

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EFREM STEPHON WILSON,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 303751

Wayne Circuit Court

LC No. 10-003287-FC

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted at a jury trial of involuntary manslaughter, MCL 750.321, and first-degree child abuse, MCL 750.136b(2). He was sentenced to 10 to 15 years' imprisonment for involuntary manslaughter, and to 10 to 15 years for first-degree child endangerment. Defendant appeals as of right. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant identifies two areas of testimony at trial, the admission of which he argues amounted to ineffective assistance of counsel. First, defendant argues that his counsel was ineffective for not objecting to the reading for the jury, and the admission into evidence of, the statement defendant gave at his apartment to Officer Maye, a Detroit Police officer who responded to the scene of the death of the victim, Mariah Harbin, defendant's nine week-old daughter. This statement included references to defendant's past encounters with Child Protective Services (CPS), and a prior domestic violence arrest. Second, defendant notes that a videotape of his interview with Sergeant Mackie, the investigating officer in the case, was played for the jury in its entirety. Pursuant to a stipulation, portions of the tape in which defendant refers to his status as a parolee were supposed to be muted so that the jury could not hear them. However, due to inadvertence, certain references to defendant's parolee status were not muted. Defendant argues that his counsel was ineffective for not properly muting the videotape, and for requesting an instruction to the jury that the convictions for which he was on parole were not violent. In short, defendant argues that, because the jury was allowed to hear evidence of these prior bad acts, there is a reasonable likelihood that it convicted him on the basis of his prior actions and not the evidence presented at trial. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must either make a motion for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Here, defendant did not move for a *Ginther* hearing or a new trial in the lower court, and thus, the issue of ineffective assistance of counsel is unpreserved.

“Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). “The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where claims of ineffective assistance of counsel have not been preserved, this Court’s review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; ___ NW2d ___ (2012).

Determining whether a defendant’s trial counsel was ineffective requires conducting a two-stage inquiry. First, “the defendant must show that counsel’s performance fell below an objective standard of reasonableness.” *Armstrong*, 490 Mich at 290, citing *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “In doing so, the defendant must overcome the strong presumption that counsel’s assistance constituted sound trial strategy.” *Armstrong*, 490 Mich at 290, citing *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Second, “the defendant must show that, but for counsel’s deficient performance, a different result would have been reasonably probable.” *Armstrong*, 490 Mich at 290, citing *Strickland*, 466 US at 694-696.

It was objectively reasonable for defendant’s counsel to not object to statements defendant gave to Officer Maye regarding his past involvement with CPS. Defendant told Officer Maye that, when it was alleged that he had abused his son, an investigator from CPS “came and checked my house and the lady said she was going to close my case because there was nothing wrong. I never heard from them again.” In other words, defendant’s statements to Officer Maye were that he was exonerated by CPS. Accordingly, the jury, by inference, could readily have concluded that CPS determined that defendant was a competent father, and it was objectively reasonable trial strategy for trial counsel to allow this testimony’s elicitation.

It was also reasonable for defendant’s counsel not to object to defendant’s past arrest for domestic violence. Pursuant to MRE 404(b)(1) and case law interpreting it, evidence of a defendant’s prior bad acts is admissible if “(1) the evidence [is] offered for a proper purpose; (2) the evidence [is] relevant; and (3) the probative value of the evidence [is] not [] substantially outweighed by unfair prejudice [under MRE 403].” *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). Regarding whether evidence of a defendant’s prior bad acts is offered for a proper purpose, the Supreme Court recently explained that “evidence is inadmissible under [Rule 404(b)(1)] only if it is relevant solely to the defendant’s character or criminal propensity.” *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010) (emphasis in original). Here, the jury heard that defendant was arrested in 1989 for domestic violence, and that Ronda Hardin, Mariah’s mother, had called the police alleging that defendant

abused her, in a case where he was charged with abusing and killing his child. MRE 404(b)(1) explains that evidence of defendant's prior bad acts may be admissible for a purpose other than criminal propensity, including "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." The prosecution does not argue on appeal that this evidence is relevant to any admissible basis under MRE 404(b), nor did it do so below, and we can conceive of no basis other than defendant's propensity for violence of which this evidence is probative. Accordingly, this evidence was not admitted for a proper purpose.

However, this evidence was not substantially more prejudicial than probative under MRE 403. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (internal citations omitted). There was overwhelming evidence of defendant's guilt, which will be discussed in greater detail below. Defendant's prior domestic violence arrest was remote in time (1989), and references in the statement to the arrest itself were brief and fleeting. It is therefore likely that defense counsel reasoned that it would have been highly improbable that the jury would convict him on the basis of his prior domestic violence arrest. Accordingly, because this evidence was not substantially more prejudicial than probative, it was objectively reasonable for defendant's counsel not to object to its admission.

Defendant's counsel's actions regarding the videotaped interview with Sergeant Mackie were also reasonable. Defendant argues that it was defendant's counsel's fault that the videotape was not muted properly to omit defendant's references to his status as a parolee for the crime of receiving and concealing a stolen motor vehicle. However, the trial judge explicitly stated on the record that "I don't blame anyone. I think we talked about before the difficulty of making sure that we shut off the video at the correct time of viewing it as I know from my own experience having done that before in a trial." Defendant's counsel did not object while the tape was played because he feared that doing so would draw more attention to defendant's admission that he was on parole. Indeed, not objecting in front of the jury was a reasonable decision, as the references to defendant's parolee status were, according to the trial judge, "fleeting," and objecting to their inadvertent admission in front of the jury while the tape was playing may well have influenced the jury to give the references more weight than they were due. However, defendant's counsel did object outside the hearing of the jury, and moved for a mistrial. Although the judge denied the mistrial, he offered to give a curative instruction, and defendant's counsel agreed. Specifically, the judge told the jury:

You must not consider the fact that he was on parole for receiving and concealing a stolen motor vehicle for any purpose. For example, you may not decide that that fact shows that he's a bad person or that he is likely to commit crimes. You must not convict him here because you think he is guilty of other bad conduct all right. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crimes for which he's on trial for or you must find him not guilty.

"[J]urors are presumed to follow their instructions," absent evidence to the contrary. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). There is no evidence that the jury did

not follow the curative instruction. Indeed, the curative instruction contextualized the admission that defendant was a parolee in a way that defendant's counsel objecting during the playing of the tape would not. Specifically, the curative instruction indicated that the crime for which defendant was on parole was not a violent crime, decreasing the likelihood that the jury would interpret defendant's admission as probative on propensity for violence. Accordingly, the instruction was sufficient to cure any potential prejudice to the jury caused by the accidental admission of defendant's status as a parolee, and defendant's counsel's actions in agreeing to the instruction were objectively reasonable.

Moreover, even assuming, arguendo, that it was error for the jury to hear and consider the evidence on which defendant relies in advancing his ineffective assistance of counsel claim, reversal would not be required in this case, because the outcome at trial would not have been different even if evidence was suppressed. This Court has held that where the evidence of guilt of the charged offense is otherwise overwhelming, the admission of prior bad acts evidence, even improperly admitted prior bad acts evidence, amounts to harmless error. *People v Davenport (After Remand)*, 286 Mich App 191, 199; 779 NW2d 257 (2009); *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995).

When Harbin left Mariah alone with defendant, she was alive and healthy. By defendant's own admission, only he and his teenage son were in the apartment with Mariah that night, but defendant's son was asleep. Defendant initially denied shaking Mariah, although he later changed his story and admitted to shaking her, gripping her around the ribs, for "about two or three minutes It might have been a bit longer." Defendant's own description regarding how he shook Mariah corresponded with the testimony of Dr. Schmidt, the Wayne County Medical Examiner, regarding injuries Mariah sustained to her chest. Specifically, Dr. Schmidt testified that Mariah suffered a broken rib, a bruised right lung, and hemorrhaging around the site of the bruised lung and a fractured rib. Dr. Schmidt explained that "to actually suffer an injury like that to the lung means that significant energy had to be submitted across the chest wall for a bruise of that magnitude to appear in the lung." While incarcerated and awaiting trial, defendant admitted to Darius Morris, a fellow inmate who testified at trial in exchange for a reduction in his sentence, that defendant had "slammed" Mariah onto the bed after he shook her. This was consistent with Dr. Schmidt's explanation of how Mariah suffered brain swelling and hemorrhaging to her optic nerve and skull. Dr. Schmidt testified that sometimes injuries such as the ones to Mariah's head and brain can occur when a child is

flung against a surface that is not hard. . . . a pillow for example, and as the infant's head strikes a surface such as a pillow that surface molds itself around the infant's head and distributes the impact throughout the surface area of the infant's head so that there is no discreet evidence of impact.

In short, even without the evidence defendant argues was improperly admitted, there was overwhelming evidence of defendant's guilt. Accordingly, the outcome of the trial would not have been different were that evidence suppressed, and therefore, defendant's counsel was not ineffective.

II. SUFFICIENCY OF THE EVIDENCE

Defendant's sufficiency of the evidence argument focuses exclusively on identity and causation: he argues that the medical evidence introduced at trial was insufficient to establish when Mariah's injuries were sustained, and that, therefore, those injuries could have been sustained prior to the time Mariah was in defendant's care. Accordingly, defendant argues that the prosecution presented insufficient evidence to sustain defendant's convictions of involuntary manslaughter and first-degree child abuse.

This Court reviews the record de novo when reviewing a claim of insufficient evidence. *People v Meissner*, 294 Mich App 438, 452; ___ NW2d ___ (2011); *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

A killing done without malice is manslaughter. *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). Involuntary manslaughter is a "catch-all crime . . . characterized in terms of what it is *not*, and ascertaining whether a homicide is involuntary manslaughter requires essentially questioning first whether it is murder, voluntary manslaughter, or a justified or excused homicide. If it is none of those, then the homicide, generally, is involuntary manslaughter." *People v Holtschlag*, 471 Mich 1, 7; 684 NW2d 730 (2004). The requisite mens rea for involuntary manslaughter is gross negligence. *Id.* at 16-17. To support a conviction of first-degree child abuse, the prosecution must show that the defendant "knowingly or intentionally cause[d] serious physical harm or serious mental harm to a child." MCL 750.136b(2). The defendant must have intended to cause serious mental or physical harm to the child, or had to know that serious mental or physical harm would be caused by his actions. *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004). Identity is an element of both involuntary manslaughter and first-degree child abuse, because "identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

The prosecution presented sufficient evidence that defendant was the cause of Mariah's injuries and death. Dr. Schmidt testified that he could not pinpoint the precise time when Mariah sustained her injuries, but indicated that, based on the available evidence, they were most likely sustained "within twelve to maybe twenty-four hours of when the impact occurred." Dr. Dragovic, defendant's expert witness, testified that Mariah's injuries could have been sustained "from several hours . . . up to thirty-six to forty-eight hours" before the time of death. Defendant argues that, because, according to Dr. Dragovic, there is a possibility that the injuries occurred before Mariah was in defendant's care, the prosecution presented insufficient evidence that defendant caused Mariah's death. Defendant's argument, in essence, asks this Court to disregard Dr. Schmidt's testimony in favor of Dr. Dragovic's. In other words, defendant asks this Court to evaluate the credibility of witnesses on appeal. However, the credibility of witnesses is within the purview of the fact finder, and will not be "resolve[d] anew" on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000), citing *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). That the jury chose to accept Dr. Schmidt's testimony and reject Dr. Dragovic's is not, without more, a basis for reversal.

However, even without the conflicting medical testimony, the prosecution presented sufficient evidence that defendant's actions caused Mariah's injuries and death. Defendant does

not dispute that Harbin placed Mariah in his care, and by defendant's own admission, only he and his son were in the apartment the entire night, but defendant's son was asleep. Defendant admitted to shaking Mariah. Defendant demonstrated to Sergeant Mackie how he gripped Mariah when shaking her: he placed his hands around her rib cage and shook her, by his own account, for at least two or three minutes, possibly more. The next morning, the paramedics found Mariah dead. Dr. Schmidt testified that Mariah suffered injuries to her chest, where defendant gripped her while shaking her. Specifically, Dr. Schmidt testified that Mariah suffered a bruised lung, a fractured rib, and hemorrhaging around her fractured rib. Regarding the injuries Mariah sustained to her head, Dr. Schmidt testified that Mariah suffered brain swelling, hemorrhaging to her optic nerves, and hemorrhaging to her skull. Dr. Schmidt testified that these injuries could have been caused if Mariah had been

flung against a surface that is not hard. For example, a pillow . . . as the infant's head strikes a surface such as a pillow that surface molds itself around the infant's head and distributes the impact throughout the surface area of the infant's head so that there is no discreet evidence of impact.

Defendant told his fellow inmate, Morris, that after he shook Mariah, he "slammed" her into the bed. Accordingly, viewing the facts in the light most favorable to the prosecution, a reasonable jury could conclude that defendant's actions in shaking Mariah and slamming her into the bed when Mariah was in his care, were the cause of Mariah's death.

Defendant also argues that the failure of Dr. Schmidt's office to include in the autopsy report the results of tissue samples from the organs in Mariah's chest "constituted a violation of the Medical Examiner's Act as all findings from all procedures conducted must be included in the written autopsy report." MCL 52.205(3) provides, in relevant part, that "the county medical examiner . . . shall carefully reduce or cause to be reduced to writing each fact and circumstance tending to show the condition of the body and the cause and manner of death." Here, the tissue samples of the organs in Mariah's chest were not reduced to writing. However, Dr. Dragovic testified that the "injur[y] that [was] essential and critical in this case [was] the head trauma" and noted that no tissue samples were taken from that region. Therefore, because the slides of tissue samples taken from Mariah's chest were not related to the essential injury that tends to show the cause and manner of death, that they were not documented in the autopsy report is irrelevant; the autopsy did not violate the law.

However, whether MCL 52.205 was violated in this case is immaterial to the jury's determination regarding defendant's guilt. As explained, there was sufficient evidence presented regarding defendant's identity and causation for a reasonable jury to determine that defendant committed involuntary manslaughter and first-degree child abuse.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause