

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD WALLACE REDINGER,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 269139

Wayne Circuit Court

LC No. 05-002838-01

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

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree child abuse, MCL 750.136b(2), and third-degree child abuse, MCL 750.136b(5). He was sentenced to concurrent prison terms of 10 to 15 years for the first-degree child abuse conviction, and one to two years for the third-degree child abuse conviction. He appeals as of right. We affirm.

In 2004, defendant was living with his then fiancée, Janet Austill, and Austill's two children, Jackie and Jacob. Defendant and Austill's son, Elliott, was born on December 14, 2004. Elliott was hospitalized for kidney treatment and surgery to repair a hernia on January 10, 2005. On February 16, 2005, defendant woke Austill to tell her that Elliott was not breathing. Austill called 911. Elliott was transferred to the hospital where he was diagnosed with retinal bleeding and subdural hematoma, but he did not present any external signs of trauma such as bruising. A few days later, x-rays revealed that he had a complex skull fracture. Meanwhile, defendant's neighbor, Stacy Cresswell, babysat Jackie and Jacob while defendant and Austill went to the hospital with Elliott. When she changed Jacob's diaper, she observed a large bruise on his right buttock. Cresswell reported the bruise to the police.

Defendant admitted to the police that he spanked Jackie and Jacob with a hunting arrow, which might have left marks on their buttocks. Defendant gave varying explanations for what happened before Elliott stopped breathing. He stated that Elliott accidentally hit his head on a kitchen cabinet and fell to the floor while defendant was swinging him into the air to stop his crying. Defendant also admitted that he punched Elliott in the head with his fist. Additionally, defendant explained that he accidentally closed Elliott's head in a recliner footrest when he stood up while Elliott was on the floor. Defendant initially said the footrest incident happened on the same day that Elliott stopped breathing, but later said that it happened several days before.

The prosecution's expert witness, Mary Smyth, M.D., opined that Elliott's injuries were not accidental, because a two-month-old child is unable to ambulate or put himself into a position where he could sustain this type of injury. She also testified that Elliott's skull fracture was not consistent with simply falling and striking his head on a hard surface, because the fracture pattern was complex, not linear. When asked whether the fracture was consistent with a punch to the head, she replied that forceful, repetitive punching might have caused it. Dr. Smyth testified that the combination of retinal hemorrhage, subdural hematoma, and skull fracture was indicative of a major traumatic event, which is usually attributable to abuse unless there is a history of a major traumatic event that could have caused the injuries. She stated that it is not unusual for a child to sustain a retinal hemorrhage in only one eye after experiencing abuse that also causes a skull fracture and subdural hematoma.

Hospital personnel did not observe any indication of a head injury during Elliott's previous hospitalization, and Dr. Smyth stated that medical testing ruled out the possibility that any of these preexisting problems contributed to Elliott's head injury. Dr. Smyth also testified that while testing for genetic abnormalities was not complete, there was no genetic disorder that could result in a spontaneous skull fracture, subdural hematoma, and retinal hemorrhage. She also ruled out the possibility that Elliott's injury was related to a fall during his mother's pregnancy. Rather, Elliott's symptoms were indicative of an acute event that happened shortly before EMS was called. Dr. Smyth acknowledged that Elliott did not immediately display external signs of injury such as bruising, but averred that a child might suffer internal brain and eye injuries without presenting external signs. She also stated that it is difficult to observe bruises on a child's scalp.

Defendant was convicted of first-degree child abuse with respect to Elliott and third-degree child abuse with respect to Jacob.

Defendant first argues that the trial court denied him the opportunity to present a defense by refusing to authorize payment of an expert witness fee in excess of the court's standard rate. We disagree.

MCL 775.15 authorizes payment of fees for an expert witness for an indigent defendant where the defendant demonstrates that the expert's testimony is necessary to enable him to safely proceed to trial. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). Although the witness "shall be paid . . . in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people," the trial court may approve additional fees. The trial court's decision whether to do so is reviewed for an abuse of discretion. *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990).

Before trial, defendant moved for appointment of an expert medical witness with regard to the cause of Elliott's injuries. The trial court agreed to appoint an expert at the court's standard rate for experts. Defendant requested that the court approve additional fees to enable Dr. Ronald Uscinski, an expert in pediatric neurology, to testify at trial. Dr. Uscinski had testified for defendant in an earlier child protective proceeding. Although Dr. Uscinski's standard fee for giving testimony was \$10,000, he agreed to accept \$3,000 to testify by telephone in the child protective proceeding. In defendant's criminal case, defendant requested that the court similarly allow Dr. Uscinski to testify by telephone and approve his \$3,000 fee. The prosecutor advised the trial court that her expert, Dr. Smyth, would receive the standard expert

witness fee of \$200. The prosecutor also objected to the proposed procedure of testifying by telephone. The trial court did not address the propriety of testimony by telephone,¹ but the trial court denied Dr. Uscinski's requested fees, finding them excessive and unreasonable, but stated that it was willing to appoint another expert at the court's standard rate. Defendant did not request appointment of another expert and did not present expert testimony at trial.

Although defendant preferred Dr. Uscinski, referring to him as "one of the nation's leading experts," due process protections do not guarantee indigent defendants all the assistance that wealthier defendants might buy. *People v Leonard*, 224 Mich App 569, 580-581; 569 NW2d 663 (1997). Further, an indigent defendant's right to appointment of an expert does not entitle him to appointment of a particular expert who will reach conclusions that satisfy the defendant but only an expert who is competent in his field. *People v Stone*, 195 Mich App 600, 606; 491 NW2d 628 (1992). Defendant has not at any point shown that there were no other competent medical experts who could testify regarding the cause of Elliott's injuries. Defendant relies on *People v McPeters*, 181 Mich App 145; 448 NW2d 770 (1989), where the trial court refused to approve an expert's fees above the standard rate, and it became apparent during the expert's testimony that he was refusing to cooperate without payment of his requested fee. The trial court erred by refusing either to approve a greater fee or to appoint a different expert. *Id.* at 149-152. In contrast, the trial court here *did* offer to appoint another expert.

Under the circumstances, the trial court did not abuse its discretion in refusing to approve Dr. Uscinski's requested expert witness fees. Further, because the trial court offered to appoint another expert witness for defendant, it did not deny him the opportunity to present a defense.

Defendant next argues that the prosecutor denied him a fair trial by making three improper comments. We disagree.

Claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). The prosecutor's comments must be read in context and evaluated in light of their relationship to defense arguments and the evidence presented at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), but they may argue the evidence and reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant argues that it was improper for the prosecutor to argue that no medical condition could explain Elliott's constellation of injuries, because the prosecutor knew that Dr. Uscinski could have rebutted Dr. Smyth's testimony, and because the argument also invited the jury to convict defendant for failing to present evidence, thus shifting the burden of proof.

¹ On appeal, defendant does not address the propriety of allowing witness testimony by telephone in a criminal trial.

However, the prosecutor's remarks were supported by the evidence that no preexisting conditions contributed to the injuries, no genetic disorder could account for the injuries, a fall during Elliott's mother's pregnancy would not cause the injuries, and the injuries were indicative of an acute event that occurred shortly before Elliott was hospitalized. The prosecutor did not comment on defendant's failure to present evidence, *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999), or imply that defendant was required to prove or explain anything. *People v Guenther*, 188 Mich App 174, 180, 469 NW2d 59 (1991). Viewed in context, the prosecutor permissibly argued that inculpatory evidence was undisputed. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Defendant's inability to present Dr. Uscinski did not preclude him from presenting expert testimony with which to rebut Dr. Smyth's testimony. The fact that defendant did not do so does not mean that the prosecutor's statement that there was no medical explanation for Elliott's injuries was unsupported by the evidence.

Defendant also argues that the prosecutor improperly commented on his decision not to testify when he referred to a "promise" defense counsel made in his opening statement concerning retinal hemorrhages. In his opening statement, defense counsel stated that the jurors would hear evidence that a retinal hemorrhage in only one eye is not consistent with physical abuse. In closing argument, the prosecutor referred to that statement, pointing out that no such evidence was presented. Defendant objected, arguing that the prosecutor was making "an impermissible comment on the fact that the Defendant did not testify." The prosecutor replied that he was not referring to defendant's right not to testify, acknowledging that defendant "has a right not to testify," but instead was referring to "promises the defendant made." The trial court instructed the prosecutor to "stick to the retinal hemorrhages," and the prosecutor proceeded with his argument, stating that defendant's opening statement anticipated evidence of bilateral retinal hemorrhages, which was contrary to Dr. Smyth's testimony.

The prosecutor's comments did not implicate defendant's right not to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor properly may respond to issues raised in a defense attorney's opening statement and may comment on the failure of the defense to produce evidence on an aspect of a defense on which the defendant seeks to rely. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). Viewed in context, the prosecutor properly was pointing out that, contrary to what was indicated in defense counsel's opening statement, no evidence was presented that a retinal hemorrhage in only one eye is not consistent with physical abuse. The prosecutor did not comment on defendant's failure to testify. Therefore, the prosecutor's argument was not improper.

Finally, defendant argues that the prosecutor improperly questioned his paternity of Elliott during rebuttal argument when he stated that defendant "may or may not be the father with a fussy baby." Defendant argues, as he did below, that the prosecutor's statement was not supported by the evidence. However, there was evidence suggesting that defendant may not be Elliott's natural father. Defendant's mother, Elma Redinger, testified on cross-examination by defendant that Jacob and Elliott were defendant's biological children. On redirect examination, however, she stated that Elliott was not defendant's child. When later asked how she knew that, she replied, "I was told that." The trial court sustained defendant's objection to the basis for Elma's knowledge because it was hearsay but did not strike her earlier testimony that Elliott was

not defendant's child. Defendant never moved to strike Elma's testimony regarding Elliott's parentage or attempt to clarify her contradictory statements. Because there was evidence that raised a question concerning defendant's paternity of Elliott, the prosecutor's statement that defendant "may or may not be the father" of Elliott was not improper. Furthermore, viewed in context, the prosecutor's focus was on Elliott's fussiness as a motive for abuse; paternity of Elliott was at most a minor issue, and this isolated reference did not deprive defendant of a fair trial.

Defendant next argues that the evidence was insufficient to support his convictions of first-degree and third-degree child abuse. We disagree.

We determine whether the evidence was sufficient to sustain a conviction by considering whether the evidence, when viewed in a light most favorable to the prosecution, would permit a reasonable trier of fact to find all essential elements of the charged crime proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We resolve all reasonable inferences and credibility assessments in favor of the jury's verdict. *Id.* First-degree child abuse entails "knowingly or intentionally caus[ing] serious physical or serious mental harm to a child." MCL 750.136b(2). Third-degree child abuse entails "knowingly or intentionally caus[ing] physical harm to a child." MCL 750.136b(5) "Physical harm" is "any injury to a child's physical condition," and "serious physical harm" is "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)(e)-(f). The child abuse statute should not be construed to prohibit a parent from reasonably disciplining a child, including the reasonable use of force. See also *People v Sherman-Huffman*, 466 Mich 39, 42-43; 642 NW2d 339 (2002).

Defendant argues that there was insufficient evidence that Elliott's injuries were caused by defendant's conduct. However, defendant admitted that he punched Elliott in the head with his fist, and Dr. Smyth testified that Elliott's injuries indicated physical abuse and could be explained by repeated, forceful punching. Dr. Smyth also ruled out other possibilities, such as birth trauma, accident, or an undiagnosed genetic condition. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that Elliott was seriously injured by defendant's knowing or intentional conduct. Likewise, considering the nature of the injury to a three-month-old child, defendant's admission that he struck Elliott in the head with a fist, and the evidence that Elliott's head injury was consistent with having been punched repeatedly and forcefully, the evidence supported an inference that defendant acted with the knowledge or intent that serious injury would result.

Defendant also argues that there was insufficient evidence to convict him of third-degree child abuse of Jacob because there was no evidence that the bruise left by the arrow was painful. However, "physical harm" includes "any injury to a child's physical condition" and does not include an element of pain. MCL 750.136b(1)(e) (emphasis added). In any event, the jury could reasonably infer that being struck with an arrow to a degree that it left a bruise would have been painful. The jury could also reasonably find that using an arrow to spank a two-year-old child did not constitute reasonable discipline or reasonable force. Thus, there was sufficient evidence to support defendant's conviction of third-degree child abuse.

Defendant argues that the trial court erred by exceeding the sentencing guidelines range of 57 to 95 months for the first-degree child abuse conviction. We disagree.

A trial court may only depart from the sentencing guidelines range if it has substantial and compelling reasons to do so and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court's reasons for departure must be objective and verifiable. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Moreover, the court may not base a departure on an offense or offender characteristic that is already taken into account in determining the appropriate sentence range, unless the court finds that the characteristic has been given inadequate or disproportionate weight. *Abramski, supra* at 74; MCL 769.34. We review for clear error whether a factor exists, we review de novo whether a factor is objective and verifiable, and we review for an abuse of discretion whether objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range. *Babcock, supra* at 265.

In this case, the trial court stated that it was departing from the guidelines range because of the severity and nature of the child's injuries, the age and vulnerability of the child, and the nature of the child's relationship to defendant. Each of these factors are objective and verifiable. Furthermore, they were not based on reasons already reflected in the offense variable scoring. Defendant received 50 points for OV 7 (victim treated with terrorism, sadism, torture, or excessive brutality). MCL 777.37(1)(a). As the trial court observed, apart from the severity of the abuse, the child's injuries were permanent. The child suffered brain damage that left him blind and mildly retarded, and the child would never have an opportunity to lead a normal life. The scoring of OV 7 does not account for the permanence of the child's severe injuries. Defendant also received ten points for OV 10 (exploitation of a victim's youth or of the offender's authority). MCL 777.40(1)(b). The trial court observed that the child's age (two months) left him not only vulnerable, but completely defenseless and unable to even scream for help. Either factor alone, youth or abuse of authority, would have supported a ten-point score for OV 10, but both factors were present here. Therefore, we agree with the trial court that the scoring of OV 10 did not adequately account for the circumstances of this case.

We therefore conclude that the trial court did not abuse its discretion in determining that a departure was justified for substantial and compelling reasons. Moreover, considering the circumstances of the case, the extent of the departure imposed does not violate the concept of proportionality. *Babcock, supra* at 261-262.

Affirmed.

/s/ Alton T. Davis

/s/ Bill Schuette

/s/ Stephen L. Borrello