

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 13, 2013

v

TIFFANY NICOLE LANG,

Defendant-Appellant.

No. 308985
Muskegon Circuit Court
LC No. 11-060170-FH

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Tiffany Nicole Lang, appeals as of right her convictions of first-degree child abuse¹ and torture² following a bench trial. The trial court sentenced Lang to serve terms of 10 to 15 years' imprisonment for the first-degree child abuse conviction and 13 to 25 years' imprisonment for the torture conviction. We affirm.

I. FACTS

A. THE CHILD'S INJURIES

Destiny Sherrod, Lang's sister, testified that on August 24, 2010, she discovered that Lang had cut off all of her hair when she returned to the apartment that she, Lang, and Lang's three- to four-week-old infant son shared. When Sherrod confronted Lang about cutting her hair, Lang became agitated. Sherrod asked Lang to let the infant sleep with her for the evening because she was concerned for his wellbeing, and she went to bed.

Officer Chad Dejong testified that Lang called the police because a man was at her home and was refusing to leave. According to Officer Dejong, Lang appeared to be calm when he arrived, and she described the incident. As he was about to leave to search for the suspect, Lang started to cry and stated that she had hit her child, but then immediately denied hitting him and

¹ MCL 750.136b(2).

² MCL 750.85.

explained that the infant had fallen on the floor and hit his head. Officer Dejong saw a large, swollen spot on the infant's head and burn marks on the infant's thigh. He called an ambulance.

Sherrod testified that she woke when Officer Dejong arrived. At that time, she was not aware that the infant was injured. Officer Dejong testified that Sherrod came up behind Lang and made a hand-gesture at her head to indicate that Lang was crazy. Sherrod and Officer Dejong stepped into a hallway, and Sherrod asked Officer Dejong to send Lang to Community Mental Health. Sherrod testified that Lang had been previously committed to a mental health hospital and often had auditory and visual hallucinations. Sherrod testified that Lang believed that she had a microchip in her head and that everyone was against her. Officer Dejong testified that Lang did not appear to be suffering from hallucinations.

Dr. N. Debra Simns testified that the infant had skull fractures that she believed were caused by strong force trauma, subgaleal hematomas on both sides of his head where blood had collected between his skull and his brain, fractured femurs below both kneecaps, and a fractured right tibia. Dr. Simns testified that the infant also had fractured ribs that appeared to be 7 to 14 days old, and had a partially healed pattern of injuries surrounding his genitals that were possibly burns. Dr. Simns testified that the injuries did not appear accidental.

B. LANG'S CONFESSIONS

Trish Nesbitt, a registered nurse who worked at the hospital that admitted the infant, testified that Lang told her that she had swung the infant against a closet door five or six times, attempted to suffocate him, and performed fellatio on him. Nesbitt believed that Lang was in touch with reality when she made those statements. Bonnie Wood, a social worker, testified that Lang made similar statements to her and did not appear to be suffering from hallucinations at that time.

Dr. Mark Ydenburg, a physician working in the emergency room, testified that Lang first told him that she had accidentally dropped the infant while exiting the bath, but eventually she admitted that she had swung him by his legs into a closet door several times and had attempted to suffocate him. He testified that Lang did not appear to be psychotic, delusional, or suffering from hallucinations.

Officer Dejong testified that he spoke with Lang at the hospital, and she agreed to be committed to a mental health facility. He testified that if she had not agreed, he would have committed her involuntarily. Officer Dejong testified that he spoke with Lang at the mental health facility from about 11:30 A.M. until noon, during which time she gave a videotaped confession.

C. EVIDENCE CONCERNING LANG'S INSANITY DEFENSE

Dr. Catherine Jawor, a psychiatrist for Community Mental Health, testified that she spoke with Lang from about 10:50 to 11:30 A.M. on the morning that she was committed. Dr. Jawor testified that Lang denied having any delusions or hallucinations, and denied that she felt like she had a microchip in her head. Dr. Jawor diagnosed Lang as suffering from mood and social anxiety disorders, but she did not believe that Lang was having hallucinations.

Dr. Margot Gilbert, a clinical psychologist, interviewed Lang on October 28, 2010. Dr. Gilbert testified that Lang told her that she had a microchip in her head that controlled her behavior and she had attempted to kill her infant son because he also had a microchip in his head and she did not want him to grow up in this world. Dr. Gilbert testified that she believed that Lang was not suffering from psychosis and could have controlled her behavior if she chose to.

Dr. Joseph J. Auffrey, a clinical psychologist, testified that he interviewed Lang on November 4, 2010. Dr. Auffrey diagnosed Lang as suffering from depression, personality disorders, and paranoid schizophrenia. According to Dr. Auffrey, Lang believed that she was controlled by an outside device. Dr. Auffrey believed that Lang could control her behavior in general, but was operating under a psychotic event and did not appreciate the wrongfulness of her conduct at the time that she struck the infant against a door. Dr. Auffrey admitted that Lang's act of concocting stories about how the child was injured suggested that she was aware that she had done something wrong.

D. THE TRIAL COURT'S FINDINGS AND VERDICT

Before trial, defense counsel moved to suppress Lang's statements to police during the interview at the hospital because she was not free to leave and was not given *Miranda*³ warnings. The trial court ruled that Lang was not in custody because she was free to leave the interview and return to her hospital room, even though the hospital could restrict her movement to prevent her from leaving the hospital itself. Later, during its verdict, the trial court stated that it "did not rely on any statements that were made by Tiffany Lang in the course of the interview that took place at the hospital" but instead relied on Lang's statements in the emergency room.

Concerning the charge of first-degree child abuse, the trial court found that Lang seriously injured the infant when she swung him against a door. Concerning the charge of torture, the trial court found that the infant suffered brutal, physical pain and that Lang's actions were evidence of her intent to cause it. The trial court found that it was satisfied beyond a reasonable doubt that the prosecution had proven the elements of both crimes.

Considering Lang's insanity defense, the trial court found that Dr. Auffrey's opinion was less persuasive than Dr. Gilbert's because Dr. Auffrey qualified his opinions. The trial court found that Dr. Gilbert's opinion that Lang was not suffering from a delusion at the time of the offense was more convincing, in part because Lang did not exhibit delusions or hallucinations shortly after the offense occurred. The trial court also found that Lang appreciated the wrongfulness of her conduct because she shifted stories to relieve herself of culpability.

The trial court concluded that Lang did not sustain her burden to prove that she was legally insane, but found that Lang was mentally ill at the time that she committed the crimes. The trial court therefore found Lang guilty but mentally ill on both charges.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

E. SENTENCING

At the sentencing hearing, defense counsel also challenged the assessment of Offense Variable (OV) 7, concerning excessive brutality, on the grounds that the crime of torture impermissibly overlapped with OV 7. The trial court ruled that it could assess 50 points for OV 7 because the Legislature did not exclude the crime of torture from its definitions.

Defense counsel also challenged the assessment of OV 11, concerning acts of sexual penetration, on the basis that the trial court did not bind Lang over on a count of criminal sexual conduct before trial. The trial court ruled that the statements that Lang made substantiated its assessment of OV 11.

II. SEXUAL PENETRATION UNDER OV 11

A. STANDARD OF REVIEW

This Court reviews the sentencing court's scoring of a sentencing guidelines variable for clear error.⁴ This Court also reviews de novo the proper interpretation and application of the sentencing guidelines.⁵

B. LEGAL STANDARDS

The trial court properly assesses a defendant 25 points under OV 11 if “[o]ne criminal sexual penetration occurred.”⁶ The penetration must “aris[e] out of the sentencing offense.”⁷ To arise out of the sentencing offense, the penetration and the offense must share a connective relationship that is more than an incidental connection.⁸

C. APPLYING THE STANDARDS

Lang contends that the trial court erred when it assessed 25 points under OV 11 because the sexual penetration did not arise out of her torture conviction. We disagree.

We conclude that the sexual penetration and the sentencing offense shared a connective relationship that was more than an incidental connection. A person commits torture when he or she “inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control” while intending to cause “cruel or extreme physical or mental

⁴ *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

⁵ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁶ MCL 777.41(1)(b).

⁷ MCL 777.41(2)(a).

⁸ *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006).

pain and suffering[.]”⁹ A sexual penetration may arise out of another offense when it is part of a continuous sequence of criminal acts.¹⁰

Here, in describing the conduct that she perpetrated on her infant son, Lang recited the sequence of her acts to more than one witness. The sequence included fellatio. Further, the intentional pattern of injuries around the infant’s genitals supports the trial court’s conclusion that the fellatio was connected to the other forms of extreme pain that Lang inflicted on her son. We conclude that the trial court did not err when it assessed 25 points under OV 11 on the basis that the sexual penetration arose from Lang’s torture conviction.

III. ADDITIONAL ISSUES

Lang raises several additional issues in her in propria persona supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. USE OF LANG’S CONFESSIONS

1. STANDARD OF REVIEW AND ISSUE PRESERVATION

Lang challenged the trial court’s use of her confession to police officers at the mental health facility below. This Court reviews for an abuse of discretion preserved challenges to the trial court’s evidentiary rulings.¹¹ The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.¹² But Lang did not challenge the voluntariness of her other statements at the hospital, and thus that challenge is not preserved.

2. LANG’S CONFESSION AT THE MENTAL HEALTH FACILITY

Lang contends that the trial court erred by admitting evidence of her confession to police officers in the mental health facility because they had not given her *Miranda* warnings before she confessed. This Court will not reverse a conviction on the basis of a harmless error.¹³ Here, the trial court stated during its rulings on this case that it was not considering Lang’s confession to police officers at the mental health facility when it was rendering its verdict. Even presuming that the trial court erred by admitting the evidence—and we are not convinced that it did so—we conclude that any error was harmless.

⁹ MCL 750.85.

¹⁰ *People v Ryan*, 295 Mich App 388, 403; 819 NW2d 55 (2012).

¹¹ *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

¹² *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

¹³ MCL 769.26; *Feezel*, 486 Mich at 192.

3. LANG'S CONFESSIONS AT THE HOSPITAL

Lang contends that the statements that she made at the hospital emergency room were involuntary because she was impaired, exhausted, and suffering from a mental illness at the time that she made them, and thus the trial court erred by admitting them. We disagree.

A defendant's constitutional right to due process of law is violated if his or her conviction is based on an involuntary confession.¹⁴ In Michigan, if the defendant challenges the voluntariness of a confession, he or she is entitled to a hearing at which the trial judge will determine whether the confession was voluntary.¹⁵

As we have previously noted, Lang did not raise this issue below. Generally, if the defendant does not challenge the voluntariness of the confession below, he or she has waived the due-process right to do so.¹⁶ But "certain alerting circumstances require the trial court to raise the issue of voluntariness on its own."¹⁷ Alerting circumstances are present when "the evidence clearly and substantially reflects a question about the voluntary nature of a confession."¹⁸

We conclude that the factual circumstances in this case did not clearly and substantially create a question about the voluntariness of Lang's confession. This Court has determined that the trial court should have raised the issue of the voluntariness of a confession sua sponte when the circumstances included that the defendant is seriously injured, heavily medicated, and on life support.¹⁹

Here, the circumstances did not rise to such an extreme level that the trial court should have sua sponte determined to hold a hearing concerning the voluntariness of Lang's confessions at the hospital. Lang confessed multiple times. Nesbitt testified that when Lang confessed, she appeared to be in touch with reality. Dr. Ydenburg testified that Lang did not appear to be suffering from delusions at that time, but that she did appear visibly upset. And Wood testified that before Lang confessed, she had an upbeat demeanor, but after she confessed, she began crying. From the testimony at trial concerning the circumstances surrounding Lang's confessions, she was not exhibiting symptoms of a mental illness at the time that she confessed and her demeanor was not unusual given the circumstances. We conclude that the trial court did not err when it did not sua sponte conduct a hearing to determine whether Lang's confessions at the hospital were voluntary

¹⁴ *Jackson v Denno*, 378 US 368, 376; 84 S Ct 1774; 12 L Ed 2d 908 (1964).

¹⁵ *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988).

¹⁶ *Id.*

¹⁷ *Id.* at 271; see *Wainwright v Sykes*, 433 US 72, 86; 97 S Ct 2497; 53 L Ed 2d 594 (1977).

¹⁸ *Ray*, 431 Mich 271.

¹⁹ *People v Hooks*, 112 Mich App 477, 482; 316 NW2d 245 (1982).

B. SUFFICIENCY OF THE EVIDENCE

1. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.²⁰ This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.²¹ We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt.²²

2. LEGAL STANDARDS

A defendant commits torture under MCL 750.85 when he or she "inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody" while intending to "cause cruel or extreme physical or mental pain and suffering."

3. APPLYING THE STANDARDS

Lang contends that the evidence was not sufficient to prove her intent to commit torture because her mental illness prevented her from forming the intent to commit the crime. "[T]he Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent."²³

Here, the trial court found that Lang was not insane at the time that she brutalized her infant son. Therefore, Lang cannot avoid her torture conviction by claiming that she lacked the specific intent to torture her son by reason of her mental illness.

C. SENTENCING CHALLENGES

1. STANDARD OF REVIEW

As discussed previously, this Court reviews for clear error the sentencing court's assessment of a sentencing guidelines variable and reviews de novo the proper interpretation and application of the sentencing guidelines.²⁴

²⁰ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); see *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

²¹ *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

²² *Id.*; *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

²³ *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001).

²⁴ *Lockett*, 295 Mich App at 182; *Morson*, 471 Mich at 255.

2. LIFE-THREATENING INJURY UNDER OV 3

Lang contends that the trial court improperly assessed 25 points under OV 3 because the infant did not suffer a permanently incapacitating injury. We reject Lang’s contention because it is based on the assumption that the infant’s injury must have been both life threatening and permanent.

The trial court properly assesses 25 points under OV 3 if “[l]ife threatening *or* permanent incapacitating injury occurred to a victim[.]”²⁵ Here, the uncontroverted evidence at trial was that Lang slammed the infant into a closet door five or six times, and as a result, he suffered from 14 fractures—including skull fractures—and two areas where blood collected between his skull and his brain. Though Sherrod testified that the infant was doing better at the time of trial, given the severity of his injuries at the time that he sustained them, we conclude that the trial court’s determination that the infant suffered a life-threatening injury was not clearly erroneous.

3. EXCESSIVELY BRUTAL CONDUCT UNDER OV 7

Lang contends that the trial court improperly assessed 50 points under OV 7 because there was no evidence that she engaged in sadistic conduct beyond what was necessary to commit the crime of torture. We disagree.

The trial court properly assesses 50 points under OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality”²⁶ To commit the crime of torture, a person must intend to cause “cruel or extreme physical or mental pain” and cause “great bodily injury or severe mental pain or suffering[.]”²⁷ For the purposes of the torture statute, the Legislature has defined “cruel” to mean “brutal, inhuman, sadistic, or that which torments.”²⁸

Here, the trial court determined that Lang tortured the infant and that “the [L]egislature had the opportunity to address . . . the double dipping that [defense counsel] is referring to. And they . . . chose not to address it in the case of [OV 7].” On that basis, the trial court assessed Lang 50 points under OV 7.

After the trial court sentenced Lang in this case, a panel of this Court held that the trial court may not consider circumstances inherent in the crime when assessing an offense variable.²⁹ *People v Glenn* is the case upon which Lang bases her argument. However, the Michigan Supreme Court has recently reversed *People v Glenn*, holding that this Court erred when we “concluded that ‘circumstances inherently present in the crime must be discounted for the

²⁵ MCL 777.33(1)(c) (emphasis added).

²⁶ MCL 777.37(1)(a).

²⁷ MCL 750.85(1).

²⁸ MCL 750.85(2)(a).

²⁹ *People v Glenn*, 295 Mich App 529, 535; 814 NW2d 686 (2012).

purposes of scoring an OV.’”³⁰ Here, Lang tortured her infant son. The trial court must assess 50 points under OV 7 when the defendant tortures a victim. Therefore, the trial court properly assessed Lang 50 points.

4. VULNERABLE VICTIM UNDER OV 10

Lang contends that the trial court improperly assessed 10 points under OV 10 because she did not cause or manipulate her infant son’s status as a vulnerable victim. We disagree.

A victim is vulnerable if he or she has a “readily apparent susceptibility . . . to injury, physical restraint, persuasion, or temptation,” such as when the victim is young and exploited by a difference in the defendant and victim’s relative sizes and strengths.³¹ A victim’s vulnerability may arise from the victim’s personal characteristics, relationships, or circumstances.³² A defendant has exploited a vulnerable victim if the defendant “manipulate[d] a victim for selfish or unethical purposes.”³³

Here, the prosecution did not have to prove that Lang caused her infant son to be vulnerable; his vulnerability as an inherent characteristic of his being a three- to four-week-old infant. Additionally, Lang used her superior size to repeatedly slam her infant son’s head into a closet door. Lang told Dr. Gilbert that she wanted to kill the infant. We conclude that the trial court did not clearly err when it determined that Lang exploited the difference in her size to manipulate her infant son for unethical purposes.

D. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1. STANDARD OF REVIEW

A defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant’s claim that his counsel was ineffective.³⁴ Here, Lang did not move for an evidentiary hearing concerning the effectiveness of appellate counsel. When the trial court has not conducted a hearing to determine whether a defendant’s counsel was ineffective, our review is limited to mistakes apparent from the record.³⁵

³⁰ *People v Hardy*, ___ Mich ___, slip op p 10; ___ NW2d ___ (2013).

³¹ MCL 777.40(3)(c); *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008).

³² *People v Huston*, 489 Mich 451, 464; 802 NW2d 261 (2011).

³³ MCL 777.40(3)(b).

³⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

³⁵ *Snider*, 239 Mich App at 423.

2. LEGAL STANDARDS

In order to establish that appellate counsel was ineffective, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for appellate counsel's error, the result of the proceedings would have been different.³⁶ We must presume that counsel's decisions were sound strategy.³⁷

3. APPLYING THE STANDARDS

Lang contends that she was ineffectively assisted by appellate counsel because he unreasonably discarded meritorious issues. We disagree.

Appellate counsel need not advance every argument that a defendant thinks is meritorious. Appellate counsel may legitimately discard weaker arguments in order to focus on stronger arguments, and need not make meritless arguments.³⁸ As discussed previously, those issues that Lang argues that appellate counsel should have raised lack merit.

Further, a defendant must also demonstrate "a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different[.]"³⁹ A defendant cannot establish that he or she was ineffectively assisted by appellate counsel when counsel failed to raise an issue that the defendant subsequently presented to this Court.⁴⁰ Because Lang was able to raise these issues in her Standard 4 brief, there is no reasonable probability that, but for counsel's error, the results of Lang's appeal would have been different.

Lang also generally complains that appellate counsel failed to timely forward her copies of her trial transcripts because she had only 1 month to read them and prepare her Standard 4 brief. A party abandons an argument when he or she merely announces a position, gives it cursory treatment, and fails to support it.⁴¹ We conclude that Lang has abandoned this issue because she had failed to provide any explanation concerning why counsel's behavior was objectively unreasonable or any authority to support her assertion.

We conclude that Lang is not entitled to relief on the basis of ineffective assistance of appellate counsel.

³⁶ *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

³⁷ *Id.* at 186.

³⁸ *Id.* at 186-187; *Snider*, 239 Mich App at 425.

³⁹ *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997).

⁴⁰ See *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002).

⁴¹ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

IV. CONCLUSION

We conclude that sufficient evidence supported Lang's torture conviction and that Lang was not ineffectively assisted by appellate counsel. We also conclude that the trial court properly assessed Lang points under OVs 3, 7, 10, and 11.

We affirm.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Michael J. Kelly