

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 25, 2013

v

DANTE LAWRENCE HUDGINS,  
Defendant-Appellant.

No. 309652  
Wayne Circuit Court  
LC No. 11-005780-FC

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Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Dante Lawrence Hudgins appeals by right his jury convictions of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). The trial court sentenced him to serve life in prison for the felony murder conviction and to serve 8 to 15 years in prison for the first-degree child abuse conviction. Because we conclude that there were no errors warranting relief, we affirm.

Hudgins first argues that the trial court erred when it allowed the prosecutor to introduce the preliminary examination testimony by the medical examiner, Scott Somerset. However, the record shows that Hudgins' lawyer had a sidebar conference with the prosecutor and judge just before the admission of this testimony and that he did not object to the admission of the testimony; it, therefore, appears that he stipulated to the admission of the testimony, which would waive any claim of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Although there are certain fundamental rights that a defendant must personally waive, whether to object or permit the admission of evidence is not one of them. *Id.* at 218. Absent a demonstration that his or her lawyer rendered ineffective assistance, “‘counsel’s word on such matters is the last.’” *Id.*, quoting *New York v Hill*, 528 US 110, 114-115; 120 S Ct 659; 145 L Ed 2d 560 (2000).

Even if his lawyer did not stipulate to the admission of the testimony, because he did not object, we could only grant relief if the error were obvious and was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, Hudgins bears the burden to persuade this Court that his lawyer did not stipulate to the admission, which he did not do. *Id.* Given the ambiguity in the record, we cannot conclude that the trial court plainly erred.

Hudgins also argues that his lawyer's failure to vigorously oppose the admission of this testimony amounted to ineffective assistance. Because the trial court did not hold a hearing on this claim, our review is limited to mistakes that appear on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated not in relevant part 493 Mich 864.

In order to establish that his lawyer was ineffective, Hudgins must show that his lawyer's decision with regard to the admission of this testimony fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 22. Because there are countless ways to provide effective assistance, this Court must indulge a strong presumption that Hudgins' lawyer's decision fell within the wide range of reasonable professional assistance. *Id.* Indeed, we must affirmatively entertain the range of possible reasons for his lawyer's decision. *Id.* And we "must conclude that the act or omission . . . fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission . . . , there might have been a legitimate strategic reason for the act or omission." *Id.* at 22-23.

Here, Hudgins has not overcome the presumption that his lawyer's decision to permit the admission without challenge was part of a legitimate trial strategy. In his preliminary examination testimony, Somerset admitted that Hudgins might have caused the child's death by the way that he placed the child in the blankets and also agreed that CPR could have caused the most recent rib fractures. On this basis, Hudgins' lawyer might reasonably have determined that Somerset's testimony was somewhat favorable. Moreover, his lawyer might also have determined that Somerset's adverse testimony might be more persuasive if given in person and that the prosecutor might be able to elicit further testimony from Somerset that directly undermined Hudgins' theory of the case. Hudgins' lawyer might have reasonably concluded that permitting the admission of Somerset's preliminary examination testimony was preferable to the risk associated with allowing Somerset to testify in person. For these reasons, we conclude that Hudgins has not established that his lawyer's decision to allow the admission of this testimony without objection fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 22.

Hudgins next argues that the trial court erred when it permitted the introduction of gruesome photographs. This Court reviews a trial court's decision to admit photographs during trial for an abuse of discretion. *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. Photographs may be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion." *Gayheart*, 285 Mich App at 227 (citations and quotation marks omitted). The photographs at issue were relevant. MRE 401. The fact that Somerset and Schmidt testified to the child's cause of death does not make the photographs irrelevant. "Photographs . . . are not excludable simply because they are cumulative of a witness's oral testimony. The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Gayheart*, 285 Mich App at 227 (citations and quotation marks omitted). The injuries depicted in the photographs were also relevant to the charges, even if they did not directly cause the child's death. The

prosecutor charged Hudgins with child abuse and felony murder. The images of the healing rib fracture, a more recent rib fracture, and bruising made the fact that someone was abusing the child more probable. It further showed a pattern of injuries that rebutted any claim that the fractures and bruising resulted from accidents.

The probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. MRE 403. “Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence.” *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). MRE 403 is intended to avoid *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).

The photographs were probative of the extent of the child’s injuries, the pattern of abuse, and to corroborate Hudgins’ confession as well as Somerset’s and Schmidt’s testimony concerning the cause of death. Moreover, there is no indication that the prosecutor admitted the photographs simply to arouse the sympathy and prejudice of the jury. The prosecutor submitted only three photographs, which addressed the three types of injuries that the child sustained: a healing fracture, a recent fracture, and a bruise. Moreover, the photographs did not emphasize that the child was an infant. Finally, even if defense counsel had stipulated to the previous rib fractures, the prosecution could have introduced the photographs because the jury “is entitled to view the severity and vastness of the injuries for itself.” *Gayheart*, 285 Mich App at 227. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Finally, Hudgins argues that the trial court erred when it denied his request for an instruction on the lesser-included offense of second-degree murder. “This Court reviews de novo claims of instructional error.” *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). “But a trial court’s determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted).

A trial court must generally instruct the jury on a necessarily included lesser offense if a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). And second-degree murder is a necessarily lesser included offense of first-degree murder. See *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975). However, even if we were to conclude that the trial court erred when it denied the requested instruction, Hudgins’ would not be entitled to relief because the error was harmless under the facts of this case. *Cornell*, 466 Mich at 363-365.

In order to prove the malice necessary for second-degree murder, the prosecution had to prove that Hudgins intended to kill the child, intended to cause the child great bodily harm, or intended “to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.” *Carines*, 460 Mich at 759. Similarly, in order to prove that Hudgins’ committed first-degree child abuse, the prosecutor had to prove that Hudgins knowingly or intentionally caused the child serious physical harm. MCL 750.136b(2); *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004).

Here, the evidence to support both the murder charge and the child abuse charge centered on whether Hudgins struck the child hard enough to stop his heart. The jury ultimately found Hudgins' guilty of first-degree child abuse—that is, it found that he struck the child and that he did so with the intent to cause serious physical harm or with knowledge that serious physical harm would result. Moreover, because the case centered on the strikes to the child's back on the day at issue, if the jury had then found that Hudgins had the requisite malice for second-degree murder when he struck the child, it would necessarily follow that he committed second-degree murder during the commission of first-degree child abuse, which is first-degree murder. MCL 750.316(1)(b). Accordingly, given the factual predicate for the charges and the fact that the jury found him guilty of first-degree child abuse, it is not more probable than not that the alleged error was outcome determinative. Therefore, even if the trial court should have instructed the jury on second-degree murder, any error does not warrant relief. *Cornell*, 466 Mich at 363-364.

There were no errors warranting relief.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Michael J. Kelly