

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 15, 2014

v

PEDRO ANTONIO NAVARRO,  
Defendant-Appellant.

No. 312879  
Kent Circuit Court  
LC No. 12-002805-FC

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Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316(1)(b), and the trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to life in prison without the possibility of parole. Defendant appeals as of right. We affirm.

The victim in this case, Aiyana Cisneros, was born on May 28, 2003, and was two years of age when she died on July 19, 2005. Her death was caused by “blunt force injuries” or “blows” to her chest and abdomen that were caused by the application of a “significant amount of lethal force.” Aiyana’s mother, Samantha Winkler, pleaded guilty to second-degree murder in November 2006 for failure to protect or seek medical treatment with regard to Aiyana’s death. Defendant was Samantha’s boyfriend and resided with Samantha and Aiyana at the time of Aiyana’s death. The prosecution’s theory of the case was that defendant, during the commission of first-degree child abuse, MCL 750.136b(2), inflicted the injuries that caused Aiyana’s death.

On appeal, defendant first argues that a letter that he wrote to his mother about his then girlfriend, Chyann Gonzalez, was irrelevant and wrongfully admitted at trial. The trial court admitted the letter because defendant expressed in the letter his feelings concerning Gonzalez’s cooperation with the investigation into Aiyana’s death. “A trial court’s decision to admit evidence is reviewed for an abuse of discretion.” *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). “Because an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one.” *Id.* at 194. “When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo.” *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

“Evidence that a defendant made efforts to influence an adverse witness is relevant if it shows consciousness of guilt.” *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743

(2010), citing *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Likewise, a defendant's attempt to procure perjured testimony "may be considered by the jury as evidence of guilt." *People v Lytal*, 119 Mich App 562, 574; 326 NW2d 559 (1982). This evidence shows "consciousness of a weak case." *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973). Specifically, the inference from such evidence is "that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit." *Lytal*, 119 Mich App at 575, quoting *Hooper*, 50 Mich App at 199.

In the letter, defendant told his mother not to give Gonzalez a car seat because he saw a detective's telephone number in Gonzalez's telephone. The letter indicated that Gonzalez was "supposed to be there for" him and that he did not know "if she'd been talking to [officers] or not," but defendant felt that it was wrong for her to have the detective's telephone number. Defendant also twice directed his mother to tell Gonzalez about his displeasure that she had the detective's telephone number. Even though defendant did not expressly threaten Gonzalez in the letter, the letter supports an inference that the defendant knew Gonzalez could provide information that would support his involvement in Aiyana's death, and, therefore, it demonstrated consciousness of guilt. See *Lytal*, 119 Mich App at 576. Accordingly, the trial court did not abuse its discretion in admitting the letter. *Smith*, 282 Mich App at 194.

Next, defendant argues that the trial court abused its discretion in admitting several autopsy photographs because prejudicial effect of the evidence significantly outweighed the probative value of the evidence. Photographic evidence is generally admissible if it is relevant, MRE 401, and not unduly prejudicial, MRE 403. *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009), citing *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). Specifically, MRE 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal." *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). "However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *Id.*

Defendant was charged with felony murder, the elements of which 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); MCL 750.316(1)(b). First-degree child abuse is an enumerated felony, MCL 750.316(1)(b), and proscribes in relevant part a person from knowingly or intentionally causing serious physical harm to a child, MCL 750.136b(2). Elements of the charged offense are always "at issue," and, thus, relevant under MRE 401. See *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995). Here, the photographs demonstrated that Aiyana's

body was covered in bruising, that she had several broken bones, and that she suffered injuries to multiple internal organs, including her liver and kidneys. “[E]vidence of injury is admissible to show intent to kill,” and the fact that Aiyana suffered from such a number of injuries made it more probable that the acts that caused her death were intentional, not accidental. *Id.* at 71.

Likewise, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. The evidence of record indicates that the photographs presented an accurate factual representation of the injuries suffered by Aiyana. Although some of the photographs were graphic, “[g]ruesomeness alone need not cause exclusion.” *Mills*, 450 Mich at 76. Moreover, “if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.” *Id.* at 77 (quotation omitted). It was important for the jury to know the nature and extent of Aiyana’s injuries and the record does not suggest that the prosecution introduced the photographs solely to shock or inflame the jury. These photographs had significant probative force and the trial court did not abuse its discretion in admitting the photographs.

Defendant argues that the prosecution could have utilized an autopsy diagram instead of admitting the photographs, and that the photographs were redundant in light of the medical examiner’s testimony and the fact that defendant was not challenging the manner of death. However, even where the defendant stipulates to a fact, it “does not alter the prosecution’s burden to prove every element of a crime beyond a reasonable doubt.” *Mills*, 450 Mich at 69 n 5. Further, “[t]he people are not required to present their case on any theory of alternative proofs.” *Id.* at 70 n 6, quoting *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). Finally, with regard to defendant’s arguments concerning the relevancy of the photographs depicting injuries to Aiyana’s vaginal and anal areas, we note that these photographs, which were exhibits 11 and 46, were never admitted at trial or presented to the jury; thus, defendant’s argument is without merit.

Next, while defendant concedes that the evidence was sufficient to prove that Aiyana’s death was the result of a homicide, he argues that there was insufficient evidence that he was the perpetrator of the abuse that resulted in Aiyana’s death. Identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). “[T]his Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). But, “[c]ircumstantial evidence and reasonable inferences arising therefrom may [also] be sufficient to prove the elements of a crime.” *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

Here, evidence was presented at trial that Aiyana did not want to go into Samantha’s home on two occasions while defendant was present. This supports the inference that Aiyana was fearful of defendant. *Nowack*, 462 Mich at 400. Samantha also testified that, a couple of nights before Aiyana died, defendant grabbed Aiyana by the arms, took her up to her room while she was crying, and told Samantha not to go check on her. When Samantha finally went to check on Aiyana, she was on the floor in a fetal position and her face was purple. After that

incident, Aiyana stopped eating, vomited several times over the next 48 hours and looked visibly ill. Several people asked if Aiyana should be taken to the hospital. The forensic pathologist who performed the autopsy testified that Aiyana had liver injuries that were one or two days old at the time of her death. Samantha further testified that she woke up on July 19, 2005, to find that defendant was already awake and Aiyana was not breathing. Further, Gonzalez testified about an incident where defendant told her that one day Aiyana was sick, crying, and having a gag reflex and defendant “hit” her or “spanked” her. He then put Aiyana to bed and the next day she was not breathing. A rational juror could infer from this testimony that Aiyana suffered physical abuse by defendant in the 48 hours leading up to her death and that this abuse ultimately caused her death. *Nowack*, 462 Mich at 400; *Plummer*, 229 Mich App at 299. Defendant and Samantha were the only two people in the home with Aiyana when she died, and both Samantha and Gonzalez testified that defendant hit Aiyana. Although defendant suggests that Samantha was not a credible witness because she pleaded guilty to second-degree murder with regard to the incident, “[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court.” *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). Additionally, even if there was evidence to support that Samantha perpetrated abuse against Aiyana, “[t]o establish that the evidence presented was sufficient to support the defendant’s conviction, ‘the prosecutor need not negate every reasonable theory consistent with innocence.’” *Id.* at 534, quoting *Nowack*, 462 Mich at 400. In sum, contrary to defendant’s argument, a rational juror could have found that the “identity” element was proved beyond a reasonable doubt. *Oliphant*, 399 Mich at 489.

Defendant also raises additional issues in his standard 4 brief. First, defendant argues that the trial court abused its discretion in allowing a foster care caseworker to testify about a statement that defendant made concerning his inability to calm himself after he became upset. Defendant asserts that this line of questioning was improper because it was presented to “falsify evidence before the jury” and “clearly violated MRE 404(b).” However, we find that defendant waived this issue because defense counsel expressly acquiesced to this line of questioning. See *People v McKay*, 474 Mich 967, 967; 706 NW2d 832 (2005); *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000). Moreover, even if we were to reach the merits of this issue, we would find no error requiring reversal. First, the record reveals that the caseworker did not testify about any specific incident where defendant failed to control his temper; thus MRE 404(b) is inapplicable. Further, there is no evidence of record that the caseworker testified falsely. Defendant bears the “burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal [is] predicated.” *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). The factual record does not support defendant’s contentions and, thus, his arguments are without merit.

Finally, defendant alleges several instances of ineffective assistance of counsel. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[A] trial court’s findings of fact are reviewed for clear error.” *Id.* Constitutional questions are

reviewed de novo. *Id.* Where, as here, no *Ginther*<sup>1</sup> hearing was held, review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). See also *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient.” *Strickland*, 466 US at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690; *Carbin*, 463 Mich at 600. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 US at 687; *Carbin*, 463 Mich at 600. Defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first argues that defense counsel was ineffective for failing to challenge a search warrant issued to search defendant’s residence and for failing to call any witnesses to challenge the warrant or to otherwise testify on defendant’s behalf. However, other than defendant’s cursory argument presented in his brief, defendant points to no evidence suggesting that a challenge could have been made to the search warrant or that witnesses existed that would have assisted in his defense and that such witnesses should have been called. In fact, the record does not contain the search warrant or any evidence with regard to how the search warrant was obtained. Defendant also completely fails to cite any authority in support of his positions. Thus, the issues are abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) (“The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.”). “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.” *People v Hoag*, 460 Mich 1, 6; 593 NW2d 57 (1999). With regard to his argument, defendant merely sets forth declarative statements without carrying his burden of establishing the factual predicate of his ineffective assistance of counsel claims. Additionally, although defense counsel has a duty to “prepar[e], investigat[e], and present[ ] all substantial defenses,” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), “[a]n attorney’s decision whether to retain witnesses . . . is a matter of trial strategy.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). “In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense.” *Id.* (quotation marks and citation omitted). Here, defendant has not alleged that there were any witnesses who would have aided or corroborated his defense. Furthermore, defendant has not articulated any possible other defense that his attorney should have explored. Thus, defendant has failed to overcome the strong presumption that counsel’s performance constituted sound trial strategy. *Strickland*, 466 US at 690; *Carbin*, 463 Mich at 600. Accordingly, defendant has not established that his counsel’s performance was objectively unreasonable. *Pickens*, 446 Mich at 338. Thus, his claim fails. *Id.*

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next asserts that his trial counsel was ineffective because he failed to sufficiently cross-examine witnesses. However, the record does not support defendant's assertion and, therefore, defendant has also failed to "establish the factual predicate for his claim of ineffective assistance of counsel" with regard to this argument. *Hoag*, 460 Mich at 6. Moreover, with regard to defendant's argument that defense counsel should have cross-examined the caseworker because she was falsifying evidence, there is nothing in the record to establish that false testimony was presented. Defense counsel is not required to take frivolous courses of action. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Therefore, defendant's arguments with regard to his ineffective assistance of counsel claims are without merit.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad  
/s/ William C. Whitbeck