

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELDRIC ANTHONY NORTHERN,

Defendant-Appellant.

UNPUBLISHED

July 26, 2007

No. 268809

Wayne Circuit Court

LC No. 05-009946-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), predicated on first-degree child abuse, MCL 750.136b(2), and sentenced to life imprisonment without parole. He appeals as of right. We affirm defendant's conviction and sentence but remand for correction of defendant's judgment of sentence to reflect 164 days of sentence credit.

Defendant's conviction arises from the death of a two-year-old child while in defendant's care. In a statement to the police, defendant admitted "popping" the child on her legs and "tossing" her, causing her to hit a hard, concrete-like end table. An autopsy revealed multiple signs of trauma to the child's head, chest, abdomen, and arm. The child's right wrist bones were fractured. There were two sites of head impact, one in the front and one in the back, and her brain and both eyes were swollen. There were also multiple bruises on the child's chest, and her liver was split in half, causing her abdominal cavity to completely fill with blood. The abdominal injury would have been caused by a "tremendous blow" to the abdomen, and the child's injuries were inconsistent with defendant's version of events or with a fall from a porch the previous day.

On appeal, defendant first argues that the trial court erred by failing to instruct the jury on second-degree child abuse as a lesser included offense of the predicate felony offense of first-degree child abuse. However, defendant did not request an instruction on second-degree child abuse at trial, and therefore, the trial court's failure to give that instruction cannot form the basis for setting aside the jury's verdict. MCL 768.29. Additionally, because defense counsel affirmatively expressed approval of the jury instructions, this issue is waived on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (a defendant's affirmative statement indicating his satisfaction with the jury instructions constitutes express approval of the instructions and waives review on appeal).

Defendant also asserts that he was denied the effective assistance of counsel by counsel's failure to request the second-degree child abuse instruction. To prevail on this claim, defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

At trial, the parties agreed that defendant was charged with child abuse only as an element of the felony-murder charge. Defendant cites no authority for the proposition that a lesser included offense instruction is proper with respect to an offense that serves only as the predicate offense element for felony murder. In any event, instruction on a necessarily included lesser offense is required only if the lesser offense is supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 533, 541; 664 NW2d 685 (2003); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). In this case, considering the nature, number, and severity of the two-year-old child's injuries, there was no rational view of the evidence that would support a conclusion that the child was subject to abuse that could only be characterized as second-degree, rather than first-degree child abuse. MCL 750.136b(2) and (3). Therefore, an instruction on second-degree child abuse was not warranted and defense counsel was not ineffective for failing to request such an instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Further, the jury was given the option of convicting defendant of second-degree murder as a lesser-included offense of felony-murder, based on a conclusion that defendant did not commit first-degree child abuse. The jury did not do so. Therefore, any failure to instruct the jury on second-degree child abuse was harmless, see, *Cornell, supra* at 365 n 19; *People v Wilson*, 265 Mich App 386, 395-396; 695 NW2d 351 (2005), and, as a result, defendant cannot establish that the absence of such an instruction affected the outcome of the proceedings. Thus, defendant's claim that he received ineffective assistance of counsel lacks merit. *Toma, supra* at 302-303.

Defendant next argues that the trial court erred in allowing the testimony of the child's oncologist, who testified that the child's cancer was in remission at the time she died and did not contribute to her death. Defendant concedes that the testimony was relevant, but argues that it should have been excluded under MRE 403, because it had little probative value, was needlessly cumulative, and was unduly prejudicial because it would evoke sympathy for the victim.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In his statement to the police, defendant mentioned that the child had cancer and only one kidney, and he claimed that he found her crying, shaking, and gasping for breath. In order to convict defendant of felony murder, the prosecution was required to prove that the child died from injuries inflicted by defendant, and not because of some other medical causes. Although the pathologist testified that cancer did not contribute to the child's death, the pathologist could not testify, as the pediatric oncologist did, regarding the effect of the child's cancer treatment on the state of the child's health at the time of her death. Further, the trial court took steps to prevent any undue prejudice by precluding the witness from testifying about a previous head injury, unrelated to the child's cancer treatment, that the witness suspected was caused by child abuse. The trial court also instructed the jury that

there was no place for sympathy in its deliberations. Under the circumstances, the trial court did not abuse its discretion in finding that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice.

Finally, defendant argues, and the prosecutor concedes, that defendant is entitled to 164 days of sentence credit for time served in jail before sentencing. MCL 769.11b. Accordingly, we remand for the limited purpose of correcting defendant's judgment of sentence to reflect an award of 164 days of sentence credit.

We affirm and remand for correction of the judgment of sentence to reflect 164 days of sentence credit. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood