

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WAYNE SPRAGGINS,

Defendant-Appellant.

UNPUBLISHED

April 1, 2008

No. 275844

Wayne Circuit Court

LC No. 06-008731-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316, and sentenced to life in prison. Defendant appeals as of right. We affirm.

On the morning of January 19, 2004, defendant was at the home of Karen Davis (Davis). He and Davis had been seeing one another for several years, and had a ten-month-old child named Daniel together. Davis went to work that morning, and defendant stayed at her home to watch Daniel and Davis's other son, Jonathan Burke, the victim of the crime at issue here. The victim was nine years old, was autistic and developmentally delayed, had congenital heart disease, and suffered from seizures. The victim was not completely toilet trained; he had trouble defecating without help. Davis provided conflicting information concerning whether the victim was able to get into and out of the bathtub without assistance; she told a police officer that the victim was able to get into the tub without any aid, but testified to the contrary at trial.

According to defendant, he took the victim to an upstairs bathroom, sat him on the toilet, and then started running the water in the bathtub. Defendant claimed that with the water running, he went downstairs to check on Daniel, and was downstairs for two to three minutes, whereupon he heard the victim cry out. Defendant testified that he went upstairs and found the victim, nude and lying on his back in the bathtub, and that he took the victim out of the bathtub and laid him face down on his bed. The victim suffered severe burns over 40 percent of his body, and his skin was hanging from his body. Defendant placed cool towels on him and called Davis.

Davis arrived home in 35 minutes, saw her son's condition, and called 9-1-1. An ambulance took the victim to the hospital, where he remained for about two months. The victim had various complications while in the hospital, and died.

An autopsy found burns to the victim's legs, feet, back and arms. The medical examiner, Dr. Diaz, concluded that the burn pattern indicated that someone had placed and held the victim in the water. Dr. Diaz explained that the victim was able to feel pain, and the burn pattern was not indicative of a person who entered a hot bath, felt pain, and then tried to get out. Dr. Diaz determined that the cause of death was thermal burns. After the autopsy, and after reviewing the medical records, Dr. Diaz determined that the manner of death was homicide.

Defendant first contends that the trial court abused its discretion in binding him over for trial. We disagree. Because defendant failed to preserve this issue, this Court is limited to reviewing whether there was plain error that affected the substantial rights of defendant. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1990).

If the evidence presented at the preliminary examination establishes probable cause that the defendant committed the charged offense, the defendant must be bound over for trial. *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). "Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (internal quotation marks and citation omitted).

Defendant was charged with felony murder. To convict a defendant thereof, the prosecution must prove: (1) the killing of a human being, (2) with intent to kill, intent to cause great bodily harm, or intent to create a high risk of death or bodily harm with the knowledge that death or bodily harm will most likely result (3) during the commission, attempted commission or assisted commission of any one of several enumerated felonies. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The underlying felony in this case is first-degree child abuse. In order to prove first-degree child abuse, the prosecutor must establish that defendant knowingly or intentionally caused serious physical or mental harm to a child. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004).

At the preliminary examination, Dr. Diaz testified that, based on the pattern of the victim's injuries, he concluded that the victim was held in the hot water of the bathtub. He further testified that there were no head wounds consistent with defendant's theory that the victim fell into the tub. Dr. Diaz acknowledged that he was aware that the victim may have had a habit of climbing into the bath tub after having accidents on the toilet, however, based on all of the evidence before him, he concluded that the cause of the victim's death was thermal burns and the manner of death was homicide.

In addition to Dr. Diaz, Scott Jordan, who shared a cell with defendant, testified that defendant told him that he was in jail facing felony murder charges and that "he did it." Jordan testified that defendant said the victim was the nine-year old son of his girlfriend, and that he put him in the bathtub to teach him a lesson about going to the bathroom on himself. Jordan also stated that he was not under the impression that the victim was mentally retarded, only that he was "artistic," (i.e., autistic), indicating that he was aware of the victim's mental condition.

Based on the testimony of Dr. Diaz, that the victim was intentionally held down in the bathtub, and the testimony of Jordan, that defendant placed the victim in the tub to punish him and teach him a lesson, probable cause existed to bind defendant over for trial for felony murder, with the underlying offense being first-degree child abuse.

Next, defendant argues that he was denied a fair and impartial trial because of prosecutorial misconduct. Specifically, defendant asserts that he was prejudiced when the prosecution used the term “baby killer” in its opening statement. We disagree. When the alleged misconduct is not properly objected to, this Court reviews claims of alleged prosecutorial misconduct for plain error affecting the substantial rights of the defendant. *Carines, supra* at 763-764. No error requiring reversal will be found if a curative instruction could have alleviated any prejudicial effect. *People v Moorer*, 262 Mich App 64, 79; 683 NW2d 736 (2004).

During the prosecutor’s opening statement, she described the eventual testimony of Jordan. In preparing the jury for defendant’s inevitable attempt to impeach the jailhouse informant, the prosecutor stated:

Also, take a look at is he being offered anything? Does he have anything to gain, any axe to grind in this case? I think he’ll tell you that he’s not getting anything for this. He’s already serving his time. Think he’ll tell you that he may be a thief and may use different names but he’s no baby killer. So listen to what he has to say. Listen to what all the witnesses have to say.

The prosecution did not explicitly call defendant a baby killer, and that implication is not unmistakably clear, although the statement could have been interpreted that way. It is possible that the prosecutor truly did not have defendant in mind when he made the comment, and was simply trying to minimize Jordan’s prior convictions. Nevertheless, by using the term baby killer, the juror’s minds likely reflected on the crime of which defendant was accused.

In deciding whether the prosecutor’s strong language constitutes misconduct, this Court must determine whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Whether a particular act is misconduct is evaluated on a case-by-case basis, and is evaluated in the context of the evidence and theories of the defense. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not state an argument blandly. *Id.* at 66. But a prosecutor is not permitted to make a factual statement to the jury that is not supported by the evidence. *Id.*

Even if defendant could show that the prosecutor’s use of the term baby killer was improper, he cannot establish that he was prejudiced by the use of the term, and thus, cannot prevail on this unpreserved issue. The jury heard expert testimony that the victim was held down in the water and his death was the result of a homicide. This testimony directly contradicted defendant’s explanation for the victim’s injuries. Furthermore, Jordan testified that defendant confessed to committing the crime while in jail. Additionally, Davis testified that the victim was not able to get in to the tub without assistance, implying that someone must have placed him in the hot water. In light of the strong evidence in support of the prosecution’s theory, it is unlikely that defendant would have been acquitted but for the prosecutor’s opening statement. Also, the trial court instructed the jury that the statements and questions of the lawyers are not evidence, and should not be treated as such. Jurors are presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Thus, any prejudicial effect from the prosecutor’s allegedly overzealous terminology in his opening statement was not only outweighed by the strong testimony in favor of defendant’s conviction, but was also rectified by the trial court’s instruction to the jury.

Defendant next argues that the trial court abused its discretion in admitting evidence that defendant had abused the victim on a previous occasion. We disagree. The propriety of a trial court's admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Evidence of a criminal defendant's prior bad acts is generally not admissible at trial in order to ensure that the defendant is afforded a fair trial based on the evidence, rather than one based on his prior actions. *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The above list of exceptions is not exclusive. *People v Sabin*, 463 Mich 43, 56; 614 NW2d 888 (2000). In order to be admissible pursuant to MRE 404(b), the prosecutor must offer the evidence for something other than a theory of propensity, the evidence must be relevant and the probative value of the evidence must not be substantially outweighed by its prejudicial effect. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The wrongful admission of evidence of prior bad acts does not in itself justify reversal; rather, a defendant must show the error was most likely outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Defendant repeatedly sought to introduce the theory that the victim's death was the result of him accidentally falling in the bathtub while defendant was downstairs. Defendant offered this theory in his statement to the police, utilized it to explain the victim's injuries to Davis, and reiterated it in his testimony at trial. Defense counsel's examination of Dr. Diaz and Dr. Marc Cullen revolved around whether the burn patterns could indicate accidental burning. As explained above, MRE 404(b) allows evidence of a defendant's prior bad acts to establish the absence of a mistake or accident. Defendant had previously been supervising the victim when the victim was injured, and on that occasion, as here, defendant told Davis that the injuries resulted from an accident for which the victim was responsible. In contrast, defendant told Jordan that the present injuries did not result from accident but resulted from his intentional act. The evidence, therefore, was not offered to show propensity, but instead was relevant to rebut defendant's theory of the case because it was probative of whether the victim died as the result of an accident. Defendant has not established that the probative value of this evidence was outweighed by an unfairly prejudicial effect. Furthermore, the trial court instructed the jury that the evidence could only be used to show an absence of mistake or accident. Defendant has not demonstrated that this instruction was ineffectual, and, again, jurors are presumed to follow instructions. *Graves, supra* at 486.

Defendant next argues that the trial court abused its discretion in admitting two autopsy photographs. We disagree. The propriety of a trial court's admission of evidence is reviewed for an abuse of discretion. *Hine, supra* at 250.

When a party challenges the propriety of the admission of photographic evidence, this Court first must determine whether the evidence was relevant, and if it was, whether the probative value was outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995). Photographs are not inadmissible simply because they are gruesome, or because a witness could have testified as to their contents. *Id.* at 76. In the present case, the photographic evidence was relevant, and its probative value was not outweighed by the likelihood of unfair prejudice. The evidence was thus properly admitted.

Under MRE 401, relevant evidence is “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.” The autopsy photographs, depicting the burn pattern on the back of the victim’s body, were a visual aid that assisted the jury with understanding some of the essential facts of the case – the injury that led to death. The trial transcript demonstrates that the somewhat technical testimony of Dr. Diaz may have been confusing to a layperson. The photographic images, while prejudicial, had considerable probative value because they enabled the jurors to more fully understand Dr. Diaz’s expert testimony. Therefore, the photographs were relevant, and the relevancy of the evidence is not outweighed by their prejudicial effect.

Defendant next asserts that the trial court erred in denying his motion for a directed verdict. We disagree. In reviewing a challenge to a ruling on a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

As stated above, defendant was charged with felony murder. In order to find a defendant guilty of felony murder, the prosecution must prove: (1) the killing of a human being, (2) with intent to kill, intent to cause great bodily harm, or intent to create a high risk of death or bodily harm with the knowledge that death or bodily harm will most likely result (3) during the commission, attempted commission or assisted commission of any one of several enumerated felonies. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The underlying felony here is first-degree child abuse. In order to prove first-degree child abuse, the prosecutor must establish that defendant knowingly or intentionally caused serious physical or mental harm to a child. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). 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).

Defendant’s conversation with Jordan establishes that he intended to place the victim in the water to burn him. Because a burn or scald is a serious physical harm, the elements of first-degree child abuse were established. Defendant contends that the testimony of Jordan, a convicted felon, cannot be believed. However, we do not sit in judgment of witnesses’ credibility. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, the testimony of Dr. Diaz also established that someone held the victim in the hot water, and that the injuries resulting therefrom caused the victim’s death. The only person inside the home that day beside the victim and defendant was defendant’s ten-month-old son. A rational finder of fact

could thus conclude that, because the evidence shows that someone held the victim in the water and defendant was the only person in the home capable of such an act, he was the person responsible for the victim's injuries. Because the prosecutor presented evidence, believable by a rationale trier of fact, that established the elements of first-degree child abuse and that the child abuse resulted in the victim's death, the elements of felony murder were established, and the trial court properly denied defendant's motion for directed verdict.

Defendant also appears to assert that the verdict is not supported by sufficient evidence. We disagree. In reviewing a challenge based on the sufficiency of the evidence, this court conducts a de novo review. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). A conviction will be affirmed when, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). As described above, the testimony of Dr. Diaz and Jordan established the elements of felony murder. Therefore, defendant's conviction is supported by sufficient evidence.

Finally, defendant asserts that the verdict was against the great weight of the evidence. We disagree. Because defendant failed to preserve this issue, this Court is limited to reviewing whether there was plain error that affected the substantial rights of defendant. *Carines, supra* at 763-764.

In an appeal based on the great weight of the evidence, a court should rarely grant a new trial when the appeal is based on conflicting testimony or the questionable credibility of witness testimony. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). Only where the testimony of a material witness is inherently implausible, incredible, defies physical reality or has been seriously impeached, should a new trial be granted. *Id.* at 643-644. The trier of fact decides issues of credibility. *Id.* at 642-643.

In asserting that the verdict was against the great weight of the evidence, defendant contends that the testimony of Dr. Cullen contradicted the testimony of Dr. Diaz. We disagree. Dr. Cullen acknowledged that he may have originally told officers that the victim's injuries were consistent with defendant's theory that the victim fell into the tub. However, the opinion he offered at trial was that it did not appear that the victim fell into the tub or climbed into the tub voluntarily. In addition, Dr. Diaz is an expert in forensic pathology, and his opinions on the cause and manner of the victim's death were never seriously impeached or shown to be incredible, implausible or defiant of physical reality. Accordingly, the guilty verdict was not against the great weight of the evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder