

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 14, 2012

v

RONALD DOUGLAS WOODARD,
Defendant-Appellant.

No. 305131
Jackson Circuit Court
LC No. 10-005136-FC

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Ronald Douglas Woodard appeals as of right his jury trial conviction of first-degree child abuse,¹ and involuntary manslaughter.² Woodard was sentenced as a fourth habitual offender³ to 23 to 40 years' imprisonment for both first-degree child abuse and involuntary manslaughter. We affirm.

This case arises out of the death of the two-year-old son of Christy Brown and Jerry Russell. Brown testified that on January 19, 2010, she left her son with Woodard, her live-in-boyfriend, while she was at work. According to Brown, when she returned home she found her son lying in his crib, nonresponsive. The victim was transported to the hospital, where it was discovered that he had sustained traumatic head injuries. The injuries were beyond the scope of what the hospital could handle, so the victim was air-lifted to the University of Michigan Children's Hospital. Emergency surgery was performed, however, the victim was declared brain dead shortly after his arrival and he died the next day.

¹ MCL 750.136b(2).

² MCL 750.321. Woodard was charged with first-degree child abuse, MCL 750.136b(2), and felony murder, MCL 750.316(1)(b).

³ MCL 769.12.

On appeal, Woodard argues that he was convicted on the basis of legally insufficient evidence. We disagree. Sufficiency of evidence is a constitutional issue that is reviewed by this Court de novo.⁴

When reviewing a claim that the evidence presented was insufficient to support the defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime.⁵

“In applying this standard, a court must ‘draw all reasonable inferences and make credibility choices in support of the jury verdict.’”⁶

“A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.”⁷ “‘Serious physical harm’ means 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.”⁸ There is no question that the victim’s injuries meet the definition of “serious physical harm.”⁹

Involuntary manslaughter is a lesser included offense of murder.¹⁰ Involuntary manslaughter:

is a catch-all concept including all manslaughter not characterized as voluntary: “Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.” If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.¹¹

⁴ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

⁵ *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

⁶ *People v Cameron*, 291 Mich App 599, 613; 806 NW2d 371 (2011) (citation omitted).

⁷ MCL 750.136b(2).

⁸ MCL 750.136b(1)(f).

⁹ *Id.*

¹⁰ *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

¹¹ *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004) (citations omitted).

The evidence presented supports a finding that Woodard knowingly or intentionally caused serious physical harm to the victim,¹² that he inflicted this harm with the intent to injure, and that the victim died as a result of these injuries,¹³ thus justifying his convictions.

Jackson City Police Department Sergeant Jeffrey Mazur responded to a 911 call from the victim's residence. Mazur testified that Woodard informed him that the victim was using the restroom and Woodard was assisting him. After the victim finished, Woodard picked him up and turned around to exit. Mazur further testified that Woodard explained that while he was carrying the victim, he tripped over the dog, and as Woodard was falling, the victim hit his head on the doorjamb. Woodard claimed that he positioned his body to protect the victim's head from also striking the floor.

The evidence, however, demonstrates an inconsistency between the severity of the injuries and Woodard's version of events. Woodard's medical expert witness stated that Woodard's explanation "cannot be excluded as a potential and legitimate cause for these injuries." But the prosecution's medical experts opined that the extent of the victim's head injuries was inconsistent with Woodard's explanation. Dr. Hugh Garton, the attending pediatric neurosurgeon at the University of Michigan Children's Hospital, testified that the victim's injuries did not appear to be consistent with hitting his head on a door frame. He opined that the victim's brain injury was like something that would be caused by "a high speed motor vehicle accident or a fall from several stories." Dr. Bethany Mohr, a pediatrician at the University of Michigan and an expert in child abuse pediatrics, also believed that the victim's head injuries were inconsistent with Woodard's version of events. Dr. Bader Cassin, the forensic pathologist who conducted the autopsy, listed the victim's manner of death as indeterminate, but also testified that there were inconsistencies between the victim's injuries and Woodard's description of the incident.

There was also evidence presented that Woodard may have abused the victim prior to the incident. Russell, the victim's father, testified that he was concerned about possible abuse because he started noticing bruises on the victim. Brown testified that the victim told her that Woodard was hitting him, and when she confronted Woodard, he allegedly told her that the victim needed more discipline. Further, Brandon Warnsley, Woodard's friend, stated that Woodard told him that he wished he could kill the victim. Moreover, Brown testified that the victim acted differently in Woodard's presence as he was "clingy" and cried more often. This testimony was consistent with the testimony of several other witnesses.

The jury was presented with two possible scenarios: the victim suffered a fatal head trauma when Woodard tripped and fell, or Woodard intentionally inflicted serious physical injury upon the victim. Viewing the evidence in the light most favorable to the prosecution, we

¹² MCL 750.136b(2).

¹³ *Holtschlag*, 471 Mich at 21-22.

find that a rational jury could find beyond a reasonable doubt that Woodard was guilty of first degree child abuse and involuntary manslaughter.¹⁴ Thus, reversal is not warranted.

Woodard next argues that the introduction of inadmissible and prejudicial expert testimony violated his right to due process. We disagree. Specifically, Woodard challenges Mohr's testimony. As Woodard failed to object to Mohr's testimony at trial, review is limited to plain error affecting Woodard's substantial rights.¹⁵

Woodard asserts that Mohr's testimony embraced the issue of intent.¹⁶ It is well established that expert "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."¹⁷ Expert testimony, however, is inadmissible to express legal definitions.¹⁸

Contrary to Woodard's assertion, Mohr never classified the manner of death as "abusive head trauma." Moreover, Dr. Mohr never stated that the injuries qualified as "serious physical harm" under the relevant statute, nor did the doctor express an opinion regarding whether Woodard inflicted the harm "knowingly or intentionally."¹⁹ She simply stated that the victim's injuries were suspicious for abuse and Woodard's version of events appeared inconsistent with the victim's injuries. As Mohr was qualified as an expert in child abuse pediatrics and her testimony assisted the jury in understanding the evidence as it related to the victim's injuries, her testimony was proper.²⁰

Woodard also argues that Mohr impermissibly testified regarding his credibility. Woodard is correct that it is improper for an expert to provide an opinion regarding the credibility of witnesses.²¹ Contrary to Woodard's argument, however, Mohr did not testify regarding his credibility. Rather, Mohr testified that she reviewed the victim's history, which included Woodard's version of events, and conducted a physical examination of the victim's body. Mohr stated that Woodard's version of events was inconsistent with the victim's injuries, which was not an assessment of Woodard's credibility.

Woodard next argues that he was denied his right to a fair trial because 13 jurors deliberated on his case. We disagree. The record reveals that after the jury was instructed, the

¹⁴ *Kissner*, 292 Mich App at 533-534.

¹⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹⁶ MCL 750.136b(2).

¹⁷ MRE 704; see also *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

¹⁸ See *People v Caulley*, 197 Mich App 177, 193-194; 494 NW2d 853 (1992).

¹⁹ MCL 750.136b(1)(f), (2).

²⁰ See MRE 702.

²¹ *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

trial court asked both attorneys if they wanted a juror removed as an alternate. Defense counsel stated “I have no objection to 13.” Because defense counsel made the affirmative decision not to object to thirteen jurors deliberating, we find that the issue is waived. “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.”²²

Woodard asserts that he has a constitutional right to a jury of exactly 12 members. Therefore, he argues that any waiver of a 12 member jury must be made by Woodard himself, not his attorney. Assuming arguendo that Woodard has a constitutional right to a jury of exactly 12 members and defense counsel’s waiver was ineffective, this unpreserved issue is reviewed for plain error affecting Woodard’s substantial rights.²³ “[A] constitutional right may be forfeited by a party’s failure to timely assert that right.”²⁴ “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.”²⁵ The record establishes that there was sufficient evidence to support Woodard’s convictions. Additionally, before the jury rendered its verdict, the trial court removed one of the jurors from the jury, resulting in there being only 12 jurors at the time of the verdict. Moreover, there is no record evidence to suggest that the limited participation of the thirteenth juror seriously affected “the fairness, integrity of public reputation of judicial proceedings.” Therefore, reversal is not warranted.²⁶

Woodard next argues that he was denied a fair trial when extraneous information was introduced to the jury during deliberations. We disagree. After the jury began deliberations, it requested to see a floor plan of Brown’s house and a tape measure. The floor plan was previously admitted, but the tape measure was not. When asked if he had any objection to giving the jury a tape measure, defense counsel stated “I have no objection, Judge.” Because defense counsel made the affirmative decision not to object, the issue is waived.²⁷

²² *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation and quotation omitted).

²³ *Carines*, 460 Mich at 763 (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (internal quotation marks omitted).

²⁶ *Carines*, 460 Mich at 763.

We reject Woodard’s contention that he is entitled to a presumption of prejudice based on the Court’s opinion in *Olano*. *Olano* is distinguishable because *Olano* involved an alternate juror being permitted to be present during deliberations but being ordered to remain silent, while this case involves the parties agreeing to 13 jurors deliberating on the case. *Olano*, 507 US at 737-739.

²⁷ *Carter*, 462 Mich at 215.

Accordingly, our final issue on appeal is Woodard's alternative claim that he was denied effective assistance of counsel because of the allegedly extraneous information introduced to the jury during deliberations. Review of this unpreserved issue is limited to "errors apparent on the record."²⁸

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different."²⁹ "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."³⁰ Woodard's hypothesis that the jury wanted the tape measure so that it could conduct experiments is based on pure speculation. Additionally, the jury attempting to better evaluate the evidence adduced inside the jury room in the presence of the other jurors does not constitute an introduction of an extraneous influence into the deliberative process.³¹ Moreover, even if counsel's performance fell below an objective standard of reasonableness, based on the record evidence, Woodard cannot show that "but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different."³² Thus, counsel was not ineffective.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan

²⁸ *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

²⁹ *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

³⁰ *Seals*, 285 Mich App at 17 (citation and quotation omitted).

³¹ See *People v Fletcher*, 260 Mich App 531, 542-544; 679 NW2d 127 (2004).

³² *Swain*, 288 Mich App at 643.

Woodard's argument that counsel's error resulted in a compromise verdict lacks merit because as discussed above there was sufficient evidence to support Woodard's conviction of involuntary manslaughter. *Kissner*, 292 Mich App at 533-534.