

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS TULEKUN BOLDEN,

Defendant-Appellant.

UNPUBLISHED

February 11, 2010

No. 288255

Muskegon Circuit Court

LC No. 08-056234-FC

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder. MCL 750.317. Defendant's conviction arises from the death of a one-year old child after having sustained a severe head injury. Defendant was sentenced to 43 to 75 years' imprisonment. We affirm defendant's conviction and sentence, but remand solely for the ministerial task of removing a document attached to defendant's presentence investigative report (PSIR).

Defendant first argues that his conviction should be overturned because the trial court erred when it gave a special jury instruction requested by the prosecution on the state of mind required for second-degree murder. Defendant contends that the standard criminal jury instruction, CJI2d 16.5(3), should have been used. We find no error requiring reversal.

"This Court reviews de novo a defendant's claim of instructional error." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). In addition:

The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. This Court reviews jury instructions in their entirety to determine "if error requiring reversal occurred." There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. [*People v Heikkiner*, 250 Mich App 322, 327; 646 NW2d 190 (2002) (citations omitted).]

"The offense of second-degree murder consists of the following elements: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999) (citations omitted). Malice has been defined as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause

death or great bodily harm.” *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). The Michigan Criminal Jury Instruction on second-degree murder has, however, adopted the definition of malice from *People v Dykhouse*, 418 Mich 488; 345 NW2d 150 (1984). CJI2d 16.5(3) states:

Second, that defendant had one of these three states of mind: [he/she] intended to kill, or [he/she] intended to do great bodily harm to [name deceased], or [he/she] knowingly created a high risk of death or great bodily harm knowing that death or such harm would be the likely result of [his/her] actions.

Defendant argues that use of the *Aaron* definition instead of the *Dykhouse* definition constituted an abuse of discretion. We disagree.

As repeatedly noted by this Court:

[T]he Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. “Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand.” [*People v Gadomski*, 232 Mich App 24, 32 n 2; 592 NW2d 75 (1998), quoting *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).]

The trial court’s use of the special jury instruction based on controlling authority that has not been overruled did not constitute an abuse of its discretion because it did not result in “an outcome falling outside [the] principled range of outcomes.” *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant next argues that the trial court erred in allowing the admission of other-acts evidence at trial. “[T]his Court reviews a trial court’s decision regarding the admissibility of other-acts evidence for an abuse of discretion.” *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007). When a trial court’s decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes admission, then the review is de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it erroneously admits or precludes evidence as a matter of law. *Id.* “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009) (citation omitted). We agree with defendant that the trial court erred in allowing a police officer to testify regarding a victim’s hearsay statements under MCL 768.27c, because this case does not fall within the statutory definition of domestic violence. However, we find that the error was harmless because the evidence of defendant’s other bad acts was properly admitted in accordance with other rules of evidence.

The other bad acts evidence was admitted through statements made by a four-year-old girl, who was also physically struck by defendant, and her mother. Their statements were admitted through the testimony of a police officer at defendant’s second-degree murder trial involving the victim in this case. Although these statements were erroneously admitted under MCL 768.27c, we find that the error was harmless because the information that the four-year-old

and her mother provided was admissible either through the police officer as an excited utterance, pursuant to MRE 803(2), or through testimony of the emergency room doctor and nurse who provided treatment, in accordance with MRE 803(4). Since the trial court reached the correct result, albeit for the wrong reason, reversal is not required merely because the trial court misidentified the ground for admitting the evidence. *People v Vandelinder*, 192 Mich App 447,454; 481 NW2d 787 (1992).

Additionally, the trial court did not abuse its discretion in admitting the other-acts evidence under MRE 404(b). In order for evidence to be admitted under MRE 404(b), a four-part test must be satisfied. The evidence must be: 1) offered for a proper purpose; 2) relevant; 3) the probative value must not be outweighed by the danger of unfair prejudice; and, 4) a limiting instruction must be given upon request that the evidence must only be considered for the proper purpose for which it was admitted. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecutor offered the evidence to prove defendant's intent, common plan or scheme, and the absence of mistake or accident. The evidence was relevant to those issues, and the probative value of such evidence was not outweighed by the danger of unfair prejudice. Although defendant failed to request a limiting instruction, the trial court nevertheless provided one. Because the evidence of defendant's other violent act was admissible, the trial court did not abuse its discretion and defendant's claim is without merit.

Defendant next asserts that the trial court erred in scoring 50 points for offense variable 7. Because defendant did not object to the scoring of OV 7 at sentencing, and did not move for resentencing or remand, our review is for plain error. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). Hence, this Court reviews whether: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "When the minimum sentence is within the range provided by the statutory sentencing guidelines, this Court must affirm unless the trial court erred in scoring the guidelines or relied on inaccurate information." *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003) (footnote omitted). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The trial court did not err in scoring 50 points for OV 7. "Offense variable 7 is aggravated physical abuse." MCL 777.37(1). OV 7 is scored at 50 points 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). Sufficient evidence existed in the record to support the finding that defendant's act of throwing the infant victim was excessively brutal. The victim suffered a depressed skull fracture and a massive closed head injury as a result of defendant's actions. As a result of his injuries, the victim's body seized to the extent that medical personnel experienced difficulty establishing an airway for the child. Swelling of the victim's brain was so severe that it resulted in a crossing of the left hemisphere across the midline into the right hemisphere and was beginning to herniate out of the skull. Based on the extent of the victim's injuries suffered at the hands of defendant, combined with the victim's age, size, and helplessness, the trial court's scoring of 50 points on OV 7 is adequately supported.

Finally, defendant argues, and plaintiff concurs, that a copy of the Muskegon County Sheriff's Department incident report that is attached to defendant's PSIR must be removed. The trial court ordered that the Sheriff's report be removed. However, the Sheriff's report remains attached to defendant's PSIR. We agree with defendant and plaintiff, and order that all attached copies of the report be removed from defendant's PSIR.

Affirmed, but remanded solely for the ministerial task of removing copies of the Sheriff's report from defendant's PSIR. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens