

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ALLAN PARKS,

Defendant-Appellant.

UNPUBLISHED

May 15, 2007

No. 266713

Cass Circuit Court

LC No. 05-010030-FC

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316(b), and the trial court sentenced defendant to life imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. Defendant preserved this issue by moving for a new trial and developing the record with a *Ginther*¹ hearing. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law; we review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The right to the effective assistance of counsel is substantive and focuses on the actual assistance defendant received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Defendant bears a heavy burden of proving that the performance of his counsel was ineffective. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Defendant asserts that his trial counsel failed to pursue the theory of the case defendant desired, and instead presented an incoherent defense theory. The trial court found that defense counsel's strategy was to develop a theory of "accident or lack of intent." A review of the record supports this finding. To prove that defendant committed first-degree child abuse, the predicate felony for defendant's felony murder conviction, the prosecutor was required to show that defendant knowingly or intentionally caused serious physical or mental harm to the victim, with the specific intent to cause the harm, and not merely the intent to do the act which caused the harm. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Therefore, the prosecutor was required to prove defendant's intent, and it was a legitimate trial strategy to attempt to demonstrate that defendant did not possess the necessary intent required. Defendant's trial counsel attempted to establish that defendant did not intend to kill or cause serious physical harm to the victim by presenting evidence, through the testimony of character witnesses, that defendant often babysat for other children without incident, that he never imposed physical discipline while babysitting, and that he never acted in an aggressive or violent manner toward another person. Generally, this Court will not substitute its judgment for that of trial counsel on matters of trial strategy, or assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The fact that the strategy did not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). In reaching our conclusion we note that the record supports defense counsel's rationale for not pursuing the defense that defendant argues should have been pursued. The medical evidence refuted a finding that either the victim's mother or the victim himself caused his injuries.

Defendant also argues that his trial counsel failed to investigate the medical history of the victim. He contends that the medical history might have revealed that the victim's mother caused his injuries and could have supported the theory that the victim's mother caused the injuries. A trial counsel's failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80, (1990). As previously noted, defendant's theory that the victim's injuries were caused by the victim's mother was contradicted by the testimony of the doctor who conducted the autopsy. The evidence presented at trial showed that the fatal blows to the victim's head were struck no more than three days before the victim's death, a period of time when the victim was not staying with his mother but, rather, was staying with defendant and was under defendant's supervision. Defendant has failed to show that the alleged lack of investigation into the victim's medical history resulted in prejudice.

Defendant additionally argues that trial counsel was ineffective for failing to adequately inform him of the prosecutor's plea offers. But defendant's testimony at the *Ginther* hearing showed that he was aware of the terms of the two offers made by the prosecutor. Defendant knew that the first offer by the prosecutor required him to plead guilty to a charge of manslaughter, and that the second offer by the prosecutor required him to plead guilty to a charge of second-degree murder. Defendant also knew that both offers would have required him to serve time in prison. The record does not support a finding that defense counsel failed to inform defendant of the plea offers. Defendant has failed to establish that he was denied the effective assistance of counsel.

Finally, defendant argues that there was insufficient evidence for a rational fact finder to find him guilty of felony murder because the prosecution failed to prove beyond a reasonable doubt that the victim died as a result of injuries inflicted by defendant and that defendant specifically intended to inflict great bodily harm on the victim. We disagree.

We review challenges to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant was convicted of felony murder with the underlying felony being first-degree child abuse. The elements of felony murder include: (1) the 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, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony, such as first-degree child abuse. MCL 750.316(1)(b); *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). The elements of first-degree child abuse are: 1) a person who cares for, has custody of, or has authority over a child; (2) knowingly or intentionally causing serious physical or serious mental harm to a child, with the specific intent to cause the harm, and not merely the intent to do the act which caused the harm. *Maynor, supra* at 295. “Serious physical harm” is defined 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).

Defendant’s intent may be inferred from circumstantial evidence, including the victim's injuries, and, because of the difficulty of proving intent, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). The medical evidence presented at trial showed that the victim received four “sharp” blows to the head, at least one of which caused subdural hemorrhaging. The blows were incurred during the period of time defendant was caring for and had authority over the victim. The doctor who performed the autopsy opined that the victim’s fatal brain injury could not have been caused by a fall from a couch on to a carpeted floor. A detective testified that defendant informed him that the victim threw tantrums, that defendant did not know how to deal with the tantrums, and that he “whooped [the victim’s] ass several times.” While defendant’s character evidence may support the inference that he did not intend to do great bodily harm to the victim, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Viewed in a light most favorable to the prosecutor, there was sufficient evidence presented at trial from which a rational fact finder could find that defendant intended to cause serious physical harm to the victim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens