

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWNDALE MARQUISE CLARK,

Defendant-Appellant.

UNPUBLISHED

June 4, 2009

No. 281386

Jackson Circuit Court

LC No. 05-001213-FC

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant Shawndale Marquise Clark appeals as of right his conviction for felony murder¹ predicated on first-degree child abuse.² A jury convicted Clark, and the trial court sentenced him to life in prison without parole. Clark's judgment of sentence reflects that the jury also convicted him of manslaughter³ and first-degree child abuse. The trial court vacated these sentences in sentencing Clark for the felony murder conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of the death of a 14-month-old child, Amaree Mathis, during the late night hours of June 16, 2005, or early morning hours of June 17, 2005. Mathis testified that Clark was the child's father and that Clark had just moved into her apartment one week before June 16, 2005. Mathis normally worked a 4:00 p.m. to 12:00 a.m. shift, and, on the evening of June 16, she and Clark decided that Clark would take care of the child when Mathis went to work because the child was not feeling well. Before that, Clark had not spent any evenings alone with the child since he moved in. According to Mathis, the child was in Clark's care "times and times" before, but not for this length of time.

Mathis and Clark called each other over the telephone while she was at work that night approximately five to eight times. During a telephone conversation at 6:00 or 6:30 p.m., Clark

¹ MCL 750.316(1)(b).

² MCL 750.136b(2).

³ MCL 750.321.

stated that the child received a rug burn on her forehead while playing a game, which Mathis described as, “[the child] would crawl away on the floor and you’d crawl right behind her and pull her legs back and she would kind of giggle and laugh.” Mathis indicated that she once gave the child a small rug burn while playing that game on a previous occasion. At approximately 8:30 p.m., during another telephone conversation, Clark stated that he gave the child a bath and she fell and “hit her head or her lip in the bath.” According to Mathis, Clark did not seem upset. Mathis also said that Clark told her that he put the child to bed at approximately 10:00 p.m.

Mathis testified that she arrived home from work at 12:15 a.m. and “peeked in” on the child to make sure she was okay. The child was lying on her stomach facing the wall. Mathis saw the rug burn “briefly,” but she did not “go in and look extensively at it.” She testified that “[t]he [rug burn] on the forehead seemed like it was a lot bigger” than the rug burn she had previously given the child. Mathis then changed her clothes and left to meet up with some friends at a bar. When Mathis arrived home again, Clark was asleep on a chair in the living room. According to Mathis, Clark was “semi-conscious” and told her that the child “was okay and that’s about it.” Mathis testified that she again “peeked through the crack in [the child’s] door,” and the child “looked like she was still sleeping”; the child was in the same position she had been before, facing the wall. Mathis testified that while she was using the bathroom, she heard “a little noise” or a “peep” from the child. Mathis was familiar with the noise because she heard that noise before when the child was having a dream. Mathis said she fell asleep in the living room on the couch and did not speak with Clark.

According to Mathis, shortly after waking up the next morning, Clark “started yelling my name from [the child’s] room. So, I went into [the child’s] room and saw that she was cold and stiff, so I ran to the living room and got the phone.” According to Mathis, the child was “very blue” and in the same position she had been the previous night. Mathis called 9-1-1, and Clark carried the child from the bedroom to the living room, where he laid her on the floor, and Mathis “tried to give her mouth to mouth and we covered her up with blankets.” Cardiopulmonary resuscitation could not be administered because the child’s mouth could not be opened. Mathis testified that she noticed the marks and bruises on the child’s face when Clark brought her into the living room, but “didn’t really think much of them.” She testified that these marks were not present on the child when she left for work on June 16. According to Mathis, before June 16, the child had a “very tiny” bruise “above her [left] ear,” but Mathis did not know how it happened and estimated that it occurred “probably a couple weeks before.”

According to Mathis, Officer Paul Long then arrived and assisted the child. Mathis testified that when Officer Long was there, Clark “was crying, frantic[,]” and yelling. Officer Long testified that he saw Clark sitting on the floor near the child and yelling, “[h]elp my baby.” When Officer Long told Clark that there was nothing he could do, Clark “picked up the child, attempted to do mouth to mouth and set [the child] back down.” Officer Long determined that the child “had been deceased for quite some time.” Officer Long asked Clark about the red marks on the child’s face, and Clark told him the marks were from “playing with the child, pulling the child on the rug.” Officer Long questioned Clark about what happened to the child before she went to bed. Clark told Officer Long about playing the game and getting the marks on her face, that he fed the child at 6:30 or 7:00 p.m., and put her to bed at 9:00 or 9:30 p.m. Clark did not mention giving her a bath or that she had hit her head in the bathtub. Officer Long testified that Mathis’s demeanor was “like nothing happened” or she was in a state of shock, but that Clark was upset and agitated.

During an initial interview with Officer Christopher Boulter, Clark told Officer Boulter that two of the injuries to the child's forehead occurred while he was playing with the child. Clark indicated that he did not realize that the child had injured herself right away because she laughed and did not fuss, but after the second rug burn, he stopped the game. Clark also told Officer Boulter that the child had injured her lip on the bathtub: "she was playing and . . . , he was trying to get her in the towel and that she had run back into the bathroom like she wanted to get back into the tub and that she had fallen and hit her mouth on the side of the tub."

Dr. Ruben Ortiz-Reyes performed an autopsy on the child on June 17, 2005. Dr. Ortiz-Reyes, informed Officer Boulter that he had classified the child's death as a homicide, and Officer Boulter informed the prosecutor's office. Officer Boulter then asked Clark to return for a second interview. According to Officer Boulter, Clark

was unsure how the third [rug burn] had actually occurred. He didn't have an explanation, or [sic] he didn't have an explanation for the injury under the eye or the smaller injuries. . . . And then later on he told me that the injury, he believed to the back of the head, after we had explained where on the head it was, was from a slip and fall in the tub.

Clark denied that he ever hit or otherwise abused his daughter, and did not change his story that he did not hurt the child.

With respect to the child's autopsy, Dr. Ortiz-Reyes testified that he observed multiple injuries on the child's head. Viewing the photograph of the child's face, Dr. Ortiz-Reyes testified that there were three abrasions on her face and that an abrasion is usually "caused when there is a rubbing of the skin on a rough surface." According to Dr. Ortiz-Reyes, the abrasion injuries could have been caused by a rug burn or by blunt trauma. There were several bruises on the child's face as well. A different photograph depicted a bruise "in the lower area of the sclera. Sclera is the white area of the eye . . . there's some hemorrhage here." The possible cause of the bruise was "trauma." The next photograph showed the bruise on the child's lip and lacerations inside of the right side of the child's upper lip, which injury was caused by trauma. Dr. Ortiz-Reyes noted that there was an abrasion on the left upper area of the child's forehead. The bruises on the "area of the cheek and chin [] were suggestive of somebody putting the hand on [sic]." However, Dr. Ortiz-Reyes admitted that it was possible that the bruises were also consistent with making contact with the bathtub. Dr. Ortiz-Reyes also testified that there was another abrasion by the child's clavicle. Viewing a photograph of the back of the child's head, Dr. Ortiz-Reyes indicated that there was "an impact on the top of the head. You've got . . . there is an impact. There is an abrasion there." Dr. Ortiz-Reyes explained that this would be caused by "either [] an object throwing [sic] to the kid or the kid thrown into a fixed object." Dr. Ortiz-Reyes testified that it is possible that the injury on the crown of the head was caused by a rear fall, but the injury was not consistent with a rear fall. The injury to the top of the child's head was not consistent with slipping and falling in the bathtub: "the extent of this injury has to be something really, really hard in order to have this amount of injury." Based on his external examination of the child, Dr. Ortiz-Reyes testified that:

With all of those injuries . . . , my first thought was that something's wrong, [sic] was going on with this baby because there were too many injuries around the head

and at the face and I was suspecting to see something else during my internal examination.

Dr. Ortiz-Reyes then explained his findings from the internal examination of the child's brain. The child had a subcutaneous hemorrhage on her skull, or a suprascapular hemorrhage, which was below the bruise or abrasion on her scalp, and below the hemorrhage was the bone of the skull. The hemorrhage corresponded to the external injury that Dr. Ortiz-Reyes observed. Dr. Ortiz-Reyes further testified that, inside of the child's skull, "what you can see here is that there is a lot of hemorrhage here, recent hemorrhage that look [sic] like a jelly like." The subdural hemorrhage was recent because "the blood is not attached still to the structures, it's easily removed at the time of examination." According to Dr. Ortiz-Reyes, a photograph showed blood clots from the subdural hemorrhage and the hemorrhage was caused by the trauma to the child. In another photograph where the child's brain was removed, Dr. Ortiz-Reyes noted that "there's still a lot of the clots that are left from the subdural hemorrhage that are going down into the base of the skull." The child's brain would have been a tan color if there were no trauma, but the trauma caused the brain to be a red color. Dr. Ortiz-Reyes indicated that the photographs only showed one color of blood, which indicates that the bleeding was not rebleeding from an old injury. According to Dr. Ortiz-Reyes, the internal examination findings were consistent with the findings from the external examination of the child's body.

Based on the level of hemorrhage in the brain, Dr. Ortiz-Reyes opined that there was "really strong trauma there," indicating that "either some object that was thrown directed to the, to the head, or the kid, forced the kid into something that was hard enough in order to cause this trauma." Dr. Ortiz-Reyes explained:

[T]o begin there is an abrasion on top of the head, this is beside the bleeding one. Second, going down, it is subcutaneous hemorrhage that was on top of the head that we see the area of extension of the trauma. And then the internal hemorrhage that is going to be secondary to rupture of the little vessels that are in the brain that are called braging (ph) vessels. These vessels go from the dura to the, to the brain and when trauma comes it tears the vessels and that in turn [sic] they are ruptured and the bleeding starts.

It depends on how hard the impact is, there is going to be a lot of destruction of the structures and a lot of hemorrhage is going to accumulate as in this case.

Dr. Ortiz-Reyes concluded:

Because the amount of blood that was accumulating there, the brain was pushed down; because the brain has to have a certain amount of space in order to function, but if it is pushed down there is going to be compression of the base of the brain and then is [sic] going to be difficulty breathing and then dies [sic].

Dr. Ortiz-Reyes opined that from the time of impact to the head, it would take "seconds to minutes" for death to occur. Dr. Ortiz-Reyes testified that he could not give a specific time, and "seconds to minutes" could mean a few seconds to several days. Dr. Ortiz-Reyes explained, however, that the blood clots in the child's brain were of recent origin. He testified that he

declared the time of death to be 6 to 12 hours before the police and emergency medical services arrived at the child's home and pronounced her dead.

Dr. Ortiz-Reyes opined that the child in this case "couldn't do [the injury] by herself. Somebody else has had [sic] to do it. So, it was classified as a homicide."

It's the extent of injuries. If a kid had this extent of injury . . . had more injuries around the face according to my review of the records, this kid was seen by a pediatrician the day before and she didn't have no [sic] injuries. So, in order to have injuries everywhere, something had to happen here.

* * *

[T]here was so much trauma all around the head to say that this kid did it by herself. I agree that kids fall often, some are more clumsy than others. But, I haven't seen this . . . some kids that have all these injuries done by herself in a short period of time.

Dr. Ortiz-Reyes admitted that there was a theory in forensic pathology called short-term fall trauma, where an individual sustains a fatal brain injury from falling from a short distance. However, according to Dr. Ortiz-Reyes, this is rare. Dr. Ortiz-Reyes also testified that, with the type of injury to the child's head, it was possible that the child experienced seizures, and that during a seizure, the individual could bruise, scratch or abrade herself. He said, however, that the child's facial and head injuries were not consistent with injuries caused by a seizure.

Dr. Ortiz-Reyes also found an injury to the posterior side of the child's left lung. He opined that the injury was caused by "trauma with something blunt, something that could have this configuration, like round." According to Dr. Ortiz-Reyes, "[The injury was] in the left lower back. Something has to hit in that area, either [sic] stationary object or some object that was coming to hurt that area in order to cause that bleeding there." There was no external injury corresponding to the internal lung injury, but "[s]ometimes it happens." The lung injury was a bruise and the impact to cause the injury would have "to be hard. Because it's [sic] deep structure." The injury could have caused the child discomfort, but Dr. Ortiz-Reyes could not rule out the possibility that the lung injury could have been caused if the child had a seizure after sustaining the head injury.

Dr. Stephen Cohle, a forensic pathologist for Spectrum Health Hospital in Grand Rapids, also testified as an expert witness for the prosecution. Dr. Cohle concluded that the child's death was a homicide caused by the internal head injury. According to Dr. Cohle, the abrasions on the child's forehead could have been rug burns, but "it would take a considerable amount of force" to make them:

Either, perhaps someone pushing the child's head down on the carpet, then pushing the child's head forcefully one way or another, or dragging the child for quite a distance. In other words, what I'm trying to distinguish here is a short, if a child falls on a run or if in play a child maybe, an older person grabs the child's legs and gently pulls the child for a few inches along the carpet, these are not gonna result. These are more severe, indicating to me there are longer period of

time where the child is dragged or more force, such as the child's head is forced into the carpet and then pulled along.

Dr. Cohle further identified the bruising and laceration on the right side of the child's lip and testified that falling in the bathtub, if the child did not "reflexively try to use her hands to stop the fall," could cause that injury. Dr. Cohle opined, however, that the bruises on the right side of the child's chin, her right temple in front of her ear, and her right cheek, along with the lip injury, were caused by blunt force trauma. The injuries along the right side of the child's face would require "multiple different blows" because "they're separated . . . by lots of uninvolved skin" and the "surface against which she fell, would have to have, for example a protrusion that would hit her in the forehead and then maybe another couple of inches away, another protrusion and then another[,] and it was "extremely unlikely" that it was caused by a bathtub. Dr. Cohle agreed that the child's head was smaller than an adult head and that her softer skin would slightly increase the tendency for abrasions and bruises to occur.

Dr. Cohle also testified that the abrasion on the back of the child's head corresponded to the bruising that was located beneath the scalp. The underlying bruising was larger than the abrasion, and the abrasion was consistent with one blow, although "the extent of the bleeding beneath the scalp . . . suggests that there were [sic] probably more than one [blow]." The abrasion indicated that her head struck "a rather rough object."

Dr. Cohle also did not see any evidence that there was an older hemorrhage and then rebleeding. Dr. Cohle testified that the rebleeding theory "from a [old] subdural [hemorrhage] in my opinion is not a viable theory to explain a massive fatal subdural hemorrhage." Dr. Cohle testified that the child's hemorrhage was recent based on the color of the blood. It was recent because "a fresh hemorrhage on the surface of the brain is loose and is not adherent to the dura." Dr. Cohle also testified that Dr. Ortiz-Reyes' autopsy report contained no mention of finding old bloodstains; Dr. Ortiz-Reyes' report indicated he examined brain tissue under a microscope and "did not see any old hemorrhage."

Dr. Cohle opined that the child's internal head injury was not consistent with slipping and falling in the bathtub because "there would [not] be enough force generated from a fourteen month old falling in the bathtub to cause a fatal head injury. I don't think she would have any significant injury at all." Dr. Cohle testified that a normal child would not sustain a fatal head injury from a trivial fall. However, Dr. Cohle also testified on cross-examination that "children can get injuries out of short falls." He was familiar with studies finding that children died because of short falls where they sustained brain injuries, although Dr. Cohle has never performed an autopsy on a short-fall injury case. Dr. Cohle testified that he could not say definitively that the cause of the brain hemorrhage was just the blow to the back of the head, without contribution from the blows to the front of the head.

Dr. Cohle also testified that the child's lung showed a hemorrhage, and he believed that blunt force trauma caused the injury. It was unusual that there was no surface injury to the child's back over the lung injury site, but the injury was "more consistent with an injury than it is an aspiration," where blood gets into the lungs.

Clark presented his own expert witness, Dr. Bader Cassin. Dr. Cassin reviewed the police investigation, Dr. Ortiz-Reyes' autopsy report, the slides from the autopsy, and

photographs of the scene and the child's body. He opined that the child's death was unnatural and was caused by the injury to her head. Dr. Cassin explained that a short-fall injury means "falls that occur somewhere within [a child's] height elevation, or in general not exceeding about twelve feet or so." This was a "subject of study," and not a theory, in forensic pathology, and it has been proven that "[s]hort fall injuries can be fatal." Short-fall injuries can be trivial, but they "can [also] be more serious and they can be serious even to the point of being fatal. This is not a matter of opinion, it's a matter of fact." According to Dr. Cassin, the injury to the back of the child's head was "[n]ot an uncommon place for a head to strike something for the first time, or unprotected." A bathtub is "obviously [a] hard" surface, and if it is wet, you could fall, "[s]o if the feet flew out from underneath this child, as if somebody were on ice skates or roller skates, and the head came down and struck this hard surface of porcelain, that would be a considerable head strike against a fixed surface." According to Dr. Cassin, a short-fall head injury could result from falling in a bathtub: "[i]t's happening from her head level, which is about two and a half feet high and so it, it would go into that category of head injury." Dr. Cassin believed the child's injury could be sustained in that way, that is, that slipping and falling in a bathtub could create sufficient force to cause the injury. Dr. Cassin said that the child's skull was not fractured because the skull is more elastic in a 14-month-old child, but there "is definite brain injury beneath it and there is the characteristic subdural accumulation of blood, which then happens over the next hour or so, that you would find in that pattern of bleeding from such an injury. So, everything else fits."

Dr. Cassin then opined that there was insufficient information to classify the child's death as a homicide or as an accident. The collection of blood in the victim's brain occurred over a time period of an hour. The pattern of injury indicated that the child's head struck something: "[t]he pattern of injury is of a moving head hitting a fixed surface." Dr. Cassin explained that "the child does not lose consciousness" at first, which is called a "lucid interval," that varies in duration, and the child would "start crying, screaming even," which would

diminish over a relatively short period of time . . . but certainly within thirty minutes or so, by the gradual accumulation of blood in the head and the swelling of the brain, which then will cause the child, first of all, to become semi-conscious, what many people would say sleepy or lethargic, and eventually lose consciousness.

Maintaining that the prosecutor failed to present sufficient evidence for second-degree murder and first-degree child abuse, the underlying crime leading to the felony-murder charge, Clark moved for a directed verdict regarding the felony murder charge. The prosecutor argued that Clark knowingly caused serious physical harm or risk of great bodily harm or death based on expert opinion on "how much force it would . . . require to cause the type of subdural hemorrhage that is present in this case." Therefore, the trial court denied Clark's motion. As stated above, the jury then convicted Clark of felony murder predicated on first-degree child abuse, and manslaughter and first degree-child abuse. The trial court later vacated the latter two convictions. Clark now appeals.

II. Juror C.S.

A. Standard Of Review

Clark argues that he was deprived of a fair trial because there was no further voir dire of a juror who was removed from the jury after the first day of trial, C.S. The parties do not dispute that C.S. was properly removable for cause because she had a felony conviction on her record.⁴ Clark claims that the presence of C.S. on the jury for part of the trial caused him actual prejudice, and he indicates that she should have been further questioned regarding why she failed to disclose her felony, her alleged connection to Mathis, and whether she tainted the jury by passing along prejudicial information. Clark also claims that defense counsel provided ineffective assistance of counsel in failing to further voir dire C.S. or request that the trial court continue questioning her to ascertain what impact she had on the jury.

Because Clark failed to request a mistrial or move for a new trial in the trial court based on this juror's alleged prejudicing of the jury, we review this unpreserved claim for plain error that affected his substantial rights.⁵ Our review of Clark's ineffective assistance claim is limited to mistakes that are apparent on the record.⁶

B. Legal Standards

When information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause and his presence denied the defendant of an impartial jury.⁷ However, the primary inquiry is whether the defendant was denied his right to an impartial jury; if not, then there is no need for a new trial.⁸ “[S]ome showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury.”⁹

To prevail on an ineffective assistance claim, a defendant must demonstrate that defense counsel's performance was deficient because it fell below an objective standard of reasonableness, and that this resulted in prejudice to him in that, but for the alleged error, it is reasonably likely that the outcome of the trial would have been different.¹⁰

⁴ MCL 600.1307a(1)(e).

⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁶ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁷ *People v Miller*, 482 Mich 540, 561; ___ NW2d ___ (2008); *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), overruled in part by *Miller*, *supra*.

⁸ *Miller*, *supra* at 561.

⁹ *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998).

¹⁰ *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999).

C. Applying The Standards

The record reflects that, after the jury was sworn and the first day of trial completed, the trial court discovered that C.S. had a prior felony conviction and was ineligible to serve as a juror. The prosecutor noted that Mathis indicated that she knew C.S. because they went to school together and previously worked together. The trial court questioned C.S. to determine whether the nondisclosure of her felony on her juror questionnaire or during voir dire was intentional. C.S. indicated that she thought the felony was dismissed. The trial court then properly dismissed C.S., and the trial proceeded with the remaining 12 jurors. C.S. did not thereafter participate in deliberations at all or in deciding Clark's guilt or innocence.

The trial court instructed the jurors, before their very first break on the first day of trial, not to discuss the case amongst themselves. "It is well established that jurors are presumed to follow their instructions."¹¹ As in *People v Grabowski*, the record here does not support a conclusion that C.S. informed the other jurors that she knew Mathis or imparted any prejudicial information to the jury.¹² In *Grabowski*, a juror was dismissed after jury was sworn because she informed the trial court that she could not be impartial.¹³ The defendant contended that the juror's bias may have tainted the jury during the lunch break, but this Court held that the trial court instructed the jurors before lunch to refrain from discussing the case amongst themselves, and "[t]here was no showing of any violation of this instruction by the jury members by discussing the case, or even having lunch together."¹⁴

Relief was unwarranted in that case, and on the record before us, we conclude that Clark has failed to show that he was actually prejudiced by the presence of C.S. in this case. She was excused for cause and did not take part in the deliberations. The mere fact of a juror being a felon does not automatically require a new trial.¹⁵ Moreover, Clark's contention that C.S. somehow tainted the jury relies solely upon speculation, which is insufficient to establish actual prejudice.¹⁶ Unlike in *People v Fetterley*,¹⁷ where the challenged juror learned of the defendant's prior criminal history during trial through outside sources, the record does not support the conclusion that C.S. possessed any prejudicial information specifically about Clark.

¹¹ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹² See *People v Grabowski*, 12 Mich App 672, 675; 163 NW2d 449 (1968).

¹³ *Id.* at 674.

¹⁴ *Id.* at 674-675.

¹⁵ *Miller, supra* at 553-554.

¹⁶ *Fetterley, supra* at 545. See also *People v Sowders*, 164 Mich App 36, 47-48; 417 NW2d 78 (1987) (Where a juror was dismissed for cause after the jury was sworn because the juror informed the trial court that he knew one of the prosecution's witnesses and the defendant claimed that the jury was thereby biased, this Court held that "[d]efendant is dealing strictly in speculation and has shown nothing which would indicate that the jury was biased.").

¹⁷ *Fetterly, supra* at 544-545.

Based on the foregoing, we also find that defense counsel was not ineffective. The record does not support the conclusion that defense counsel was ineffective for failing to request further voir dire of C.S. In so ruling, we reject Clark’s argument that a remand to explore these issues is necessary. Clark has not established that a remand would establish any relevant facts.¹⁸

III. Autopsy Photographs

A. Standard Of Review

Clark argues that the photographs admitted into evidence at trial were unduly prejudicial and should have been excluded. Defense counsel stipulated to their admission at trial and this issue is therefore waived.¹⁹

We nonetheless address Clark’s claim because he further asserts that defense counsel was ineffective for failing to move to exclude the photographs or object to their admission at trial. This Court generally reviews the trial court’s decision to admit evidence for a clear abuse of discretion.²⁰ The trial court abuses its discretion where it selects an outcome that falls outside the range of reasonable and principled outcomes.²¹ Unpreserved non-constitutional error, such as an evidentiary error,²² warrants reversal only where the defendant establishes plain error that affected the outcome of the trial.²³ A defendant must also show that he was actually innocent, or that the fairness, integrity, or public reputation of the judicial proceedings was seriously affected.²⁴

B. Legal Standards

“Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal.”²⁵ “However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime.”²⁶

¹⁸ MCR 7.211(C)(1).

¹⁹ *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

²⁰ *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod 450 Mich 1212 (1995).

²¹ *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

²² *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

²³ *Carines*, *supra* at 774.

²⁴ *Id.*

²⁵ *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

²⁶ *Id.*

C. Applying The Standards

First, the photographs must be relevant. MRE 401 provides that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Clark was charged with felony murder. The elements of felony murder are:

“(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony murder statute.”^[27]

The underlying felony here was first-degree child abuse, which requires that the defendant “knowingly or intentionally cause[d] serious physical or mental harm to a child.”²⁸ The prosecutor bears the burden of proving all the elements of the crime beyond a reasonable doubt, even if the defendant offers to stipulate to any of the elements.²⁹ Because all of the elements of the charged offense are at issue, the prosecutor may offer evidence that is relevant to every element.³⁰ “[E]vidence of injury is admissible to show intent to kill.”³¹

Here, both defense and prosecutorial experts extensively used the challenged photographs while testifying regarding the nature, extent, and cause of the child’s injuries. In *People v Unger*,³² this Court held that the victim’s autopsy photographs were admissible under circumstances where the “nature, type, and location” of the injuries were disputed, and the photographs illustrated and augmented the expert testimony regarding the victim’s brain injuries. In *People v Mills*,³³ the photographs of the victim’s injuries were relevant to show the defendants’ intent to commit murder: “[t]he severity and the vastness of the victim’s injuries were of consequence to the determination whether the defendants’ acts were intentional.” For the same reasons, the challenged photographs in this case were also relevant, material, and admissible for the proper purpose of demonstrating the extent, nature, and cause of the child’s injuries. These issues were relevant to a determination of whether Clark knowingly and intentionally physically abused the child and whether he also possessed the intent to kill, inflict

²⁷ *Carines, supra* at 758-759, quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).

²⁸ MCL 750.136b(2).

²⁹ *Mills, supra* at 69.

³⁰ *Id.* at 71.

³¹ *Id.*

³² *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

³³ *Mills, supra* at 71.

great bodily harm, or create a very high risk of death or great bodily harm.³⁴ Further, the credibility of the witnesses' testimony was an issue of consequence because of the competing experts' testimony, and the evidence was also admissible to aid the jury in assessing credibility.³⁵ The photographs further assisted the jury in understanding the expert testimony.

The photographs in this case were also relevant because they tended to make the existence of child abuse and Clark's intent with respect to the abuse and the murder more probable than they would be without the photographs.³⁶ The prosecution's experts testified that the level of the child's internal head injury was not consistent with merely slipping and falling in the bathtub, that the external injuries such as the abrasions demonstrated signs of child abuse, and that the bruises may have been caused by Clark's hand being placed on the child's face and then slamming her head into a hard surface. A lung injury added to the possible signs of child abuse. On the other hand, Clark disputed the prosecution's experts' conclusions. Clark's expert used the photographs in his testimony to explain and provide support for his conclusions. Clark argued that the child's fatal head injury either occurred when she slipped and fell in the bathtub or was a "re-bleeding" in the child's brain to an area that bled before.

Second, even if relevant, photographs may nonetheless be excluded "if [their] probative value is substantially outweighed by the danger of unfair prejudice."³⁷ While the prosecution's evidence is prejudicial to some extent, "[i]t is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded."³⁸ We conclude that the photographs here were not offered nor admitted solely to arouse the prejudices and passions of the jury. Moreover, evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury.³⁹ However, here the photographs were not just marginally probative and nothing in the record supports that they were given undue or preemptive weight. Although Clark contends that less prejudicial means were available to the prosecutor to illustrate the child's injuries, we note that Clark's expert witness also used the photographs while testifying. We also note that Clark objected when one of the prosecutor's experts attempted to use a model Styrofoam head in order to illustrate the location of the injuries on ground that the photographs were the best evidence.

Because the photographs were admissible, we reject Clark's argument that defense counsel was ineffective for failing to object to them. Defense counsel did not have to raise a meritless objection or futile argument.⁴⁰

³⁴ *Carines, supra* at 758-759.

³⁵ *Mills, supra* at 72.

³⁶ MRE 401.

³⁷ MRE 403.

³⁸ *Mills, supra* at 75 (emphasis in original).

³⁹ *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

⁴⁰ *Snider, supra* at 425. See also *Unger, supra* at 257 ("Defense counsel was not ineffective for failing to make a futile object to the admission of the [properly admissible] photographs.").

IV. The Dissent

Our dissenting colleague, however, asserts a separate and distinct ground for proposing a reversal in this case. The dissent asserts trial counsel was ineffective in failing to request a voluntary manslaughter instruction at the trial from which this appeal originates. We first note that, as the dissent candidly acknowledges, this asserted ineffectiveness is not among the questions that Clark has asked this Court to review in this appeal. Indeed, the statement of questions presented concerning ineffective assistance of counsel reads, in its entirety, as follows:

Trial counsel performed ineffectively by failing to properly voir dire the tainted juror, failing to request a mistrial and failing to file a motion to quash the gruesome autopsy photographs or at least object to and limit their admission resulting in unfair prejudice and undermining defendants' due process right to a fair trial.

Rather obviously, there is not a single reference in this statement, or elsewhere in Clark's brief on appeal, to trial counsel's failure to request a voluntary manslaughter instruction.

This Court is not obligated to consider issues not properly raised and preserved or any issues not set forth in the statement of questions presented.⁴¹ Moreover, this Court has often held that an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims,⁴² nor may he give issues cursory treatment with little or no citation of supporting authority.⁴³ We have also held that argument must be supported by citation to appropriate authority or policy.⁴⁴ Further, we have held that an appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.⁴⁵ Here, Clark has not announced his position on the question of whether his trial counsel was ineffective in failing to request a voluntary manslaughter instruction in the trial from which this appeal originates. Nor has he failed to support such an argument by proper citation. Rather, for reasons of his own, he has not made any argument at all on this question. If ever there was an assertion of error that has been abandoned, it is this one.

⁴¹ *MEA v SOS*, 280 Mich App 477, 488; 761 NW2d 234 (2008); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

⁴² *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004); *Amb v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003).

⁴³ *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after rem 211 Mich App 214 (1995); *Matuszak*, *supra*; *In re Ind Mich Power Co*, 275 Mich App 369, 376; 738 NW2d 289 (2007).

⁴⁴ MCR 7.212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

⁴⁵ *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

But our dissenting colleague nevertheless resurrects this issue in the interests of justice. We fail to see how such interests will be served by deciding an unbriefed, indeed unasserted, issue. We decline to speculate as to the conclusion (or conclusions) that a jury might have reached had it been given a voluntary manslaughter instruction. We also decline to speculate on the reasons that Clark's trial counsel might have had when that counsel decided not to seek such an instruction. We further decline to speculate on the reasons that Clark's appellate counsel—a different lawyer from the one who represented Clark at trial—might have had when that counsel decided not to assert an ineffective assistance of counsel claim on appeal with respect to trial counsel's decision not to seek a voluntary manslaughter instruction. As our dissenting colleague states, Clark has now been tried twice on the charge of felony murder arising out of the death of his 14-month old daughter. At each trial, a jury found Clark guilty of felony murder. We fail to see how a third trial on this charge would serve the interests of justice.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck