

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

MALINI RAO,

Defendant-Appellant.

No. 289343
Oakland Circuit Court
LC No. 2008-219989-FH

ON REMAND

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

This case comes before us again on remand from the Michigan Supreme Court. After a jury trial, defendant was convicted of second-degree child abuse, MCL 750.136b(3), and she appealed as of right. The majority of this Court determined that the trial court abused its discretion when it denied defendant's motion for a new trial based on newly discovered evidence. The majority concluded that defendant's proffered evidence – the x-rays taken in 2009 – satisfied the first three parts of the four-part test articulated in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), regarding whether the evidence was newly discovered. Consequently, this Court reversed the trial court's order denying defendant's motion for a new trial and remanded for an evidentiary hearing to determine if the fourth part of *Cress* was satisfied – i.e., whether 2009 x-rays would have made a difference in the outcome of the trial. *People v Rao*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 289343), slip op, pp 7-13. Presiding Judge Murray dissented, arguing that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Rao*, unpub op at 1 (MURRAY, P.J., *dissenting*).

The prosecution sought leave to appeal with the Michigan Supreme Court. After that Court heard oral argument on the application for leave to appeal, it issued an opinion reversing this Court, reinstating the trial court's order, and remanding the case back to this Court for consideration of defendant's remaining appellate issues. *People v Rao*, 491 Mich 271; 815 NW2d 105 (2012). We now affirm defendant's conviction and sentence.

I. BACKGROUND

The foundational facts of this case were previously provided by this Court:

A jury convicted defendant of second-degree child abuse, MCL 750.136b(3). The trial court sentenced defendant to five years' probation, with 90 days of jail confinement. Defendant moved for a new trial, asserting that newly discovered, exculpatory evidence made a different result probable on retrial. The trial court denied defendant's motion, and defendant appeals as of right.

* * *

In August 2006, defendant and her husband, Viswanath Seetheraman, brought 18-month-old [R.S.] to the United States to adopt her. [R.S.]'s medical history in India included infection by a parasite called giardia lamblia and head-to-toe eczema. In India, [R.S.] had resided in an orphanage. On [R.S.]'s arrival in the United States, her height and weight fell within the third and fifth percentiles for children her age.

In October 2007, the Department of Human Services (DHS) removed [R.S.] from defendant's care after Dr. Robert Cohen, an emergency room physician, opined that someone had physically abused [R.S.]. At trial in July 2008, the prosecution contended that defendant had committed second-degree child abuse by beating [R.S.] about the chest, back and face. According to the prosecution's expert witnesses, [R.S.] sustained multiple rib fractures and possibly an elbow fracture caused by trauma that defendant had inflicted. The defense countered that a metabolic disorder accounted for the abnormal x-ray appearance of [R.S.]'s bones. Defense expert witnesses explained that due to disease, vitamin deficiency, inactivity and malnutrition during the first 18 months of [R.S.]'s life in India, her bones developed abnormally, resulting in "pathological" fractures from minor trauma. Alternatively, the defense experts theorized that the apparent fractures actually constituted bone abnormalities that resulted from [R.S.]'s preadoption nutritional and physical neglect.

* * *

In July 2008, a jury convicted defendant of second-degree child abuse. Subsequently, the same trial judge who presided over defendant's trial declined to terminate defendant's parental rights. In May 2009, before returning [R.S.] to defendant's care, the trial court ordered that she undergo a second skeletal survey. [*Rao*, unpub op at 1-2, 5 (footnotes omitted).]

As noted, defendant was convicted by a jury of second-degree child abuse. We now turn to those issues defendant raised in the prior appeal but were left undecided.

II. ANALYSIS

A. DIRECTED VERDICT AND GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the trial court erred when it denied her motion for a directed verdict and her motion for a new trial based on the argument that the jury's verdict was against the great weight of the evidence. This Court reviews a trial court's decision on a motion for a

new trial based on the argument that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

“In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to ‘determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.’” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need [sic] merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.” *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

Defendant contends that the elements of second-degree child abuse were not established at trial because the prosecution failed to provide evidence that defendant caused her child, R.S., to suffer from serious physical harm. MCL 750.136b(3) provides that an individual is guilty of second-degree child abuse when:

- (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
- (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
- (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

To establish second-degree child abuse, the prosecution was required to prove that defendant committed a reckless act that caused serious physical harm or serious mental harm to her child. MCL 750.136b(3)(a); *People v Maynor*, 470 Mich 289, 300; 683 NW2d 565 (2004) (WEAVER, J., *concurring*). Alternatively, the prosecutor was required to show that defendant knowingly or intentionally committed an act that was likely to cause the child serious physical or mental harm, regardless whether such harm resulted. MCL 750.136b(3)(b); *Maynor*, 470 Mich at 300 (WEAVER, J., *concurring*). “Serious physical harm” is “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).

The prosecution presented evidence that established R.S. suffered from serious physical harm. According to the record, R.S. presented at St. Joseph Mercy Oakland Hospital on October 11, 2007, with several injuries to her face, including bruising, numerous cuts on her lips, missing

teeth, and a laceration on her right eyelid. The cuts on her lips were of different ages and a cut on her lower lip was several weeks old and serious enough to have required stitches, although there was no evidence that it was treated with stitches. Moreover, Dr. Robert Cohen opined that the lower lip injury was not consistent with missing teeth, biting, or bumping. He also testified that although the child's lip injuries could have occurred from falling, that was not a likely explanation. These facial injuries constituted "serious physical harm," because the lower lip laceration was arguably a "severe cut" as stated in MCL 750.136b(1)(f).

The prosecution also presented evidence that established that defendant was the cause of R.S.'s serious physical harm. Dr. Cohen testified that the laceration on R.S.'s right eyelid was not consistent with her scratching the eyelid and that the child's right cheek and eye injuries were unlikely to have been caused by her running into a table. When Children's Protective Services worker Michelle Sparks interviewed defendant in her home, defendant admitted that she "beat" R.S. on her face and demonstrated her manner of doing so by striking the seat of her chair with an open hand and a forceful swing. Defendant was a stay-at-home mother while her husband worked 11 to 12-hour days five days a week. Defendant's husband testified that when he came home from work and noticed a mark or a bruise on R.S., he always asked defendant how it occurred, and was "almost always" satisfied with her explanation and was "certainly satisfied" after he thought about it. In addition, R.S.'s five-year-old sister testified that defendant beat R.S. with her hand or a back scratcher when R.S. "was pooping her pants."

Additionally, x-rays taken on October 11, 2007, revealed several rib fractures of differing ages on both sides of R.S.'s rib cage. Dr. Wilbur Smith testified that R.S. had a total of seven rib fractures occurring on at least three different occasions. He opined that some of the fractures were between zero and seven days old on October 11, 2007, and that others were approximately two or three weeks old and six or seven weeks old. Dr. Smith testified that R.S.'s fracture to her eleventh rib in her back was likely caused by a direct blow to her back and that her front rib fractures were likely caused by direct blows under her rib cage. He opined that an adult could have struck R.S. with enough force to have caused the fractures but that it was unlikely that they could have been caused by another child or by R.S. running into an object.

Moreover, Dr. Smith testified that the fractures were not anomalies because anomalies do not occur in the areas affected on R.S.'s ribs and anomalies do not heal. Dr. Smith noted that the x-rays revealed that the fractures were in three distinct stages of healing and that the x-rays taken in August 2006 – when R.S. was placed in defendant's care – did not reveal any rib fractures or anomalies. Dr. Smith also opined that R.S.'s fractures could not have been caused by walking or running and falling down. Likewise, Dr. Marcus DeGraw testified that rib fractures were not consistent with a child falling while walking or running and that the number of fractures, their differing ages, and R.S.'s other injuries indicated that they were not accidental.

In addition, medical testing and observations ruled out possible explanations for the rib injuries other than child abuse. Dr. DeGraw observed R.S. walk, run, and climb on and off chairs without exhibiting any signs of delay or abnormality in her gross motor skills. R.S. did not test positive for Beta Thalassemia, general Thalassemia, Osteogenesis Imperfect, Rickets, Scurvy, Sick Cell Variant Disease, Mucopolysaccharidosis, Mucopolidosis, Hepatitis, or vitamin C and D deficiencies and the testing revealed that R.S.'s elevated liver enzyme levels were consistent with the injuries to her ribs that surrounded her liver. Dr. DeGraw found no

evidence indicating that R.S. was prone to rib fractures. Dr. Smith testified that R.S. did not suffer from malnutrition severe enough to cause brittle bones. Also, Dr. Satish Sundar testified that there was nothing appropriate medically to explain R.S.'s injuries.

Finally, defendant and her husband did not give Dr. Cohen a history that explained the rib fractures and R.S. did not suffer from additional bone fractures after being removed from defendant's care. Defendant argues that a skeletal survey conducted in May 2009 belies the prosecution experts' conclusions. However, as concluded by the Supreme Court, this "new" evidence merely presented the same issue to the jury that it was asked to resolve during defendant's trial – i.e., whether R.S.'s rib abnormalities were accidental fractures, nonaccidental fractures, or anomalies resulting from metabolic bone disease. Moreover, the May 2009 skeletal survey did not show new fractures that occurred after the child was removed from defendant's care.

Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact would be able to find that defendant's actions caused R.S. to suffer serious physical harm beyond a reasonable doubt. *Gillis*, 474 Mich at 113.

Defendant also argues that her conviction is against the great weight of the evidence. A verdict was against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). For the reasons stated above, the jury's verdict is not against the great weight of the evidence. To rebut the prosecution's evidence, defendant presented expert testimony that R.S.'s soft tissue injuries were consistent with accidental causes, that her various health problems resulted in her bones not developing normally, that her x-rays revealed bone abnormalities resulting from metabolic bone disease rather than fractures, that her lack of pain revealed that her ribs were not fractured or that her bones were fragile enough to crack with incidental activity, that malnutrition caused R.S.'s broken ribs, and that normal activity, such as falling or running into objects, caused her fractures. It was for the jury to determine which testimony to believe and to decide whether defendant committed any act that caused R.S.'s injuries. The evidence presented did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Id.* Thus, the trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis. *Unger*, 278 Mich App at 232.

II. RIGHT TO PRESENT A DEFENSE AND TO CALL WITNESSES

Defendant argues that she was denied her constitutional right to present a defense and call witnesses on her behalf when the trial court refused to allow Jacqueline Skelding and Gary Skelding to testify. Regarding Gary, defendant waived appellate review of this issue because defense counsel indicated that he did not wish to call Gary as a witness and did not seek to present his testimony thereafter. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Thus, we decline to review this issue. Regarding Jacqueline, defendant preserved this issue when defense counsel called Jacqueline, but, the trial court did not allow her testimony. We review de novo whether a defendant was denied the constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review for an abuse of

discretion a trial court's decision whether to admit or exclude evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

While a criminal defendant has a constitutional right to present a defense, including the right to call witnesses, US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 20; *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), this right is not absolute, *Yost*, 278 Mich App at 379. An “accused must still comply with “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”” *Id.*, quoting *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). “Nevertheless, the sanction of preclusion is extreme and should be limited to only the most egregious cases.” *Yost*, 278 Mich App at 379.

The trial court did not abuse its discretion by disallowing Jacqueline's testimony. The record arguably shows that defense counsel vacillated regarding which witnesses he intended to call and consequently took more of the trial court's, the prosecutor's, and the jury's time than necessary. The record in fact reveals that the trial court provided defense counsel with prior opportunities to call Jacqueline, but defense counsel represented to the court that he did not wish to call Jacqueline. Given defense counsel's actions, the trial court did not abuse its discretion by disallowing Jacqueline's testimony. *Katt*, 468 Mich at 278.

Even if the trial court did abuse its discretion, the trial court's ruling did not deny defendant her constitutional right to present a defense. Defense counsel made an offer of proof indicating, in relevant part, that he sought to present Jacqueline's testimony to establish that R.S. was clumsy, lacked coordination, and was accident prone. This testimony would have been cumulative of other evidence, as both defendant and her husband testified that R.S. was clumsy and they told several doctors and CPS worker Sparks that R.S. often injured herself because of her clumsiness. Defendant's mother, R.S.'s sister, and Deanna Perrino, defendant's neighbor, all testified regarding R.S.'s clumsiness. Evidence was presented that R.S. fractured her elbow in February 2007 because of an accidental fall. Moreover, Mia Gougeon-Adarkwa, R.S.'s adoption case manager, observed R.S. and noted that she was somewhat unstable, fell a few times, and bumped into a wall.

Additionally, defendant argues that the Skeldings would have testified that they observed R.S. suffer an accidental injury post-removal from defendant's care when she attempted to climb onto a chair at the Skeldings' home. In support of this testimony, defendant submitted a photograph of R.S. highlighting a lip injury, along with affidavits submitted by the Skeldings averring that R.S. slipped while climbing onto a chair, struck her face on the table, and opened a cut on her lip. However, as admitted in the Skeldings' affidavits and by defense counsel, R.S.'s lip injury was actually an aggravation of her previous lip injury, and thus, this evidence is cumulative. Consequently, the trial court's refusal to allow Jacqueline to testify did not deny defendant her right to present a defense.

III. ADMISSION OF EVIDENCE

Defendant argues that other acts and character evidence were improperly admitted into evidence pursuant to MRE 404(a), MRE 404(b), and MCL 768.27b. Defendant failed to object

to these alleged claims of error, and thus, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).¹

Regarding the admission of the other acts evidence that defendant duct-taped R.S.'s mouth shut on one occasion to quiet R.S., defendant asserts that this evidence was inadmissible because it was not relevant, it was not sufficiently similar to the charged offenses, and its probative value was outweighed by the danger of unfair prejudice. MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All relevant evidence is admissible. MRE 402; *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). But, "MRE 404(b) requires the exclusion of other acts evidence if its only relevance is to show the defendant's character or propensity to commit the charged offense." *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012).

Notwithstanding these evidentiary rules, MCL 768.27b(1) is a specific statutory provision that governs the admission of other acts related to domestic violence, and provides, in the relevant part:

[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.²[[Footnote added.]

This Court has stated that this language allows "relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2011) (quotation marks and citation omitted). Consequently, as long as the probative value of the proffered character evidence outweighs any unfair prejudice, the other acts evidence was properly admitted by the trial court.

¹ At the outset, defendant asserts that unless MCL 768.27b is interpreted entirely consistent with MRE 404(b), it infringes on the Michigan Supreme Court's constitutional authority to make court rules involving practice and procedure and violates the separation of powers. However, as conceded by defendant, this Court has rejected this argument, see *People v Schultz*, 278 Mich App 776, 777-779; 754 NW2d 925 (2008), citing *People v Pattison*, 276 Mich App 613, 619-621; 741 NW2d 558 (2007), and we are bound to follow these decisions, MCR 7.215(J)(1); *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007).

² MCL 768.27b(5)(a)(i), in the relevant part, defines "domestic violence" as "[c]ausing or attempting to cause physical or mental harm to a family or household member." MCL 768.27b(5)(b)(ii), in the relevant part, defines a "family or household member" as "[a]n individual with whom the person resides or has resided."

“Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). “The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.” *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). We conclude that the other acts evidence of defendant duct-taping R.S.’s mouth shut was admissible under MRE 403 because its probative value was not outweighed by the danger of unfair prejudice. Instead, the evidence was relevant to the charged crime because it demonstrated defendant’s treatment of R.S., but it was not so shocking or appalling that the jury would accord it undue or preemptive weight. Thus, defendant has failed to show that the admission of the evidence under MCL 768.27b was plain error.

Defendant also argues that the prosecutor elicited improper character evidence by questioning her about her impatience and inability to control her temper, and asking her whether she had previously mouthed the word “bitch” at CPS worker Sparks at a court proceeding. Defendant argues that this evidence was improper character evidence under MRE 404(a) and was inadmissible under MRE 404(b) and MCL 768.27b. However, the evidence was admissible under MRE 404(a)(1)³ and MRE 405⁴ to rebut defendant’s claim that she was a compassionate and selfless person. See *People v Lukity*, 460 Mich 484, 497-499; 596 NW2d 607 (1999). Defendant testified on direct examination that she previously volunteered her time to help people, mostly children, with developmental problems and, while a student, assisted other students with special needs. She also assisted outpatient surgery patients and volunteered at a library. She claimed that she wanted to adopt a female child from India because of the way that girls are viewed in the Indian culture and she wanted to make a difference in a child’s life. This testimony opened the door to the prosecutor’s questioning regarding defendant’s impatience and bad temper. *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009) (“But once a defendant chooses to present evidence of his or her character [under MRE 404(a)(1)], the prosecutor may also present evidence concerning that same character trait to rebut the defendant’s evidence.”). Consequently, this evidence was admissible under MRE 404(a)(1) and MRE 405. See *Lukity*, 460 Mich at 497-499. Defendant has failed to prove plain error.

IV. INSTRUCTIONAL ERROR

Defendant next argues that the trial court erred by failing to give a unanimity instruction to the jury regarding an alternative means of proving second-degree child abuse and regarding the separate and distinct injuries suffered by R.S. In order to preserve a jury instruction challenge for review, a defendant must object on the record and state specifically the basis for

³ MRE 404(a)(1) provides, in the relevant part, that “[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . .” is admissible “for the purpose of proving action in conformity therewith on a particular occasion.”

⁴ MRE 405(a) provides, “[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.”

the objection. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000), citing MCL 768.29. Defendant objected to the trial court’s failure to give a unanimity instruction regarding the alternative means of proving second-degree child abuse, i.e., a reckless act causing serious physical harm or serious mental harm, or a knowing or intentional act likely to cause serious physical or mental harm regardless whether such harm results. However, defendant failed to assert that the trial court should have given a unanimity instruction with respect to the separate and distinct injuries that R.S. suffered, i.e., her rib fractures and facial injuries. This Court reviews preserved claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). We review unpreserved issues for plain error affecting a defendant’s substantial rights. *Carines*, 460 Mich at 763.

“A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement.” *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006), *aff’d* 482 Mich 851 (2008). In most circumstances, a general unanimity instruction is sufficient. *Id.* A jury is “not required to unanimously agree upon every fact supporting a guilty verdict.” *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). Moreover, “it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories.” *Id.*; see also *People v Cooks*, 446 Mich 503, 515 n 16; 521 NW2d 275 (1994).

Regarding defendant’s argument that a unanimity instruction regarding the alternative means of proving second-degree child abuse, the prosecutor charged defendant with one count of second-degree child abuse. MCL 750.136b, the second-degree child abuse statute, provides, in the relevant part:

- (3) A person is guilty of child abuse in the second degree if any of the following apply:
 - (a) . . . the person’s reckless act causes serious physical harm or serious mental harm to a child.
 - (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

Because the statute lists alternative means of committing the offense, and the means do not constitute separate and distinct offenses, jury unanimity was not required regarding the alternate theories. *Cooks*, 446 Mich at 515 n 16; *Gadomski*, 232 Mich App at 31. The trial court did not abuse its discretion when it declined to give the requested instruction.

Regarding defendant’s assertion that a unanimity instruction was required with respect to R.S.’s facial injuries and rib fractures because the injuries were separate and distinct acts:

[W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, *the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct* or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant’s guilt.

When neither of these factors is present, . . . a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [Cooks, 446 Mich at 530.] [Emphasis added.]

Here, defendant contends that only the child's rib fractures satisfied the actus reus element of second-degree child abuse. Hence, the trial court was not required to give a unanimity instruction because, according to defendant's argument, the child's facial injuries and rib fractures did not independently satisfy the actus reus element. *Cooks*, 446 Mich at 530.

In any event, the trial court instructed the jury in accordance with the statutory language as follows:

The defendant is charged with second[-]degree child abuse. To establish this charge the prosecution must prove each of the following elements beyond a reasonable doubt: First, that [defendant] is the parent and/or guardian of [R.S.]. Second, that the defendant did some reckless act. Third, that as a result [R.S.] suffered serious physical harm by – and by serious physical harm I mean 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. And fourth, that [R.S.] was at the time under the age of 18.

In addition, the defendant is charged with the crime of second[-]degree child abuse. And to prove this charge the Prosecutor must prove each of the following elements beyond a reasonable doubt: First, that [defendant] is the parent and/or guardian of [R.S.]. Second, that the defendant knowingly or intentionally did an act likely to cause serious physical harm to [R.S.] regardless of whether such harm resulted. By serious physical harm I mean 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. And third, that [R.S.] was at the time under the age of 18.

As previously noted, 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." Thus, the jury was properly instructed in accordance with the plain language of the statute. See *Maynor*, 470 Mich at 295-296.

Additionally, as previously discussed, R.S.'s laceration to her lower lip was arguably a "severe cut" that satisfied the definition of "serious physical harm" based on Dr. Cohen's testimony that the laceration was severe enough to require stitches. Even if R.S.'s lip injury constituted "serious physical harm" and was sufficient to establish second-degree child abuse, however, no unanimity instruction was required. A trial court must provide such an instruction only if the multiple acts satisfying a single charged offense "are materially distinct or if there is

reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *Cooks*, 446 Mich at 530. Here, the multiple acts were not materially distinct and all involved child physical abuse perpetrated on R.S. In addition, the record fails to evidence any reason to believe that the jurors might be confused or disagree regarding the factual basis of defendant's guilt. *Id.* Further, because the lip laceration and rib fractures were alternative means, listed in the statute, for committing the offense, they did not constitute separate and distinct offenses and a unanimity instruction was not required. *Id.* at 515 n 16; *Gadomski*, 232 Mich App at 31. Defendant has failed to show plain error.

V. HEARSAY EVIDENCE

Defendant contends that the trial court improperly excluded six statements from evidence as hearsay. For those statements where defendant objected to their exclusion, we review the trial court's decision whether to admit or exclude evidence for an abuse of discretion. *Katt*, 468 Mich at 278. Preliminary questions of law, such as whether a rule of evidence precludes admission of proffered evidence, are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). For those statements where defendant failed to object, we review for plain error. *Carines*, 460 Mich at 763.

Defendant first argues that the trial court erroneously refused to admit Perrino's testimony that defendant was eager to have children and wanted to have additional children. Defendant argues that this testimony was admissible under MRE 803(3) as a statement of the declarant's, i.e., defendant's, then existing state of mind, emotion, sensation, or physical condition. Even if we were to accept defendant's argument, it is not enough to prove plain error because this evidence was admitted despite the trial court's exclusion of Perrino's testimony. Both defendant and her husband testified that they discussed adopting a child before defendant became pregnant with her other daughter and that, after her daughter's birth, they again discussed adoption and ultimately adopted R.S. They testified that they wanted to adopt a girl because of the manner in which girls are regarded in the Indian culture and wanted to provide a better life for an Indian girl. Thus, because the evidence that defendant sought to admit was admitted through other witnesses, defendant has failed to establish plain error.⁵

Defendant argues that she and her husband were repeatedly precluded from testifying regarding what doctors had told them about R.S., and that such testimony was admissible because it was not offered for its truth but, to show its effect on the listener. "Hearsay" is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c).

⁵ The trial court also did not err by excluding defendant's husband's testimony regarding his and defendant's explanation of R.S.'s injuries to a neighbor. Defendant fails to indicate why this testimony would be admissible, and it is well established that a defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation marks and citation omitted). In any event, the trial court did not exclude the testimony as inadmissible hearsay, but rather on the basis of relevance, and defendant does not argue that the evidence was relevant.

A statement offered to show its effect on the listener is not hearsay. *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995). However, the record shows that defendant sought to admit testimony regarding what doctors had told her and her husband about R.S. for the truth of the matters contained in the statements, and not merely for their effect on the listener. Thus, defendant has failed to establish plain error.

We next consider defendant's argument that she and her husband were improperly precluded from testifying that CPS worker Sparks would not allow them to obtain food for R.S. while she was at the hospital on October 11, 2007. Defendant again contends that such evidence was admissible to show its effect on the listener. But, whether CPS worker Sparks permitted defendant and her husband to obtain food for R.S. at the hospital was irrelevant to the charges against defendant, and thus defendant has failed to show plain error.

Defendant also asserts that the trial court erred by refusing to admit the business record of Dr. Jason Vettraiño, the dentist who treated R.S. after she lost a tooth. MRE 803(6) allows a record to be admitted if "the testimony of the custodian *or other qualified witness*' shows that it was made and kept as a regular practice of the business." *People v McLaughlin*, 258 Mich App 635, 652; 672 NW2d 860 (2003), quoting MRE 803(6). (Emphasis in the original.) Defendant argues that the record was admissible under MRE 803(6) because Dr. Vettraiño was "a qualified witness" as contemplated in the rule.

Dr. Vettraiño was not qualified to testify that the record was kept in the normal and regular course of business because he was no longer employed at the office where the record was kept. In any event, Dr. Vettraiño testified regarding his treatment of R.S., utilized the record to refresh his recollection during his testimony, and opined that he saw no signs of child abuse when he treated the child. Thus, even if the trial court erroneously refused to admit the record, defendant cannot show that it was more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496.

Finally, defendant argues that the trial court erred by refusing to allow Dr. Rothfeder to testify regarding a report from R.S.'s school that allegedly confirmed that she frequently fell after being placed in foster care. The trial court disallowed the testimony because the report had not been admitted as evidence and the prosecutor argued that it was unlikely to be admitted as evidence since the foster mother denied reporting that R.S. frequently fell. Ultimately, the report was not admitted as evidence.

MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

Thus, "under this rule, an expert may not offer an opinion that is based on 'facts or data in the particular case' unless the facts or data are in evidence or will be in evidence." *Yost*, 278 Mich App at 390. Because the school report was not admitted into evidence at any point during trial, the trial court did not err by excluding Dr. Rothfeder's testimony regarding the report.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that she was denied the effective assistance of counsel. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court’s factual findings for clear error and questions of constitutional law de novo. *Id.* In this case, our review is limited to mistakes apparent on the record because, although defendant filed a motion for a new trial, the trial court did not hold a *Ginther*⁶ hearing. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish ineffective assistance of counsel, the defendant must demonstrate that counsel’s performance fell below an objective standard of reasonableness and that counsel’s deficient performance prejudiced the defendant. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Effective assistance of counsel is presumed, *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), and the defendant must overcome a strong presumption that counsel’s actions constituted sound trial strategy, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). With respect to the prejudice requirement, defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 302-303; *Moorer*, 262 Mich App at 75-76.

Defendant argues that counsel was ineffective for failing to seek the admission of Gary’s testimony during trial. At trial, counsel stated that he did not intend to call either Gary or Jacqueline to testify. And, as already discussed, the trial court did not abuse its discretion by disallowing Jacqueline’s testimony and that ruling did not deprive defendant of a substantial defense. Because Gary’s testimony would have been identical to Jacqueline’s testimony, which was properly excluded, it would have been futile for counsel to seek admission of this testimony. It is well established that counsel is not ineffective for failing to assert futile arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Counsel was also not ineffective for failing to object to the prosecutor’s elicitation of evidence that defendant was impatient, had a bad temper and that she called CSP worker Sparks a “bitch” at a previous court proceeding. Again, as previously discussed, this evidence was properly admissible, and counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Finally, defendant argues that counsel was ineffective for failing to subpoena the Genesee County School District record that purportedly would have indicated that Shannon Byard, one of R.S.’s foster mothers, noticed that R.S. was clumsy and often fell. However, the record belies defendant’s argument and highlights that defense counsel had a copy of the school record in his possession during trial. In fact, counsel utilized the report to refresh Byard’s recollection during

⁶ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

her testimony. Thus, defendant's argument lacks merit.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio