

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 26, 2013

v

JOSEPH LEE BROCKITT,
Defendant-Appellant.

No. 311042
Sanilac Circuit Court
LC No. 12-006940-FC

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of torture, MCL 750.85, first-degree child abuse, MCL 750.136b(2), four counts of second-degree child abuse, MCL 750.136b(3), and fourth-degree child abuse, MCL 750.136b(7). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of life in prison for the torture and first-degree child abuse convictions, 10 to 15 years in prison for each second-degree child abuse conviction, and 365 days for the fourth-degree child abuse conviction. We affirm in part, vacate in part, and remand.

I. BACKGROUND FACTS

The evidence presented at trial established that defendant abused two of his young children, JB and RAB, over the course of several weeks or months. At the time of the abuse, defendant lived in a home with his four children, his wife Natasha,¹ Natasha's cousin Elyse Rich, Rich's boyfriend Jonathan Detiege, and the infant daughter of Rich and Detiege.

Detiege was pulled over in December 2011, and showed the police photographs stored in his cellular phone that depicted the severity of the abuse. On the basis of the photographic evidence and Detiege's statements, the police placed defendant's residence under surveillance. Police eventually obtained a warrant to search the home. Defendant and Natasha were ultimately arrested and charged with various crimes related to the abuse. Confronted with the

¹ Natasha was the mother of two of the four children. JB and RAB were defendant's children from a previous relationship.

photographs and other evidence gathered by the police, Natasha pleaded guilty to second-degree child abuse and agreed to testify against defendant at trial.

The photographs provided by Detiege generally depicted a young boy lying naked in a bathtub, his hands bound tightly behind him with electrical tape. In some of the photographs, the boy's head was completely covered with a pair of pants. Still other photographs depicted a young boy standing next to a wall with pants pulled down over his head. In some of the photographs, the boy had noticeable bruising and skin discoloration. The photographs were admitted into evidence at trial. The undisputed testimony revealed that the boy depicted in the photographs was JB, who was three years old at the time. The testimony also established that the pants covering JB's head in the photographs were soaked with urine.

Defendant provided wildly varying explanations for why he had bound JB's hands and covered JB's head with urine-soaked pants. For instance, defendant first suggested that the abuse was a form of punishment designed to correct JB's bedwetting problem. Thereafter, defendant claimed that he had accidentally urinated on JB when JB fell asleep on the toilet. Defendant later claimed that he had placed pants over JB's head in order to prevent JB from picking at his sores.

Rich testified that defendant routinely placed RAB and JB in a bathtub with cold water and forced them to stand for long periods of time. The testimony established that JB was placed in the bathtub as punishment approximately three or four times a week. Sometimes, JB was forced to remain in the bathtub all day. Detiege testified that defendant had also forced the children to stand against the wall all night. At times, according to Detiege, JB was forced to stand against the wall with the urine-soaked pants pulled down over his head. Rich confirmed that she had heard defendant laughing about having urinated on JB. Rich testified that defendant had urinated on both RAB and JB while they were in the shower. Detiege testified that when defendant bound JB's hands with electrical tape, JB's hands would turn purple from the lack of circulation.

RAB and JB were examined by Dr. William Starbird in December 2011. Fortunately, the children showed no signs of permanent physical injury. However, JB did have bruising on his scalp, thigh, elbow, and buttocks. There was also discoloration near JB's left eye, swelling of JB's left ear, and bruises or lesions on JB's buttocks. Dr. Starbird, who had examined the photographs, testified that JB's hands had been bound tightly enough to cut off his circulation. Dr. Starbird opined that the significant redness on JB's head might have been caused by exposure to urine, which contains a compound that breaks down into ammonia. Dr. Starbird believed that the abuse had most likely affected RAB and JB emotionally, but no psychological evidence was admitted at trial.

With respect to JB, the jury convicted defendant of one count of torture, MCL 750.85, one count of first-degree child abuse, MCL 750.136b(2), and four counts of second-degree child abuse, MCL 750.136b(3). With respect to RAB, the jury convicted defendant of one count of fourth-degree child abuse, MCL 750.136b(7).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence presented at trial to support his convictions of torture and first-degree child abuse.² For the reasons that follow, we affirm defendant's conviction of torture, but vacate defendant's conviction of first-degree child abuse.

We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crimes were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "All conflicts with regard to the evidence are resolved in favor of the prosecution." *People v Ortiz*, 249 Mich App 297, 300; 642 NW2d 417 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400. Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

"Determining the scope of a criminal statute is a matter of statutory interpretation, subject to de novo review." *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). Unless otherwise defined by the Legislature, statutory words and phrases must be interpreted according to their commonly understood meanings. MCL 8.3a; *People v Bylsma*, 493 Mich 17, 30-31; 825 NW2d 543 (2012). Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A. TORTURE

Michigan's torture statute provides in pertinent that "[a] person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony . . ." MCL 750.85(1). A person is within the defendant's "custody or physical control" if the defendant "forcibl[y] restrict[s] . . . [the] person's movements or forcibl[y] confine[s] . . . the person so as to interfere with that person's liberty, without that person's consent or without lawful authority." MCL 750.85(2)(b).

1. LAWFUL AUTHORITY

Defendant first contends that, because he was JB's custodial parent, and therefore had "lawful authority" to forcibly discipline JB, he was legally incapable of violating the torture statute. We disagree.

We fully acknowledge that parents have a fundamental liberty interest in the care, custody, and control of their minor children. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599

² Defendant does not challenge his convictions of second-degree child abuse and fourth-degree child abuse.

(1982). However, the statutory requirement that the victim be forcibly restricted or forcibly confined “without that person’s consent or without lawful authority,” MCL 750.85(2)(b), is written in the disjunctive. The disjunctive word “or” is used to indicate a separation between two different alternatives. *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011). In other words, the statute allows the conviction (1) of a defendant who has lawful authority to forcibly restrict or confine the victim if the victim does not consent to the restriction or confinement, or (2) of a defendant who does not have lawful authority to forcibly restrict or confine the victim, even if the victim consents to the restriction or confinement.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that JB was within defendant’s “custody or physical control” under either of these alternatives. Given JB’s young age, it can be presumed that he lacked the capacity to consent to the forcible restriction of his movements and the forcible confinement of his person. And although it is true that a parent or guardian may take steps to “reasonably discipline a child, including the use of reasonable force,” MCL 750.136b(9), the evidence in this case reveals that defendant used unreasonably excessive force when he bound JB’s hands behind his back with electrical tape and forced JB to remain in the bathtub or against the wall for hours with urine-soaked pants covering his head. As this Court has explained, “a criminal statute may not, constitutionally, interfere with the right of parents to administer normal (reasonable and timely) discipline to their children but such statute may prohibit discipline that is not reasonable and timely.” *People v Hicks*, 149 Mich App 737, 744; 386 NW2d 657 (1986). There was ample evidence presented at trial to allow the jury to conclude that defendant’s use of force against JB was neither “normal” nor “reasonable.” *Id.*

2. GREAT BODILY INJURY

Defendant also argues that there was insufficient evidence to prove that he inflicted great bodily injury or severe mental pain and suffering on JB. Again, we disagree.

To be convicted of torture, a defendant must “inflict[] great bodily injury or severe mental pain or suffering upon another person . . .” MCL 750.85(1). As noted earlier, there was little, if any, evidence presented at trial concerning JB’s psychological state or his mental pain and suffering. Nevertheless, we conclude that there was sufficient evidence to prove that defendant inflicted “great bodily injury” on JB.

For purposes of the torture statute, “[g]reat bodily injury” means, among other things, “[s]erious impairment of a body function as that term is defined in . . . MCL 257.58c.” MCL 750.85(2)(c)(i). “Serious impairment of a body function” includes the “loss of use of a limb.” MCL 257.58c(a). To constitute a serious impairment of a body function, the loss of use of a limb need not be long-lasting or permanent. *People v Thomas*, 263 Mich App 70, 77; 687 NW2d 598 (2004).

The uncontroverted evidence established that JB was frequently unable to use his arms and hands because they were bound behind his back with electrical tape. Several of the photographs admitted into evidence showed JB’s arms and hands bound in such a manner. Based on the discoloration of JB’s hands in the photographs, Dr. Starbird opined that they must have been bound tightly enough to cut off JB’s circulation. Natasha testified that JB was often

left with his hands bound behind his back for 12 to 14 hours at a time. During these prolonged periods of forcible restraint, JB was obviously unable to use his hands and arms. The evidence was sufficient to enable the jury to find beyond a reasonable doubt that JB's temporary but recurring loss of the use of his arms and hands constituted a serious impairment of a body function. See *id.*

In sum, the prosecution presented sufficient evidence to enable a rational jury to conclude beyond a reasonable doubt that defendant committed torture in violation of MCL 750.85 by inflicting great bodily injury on JB while forcibly restraining or confining him against his consent and without lawful authority.

B. FIRST-DEGREE CHILD ABUSE

“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.” MCL 750.136b(2). As noted earlier, there was little, if any, evidence presented at trial concerning JB's psychological state or mental condition. Accordingly, the pertinent issue here is whether defendant “knowingly or intentionally cause[d] serious physical . . . harm” to JB. We conclude that he did not.

The child abuse statute defines “[s]erious physical harm” as “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.” MCL 750.136b(1)(f). Unlike the torture statute, the child abuse statute does not specifically include within its ambit the serious impairment of a body function. Hence, the fact that JB was unable to use his arms and hands for prolonged periods of time was, by itself, insufficient to permit the jury to find serious physical harm under MCL 750.136b(2).

Instead, the question is whether the injuries actually inflicted on JB “seriously impair[ed] the child's health or physical well-being” and were of the same kind and severity as the types of injuries enumerated in MCL 750.136b(1)(f). We acknowledge that the list of injuries set forth in MCL 750.136b(1)(f) is not exhaustive. But under the doctrine *ejusdem generis*, an injury must be of the same kind, class, or severity as those enumerated in the statute to rise to the level of serious physical harm. See *Adams Outdoor Advertising, Inc v Canton Charter Twp*, 269 Mich App 365, 371; 711 NW2d 391 (2006) (stating that “[t]he doctrine of *ejusdem generis* provides that, if a law contains general words and an enumeration of particular subjects, those general words are presumed to include only things of the same kind, class, character, or nature as the subjects enumerated”).

In the present case, the evidence established that JB had numerous bruises, a swollen ear, and irritated skin on the buttocks and scalp. None of these injuries was of the same kind, class, or severity as the injuries enumerated in MCL 750.136b(1)(f). Nor was there evidence to establish that the injuries inflicted on JB “seriously impair[ed] the child's health or physical well-being” within the meaning of MCL 750.136b(1)(f). Indeed, by the time Dr. Starbird examined JB, the child had no lasting signs of physical injury. We do not detract from the heinousness of the treatment that JB was forced to endure. However, the evidence admitted at trial was simply insufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that JB

sustained “serious physical . . . harm” within the meaning of MCL 750.136b(2). See MCL 750.136b(1)(f). We are thus compelled to vacate defendant’s conviction of first-degree child abuse and his corresponding sentence.

III. SENTENCING ISSUES

Defendant next argues that, if this Court reverses his torture conviction, he is entitled to resentencing with regard to his lesser convictions of first-degree child abuse and second-degree child abuse.

For the reasons explained previously, we affirm defendant’s conviction of torture. The circuit court properly sentenced defendant to life in prison for his torture conviction. Torture is a Class A felony, MCL 777.16d, and is “punishable by imprisonment for life or any term of years,” MCL 750.85(1). In this case, defendant’s total offense variable (OV) score was 115, and his total prior record variable (PRV) score was 100. This placed defendant in cell F-VI on the sentencing grid for Class A felonies. MCL 777.62. Additionally, defendant was subject to enhanced sentencing as a fourth habitual felony offender. MCL 769.12. Therefore, the statutory sentencing guidelines prescribed a minimum sentence of 270 to 900 months or life in prison for defendant’s conviction of torture. MCL 777.62; see also MCL 777.21(3)(c).

Defendant asserts that his sentences for first-degree and second-degree child abuse were based on inappropriate, upward departures from the sentencing guidelines. However, we have already vacated the life sentence imposed for defendant’s conviction of first-degree child abuse. Furthermore, even if defendant’s sentences for second-degree child abuse were actually based on improper, upward departures from the sentencing guidelines, any corrected sentences for these lesser convictions would still be subsumed within the greater life sentence imposed for defendant’s torture conviction. Because defendant was properly sentenced to life in prison for his torture conviction, any issue concerning the circuit court’s departure from the guidelines with respect to his lesser convictions is moot. *People v Poole*, 218 Mich App 702, 719; 555 NW2d 485 (1996); *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to object when the circuit court instructed the jury that a “temporary” loss of the use of a limb can constitute a “[g]reat bodily injury” within the meaning of the torture statute. We disagree. As explained previously, the torture statute defines “[g]reat bodily injury” as, among other things, “[s]erious impairment of a body function as that term is defined in . . . MCL 257.58c.” MCL 750.85(2)(c)(i). “Serious impairment of a body function” includes the “loss of use of a limb.” MCL 257.58c(a). This Court has specifically held that the loss of use of a limb need not be “long-lasting or permanent” in order to constitute a serious impairment of a body function. *Thomas*, 263 Mich App at 77. Accordingly, the circuit court’s instruction to the jury was correct. Defense counsel was not ineffective for failing to make a futile objection. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

V. PRESENTENCE INVESTIGATION REPORT

Lastly, we note that the presentence investigation report (PSIR) contains language indicating that defendant forced JB to eat feces. At sentencing, the circuit court clarified that defendant was acquitted of all charges stemming from this particular allegation. The circuit judge noted that he would correct the PSIR to remove any references in this regard. However, the PSIR was never corrected.

The Department of Corrections makes critical decisions regarding a defendant's status based on the information contained in the PSIR. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). "Accordingly, the PSIR 'should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report.'" *Id.*, quoting *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). We remand for correction of the PSIR to delete any language alleging or indicating that defendant forced JB to eat feces. See MCL 771.14(6); *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

VI. CONCLUSION

We affirm defendant's conviction of torture and corresponding sentence of life in prison. We vacate defendant's conviction of first-degree child abuse and corresponding sentence. We remand for correction of the PSIR to delete any language alleging or indicating that defendant forced JB to eat feces.

On remand, the circuit court shall also correct the PSIR and judgment of sentence to make clear that defendant's conviction of first-degree child abuse and corresponding sentence have been vacated. See *People v Bulls*, 262 Mich App 618, 630; 687 NW2d 159 (2004); *Spanke*, 254 Mich App at 650.

Affirmed in part, vacated in part, and remanded for correction of the PSIR and judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey