argues that the trial court improperly instructed the jury on the charged offenses. Specifically, defendant argues that the jury instructions were improper because they failed to "differentiate between first-degree child abuse when charged as a separate offense, where it may be based on a number of abusive acts occurring over a period of time, and first-degree child abuse as the predicate felony for felony murder, where the murder must occur 'in the perpetration of' the felony." We disagree.

Because defendant did not object to the trial court's instructions below, her claim of instructional error is not properly preserved for review on appeal. See *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). We review unpreserved claims of instructional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error exists if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant's innocence. *Id.* at 763.

In reviewing claims of instructional error, we examine the instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). The defendant bears the burden of establishing error requiring reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

Here, the trial court instructed the jury that defendant was charged with one count of open murder occurring on July 1, 2005, and one count of first-degree child abuse occurring between July 2002 and July 2005. The court clarified that each count was a separate crime being charged, and that the jury must consider each crime separately in light of all of the evidence. With regard to the first count, the court instructed the jury on the elements of felony murder, second-degree murder, and involuntary manslaughter. The court explained that the predicate felony for felony

murder was first-degree child abuse and then listed the elements of first-degree child abuse. The court also clarified that the prosecutor must prove beyond a reasonable doubt that defendant caused the death of Ricky, and that Ricky died as a result of a blow to the head, or hammer blow. With regard to the second count, the court again instructed the jury on the elements of first-degree child abuse, and then on the elements of second-degree child abuse. When jurors asked questions about the charged offenses during deliberations, the court directed the jury to the instructions already given.

The elements of 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)].” *Smith, supra* at 318-319 (internal quotations and citations omitted). In *People v Gillis*, 474 Mich 105, 120-121; 712 NW2d 419 (2006), our Supreme Court found that “both the common law, as it was understood when the crime of murder was codified, and the clear language of MCL 750.316(1)(b) lead to the same conclusion – murder that occurs during the uninterrupted chain of events surrounding the commission of the predicate felony is committed ‘in the perpetration of’ that felony for felony-murder purposes.” Accordingly, the *Gillis* Court concluded that “the term ‘perpetration’ encompasses acts beyond the definitional elements of the predicate felony, to include those acts committed within the *res gestae* of that felony.” *Id.* at 121.

In this case, the prosecution presented evidence that defendant mistreated Ricky during the three-year period leading up to his death. Based on that evidence, the jury determined that defendant knowingly or intentionally caused serious physical or mental harm to Ricky and convicted her of first-degree child abuse occurring between July 2002 and July 2005. As the prosecution asserts, “defendant’s murder of Ricky occurred during this period of abuse and was the culmination thereof.” In determining whether defendant committed felony murder, the jury had to decide whether defendant killed Ricky in the perpetration of first-degree child abuse and it was, therefore, appropriate for the jury to consider the acts committed within the *res gestae* of the first-degree child abuse charge. See *Id.* Moreover, contrary to defendant’s allegation that the jury could have convicted her of felony murder based solely on “years of alleged abuse” as compared to a temporally related act that caused Ricky’s death, the court clearly instructed the jury that, as to the felony murder charge, it had to find that Ricky died as a result of a blow to the head. Accordingly, we find that the trial court’s instructions were proper and that they fairly presented the issues to the jury.

Defendant further argues that her trial counsel was ineffective for failing to object to the jury instructions. Considering, however, that the trial court’s jury instructions were proper, any objection to the instructions would have been futile. “Counsel is not ineffective for failing to make a futile objection.” *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, in light of the fact that the court gave standard jury instructions that fairly presented all of the issues, defendant cannot establish that an objection to the instructions or to the court’s responses to juror questions would have changed the outcome of the case. *Id.* Reversal is not required on defendant’s claim of ineffective assistance of counsel.

#### V. Dr. DeJong’s Expert Testimony

Next, defendant argues that the trial court erred in admitting Dr. DeJong's testimony about Ricky's cause of death. We disagree. We review unpreserved evidentiary claims for plain error affecting the defendant's substantial rights. *Carines, supra* at 763-764. Questions of law involved in the admission of evidence are reviewed de novo on appeal. *Dobek, supra* at 85.

Defendant argues that Dr. DeJong's testimony was improper because she based her opinion as to cause of death on Tim's testimony rather than scientific, technical, or specialized knowledge as required by MRE 702. MRE 702 governs the admissibility of expert testimony, stating:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In addition, MRE 703 states that the "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

The trial court admitted Dr. DeJong as an expert in forensic pathology and defendant does not dispute her expertise in that field. After reviewing Ricky's skeletal remains, Dr. DeJong concluded that his death was a homicide by unspecified means. She subsequently amended her conclusion as to cause of death, attributing Ricky's death to complications from a head injury. Dr. DeJong testified that in amending her conclusion, she took particular note of Tim's testimony that Ricky may have been hit in the head with a hammer and Ricky's condition in the days following. According to Dr. DeJong, if a person suffers a head injury without a skull fracture, there is generally a gradual decline in the person's ability to function and it may take hours or even days for the person to die. She also noted the forensics experts' testimony about the blood patterns found on Ricky's clothing and in the Hollands' house. Dr. DeJong further testified that it is a normal practice within her profession to consider all available information in determining the cause and manner of death. It is apparent that in amending her opinion as to cause of death, Dr. DeJong, a qualified expert, applied reliable principles and methods to facts in evidence. Therefore, we find that Dr. DeJong's testimony was properly admitted under MRE 702 and 703.

We are also unpersuaded by defendant's assertion that Dr. DeJong improperly vouched for Tim's credibility as a witness. It is improper for a witness to vouch for the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). But, Dr. DeJong did not indicate that Tim's testimony was true or that she believed Tim's testimony. Rather, Dr. DeJong based her conclusions as to cause of death on all of the applicable facts admitted into evidence, including Tim's testimony. Whether Tim's testimony was credible was for the jury to decide. See *Id.*

Alternatively, defendant argues that her trial counsel was ineffective for failing to object to Dr. DeJong's testimony. Considering, however, that the trial court committed no error in admitting the testimony, any objection by defense counsel would have been futile and counsel

cannot be found ineffective on that basis. *Thomas, supra* at 457. Moreover, in light of the overwhelming evidence establishing defendant's guilt, Tim's description of Ricky leading up to Ricky's death, and Dr. DeJong's testimony that the manner of death was homicide, defendant cannot establish that Dr. DeJong's testimony on cause of death affected the outcome of the case. *Id.* Accordingly, defendant's claim of ineffective assistance of counsel must fail.

## VI. Dr. Pomeranz's Expert Testimony

Finally, defendant argues that the trial court abused its discretion in admitting Dr. Pomeranz's testimony on MSBP under MRE 702 and 703. We disagree. We review the trial court's admission of the evidence for an abuse of discretion, *Bauder, supra* at 179, and questions of law de novo on appeal, *Dobek, supra* at 85.

At trial, Dr. Pomeranz testified about MSBP and its two components, pediatric condition falsification (PCF) and factitious disorder by proxy (FDP). According to her testimony, MSBP is a form of child abuse occurring when a parent or caregiver exaggerates, fabricates, or induces the symptoms of an illness or disability in the child. *Stedman's Medical Dictionary* (27th ed, 2000) defines MSBP as "a form of child maltreatment or abuse inflicted by a caretaker (usually the mother) with fabrications of symptoms and/or induction of signs of disease, leading to unnecessary investigations and interventions, with occasional serious health consequences, including death of the child." Dr. Pomeranz testified that PCF relates to the child victim, whereas FDP relates to the adult perpetrator and the motivation for the abuse.

During her testimony, Dr. Pomeranz did not indicate whether PCF existed in this case. Instead, the doctor described typical trends in PCF cases, stating that the perpetrator often escalates the fabricated symptoms over time and, if a professional disagrees with the perpetrator about the child's condition, the perpetrator often removes the child from the professional's care. Dr. Pomeranz said that, in this case, the jury should consider what defendant reported about Ricky's behavior compared to what others observed, as well as defendant's other related patterns of behavior.

On appeal, defendant argues that Dr. Pomeranz's testimony was improper because it did not qualify as the type of "'syndrome' evidence deemed admissible in cases like *People v Beckley*, [434 Mich 691; 456 NW2d 391 (1990)] and *People v Peterson*, [450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995)]." We disagree. In *Ackerman, supra* at 442, this Court found that the trial court properly admitted expert testimony on patterns of adult sex offenders in desensitizing child victims. In that case, Leo Niffeler, a clinical social worker and psychotherapist, testified that there is "a difference between an offender who is a stranger and one who has a relationship with a victim." *Id.* at 443. He described a typical "molestation scenario" and provided examples of desensitizing a child victim. *Id.* The *Ackerman* Court found that under *Peterson, supra*, an expert may testify about typical symptoms exhibited by victims of child abuse "for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *Ackerman, supra* at 444 (internal quotations, citation, and emphasis omitted). The *Ackerman* Court further found, however, that the Supreme Court's holding in *Peterson* does not preclude the admission of "expert testimony concerning typical patterns of behaviors by adults who perpetrate child sexual abuse." *Ackerman, supra* at 444.

Considering the general test for admitting expert testimony under MRE 702 and 703, we find that the trial court properly admitted Dr. Pomeranz's testimony on MSBP. The court recognized Dr. Pomeranz as an expert in emergency pediatric medicine, forensic pediatrics, and child abuse. The doctor testified that PCF is a pediatric medical diagnosis, that the state has adopted guidelines for diagnosing PCF, and that she teaches others how to recognize PCF. Moreover, Dr. Pomeranz's testimony assisted the jury in understanding the evidence and determining a fact in issue as required by MRE 702. "The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case." *Id.* at 445 (internal quotations and citations omitted). Limiting her testimony to facts in evidence, Dr. Pomeranz provided the jury with information on MSBP, a unique form of child abuse, and described the patterns of behavior typical in PCF cases. Furthermore, the evidence in this case demonstrated that defendant repeatedly reported Ricky's behavior as being more severe than what others observed, and when health care providers and educators disagreed with defendant about Ricky's condition, she removed him from their care. While the jurors in this case may not have been qualified to render a PCF diagnosis, whether defendant abused Ricky was a question for the trier of fact. *Lemmon, supra* at 637. Therefore, we find that the trial court properly exercised its discretion in admitting Dr. Pomeranz's testimony on MSBP.

Affirmed.

/s/ Alton T. Davis

/s/ Christopher M. Murray

/s/ Jane M. Beckering