

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT EDWARD CROSSLEY,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 224772

Berrien Circuit Court

LC No. 99-402195-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, for the death of two-year-old Abryanna Grant. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment. He appeals as of right. We affirm defendant's conviction but remand for resentencing.

In January 1999, Tammarah Leonard and her daughter, the victim, moved into an apartment with defendant. Thereafter, other people began noticing unexplained bruises on the victim. This eventually prompted the victim's grandfather to call protective services in February 1999. On March 17, 1999, while protective services was in the process of investigating, the victim was hospitalized after suffering an apparent seizure. Medical personnel at the hospital did not determine the exact cause of the seizure but believed it was related to fever.

Both Erica Thompson and Leonard testified that on March 4, 1999, the victim was forcefully shaken by defendant. After that time, the victim was constantly tired and suffered from headaches. It was also after that time that the victim suffered the apparent seizure and was hospitalized. Leonard admitted that she did not advise hospital personnel about the shaking incident. At trial, it was opined that the seizure on March 17, 1999, was secondary to a brain injury, which could have been caused by shaking. There was also testimony that approximately two weeks before the victim's death, a neighbor witnessed defendant kick the victim in the bottom and hit her on the back of her head. The neighbor testified that while defendant's behavior was not appropriate, it did not appear that the victim was injured.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On April 5, 1999, the victim collapsed, and she subsequently died in the early hours of April 6. Leonard testified that, before the victim collapsed, defendant shook the victim and hit her on the head. Leonard believed that defendant hit the victim three or four times, very hard, on the head. Leonard immediately left the apartment with the victim, who either fell or suffered another seizure while on the steps outside of the apartment. Medical evidence confirmed that the injuries suffered by the victim were caused by both a violent shaking and by severe blows to the victim's head. A medical doctor documented that the victim had thirty-five separate bruises. Ten of the bruises, including the two worst, were found directly on the victim's head. One of the largest bruises was on the back of the head. The majority of the head bruises occurred just before, or within very close proximity to, the victim's collapse. They were caused by force being applied to the head. A hand or fist could have been used. Testimony established that a tremendous blow is necessary to cause a fatal head injury, but an adult using all of his strength could cause such an injury.¹ A scan of the victim's brain revealed old and new areas of bleeding. The bones of the skull were widened, which can be caused only by a very significant force. The victim also suffered retinal hemorrhaging in both eyes. The blood was vitreous, which indicated a severe trauma or force to the head and neck. The "whiplash" injuries to the brain were caused by violent, repetitive shaking. One physician indicated that fairly extreme force was used to achieve the injuries. Shortly after receiving the injuries, the victim would have become unconscious and possibly had a seizure.

I

Defendant argues that the evidence was insufficient to support his conviction for second-degree murder. Specifically, he contends that while the evidence portrayed him as a harsh disciplinarian, it did not establish his intent to kill or to inflict great bodily harm. Defendant argues that he did not know that shaking the victim would cause great bodily harm or death and thus, at most, his actions were grossly negligent. He further claims that, because he did not have a subjective awareness of the magnitude of risk, i.e., knowledge that grievous harm was very likely to result, he could not be convicted.

In reviewing the sufficiency of the evidence, we "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Second-degree murder is a general intent crime. *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). There are four elements of the crime: (1) a death, (2) caused by an act of defendant, (3) with malice, and (4) without justification or excuse. *People v Kris Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). Defendant contests the sufficiency of the evidence only on the element of malice. That element requires proof that defendant had an intent

¹ Leonard testified that earlier on the day at issue, she spanked the victim with a belt. Leonard denied striking the victim on the head.

to kill, an intent to cause great bodily harm, or an intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* Malice may be inferred from evidence that defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *Id.*, citation omitted. The offense “does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of the life-endangering consequences.” *Id.*, citation omitted. In other words, “[b]ecause depraved-heart murder is a general intent crime, the accused need not actually intend the harmful result.” *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998). Only in an unusual case should there be a determination of whether the defendant was subjectively aware of the risk created by his conduct. *Id.* at 464-465.

[M]ost depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue – where the defendant is more absent-minded, stupid or intoxicated than the reasonable man. [*Id.* at 465, n 25 (alteration in original).]

The evidence in this case, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find that defendant intentionally set in motion a force likely to cause great bodily harm. Defendant became angry at the victim, apparently for playing with her food. He forcefully shook the victim, who weighed approximately twenty-five pounds. Medical evidence established that the victim was shaken with violent and tremendous force, resulting in retinal hemorrhaging and injury to the brain. The blows to the victim’s head were also tremendous and numerous. The victim had numerous, very fresh bruises on her head when she arrived at the hospital. Further, Stephen Cohle, who performed the autopsy, opined that death was caused by a combination of both the shaking injuries and the blunt force injuries. This evidence was sufficient to support an inference that defendant had the requisite intent to inflict great bodily harm. This is not an unusual case, which necessitates a determination of whether defendant was subjectively aware of the risk his conduct posed.

II

Defendant next argues that the trial court failed to correctly instruct the jury on the issue of intent after the jury asked for clarification. We disagree.

This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). “The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them.” *Id.* Even if instructions are imperfect, there is no error if the instructions fairly present the issues to be tried and sufficiently protect the defendant’s rights. *Id.*

In this case, the trial court instructed the jury in accordance with CJI2d 16.5, which sets forth the elements of second-degree murder. Defendant did not object to the instruction. After deliberations began, the jury sent a note to the trial court, which was written on a printed copy of CJI2d 16.5. Paragraph 3 of the instruction provides:

(3) Second, that the defendant had one of these three states of mind: he intended to kill, *or he intended to do great bodily harm to Abryanna Grant*, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.

The jury underlined the italicized portion of the instruction, and it inquired whether the underlined portion stood alone or whether it must be read in conjunction with the phrase “knowing that death or such harm would be the likely result of his action.” Defendant advocated that the two phrases should be read together and that the element of intent to do great bodily harm included an element of knowing that defendant’s actions would result in great bodily harm. The trial court disagreed, finding that the language “knowing that death or such harm would be the likely result of his actions” related only to the third, disjunctive alternative. The trial court instructed the jury that the three states of mind were alternatives and that any one of those states of mind would satisfy the requirements for second-degree murder. It then reread CJI2d 16.5(3).

On appeal, defendant complains that the trial court erred when it failed to clarify for the jury that he had to be subjectively aware that his conduct could cause grievous harm. He contends that the mere fact that he intentionally shook the child is meaningless if he did not have knowledge that death or great bodily harm was almost certain to result. Defendant’s position has no merit. There are three possible intents that may suffice to establish the crime of second-degree murder. *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). The intent to inflict great bodily harm is distinct from the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result. See *People v Nowack*, 462 Mich 392, 408; 614 NW2d 78 (2000), citing *People v Aaron*, 409 Mich 672, 714; 299 NW2d 304 (1980). There is no requirement that, in order to find intent to inflict great bodily harm, the jury must determine that the defendant was subjectively aware or knew that his actions would likely result in death or great bodily harm. Indeed, as previously discussed, defendant did not actually have to intend the harmful result if he set in motion a force likely to cause such harm. *Goecke, supra*; *Aldrich, supra*. The standard jury instruction, CJI2d 16.5, was correct and adequate. It fairly presented the issue of intent and sufficiently protected defendant’s rights. *Daniel, supra*. There was no error.

III

Defendant next argues that he was denied a fair trial by the erroneous admission of similar-acts evidence. We review this preserved evidentiary issue for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) provides:

(1) 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 this case.

MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). Relevant, other-acts evidence does not violate MRE 404(b) unless offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v Katt*, 248 Mich App 282, 304; 639 NW2d 815 (2001), lv gtd in part on other grounds ___ Mich ___; 649 NW2d 72 (2002). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad acts evidence:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Crawford, supra* at 387. With regard to relevance, the offered evidence must truly “be probative of something *other* than the defendant’s propensity to commit the crime.” *Id.* at 390, emphasis in original. “If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded” *Id.* Where the evidence is relevant, “admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction” *Id.* at 385.

In this case, the trial court admitted evidence of three other bad acts: (1) that defendant shook the victim on March 4, 1999; (2) that a neighbor saw defendant kick and push the victim approximately two weeks before her death; and (3) that defendant physically abused Leonard. Defendant concedes that the admission of evidence that he physically abused Leonard was justified to explain why Leonard waited so long to implicate defendant. Given defendant’s concession and his lack of argument with respect to the admissibility of that evidence, he has abandoned any argument that its admission was an abuse of discretion. With respect to the other two acts, we find no abuse of discretion. The evidence was not offered to show that defendant was a bad man or had a bad character. The prosecution identified several proper purposes for the admission of the evidence, including that it was relevant to defendant’s intent, absence of mistake, knowledge, pattern of extreme discipline, and possible motive.

The evidence was also logically relevant. Defendant’s defense was to argue that he did not know that his actions could cause death or grave bodily harm. Defendant also suggested that Leonard may have inflicted the injuries. The evidence of the prior shaking and the prior physical pushing and kicking was logically relevant and highly probative to support the element of intent and to rebut the asserted defenses. Other instances when a defendant deliberately injures a particular child are probative of malice. *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1993). Specifically, they are probative of defendant’s intent to kill or cause great bodily harm, or of defendant’s willful and wanton disregard for the natural consequences of the actions. *Id.* In addition, the other instances of defendant’s abuse against the particular child “are also probative of the absence of mistake or accident.” *Id.* at 452-453. Further, evidence that defendant previously shook the victim and that he previously kicked the victim and hit or pushed her on the back of her head demonstrated that defendant had a common plan or scheme of physically abusing the victim. *People v Sabin (After Remand)*, 463 Mich 43, 65-66; 614 NW2d

888 (2000). We also note that the testimony was relevant to explain the medical findings, which showed that the victim had evidence of older bleeding on the brain at the time of her death.

While the other-acts evidence was prejudicial, as is the case with all bad-acts evidence, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Moreover, it was essential to include the prior, known acts of violence against the child to give the jury an intelligible presentation of the full context in which the disputed event took place. *People v Sholl*, 453 Mich 730, 740-741; 556 NW2d 851 (1996). Further, the trial court gave a limiting instruction with respect to the testimony at issue. Therefore, we find no abuse of discretion in the admission of the evidence.

IV

Defendant next argues that the prosecutor improperly appealed to the sympathy of the jury. Defendant specifically challenges one passage from the prosecutor's opening statement. Defendant failed to object to the comments. To avoid forfeiture of this unpreserved claim of prosecutorial misconduct, defendant must establish a plain error, which was outcome determinative. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). There is no error if the prejudicial effect of an improper comment could have been cured by a timely instruction. *Id.* In this case, the prosecutor's opening statement included a passage, which was emotional and appealed to the juror's sympathy. Appeals to the sympathy of the jury constitute improper argument. *Id.* at 591. However, the challenged comments were isolated and did not prevail throughout trial. They were confined to the beginning of the opening statement. Moreover, a timely curative instruction would have cured any prejudice. Further, the trial court later instructed the jury that it must not let sympathy or prejudice influence its decision. The trial court also instructed that the lawyers' statements and arguments were not evidence. There was no plain error requiring reversal.

We are aware that defendant also argues that the prosecutor improperly injected his personal opinion during closing argument. This argument is not properly presented to this Court because defendant failed to raise this challenge in his statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Regardless, the prosecutor's comment constituted a reasonable inference gleaned from the evidence. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

V

Defendant next argues that the trial court should have sua sponte instructed the jury about how to evaluate the accomplice testimony given by Leonard. An accomplice credibility instruction would have warned the jury to consider Leonard's testimony more cautiously than that of an ordinary witness and would have provided guidelines to follow when assessing her credibility. See CJI2d 5.6. Defendant concedes that he never requested the instruction at issue. Thus, the issue is not preserved.

Unpreserved claims of instructional error are reviewed under the plain error rule. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000), citing *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). We find no plain error. First, in making his argument, defendant presumes that an accomplice instruction was warranted in this case. This presumption

is not supported by the record or by any authority, and defendant fails to explain why the instruction is applicable. An accomplice is a “person who knowingly and willingly helps or cooperates with someone else in committing a crime.” *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). The evidence in this case does not support a finding that Leonard knowingly and willingly helped or cooperated in defendant’s crime of murder. Leonard was charged with involuntary manslaughter on a theory that she failed to protect the victim from defendant’s abuse, not on a theory that she assisted or cooperated in the victim’s murder.

Even if the accomplice instruction applied, we find no error in the trial court’s failure to give it. “[A] judge should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice’s credibility have not been plainly presented to the jury.” *People v Reed*, 453 Mich 685, 693; 556 NW2d 858 (1996). In this case, the problems with Leonard’s credibility were plainly presented to the jury. The prosecutor explored the deal given to Leonard in exchange for her testimony. In addition, defense counsel elicited that Leonard initially took responsibility for the crime and never implicated defendant until later in the investigation. We also note that, while the accomplice instruction was not given, the jury was instructed that it could consider Leonard’s deal with the prosecutor when considering her credibility.

Defendant also argues, in the alternative, that his counsel was ineffective for failing to request the instruction at issue. This argument is not properly presented to this Court because it is not raised in the statement of questions presented. *Miller, supra*. Moreover, defendant cannot meet his burden of proving ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s error, there was a reasonable probability that the result of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In this case, defendant cannot establish that his counsel’s failure to request the accomplice credibility instruction fell below an objective standard of reasonableness. It is likely that the instruction was not requested because neither party treated Leonard as an accomplice. More importantly, even if Leonard were an accomplice, the problems with her credibility were explored and an instruction was given. Defendant has not demonstrated that, but for the alleged error, there is a reasonable probability he would have been acquitted.

VI

Defendant argues that he is entitled to resentencing because the sentencing guidelines were misscored and because his sentence was based on inaccurate information that he was a fourth-felony offender.

The prosecutor concedes defendant’s claim that offense variable 3, MCL 777.33, was improperly scored at 100 points and that this resulted in a higher sentencing grid. We note, however, that the scoring error is not preserved for our review because it was not raised at sentencing, in a proper motion for resentencing, or in a proper motion for remand filed in this Court. MCL 769.34(10).² Nevertheless, because defendant argues that his trial counsel was

² Defendant filed an untimely motion to remand in this Court, which was denied. MCR 7.211(C).

ineffective for failing to challenge the scoring of offense variable 3, we consider the claim in that context. Under the circumstances, we agree with the prosecutor that offense variable 3 was improperly scored. The variable should not be scored when the sentencing offense is homicide. MCL 777.33(2)(b). The improper scoring of that variable raised the guidelines grid and defendant was sentenced at the very highest end of the improper guidelines grid. Thus, we conclude that defendant has demonstrated that his counsel was ineffective with respect to his failure to object to the scoring of offense variable 3. *Stanaway, supra*. We remand for resentencing.³

Defendant's argument that he was sentenced on the basis of inaccurate information is not properly preserved for our review. MCL 769.34(10). Further, we reject defendant's alternate argument that counsel was ineffective for failing to object to information that he was a fourth-felony offender. Defendant's appellate counsel speculates that defendant's two prior cocaine convictions were part of a single transaction and, therefore, constitute one conviction for purposes of determining defendant's habitual offender status. We disagree. At arraignment, defendant informed the trial court that the two 1996 cocaine convictions were separate. Further, the presentence investigation report notes that the dates of the cocaine offenses were March 21, 1996, and April 2, 1996. Thus, the record indicates that they were separate offenses even if defendant was sentenced for both offenses on the same date. In addition to the two separate cocaine convictions, defendant had one second-degree child abuse conviction. Thus, he was properly treated as a fourth-felony offender. Defendant has not demonstrated that counsel was ineffective for failing to make a meritless objection to the information that he was a fourth-felony offender. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Finally, defendant argues that his life sentence constitutes cruel and unusual punishment and an abuse of discretion by the trial court. The sentence was within the improperly scored guidelines range. Because the guidelines were improperly scored, however, we remand for resentencing. For that reason, it is not necessary to address defendant's claims that his sentence was cruel and unusual and an abuse of discretion.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof

³ The prosecutor is in agreement that the case should be remanded for resentencing in light of the scoring error.