

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOWANDA CHERISE WRIGHT,

Defendant-Appellant.

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UNPUBLISHED

August 8, 2006

No. 261380

Macomb Circuit Court

LC No. 04-001187-FC

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of involuntary manslaughter, MCL 750.321, and first-degree child abuse, MCL 750.136b(2). Defendant received concurrent sentences of 7 to 15 years in prison for each conviction. We affirm.

I. Facts

On January 24, 2004, defendant brought her unconscious four-year-old daughter to the hospital, where the child died. The autopsy indicated the child died of a combination of blunt force injury to her back and blunt force injury to her head and face, all injuries inflicted on the day she died.<sup>1</sup> The medical examiner opined that the injuries to the child's face were most likely caused by a fist, not a fall or other accident. He further stated that the injuries collectively could not have been caused by a single fall because they were too many and varied. In addition, the child had recently suffered bruises and tears to her vagina, which were not caused by a fall or other accident.

At the hospital, defendant gave a series of different accounts of the day to various police officers. The final version that day asserted that when defendant went to work that day, she left her child with her boyfriend, James Jamar Martin, as she typically did. Defendant stated that the child had a black eye when she left for work, but denied any responsibility for it. Defendant said that Martin called her at work several hours after she left the house and told her something was wrong with the child. In response to his call, she went home and took the child to the hospital.

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<sup>1</sup> The medical examiner noted as well that the child had many older injuries in various stages of healing.

On January 26, 2004, two days after her daughter died, defendant gave a written statement to Detective Bishop<sup>2</sup>. For the first time, defendant stated that on the morning of her death, the child had slipped in the bathroom and hit her face on the floor. On February 5, 2004, in an interview with detectives Misch and Kennedy, defendant added the detail that she had physically disciplined her daughter for wetting her bed and defecating in the bathtub two and a half days before the day the child died. Defendant also added that when she had left for work that day, she had to leave the child alone at home for a brief period of time because Martin had not arrived home yet, but she expected him to arrive shortly after she left. Later on February 5, defendant told Deputy Briney, during a polygraph examination, that on the day her daughter died defendant was angry with her for wetting her bed and lying about it, and that she “snapped” due to that anger, and pulled her daughter out of the bathtub, at which point the child fell and hit her head. After this interview, defendant was arrested, and shortly thereafter defendant told detectives Furno and McFadden that on the day the child died defendant had spanked her with a belt and a spoon, and that she had punished the child for wetting her bed and defecating in the bathtub by shoving a spoon into the child’s vagina and anus.

Defendant was charged with felony murder, MCL 750.316(1)(b) (murder committed during the perpetration of first-degree child abuse), first-degree child abuse, and first-degree criminal sexual conduct, MCL 750.520b(1)(a), (c) and (f) (sexual penetration with a person under 13 years of age, under circumstances constituting first-degree child abuse, or using force or coercion and causing injury). Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321, and first-degree child abuse, MCL 750.136b(2). Defendant appeals her convictions and her sentences.

## II. Admissibility of Defendant’s Prior Statements to Police

Defendant first argues that the trial court erred in denying her motion to suppress statements she had made to the police. Defendant argued then and now that the statements were the result of illegal seizure and illegal arrest, and were not voluntarily given.

### A. Standard of Review

We review de novo a trial court’s ultimate ruling on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005). We review the court’s underlying findings of fact at a suppression hearing for clear error. *Williams, supra* at 313; *Walters, supra* at 352. A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with a firm conviction that a mistake was made. *Walters, supra* at 352. When reviewing the record, we defer to the trial court’s determinations regarding witnesses’ credibility. *Id.*

Similarly, we conduct an independent review of whether a defendant’s statements to police were voluntary. We will affirm the trial court’s decision regarding voluntariness unless we are left with a definite and firm conviction that a mistake was made. If a factual question

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<sup>2</sup> All officers mentioned throughout this opinion are employees of the Macomb County Sheriff’s department, with the exception of Bishop, who is with the Mount Clemens police.

turns on the credibility of witnesses or the weight of the evidence, we defer to the trial court's findings on these matters. *People v Sexton (Aft Rem)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *Walters, supra* at 352-353.

### B. Improperly Seized Psychological Records

Defendant contests the admission at trial of incriminating statements she made to several police and sheriff's officers on February 5, 2004, at the Macomb County Sheriff's Office. Defendant argues that statements made to Furno, McFadden, and Briney<sup>3</sup> were elicited using questions crafted with knowledge of defendant's confidential psychological records. Defendant argues these records were seized from a counseling center pursuant to an unlawfully issued search warrant,<sup>4</sup> and that any statements made to officers who had reviewed those records are tainted. The trial court disagreed, finding, after a three-day *Walker*<sup>5</sup> hearing, that while the records were improperly seized, there was no "evidence establishing that the records had been used by the three officers in question as a means of eliciting statements from defendant."

We agree with the trial court that the records were improperly seized, and note that for the purposes of this appeal, the prosecution concedes that defendant's records are not the type of property that may be properly seized pursuant to a warrant under MCL 780.652. The trial court's determination that any error in obtaining the records was harmless was based entirely on testimony from the officers that they either had not reviewed the records at all or had looked at them only briefly, and that they had not discussed or been briefed on the details of those records by officers who had reviewed them. Based on our thorough review of the transcript of the *Walker* hearing and because we defer to the trial court on the issue of the credibility of these witnesses, we find no clear error in the finding of fact that led to this ruling. *Walters, supra* at 352. The trial court did not err in determining the statements need not be suppressed, although defendant's counseling records were improperly acquired by the police.

### C. Suppression of Statements as Fruit of Unlawful Arrest

Defendant also argues that her statements to Furno and McFadden after she was arrested should have been suppressed because the arrest was unlawful. Again, we disagree.

An officer may lawfully arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(1)(c); *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998). In

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<sup>3</sup> Although defendant claims that Misch and Kennedy also had access to the file which included the psychological records before they interviewed her, she presents no argument that her statements to these officers should have been suppressed.

<sup>4</sup> Defendant contends that the records were unlawfully seized either because they are protected from seizure and use in criminal proceedings because of their confidential nature, MCL 330.1750, or because the search warrant pursuant to which they were obtained did not establish probable cause for the seizure, MCL 780.651(1).

<sup>5</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

reviewing a challenged finding of probable cause, we must determine “whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony.” *Id.* A confession made after an unlawful arrest must be suppressed if the detention was used as a tool to procure evidence from the detainee. *Id.* at 634.

Defendant argues that her arrest was unlawful because the statements she made during the polygraph interview were improperly elicited through the use of her psychological records and, therefore, could not properly form the basis for her arrest. As discussed, *supra*, defendant has failed to convince us that the trial court erred when it concluded that Briney did not use the records to elicit her statements.

We find that the information available to the officers at that point was sufficient to justify the arrest: defendant’s admission to Briney that she had “snapped” and beat the child with a spoon until the spoon cracked; the varied statements defendant had given as to the events leading up to the child’s death; the probability that defendant had been home alone with the child the night and morning leading up to her death; the coroner’s conclusion that the child’s various injuries were not consistent with the fall theory advanced by defendant. We find that these facts would justify a fair-minded person of average intelligence in believing that defendant was responsible for many, if not all, of the child’s injuries and, therefore, that she had committed first-degree child abuse or felony murder. The trial court correctly concluded that the arrest was proper and did not form a basis for the suppression of defendant’s ensuing statements.

#### D. Suppression of Statements Made Involuntarily

Defendant argues that many of the statements she made were involuntary, but although defendant’s arguments focus on Briney and the polygraph interview, she is not specific as to which statements were not voluntary. We find that all of defendant’s statements were voluntary.

“A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.” *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), citing *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). “A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker.” *Akins, supra* at 564 (internal citation omitted).

A court should determine whether a custodial statement was freely and voluntarily made by examining the totality of circumstances surrounding the making of the statement, including the following factors: the accused’s age, educational attainment and level of intelligence; the extent of her previous experience with police; the length of her detention before the statement was made; whether the questioning was repeated or prolonged; whether she was advised of her constitutional rights; whether she was physically abused or threatened with abuse; whether she was intoxicated, drugged, injured or otherwise in poor health; and whether she was deprived of sleep, food or medical attention. *Sexton, supra* at 753; *Akins, supra* at 564-565. When considering whether a statement was voluntary, a court should focus on the conduct of police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

We note first that defendant does not argue that she was in custody during the polygraph interview with Briney. And we find that the evidence does not support a conclusion that she was in custody. Rather, defendant had voluntarily come to the station that day, and after her initial 30-minute interview with Misch and Kennedy, during which defendant was advised she was free to leave, defendant requested that she be administered the polygraph test.<sup>6</sup> Throughout the several interviews that day, defendant was in unlocked rooms, and was left alone several times. Before beginning the polygraph interview, Briney advised defendant of her *Miranda* rights and had defendant initial and sign a form indicating she understood the rights. Briney also explained a consent and release form required for the examination, and defendant signed that form as well. Defendant was aware that she could stop the examination at any time, and at one point did so to use the restroom. Only at the end of the three hours and 15 minute interview did defendant state: “I’m about to call . . . an attorney,” and, “I want to go home.” At that point, Briney ended the interview and Furno and McFadden arrived to arrest defendant at the direction of the prosecutor, who had been watching the videotaped interview from another room. We find that defendant’s polygraph interview does not meet the criteria for a custodial interrogation.

Furno testified that after defendant was arrested, defendant told Furno several times that she wanted to speak with her in private. Defendant, Furno, and McFadden went to a small room in the booking area and McFadden read defendant her *Miranda* rights. Defendant stated that she understood her rights and wanted to answer questions. This interview occurred five to six minutes after the arrest and lasted between five and ten minutes. The officers and defendant then moved to an interview room with recording equipment. Defendant’s rights were read to her again and she circled each right on a form to indicate that she understood them. Defendant answered questions for less than five minutes and then asked for an attorney, at which point the officers stopped questioning her. Because defendant requested this interview, and continued despite being advised again of her right to counsel, we find that the statements were voluntary.

We further find, relative to the various interviews throughout the day, that, considering the totality of circumstances surrounding the making of the statements, the trial court did not err in finding the statements were voluntary. *Sexton, supra* at 753. Defendant voluntarily came to the station. She requested the polygraph be administered. She was advised of her *Miranda* rights. Defendant was a 32-year-old high school graduate at the time of the interviews. She did not appear to be sick or under the influence of alcohol or drugs. She was given water to drink during the initial interview that day and offered food and water again later. As to coercion, the officers admitted they asked her the same questions repeatedly, told her that they did not believe she was being entirely truthful, and may even have raised their voices above normal speaking level at some points. However we cannot conclude that these tactics go beyond typical and acceptable interview methods. Defendant was neither verbally nor physically threatened, nor was she given the impression that she was not free to leave.

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<sup>6</sup> Earlier in the interview, Misch had asked defendant a standard question regarding whether defendant would submit to a polygraph test if she was asked to do so; defendant had said she was willing. Misch and Kennedy attested, however, that defendant voluntarily requested the test at the end of the interview.

We find that the trial court did not err in finding that defendant's statements were voluntary, and the statements were properly admitted.

### III. Admissibility of Blood Evidence

#### A. Standard of Review

We review a trial court's findings of fact on the admissibility of scientific evidence for clear error. *People v Holtzer*, 255 Mich App 478, 484; 660 NW2d 405 (2003). We review the court's ultimate decision to admit expert witness testimony for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

#### B. Analysis

David Woodford, a forensic scientist for the Michigan State Police, testified that he investigated defendant's home for the presence of blood on January 30, 2004. He did not see blood in the bathroom or on the kitchen floor, so he used a reagent known as Leuco Crystal Violet or "LCV" which, when sprayed on a surface, reacts with blood that is invisible to the naked eye and turns purple. LCV reacts with blood even if the surface has been washed, as long as the blood has not been completely washed away. The LCV did not reveal blood in the kitchen, but in the bathroom it revealed "purple all over the bathtub [and] on the floor." No samples from the bathroom were sent for DNA testing because Woodford believed that they were too diluted to be successfully tested.

On appeal, defendant argues that LCV testing cannot pass the *Davis-Frye*<sup>7</sup> "general acceptance" standard for admissible scientific evidence and, therefore, that the trial court erred when it concluded that the LCV test results were admissible. As the prosecution argued at trial, however, the appropriate test for admissibility in Michigan is now the reliability standards test announced in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). MRE 702 was specifically amended, effective January 1, 2004, to incorporate the *Daubert* standards, identifying these three key criteria: "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702.

Woodford testified that LCV had been used to test for blood by laboratories across the United States and in other countries since 1995, when a paper was published on its uses. He explained that scientific literature suggested that some other substances, such as rust, theoretically could result in false positives, but added that he had never had a false positive using LCV. He also explained that he often also used a second chemical, Phenolphthalein, to corroborate the conclusion that a substance was blood after it was initially detected by the LCV, and that he did so in this case.

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<sup>7</sup> *People v Davis*, 343 Mich 348; 72 NW2d 269 (1995); *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).

We find no clear error in the trial court's assessment of the admissibility of this evidence, and no abuse of discretion in the decision to allow Woodford to testify.

#### IV. Sufficiency of the Evidence

##### A. Standard of Review

When considering a claim of insufficient evidence, this Court reviews the record de novo and considers the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In appeals challenging the sufficiency of the evidence, questions of witnesses' credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

##### B. Analysis

Defendant argues there was insufficient evidence to support her conviction for involuntary manslaughter or her conviction for first-degree child abuse. We disagree as to both.

“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). Involuntary manslaughter may be proved when a parent does not fulfill her duty to seek medical attention for her child when it would be apparent to the ordinary mind that this failure would prove disastrous for the child. *People v Sealy*, 136 Mich App 168, 172-174; 356 NW2d 614 (1984).

Here, considering the evidence in the light most favorable to the prosecution, a rational trier of fact could easily have found the elements of involuntary manslaughter were proved beyond a reasonable doubt. Defendant claims that there was no evidence that the child's injuries occurred before defendant left for work or that defendant inflicted the injuries. However, defendant's version of the events of the day is contradicted by the testimony of her boyfriend, Martin, who testified that he had been out of town since the night before, and did not return home until 3:00 p.m., at which point he found the child injured. This timing was corroborated by a receipt, which police found in Martin's car, that confirmed that he had purchased gas at a station in Detroit at 2:50 p.m. that afternoon. Martin also testified that the child's eye was not swollen when he left the night before. The jury may simply have believed Martin rather than defendant, and we will not substitute our judgment as to credibility for that of the jury. See *Avant, supra* at 506.

In addition, the medical examiner testified that the child had suffered a recent severe head injury, which would have immediately dazed her or rendered her unconscious, and thus would have been obvious to an observer. Given the testimony of police officers that defendant had admitted that the child hit her head on the bathtub in defendant's presence earlier that day, and given Martin's testimony that he was not home that morning or the night before, we find that the

jury would have been justified in concluding that, when defendant left for work, the child had a substantial injury which would have convinced an ordinary mind that she needed immediate medical attention.

We find that there was sufficient evidence from which a jury could reasonably conclude that defendant unlawfully caused the child's fatal injuries, or at a minimum, that defendant failed to seek medical attention when it was apparent that it was necessary.

A conviction for first-degree child abuse requires proof that a person "knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2); *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Serious physical harm is defined as "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, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f).

As we have already noted, there was sufficient evidence from which the jury could conclude that defendant inflicted the child's recent injuries. We note that because of the obvious difficulty of proving intent or state of mind, the jury may draw inferences from minimal circumstantial evidence, including the victim's injuries. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005); *People v McRunels*, 237 Mich App 168, 181-182; 603 NW2d 95 (1999). Here, at a minimum, defendant's prior admissions established that she intentionally shoved a spoon into the child's genital area to punish her. In addition, the extent and severity of the child's overall injuries, which were largely recent and resulted from multiple impacts including probable fist strikes to the face and head, certainly create an inference that the injuries were not caused accidentally. We find there was sufficient evidence of first-degree child abuse.

## V. Scoring of Offense Variables

### A. Standard of Review

This Court reviews a trial court's scoring decisions by determining "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We must "affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Lerversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000); MCL 769.34(10). We review de novo claims of legal error involving the interpretation or application of the statutory sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); *McLaughlin, supra* at 671. Otherwise, review is very limited; a scoring decision will be upheld if there is any evidence to support it. *Hornsby, supra* at 468.

### B. Scoring of Offense Variable 3

Defendant argues that the trial court erred when it scored 25 points for offense variable three ("OV 3") at the sentencing hearing. OV 3 states that 25 points should be scored when "[I]f life threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c);

*People v Houston*, 473 Mich 399, 404; 702 NW2d 530 (2005). Defendant argues that no points can be scored under OV 3 because the sentencing offense was manslaughter, a homicide crime, and MCL 777.33(2)(b) states that 100 points should be scored “if death results from the commission of a crime and homicide is not the sentencing offense.”

Defendant’s argument fails because our Supreme Court in *Houston*, *supra* recently found that OV 3 could properly be scored even where the underlying offense is a homicide, although it can only be scored 25 points. *Houston*, *supra* at 402.<sup>8</sup> We find that OV3 was properly scored.

### C. Scoring of Offense Variable 7

Defendant also argues that the court lacked any basis to score 50 points under OV 7 for excessive brutality. OV 7 should be scored when “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a); *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). Defendant claims that the score was improper because excessive brutality requires a showing of intent that is inconsistent with the jury verdict of involuntary manslaughter and is not supported by the record.

However, in Michigan, the court’s determination of a minimum sentence need not be based on facts which a jury has concluded were proved beyond a reasonable doubt. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), slip op, pp 164-165 (Weaver, J., concurring); *People v Claypool*, 470 Mich 715, 730, 730 n 14; 684 NW2d 278 (2004). Rather, a scoring decision will be upheld if the record adequately supports it. *McLaughlin*, *supra* at 671; *Hornsby*, *supra* at 468. Accordingly, a verdict of involuntary manslaughter does not preclude the court from finding evidence of excessive brutality for sentencing purposes.

We find that here the record supports a finding of excessive brutality, which may be shown by the circumstances of a crime and the resulting injuries.<sup>9</sup> Here, fresh bruises and cuts, as well as internal bleeding and brain swelling, showed that the child had recently endured extensive injuries probably inflicted through at least four separate assaults or impacts. The medical examiner attested that the injuries to her back, face and genitals could not have been caused by a single impact, and even the impacts to each side of her face suggested different sources of injury. The testimony of Furno and of the examiner also specifically suggested that, within the day leading up to her death, the child was punched in the face and sexually abused with a plastic spoon. Finally, the officers’ testimony regarding defendant’s admissions, and Martin’s testimony that he did not return home until around 3:00 that day, suggest that defendant

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<sup>8</sup> “The defendant not only killed the victim, but in the process also caused a physical injury--a gunshot wound to the head. Consequently, although the court did not have the option of assessing one hundred points for OV 3, it properly assessed twenty-five points on the basis of the next applicable variable element: ‘Life threatening or permanent incapacitating injury.’”

<sup>9</sup> See, e.g, *People v Wilson*, 265 Mich App 386, 398; 695 NW2d 351 (2005), in which excessive brutality was shown by the victim’s testimony that an attack lasted for several hours, involved the use of weapons as well as kicking, punching, slapping and choking, and resulted in injuries which required hospitalization and caused ongoing pain.

was responsible for the injuries. Accordingly, we conclude that the trial court did not err when it scored 50 points under OV 7 based on the “damages” to the child who, the court added, was just four years old and therefore unable to defend herself.

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello