

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY SCOTT CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

January 27, 2005

No. 245263

Branch Circuit Court

LC No. 01-017197-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANTHONY SCOTT CAMPBELL,

Defendant-Appellee.

No. 254807

Branch Circuit Court

LC No. 01-017197-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

The trial court convicted defendant Anthony Scott Campbell of second-degree murder¹ and sentenced him to 206 to 360 months' imprisonment. Campbell appeals as of right in Docket No. 245263. While Campbell's appeal was pending, this Court granted his motion to remand for an evidentiary hearing. Following the evidentiary hearing, the trial court granted Campbell a new trial. In Docket No. 254807, this Court granted the prosecution's application for leave to appeal the order granting Campbell a new trial, and consolidated the two appeals. We affirm the trial court's grant of a new trial for Campbell and remand for further proceedings.

II. Basic Facts And Procedural History

Campbell's conviction arises from the death of Paige Anderson, the ten-month-old daughter of Campbell's live-in girlfriend, Teri Anderson. In January 2001, the child was brought

¹ MCL 750.317.

to the emergency room at the Community Health Center in Coldwater, Michigan and found to be in critical condition. She was not breathing, her eyes were fixed and dilated, and she was bruised across her forehead, on her left leg, below her clavicle, and on the side of her neck. The bruises were in various stages of healing. The sclera of the child's right eye was bleeding and both eyes exhibited retinal hemorrhaging. She was flown to another hospital for further assessment and treatment, but she did not survive. The cause of death was determined to be a severe craniocerebral trauma caused by a significant blow to the back of her head, which caused a skull fracture and swelling of the brain.

Campbell was in exclusive control of the child at the time she sustained her fatal head injury. He testified that, after two mishaps in the bathtub on the evening of January 5, 2001, he put the child to bed. He later received a call from Teri Anderson, who wanted to be picked up from work. Anderson was ill and wanted to see a doctor. According to Campbell, when he rushed out of his apartment, he was holding the child on his right side. As he stepped onto the second step of the stairs, his foot went out from underneath him and the child shot out of his arms. She landed on the back of her head on the fourth or fifth step. She continued moving, feet first, onto the landing where she rolled up to the railing and came to rest. Campbell testified that it appeared that the child banged her head against the wall during the fall, and her right lower back or stomach hit the railing.

The prosecution presented evidence that Campbell's version of the alleged fall had evolved over time. For example, Campbell initially informed the police that the child had fallen face- and chest-first onto the steps. Later, he indicated that she landed on the back of her head. More importantly, the prosecution presented evidence from several treating physicians, all of whom were qualified as experts at trial, and from the medical examiner, who performed the victim's autopsy. Their unrefuted testimony was that the child's injuries were inconsistent with a fall on the stairs. The medical experts agreed that the child's skull fracture was caused by an impact on a hard, flat surface. Some of the physicians testified that retinal hemorrhaging is indicative of abuse until proven otherwise. All of the experts admitted that their conclusions took into consideration the history of the alleged fall, as presented to them. The history was not the version to which Campbell testified at trial.

The trial court, sitting as the trier of fact, and relying primarily on the medical evidence, convicted Campbell of second-degree murder.

III. The Prosecutor's Appeal Of The Order Granting A New Trial

A. Standard Of Review

We review the trial court's decision to grant a motion for new trial for an abuse of discretion.²

² *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001).

B. Ineffective Assistance Of Counsel

We first address the trial court's decision granting Campbell a new trial, which the prosecutor challenges in Docket No. 254807. Following an evidentiary hearing, the trial court found that Campbell was deprived of the effective assistance of counsel in two crucial regards. Specifically, the trial court determined that trial counsel was ineffective for failing to contact, investigate, and urge Campbell to hire an expert to refute the medical testimony presented by the prosecution. The trial court found that, but for defense counsel's failure with respect to expert testimony, there was a strong likelihood that it would have acquitted Campbell. Additionally, the court found that trial counsel was ineffective for failing to produce police records from Iowa involving another one of Anderson's children. Campbell had no contact with this other child, who was found with bruising due to suspected physical abuse.

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.³ This determination requires the trial court first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."⁴ We review the trial court's factual findings for clear error and review de novo its constitutional determination.⁵ To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different.⁶ We presume that counsel provided effective assistance, and defendant bears a heavy burden of demonstrating that counsel was ineffective.⁷

Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy.⁸ However, the failure to call significant witnesses without articulating any strategic reason for doing so may constitute ineffective assistance of counsel.⁹ The failure to call witnesses is ineffective if it deprives a defendant of a substantial defense.¹⁰

At the evidentiary hearing, Campbell presented testimony from two expert witnesses, Chris Van Ee, a Ph.D. in biomechanical engineering, and Dr. Ronald Uscinski, a clinical neurosurgeon. Van Ee concluded that a fall down the stairs, in the manner described by Campbell, would produce a violent impact to the back of the victim's head and could result in a skull fracture. Dr. Uscinski testified that, if the child's fall occurred in the manner described by Campbell at trial, the injuries she sustained could have resulted. He testified that medical

³ *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

⁴ *Id.* at 579.

⁵ *Id.*

⁶ *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 577 (1994).

⁷ *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

⁸ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁹ *People v Johnson*, 451 Mich 115, 122-124; 545 NW2d 637 (1996).

¹⁰ *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

science cannot distinguish between an intentional slamming of the head and an accidental drop on the head. He disagreed that retinal hemorrhaging is indicative of intentional abuse.

Campbell's trial counsel testified that there was no strategic reason for failing to investigate and hire an expert. Although Campbell was aware that there were nine physicians testifying for the prosecution, he believed he could adequately cast doubt on their testimony through cross-examination. He testified that he was specifically aware of Dr. Uscinski and had previously heard Dr. Uscinski testify. Trial counsel claimed that he discussed retaining Dr. Uscinski with Campbell, but that Campbell declined to hire him because of the expense.

Campbell, his mother, and his cousin also testified at the evidentiary hearing. They testified that they asked Campbell's trial counsel about hiring an expert, and he informed them that it was not necessary. Campbell's mother, who paid for his defense, said she would have paid for an expert witness, but was not asked to do so.

The trial court made numerous findings of fact with respect to the issue of trial counsel's effectiveness, including that trial counsel understood the importance of hiring Dr. Uscinski or another expert, that trial counsel did not clearly convey the importance of hiring an expert to Campbell and his family, that Campbell's family was apparently willing to pay for an expert, that Campbell's family was not asked to pay for an expert even though trial counsel knew they were paying for the defense, that trial counsel never spoke with an expert, that trial counsel never hired an expert, and that trial counsel did not call an expert at trial. These findings of fact are supported by the record and are not challenged by the prosecution on appeal.

Given the court's findings, we affirm the trial court's decision to grant Campbell a new trial based on ineffective assistance of counsel. Under the circumstances, trial counsel's performance fell below an objective standard of reasonableness. He was aware of Dr. Uscinski, knew the value of his testimony, and knew that the principal contested issue in the case was whether the victim's injuries could have been caused by a fall down the stairs. Moreover, trial counsel was aware that the prosecution was offering nine medical experts to testify that the injuries could not have been caused by a fall down the stairs. Under these circumstances, Dr. Uscinski's testimony, or that of another similar expert, would have been crucial to refute the prosecutor's claims and support the defense that the victim was injured in an accidental fall.

The record also supports the trial court's determination that, but for trial counsel's defective performance, the outcome of trial would have been different. The trial court, which sat as the trier of fact, concluded that there was a high probability that its verdict would have been different had Campbell presented expert testimony to support his claim that the victim's injuries could have been caused by a fall down the stairs. The verdict was primarily based on the unchallenged medical testimony that a fall down the stairs could not account for the child's condition at the time she presented to the hospital. Dr. Uscinski's testimony would have directly refuted these conclusions. We conclude that the failure to call this witness constituted ineffective assistance of counsel, because it deprived Campbell of a substantial defense.¹¹

¹¹ *Id.*

The prosecution's argument on appeal rests on its assertion that Campbell decided not to hire an expert because of the cost. It argues that, where a defendant can afford to hire an expert and chooses not to do so, the failure cannot be attributed to defense counsel. But the trial court did not find that Campbell and his family chose to forego hiring an expert based on financial reasons. Rather, the court determined that defense counsel did not adequately import the need for an expert, that Campbell's family was apparently willing to pay for an expert, and that they were not asked to do so. The prosecution does not challenge these factual findings, but rather ignores them in making its argument.

In granting Campbell a new trial, the trial court also determined that trial counsel's failure with respect to the Iowa police reports fell below an objective standard of reasonableness. We agree. The reports would have been valuable in dispelling the notion that Campbell was responsible for any abuse the victim may have suffered.

Accordingly, we conclude that the trial court did not abuse its discretion in granting Campbell a new trial.

IV. Campbell's Appeal

A. Moot And Abandoned Issues

In Docket No. 245263, Campbell raises several issues with respect to his trial. In light of our disposition in Docket No. 254807, we find it unnecessary to address most of the issues Campbell raises. First, Campbell's issues with respect to an evidentiary hearing and the great weight of the evidence are moot because Campbell was granted an evidentiary hearing and because we are affirming the order granting Campbell a new trial.¹²

Second, we conclude that three of Campbell's issues should be deemed abandoned. Campbell argues that the presentation of "junk science" evidence at trial constituted error requiring reversal. But he fails to explain or rationalize his positions, or cite authority supporting that the alleged "junk science" evidence was improper or that the experts were erroneously permitted to testify in areas that exceeded their expertise. While Campbell cites *Daubert v Merrell Dow Pharmaceuticals, Inc.*,¹³ and argues that the challenged testimony was unacceptable under "*Daubert* and its progeny," he completely fails to explain this position. His argument is cursory and conclusory, and we therefore decline to review it.¹⁴

¹² See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995) (an issue is moot where a subsequent event renders it impossible for this Court to fashion a remedy).

¹³ *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 593; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

¹⁴ See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

We also deem abandoned Campbell's argument that he was denied his right to the presumption of innocence and a fair trial because the prosecution's experts improperly assumed his guilt and intent. This argument is conclusory, and Campbell fails to explain, rationalize, or support his positions with citation to relevant authority. We will not be left to discover and rationalize Campbell's claim that he was deprived of the important right to be presumed innocent unless proven guilty.¹⁵

We additionally find abandoned Campbell's argument that the evidence was insufficient to support his conviction of second-degree murder. He combines this argument with his cursory argument challenging the great weight of the evidence, fails to analyze the evidence in light of the appropriate standard of review, and ignores circumstantial evidence favoring conviction.¹⁶ We nevertheless note that we have considered the issue and find that the evidence, including the medical testimony presented, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the victim's death was caused by Campbell's acts, with malice, and without justification or excuse.¹⁷

B. Suppression Of Campbell's Statements To Police

(1) Standard Of Review

Campbell argues that the trial court erred when it refused to suppress his statements to the police, which were made without the benefit of *Miranda*¹⁸ warnings. We review this issue because the admissibility of Campbell's statements to the police is an issue that is likely to recur at retrial. We review the trial court's factual findings after a suppression hearing for clear error.¹⁹ We review de novo the issue of whether Campbell was in custody.²⁰

(2) The Trial Court's Ruling

The factual circumstances surrounding Campbell's statements to the police are complex. As Sergeant Patrick Beeman of the Coldwater Police Department explained it, in the late evening of January 5 and the early morning of January 6, 2001, he interviewed Campbell at the Coldwater police station. Part of this interview was recorded, through an audio-visual system with the video camera mounted on the windshield of Sergeant Beeman's patrol car. The video portion of the tape showed only the blank back wall of the police garage, toward which the video camera was apparently pointed during the interview. However, Sergeant Beeman had a mike on his duty belt that allowed him to pick up the audio portion of his conversation as long as he was nearby. Therefore, the audio portion of the tape, which commenced at approximately 10:56 PM

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

¹⁸ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

¹⁹ *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001).

²⁰ *Id.*

of January 5 and continued through approximately 1:04 AM of January 6, was available and was played to the trial court.

However, the statements by Campbell that are at issue here are not contained in the audio portion of the tape. According to Sergeant Beeman, the recording device stopped because it simply ran out of tape. Approximately ten minutes after the tape ended, Sergeant Beeman, after taking an intervening call, recommenced the interview with Campbell. That interview continued, with several breaks and interruptions, until approximately 5:42 AM of January 6. Ultimately, Campbell signed a detailed statement. This later statement, while not necessarily inculpatory, did differ in several material respects from Campbell's earlier, recorded, statements. For example, in the later statement Campbell, after commenting that "this is where it differs significantly," indicated that as part of an unintended accident the child's head forcefully hit the back of the bathtub when he was bathing her. Similarly, after commenting that "This is different," in the later statement Campbell indicated that, contrary to his earlier assertions, the child did not land on her face in the fall; rather, he stated, she "landed and hit the back of her head and slid down."

The trial court, after hearing argument from both sides, found both the recorded statements and the later statement to be admissible. The trial court stated:

Up until approximately 1:00 o'clock when, as we now all have heard, the second tape came to a conclusion – and commenting upon that only in light of Mr. Campbell's testimony – the Court would determine that he had voluntarily gone to the police station under the circumstances, even in light of Mr. Campbell's testimony, the court would conclude was voluntary and the statements would be admissible.

As indicated, the real focus was upon that portion of the interview that purportedly took place after the second tape ended. Towards that point, as [the prosecution] has indicated, it may have been helpful if the tape itself had continued or a new one had been inserted. It may have been helpful if there had actually been a recording – a video recording device in the interview room so that we could have seen the demeanor of the participants. That's not required. I suppose I could hope that the legislature of this state, as some legislatures in other states are doing, might make that mandatory. But to this point it is not.

The officer testified that he didn't know when the tape ended, though he certainly presumed that it would end at some point.

And the Court would also indicate that it appeared that the attitudes of the intervening officer effectively [presumably Sergeant Beeman] had changed and become more accusatory even before the second tape ended.

Other points for the Court to consider. The duration of the interview, approximately eight hours was long, but the Court would determine not excessive under these circumstances.

The only discussion of an attorney apparently arose in response to discussions about the defendant's agreeing to take a polygraph, but according to

Office Beeman, in order to avoid any misunderstanding, he asked the defendant if he wished to speak to an attorney. And the defendant declined.

The defendant was provided water and relieve, was allowed to smoke both accompanied and apparently, at least on one or two occasions, unaccompanied when the garage door was dropped and the manpower was not sufficient to have someone accompany him to the garage. And then later an ashtray of some sort was provided in the interview room, apparently to the stress of Office Beeman.

In the portion of the tape that the Court has heard –and the Court would conclude that defendant never specifically asked to leave. He did state that he wanted to go to the hospital and was told that the interview would continue so that some more questions could be asked. But it would be done as quickly as possible. He was never told that he could not leave.

As a matter of fact, both Officer Beeman and Deputy Director Bartell suggested that had the defendant wanted to leave he could have; that they were at that point in no position to stop or detain him.

The defendant, from his brief testimony, has revealed himself to be an intelligent, articulate and educated individual, who, more than many, understood his rights and his circumstances.

While the offering of the Miranda rights may have been helpful, the Court would determine that under the totality of all these circumstances, and applying the objective standard in such cases, they were not required.

The Court is, however, persuaded that even if the right had been given that under these circumstances, more likely than not, the defendant would have continued to talk. As Officer Beeman suggested, he was willing to do so in an attempt to offer further explanations after he was placed under arrest later in the morning.

Because of all of this the Court would determine that any subsequent statements are admissible.

(3) Legal Standards

This Court has held that

Miranda warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of the investigation. Custodial interrogation is “questioning initiated by law enforcement officers after a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way.”^[21]

In other words, “[a]n officer’s obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with formal arrest.”²² In *Peerenboom*, this Court refused to suppress statements given without *Miranda* warnings because the defendant was not formally arrested and no formal restraint was placed on her freedom of movement at the time the statements were given.²³ When determining whether a defendant was in custody at the time his statements were made, the totality of the circumstances must be reviewed.²⁴ The key question is whether the accused could reasonably have believed that he was not free to leave.²⁵ Objective circumstances are reviewed rather than the subjective views harbored by the interrogating officers or the person being interviewed.²⁶

(4) Applying The Standards

We first note that, on the critical question of whether Campbell was free to leave the Coldwater police station, the testimony was contradictory. Sergeant Beeman testified that at no point did Campbell ask that the interview end and that at no point did Campbell ask to leave. Specifically, Sergeant Beeman said that “Had [Campbell] wanted to get up and walk out the door he would have gone.” Campbell, by contrast, said that he was never told he could leave, that he believed he had to stay, and that one point he specifically asked to leave the station and received a “non-committal” answer.

The trial court rather clearly believed the testimony of the police officers when it concluded that the defendant never specifically asked to leave and was never told that he could not leave. It is black letter law that questions of witness credibility are for the trier of fact, and that appellate courts are not to engage in retroactive review of such credibility determinations.²⁷ However, in determining whether a defendant is in custody, the test is objective one and the subjective views of the interrogating officers or the person being interviewed are irrelevant. To the extent that the trial court engaged in a subjective determination in finding the police officers’ testimony more credible than Campbell’s testimony, , it erred.

²¹ *Id.* at 395-396 (citation omitted).

²² *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997), citing *Stansbury v California*, 511 US 318, 322; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

²³ *Peerenboom*, *supra* at 198. See also *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000).

²⁴ *People v Coomer*, 245 Mich App 206, 219-220; 627 NW2d 612 (2001).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Further, the trial court's somewhat offhand comment that it was more likely than not that, had the *Miranda* warnings been given, Campbell "would have continued to talk" was most certainly both speculative and subjective. We conclude, however, that these errors were harmless when the totality of the circumstances are considered, and we note that the trial court accurately and succinctly stated that it was required to consider the totality of the circumstances and to apply an objective standard. It is undisputed that Campbell voluntarily went to the police station, that he was informed on two occasions that he was not under arrest, and that he never asked to leave while his conversations were being recorded. These facts support the trial court's finding that Campbell was not in custody during the recorded portion of the interview.

The facts relating to the unrecorded portion of the interview and to Campbell's later statement are murkier. Clearly, Campbell thought he was not able to leave the police station while the police officers thought he was free to go at any time, but these are subjective views and help us not at all when it comes to the ultimate question of whether an objective person in Campbell's circumstances would reasonably have believed that he was not free to leave. We concede that the atmosphere of a police station can be an intimidating one. We are cognizant of the fact that, whether the doors to the interview room were open or closed, a reasonable person might experience both apprehension and a certain amount of claustrophobia under such circumstances. We appreciate the fact that an eight-hour interview, even with the undisputed interruptions and smoking breaks, almost certainly produced a certain level of fatigue. We also recognize that the fact that Campbell was indeed arrested at the conclusion of the interview lends credence to his argument that he may not have been allowed to leave had he attempted to do so.²⁸

However, we agree with the trial court that the duration of the interview, while long, was not excessive. Further, the fact that Campbell was allowed to move around the police station unaccompanied on at least one occasion leads us to conclude that his freedom of movement was not restrained to the degree associated with formal arrest up to and including the time he gave his later statement.²⁹ Finally, we note that the statement itself was very—indeed, it could be said that it is excruciatingly—detailed. While this fact could be indicative of Campbell's desire to give the officers enough information that they would conclude the interview and allow him to leave, it could also indicate Campbell's desire to present the officers with a sufficiently complete and credible account of the incident to exculpate himself. The content of the statement supports the latter view: although it amplified on and to some extent contradicted Campbell's earlier recorded statements, it contained no confession. There are no indicia in that statement that, when considered objectively, would lead to the conclusion that a reasonable person providing such an exhaustive account of the circumstances leading up to the death of the child did so while under formal restraint on his freedom of movement.

Accordingly, in Docket No. 254807, we affirm the trial court's grant of a new trial for Campbell. In Docket No. 245263, we affirm the trial court's denial of Campbell's motion to

²⁸ See *Oregon v Mathiason*, 429 US 492, 495; 50 L Ed 2d 714, 97 S Ct 711 (1977) (fact that person was not arrested at conclusion of interview weighed against finding that he was in custody).

²⁹ See *Peerenboom*, *supra* at 197-198, citing *Stansbury*, *supra* at 322.

suppress his statements to the police. The case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens