

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATINA MARIE THORNTON,

Defendant-Appellant.

UNPUBLISHED

June 13, 2006

No. 260067

Wayne Circuit Court

LC No. 04-005169-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial conviction for second-degree child abuse, MCL 750.136b(3), for which defendant was sentenced to two years' probation. We affirm.

Defendant first argues that her conviction should be reversed because the trial court failed to give adequate and sufficient findings to support the verdict. In reviewing whether the trial court's findings of fact are sufficient to satisfy the verdict, this Court must determine whether the trial court was aware of the issues and correctly applied the law to the facts. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). In a bench trial, the trial court must not only find facts, but must also specify its legal conclusions pertaining to contested matters. MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). Specific findings are required so that the appellate court may review the trial court's specific application of the law. *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989). Provided the trial court was aware of the issues in the case and correctly applied the law, its findings are sufficient. *Smith, supra* at 235. In addition, the trial court is not required to make "specific findings of fact on each element of the crime." *People v Wardlaw*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991). Ultimately, this Court must review the findings "in the context of the specific legal and factual issues raised by the parties and the evidence." *People v Rushlow*, 179 Mich App 172, 177; 445 NW2d 222 (1989) (citation omitted).

We hold that the trial court sufficiently explained its findings and legal conclusions.¹ Regarding the facts, the court specifically noted that two witnesses testified that the child was

¹ A person is guilty of second-degree child abuse if:

(continued...)

“not only slapped, but he was shaken and hit with a strap.” The trial court also stated that Dr. Marcus Degraw, an expert witness in the field of child abuse, provided information that this type of action could likely result in a head injury. Thus, the court specifically identified the basis of its factual conclusions. Regarding its legal conclusions, the court stated, “I don’t even think we need a doctor to come in here and say that when a person is shaken, especially if they are two years old, that is likely to cause head injury” The court also concluded that there was no question that defendant was the perpetrator of this act. In context, these findings clearly refer to defendant’s actions with her child. *Rushlow, supra* at 177. Moreover, given that the trial court found that these actions would likely cause a head injury based on the evidence before it, it is clear in context that the trial court was applying MCL 750.136b(3) in finding defendant guilty of second-degree child abuse. *Id.* Therefore, the trial court’s findings are sufficient because the record demonstrates that the court was aware of both the factual and legal issues in this case. *Smith, supra* at 235.

Second, defendant argues that the trial court erred in failing to instruct itself and consider the lesser-included offenses of third- and fourth-degree child abuse. We disagree. We review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999).

The trial court is presumed to know the law. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). For this reason, the trial court is not required in a bench trial to give instructions on the law to be applied in open court. *People v Casal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982). Therefore, no error was committed when the trial court did not give instructions on third- and fourth-degree child abuse.

Defendant argues that the trial court’s failure to sua sponte consider the lesser-included offenses of third- and fourth-degree child abuse constitutes reversible error. However, in making this argument, defendant asserts that third- and fourth-degree child abuse are lesser-included offenses of second-degree child abuse without providing any authority for that proposition. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation omitted). Notwithstanding this, even if third- and fourth-degree child abuse are necessarily included lesser offenses, “it is not error to omit an instruction on such lesser offenses, where the

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(a) the person’s omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child.

(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b(3); *People v Maynor*, 470 Mich 289, 300; 683 NW2d 565 (2004).]

evidence tends only to prove the greater” *People v Cornell*, 466 Mich 335, 355-356; 646 NW2d 127 (2002), quoting *People v Patskan*, 387 Mich 701, 711; 199 NW2d 458 (1972).

A person is guilty of third-degree child abuse if “the person knowingly or intentionally causes physical harm to a child.” MCL 750.136b(5). A person is guilty of fourth-degree child abuse if “the person’s omission or reckless act causes physical harm to a child.” MCL 750.136b(6). Person means “a child’s parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person.” MCL 750.136b(1)(d). Child means “a person who is less than 18 years of age and is not emancipated by operation of law” MCL 750.136b(1)(a). Physical harm means “any injury to a child’s physical condition.” MCL 750.136b(1)(e). Serious physical harm means “any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma . . . [or] internal injury” MCL 750.136b(1)(f).

In the instant case, neither the eyewitnesses, Police Officer Sean Wittmer, nor an employee of Child Protective Services who investigated this claim of child abuse claimed to see any marks on the child. In fact, two witnesses claimed that marks were not present. Thus, there was no evidence of actual physical harm in this case. As such, a rational view of the evidence would not support a conviction of those offenses. *Cornell, supra* at 357.

In contrast, the evidence did support defendant’s second-degree child abuse conviction. Not only did eyewitnesses see defendant shake the child so that his head snapped back and forth, but Degraw indicated that shaking a child under these circumstances could likely cause bleeding inside the head, bleeding in the back of the eyes, concussive-type injuries, or cognitive injuries. Given that the statutory definition of serious injury includes internal head injuries, the possible injuries to the child resulting from defendant’s actions were likely serious. MCL 750.136b(1)(f). Therefore, because second-degree child abuse requires an act likely to cause serious physical harm rather than actual physical harm as required by third- and fourth-degree child abuse, even if third- and fourth-degree child abuse were necessarily included lesser offenses, the trial court did not err in omitting an instruction on them because evidence tended only to prove second-degree child abuse. *Cornell, supra* at 355-356.

Third, defendant argues that the evidence was insufficient to support her conviction. We disagree. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court does not consider whether any evidence existed that could support a conviction, but rather, we must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *Wolfe, supra* at 513-514, citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

In determining the sufficiency of the evidence, it is the role of the trier of fact rather than this Court to draw reasonable inferences from the evidence and accord the proper weight to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Issues of credibility and intent are also left to the trier of fact rather than this Court. *People v Avant*, 235

Mich App 499, 506; 597 NW2d 864 (1999). In addition, this Court must resolve all conflicts of evidence in the favor of the prosecution, who need not negate every reasonable theory of innocence, but only prove its case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

In the instant case, sufficient evidence existed to support defendant's conviction.² One eyewitness, Sonia Roos, testified that she saw defendant shake a two-year-old child until his head snapped back and forth and then saw defendant hit the child on the head and face with a leather strap, while Wilma Slater testified that she saw a woman shake a child to the point that his head moved back and forth quickly, and then strike the child with what Slater thought was a belt. Even though Slater did not identify defendant, Slater, who works in the same office as Roos, testified that she saw Roos approach the woman and call the police. Besides the eyewitness testimony, Degraw explained that it is very possible that a two-year old child could sustain serious injury if an adult woman shook a child to the point that the child's head snapped back and forth.³ Given that it is within the trial court's province to determine witness credibility, sufficient evidence existed for the trial court to find defendant guilty of second-degree child abuse. *Avant, supra* at 506.

For much the same reason, we reject defendant's argument that the verdict was against the great weight of the evidence. In determining whether the verdict is against the great weight of the evidence, we review the entire body of proofs to decide whether "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); see also *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). When the evidence conflicts, this Court must leave the resolution of credibility issues to the jury, even if the testimony is impeached to a certain extent, *Lemmon, supra* at 642-643, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' . . . or [the testimony] contradicted indisputable physical facts or defied physical realities" *Id.* at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410; 124 NW2d 255 (1963).

The verdict was not against the great weight of the evidence. As stated above, Roos and Slater both indicated that they saw a woman shake a child to the point that his head snapped back and forth, and then strike him on the head and face with a leather strap or belt. In addition, Roos

² See n 1, *supra*, for the elements of second-degree child abuse.

³ Defendant argues that Degraw's testimony was irrelevant. Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Here, Degraw's testimony creates the inference that defendant's actions could likely cause an injury to the child. Given that that is an element of second-degree child abuse, his testimony was relevant. MCL 750.136b(3); *Maynor, supra* at 300.

identified this woman as defendant. Also, Degraw indicated that a two-year old child could sustain serious injury under these circumstances. Further, Degraw noted that possible injuries could include bleeding inside the head, bleeding in the back of the eyes, a concussive-type injury, or even cognitive injuries that would appear later in life. Thus, the harm that defendant's actions could cause would likely be internal and not necessarily visible in the form of marks on the child. In light of this, that Wittmer and a Child Protective Services' worker did not see marks on the child or see defendant harming the child does not preclude the possibility that the child could have suffered internal injuries or injures that may not be manifested until later in life. Thus, this information does not necessarily contradict the testimony of Roos and Slater as defendant argues. Notwithstanding this point, the testimony of Roos, Slater, and Degraw did not contradict indisputable facts or defy physical realities. *Lemmon, supra* at 645-646. Therefore, defendant's conviction is not against the great weight of the evidence.

Affirmed.

/s/ Michael R. Smolenski

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray