

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIKOLE MICHELLE FREDERICK,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 255236

Oakland Circuit Court

LC No. 03-192530-FC

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b), and sentenced to life imprisonment without parole.¹ She appeals as of right. We affirm.

I. Basic Facts

Defendant's conviction arises from the tragic beating death of her two-year-old stepdaughter, Ann Marie Shawley. The child died from blunt trauma injuries to her head, and also sustained numerous burns, bruises, scrapes, abrasions, and retinal bleeding, and clumps of her hair were torn out.

II. Double Jeopardy

Defendant first argues that her constitutional double jeopardy rights were violated because she was charged with four separate offenses (1) first-degree premeditated murder, (2) first-degree felony murder, (3) second-degree murder, and (4) manslaughter, arising from a single death. We disagree.

¹ The jury also found defendant guilty of second-degree murder, MCL 750.317, as a lesser offense to an additional alternative charge of first-degree premeditated murder. At sentencing, the prosecutor elected to proceed on a single conviction of first-degree felony murder. The judgment of sentence denotes only a single conviction and sentence for first-degree felony murder.

A. Standard of Review

A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

B. Analysis

The double jeopardy protections, US Const, Am V; Const 1963, art 1, § 15, protect against “a second prosecution for the same offense after acquittal,” “a second prosecution for the same offense after conviction,” and “against multiple punishments for the same offense.” *Nutt*, supra at 574. These protections were not disregarded in this case. Where, as here, “there is evidence on each of several alternative theories, the prosecution need make no election until after the jury returns its verdict.” *People v Nicolaidis*, 148 Mich App 100, 103; 383 NW2d 620 (1985). Although it would have been more appropriate to bring a single charge of murder in a single count, listing under it the alternative theories, any error in the manner in which defendant was charged was harmless because defendant was actually sentenced for only one conviction, first-degree felony murder, which is all that was necessary to protect defendant’s rights. *People v Herndon*, 246 Mich App 371, 391-392; 633 NW2d 376 (2001), citing *Nicolaidis*, supra, and *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998).

III. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to support the charge of first-degree premeditated murder, or to establish first-degree child abuse, the underlying felony for first-degree felony murder. We disagree.

A. Standard of Review

In considering this issue, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury’s verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

B. Analysis

Initially, because the jury found defendant guilty of second-degree murder as a lesser offense to the first-degree premeditated murder charge, and because the finding of guilt of second-degree murder was later rescinded, any evidentiary deficiency with respect to the original first-degree murder charge is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Regardless, there was more than ample evidence on all the elements of the charged crimes.

First, there was sufficient evidence to establish defendant’s identity as the person who killed the child. Defendant admitted to the police that she was with the child during the night before Ann Marie was found unconscious on the living room floor, and that she got up with Ann Marie at about midnight. She also admitted that her husband, John Shawley, never got out of

bed. Defendant's daughter told the police that defendant "smacked" Ann Marie and would not stop hitting her. One of defendant's fingerprints was found on the outside, non-adhesive portion, of a roll of duct tape. Clumps of Ann Marie's hair, with roots attached, were embedded in pieces of tape found in the trash, and Ann Marie's blood was found on the inside cardboard liner of the tape roll. Defendant slept on the couch next to the living room heating grate where Ann Marie's unconscious body was found, and her blood was found on the grate and on the carpet surrounding it. Defendant admitted pushing Ann Marie so that she struck her head on the toilet. Clumps of Ann Marie's hair, including one that was bloodstained, were found on a toilet seat. Drawing all reasonable inferences and making credibility choices in support of the jury's verdict, a rational trier of fact could have found beyond a reasonable doubt that defendant was the person who injured and killed Ann Marie.

There was also sufficient evidence of premeditation and deliberation. To support a finding of first-degree premeditated murder, there must be "[s]ome time span between [the] initial homicidal intent and ultimate action[.]" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.* Defendant argued below that the evidence supported a finding that the injuries occurred in a "snap moment," without time for premeditation or deliberation. We disagree. The medical examiner testified that, although the injuries occurred within the same general time frame, it would have taken a "period of time" to inflict all of them on Ann Marie, because there were so many different types of injuries, including burns, scrapes, blunt trauma, pulled hair, and evidence that her head was shaken. Burn patterns on Ann Marie's thighs, buttocks, and external genitalia suggested that the child was positioned on a hot heating grate. There were other second-degree burns on her chin, foot, arm, and chest, some of which appeared consistent with application of a hot lighter and a cigarette. Each injury was horrific in itself, and each was inflicted separately. We agree with the trial court that the evidence showed that there was "more than ample opportunity to take a second look." Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that premeditation and deliberation were proven beyond a reasonable doubt.

There was also sufficient evidence to support a finding of first-degree child abuse. "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). The evidence in this case showed that Ann Marie sustained numerous serious injuries to several areas of her body that caused her death. Further, from the number and nature of the injuries, a rational trier of fact could reasonably conclude beyond a reasonable doubt that the injuries were knowingly or intentionally inflicted.

IV. Involuntary Manslaughter Jury Instruction

Defendant last argues that the trial court erred by refusing to instruct the jury on involuntary manslaughter. We disagree.

A. Standard of Review

This Court reviews de novo preserved claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem'd 467 Mich 888; 653 NW2d 406 (2002). In addition, harmless error analysis is applicable to instructional errors involving necessarily included lesser-

offenses. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). The instant case involves nonconstitutional error that has been preserved by defendant's request for the lesser included instruction. *Id.* at 356.

A preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. Stated another way, the analysis focuses on whether the error undermined reliability in the verdict. Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included [] instruction undermined reliability in the verdict. [*Cornell, supra* at 363-364 (internal citations omitted).]

B. Analysis

“Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). Although the trial court incorrectly stated that involuntary manslaughter is not a necessarily lesser included offense of murder, we conclude that an instruction on that offense was not required because it was not supported by a rational view of the evidence. *Id.* at 541. “[I]t is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction.” *Cornell, supra* at 365. [T]his ‘substantial evidence’ standard for determining whether reversal is required on the basis of instructional error differs from the standard for determining whether the error occurred,” “because more than an evidentiary dispute . . . is required to reverse a conviction; pursuant to MCL 769.26, the ‘entire cause’ must be surveyed.” *Id.* at 365-366 (emphasis in original). Defendant relies on evidence that she inadvertently pushed the child and caused her to hit her head on a toilet seat as support for an involuntary manslaughter instruction. This single admission, however, is not substantial in light of the bleeding on both sides of Ann Marie’s brain that resulted from at least three blunt trauma injuries, together with numerous other injuries sustained by Ann Marie, from different instrumentalities. Therefore, the trial court properly refused to instruct the jury on involuntary manslaughter.

Furthermore, defendant fails to demonstrate that it is more probable than not that the failure to give an involuntary manslaughter instruction undermined reliability in the verdict. By definition involuntary manslaughter is unintentional. *Mendoza, supra* at 536. Here, the trial court instructed the jury that, if defendant “did not mean to kill” or “did not realize that what she did would probably cause a death or cause great bodily harm,” she was not guilty of murder. The court also instructed the jury that, if defendant “did not mean to kill or do great bodily harm, or knowingly put in motion a force that is likely to cause death or great bodily harm, then she is not guilty of second-degree murder.” As the prosecutor argues, if the jury had concluded that defendant did not act with an intent to harm, it was required to find her not guilty of both first-

degree murder and second-degree murder. It is clear from the jury's verdict that it found that defendant knowingly and intentionally intended to seriously harm the two-year old child. Under these circumstances, the failure to give an involuntary manslaughter instruction, even if error, reversal is not required. *Cornell, supra* at 363-364.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra