

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN JAMES BREWSTER,

Defendant-Appellant.

UNPUBLISHED

July 17, 2003

No. 236186

Calhoun Circuit Court

LC No. 00-003398-FC

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, two counts of first-degree felony murder, MCL 750.316(1)(b) (based on alternative theories of murder committed during the perpetration of either first-degree criminal sexual contact or first-degree child abuse), first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a), first-degree child abuse, MCL 750.136b(2), and arson of a dwelling house, MCL 750.72. At sentencing, the trial court vacated defendant's convictions for second-degree murder, felony murder (committed during the perpetration of CSC I), and first-degree child abuse, and then sentenced defendant to mandatory life imprisonment without parole for the remaining felony murder conviction, life imprisonment for the CSC I conviction, and 140 to 240 months' imprisonment for the arson conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of sexually assaulting and then killing the four-year-old daughter of his live-in girlfriend, and then setting the house where they lived on fire to cover up his crimes. It was the prosecution's theory that defendant, who was caring for the child while his girlfriend was at work, sexually assaulted the child with a potato peeler. When the child subsequently became upset and asked for her mother, defendant decided to cover up his crime and stabbed the child in the neck with the potato peeler. The child suffered additional blunt force trauma to the head and, when she did not immediately die from her wounds, defendant strangled her to death. Defendant then set the child's body on fire and also tried to burn down the home where they lived in order to further cover up his crimes. Others who saw the fire were able to prevent the structure from burning down and, although they were able to remove the victim's body from the fire, she had died before the fire started.

At trial, defendant claimed that he accidentally stabbed the victim with the potato peeler when he fell on her, but denied otherwise physically or sexually abusing the child. He admitted

starting the fire, but claimed that he did so only because he felt that his girlfriend could never forgive him for accidentally causing the child's death and believed that it was better that she not know how the child actually died.

I

Defendant first argues that there was insufficient evidence to support his convictions for CSC I, first-degree child abuse, and felony murder. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 515.

CSC I requires sexual penetration in addition to one of the enumerated aggravating circumstances in MCL 750.520b(1). *People v Proveaux*, 157 Mich App 357, 360-361; 403 NW2d 135 (1987). The aggravating circumstance in this case was that the victim was under the age of thirteen years. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). CSC I is a general intent crime. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000). "[N]o intent is requisite other than that evidenced by the doing of the acts constituting the offense." *Id.* at 68-69, quoting *People v Langworthy*, 416 Mich 630, 644; 331 NW2d 171 (1982).

In the present case, the physical evidence showed that the victim had been sexually penetrated with an object before her death and had blood in her underpants at the time of her death. The victim did not have any signs of bleeding or trauma in her vaginal area when her mother left her with defendant earlier that day. Additionally, the victim could only have incurred these injuries before her body was set on fire. The only other person who was with the victim, apart from defendant, was the victim's younger sister, who was only an infant. Viewed in a light most favorable to the prosecution, this evidence, along with defendant's statements, was sufficient to enable the jury to determine beyond a reasonable doubt that defendant committed CSC I.

Defendant was also convicted of felony murder with first-degree child abuse as the predicate felony. Felony murder consists of the following elements:

(1) [T]he killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute]. [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (citation and internal quotations omitted).]

The jury may infer malice from the facts and circumstances of the killing. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

First-degree child abuse is an enumerated felony in MCL 750.316. MCL 750.316(1)(b). “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). To convict a defendant of first-degree child abuse, the prosecution must show that the defendant specifically intended to seriously harm the victim. *People v Maynor*, 256 Mich App 238, 242-243; ___ NW2d ___ (2003). “Serious physical harm” includes a severe cut. MCL 750.136b(1)(f).¹

The evidence in this case indicated that defendant stabbed the child in the neck with a potato peeler after sexually assaulting her, and then caused blunt force trauma to the child’s head before finally strangling her to death. The evidence sufficiently demonstrated that defendant intentionally caused serious physical harm to the child before she was killed and, thus, was sufficient to sustain the jury’s determination that defendant was guilty of first-degree child abuse.

The evidence was also sufficient to support defendant's conviction of felony murder. First, the evidence at trial indicated that the victim died before the fire was started. Second, the evidence that defendant stabbed the victim in the neck with a potato peeler, then caused additional blunt force trauma to her head, before finally strangling her to death, was unquestionably sufficient to prove that defendant acted with the requisite malice. *Carines, supra* at 758-759. Third, the evidence also demonstrated that the murder occurred during the perpetration of first-degree child abuse. Indeed, the victim's death was immediately connected to the abuse of the victim, which occurred as part of one continuous transaction. See *People v Thew*, 201 Mich App 78, 86-88; 506 NW2d 547 (1993).

Accordingly, the evidence was sufficient to convict defendant of CSC I and felony murder committed during the perpetration of first-degree child abuse.

Defendant also argues that the evidence was insufficient to support his felony murder conviction with CSC I as the predicate felony. We note that the trial court vacated that conviction. Nonetheless, the foregoing analysis likewise demonstrates that there was sufficient evidence to convict defendant of felony murder committed during the perpetration of CSC I.

II

Next, defendant argues that the prosecutor committed misconduct in his closing arguments. Because defendant did not preserve this issue with an appropriate objection to the

¹ MCL 750.136b(1)(f) defines “serious 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.

challenged remarks at trial, he must show that a plain error affected his substantial rights. *Carines, supra* at 761-767; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

In closing arguments, a prosecutor is afforded great latitude and is permitted to argue the evidence and make reasonable inferences in support of his theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id.* at 282-283. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when it is supported by the evidence, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

We find no merit to defendant's claim that the prosecutor improperly urged the jury to sympathize with the victim when he asked the jury to imagine the victim screaming. Considered in context, the prosecutor was commenting on the victim's reaction to the initial abuse, which allegedly was a factor in defendant's decision to try to quiet the victim, eventually leading to her death. The comments were based on the evidence and reasonable inferences drawn from the evidence. They were not an obvious plea with the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

We likewise find no plain error stemming from the prosecutor's comments about the bravery of the person who rescued the victim from the burning house after defendant failed to find her after twice reentering the home. Again, the prosecutor's comments were based on the evidence and reasonable inferences drawn from the evidence. The prosecutor also did not commit plain error by arguing that defendant's testimony was not credible. Because defendant testified, the prosecutor was free to comment on his credibility and argue that his testimony was not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant has failed to show that the prosecutor's comments constituted plain error. *Carines, supra*; *Schutte, supra*.

III

Defendant also argues that the trial court erred in admitting prosecution Exhibits 30A through 30E, which consisted of five letters with incriminating details about this offense. The letters were written on the back of legal paperwork belonging to defendant, and defendant's former girlfriend, who was familiar with defendant's handwriting, identified the handwriting on the exhibits as defendant's.

The trial court did not abuse its discretion in admitting the exhibits. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). First, we disagree with defendant's claim that a proper

foundation for admitting the letters was not established. The trial court properly found that defendant's former girlfriend's testimony identifying the handwriting as defendant's provided a sufficient foundation to support admission of the letters. MRE 901(b)(2).

Second, we reject defendant's claim that the trial court erred in denying his request for a handwriting expert. At trial, defense counsel informed the court that he was going to attempt to locate a handwriting expert to testify in support of the defense position that defendant did not write the letters. He informed the court that funds to pay some of the expense of procuring an expert may be required. The court commented that the motion was brought quite late in the proceedings, but did not foreclose defendant from pursuing this testimony. Defendant had almost a week to locate an expert before the trial concluded, but an expert was never produced and the issue was never revisited. Defendant did not request that the court provide funding for an expert.

Although a defendant may be entitled to the appointment of an expert witness to help with his case, see *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), here defendant never made a request for funding to pay for the services of a handwriting expert. An indigent defendant may not rely on a trial court's failure to appoint an expert on due process grounds absent a timely request to the court for expert assistance, the request is improperly denied, and the court's ruling renders the trial fundamentally unfair. *People v Leonard*, 224 Mich App 569, 584; 569 NW2d 663 (1997). Because defendant did not make a request for the court to appoint a handwriting expert, appellate relief is precluded absent a plain error affecting defendant's substantial rights. *Carines, supra*. Here, the existing record does not establish that there was an available handwriting expert who could have supported defendant's position that the letters were not written by him. Thus, defendant has failed to show a plain error affecting his substantial rights.

Third, we also reject defendant's argument that a new trial is required because the prosecution failed to produce a witness who had been an inmate at the county jail. Exhibits 30A through 30E were originally sent to that witness. Although the prosecution listed him as a witness, the prosecution could not locate him at the time of trial and asked the court to excuse his production. Following an evidentiary hearing, the court determined that the prosecution had exercised due diligence in attempting to locate and produce that witness and, accordingly, excused the prosecution from calling him. Defendant now argues that this decision was erroneous. We disagree.

Pursuant to MCL 767.40a(1) and (2), the prosecutor has a duty to disclose all known res gestae witnesses. Additionally, upon request by a defendant, the prosecutor must provide reasonable assistance in locating and serving process upon a witness. MCL 767.40a(5). See also *People v Lawton*, 196 Mich App 341, 347-348; 492 NW2d 810 (1992). However, the statute does not require the prosecutor to produce for trial all res gestae witnesses. Instead, the prosecution is only required to produce those witnesses included on its witness list. MCL 767.40a(3); *People v Burwick*, 450 Mich 281, 287-289, 292; 537 NW2d 813 (1995). Further, the due diligence standard no longer applies to the prosecution's witnesses. Instead, the prosecution is permitted to amend its witness list at any time for good cause. *Id.* at 292. See also *People v*

Perez, 255 Mich App 703, 707, 709; ___ NW2d ___ (2003), and MCL 767.40a(4). In this case, however, we agree that both standards, due diligence and good cause, were satisfied.

The testimony at the evidentiary hearing established that the prosecution and the police did everything reasonable to attempt to locate the former inmate. The police began looking for him once it was clear that he would be a witness at trial. Leads were followed in both this state and North Carolina, where the witness was thought to have relocated after his release from custody. The information provided to the police suggested that the witness most likely fled the state and had gone into hiding because of problems he was having with others in this state. He also had an outstanding felony warrant. The evidence established that reasonable efforts were made to locate him. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Thus, under either the due diligence standard or the test for good cause, the trial court did not err in excusing the prosecution from producing the former inmate as a witness.

Lastly, the trial court did not err in refusing to give the missing witness instruction, CJI2d 5.12. *Perez*, *supra* at 708-711.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell