

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE MANCIAZ, JR.,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 183784

Van Buren Circuit Court

LC No. 94-009094

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549 of his ten-month old daughter. Defendant appeals and we affirm.

I

Defendant first argues that the trial court erred by not instructing the jury on his theory of the case pursuant to CJI2d 16.13, "Involuntary Manslaughter -- Failure to Perform a Legal Duty." We disagree. Pursuant to MCL 768.29; MSA 28.1052, defendant was obligated to either request that the instruction be given or object to the trial court's refusal to give it, in order to preserve this issue for appeal. However, defense counsel failed to either request CJI2d 16.13, or to object to its omission. Therefore, this issue is not properly preserved, absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We see no manifest injustice here. Prior to instructing the jury, the trial court clearly set forth defendant's theory of the case, noting that defendant believed that he was merely negligent in the care of his daughter. While the trial court did not instruct the jury specifically about defendant's duty of care toward his daughter, it did instruct the jury that they could find defendant guilty of involuntary manslaughter if defendant acted in a grossly negligent manner. Because defendant's theory of the case involved the negligent care of his daughter, and gross negligence was explained to the jury, the trial

* Circuit judge, sitting on the Court of Appeals by assignment.

court's failure to give CJI2d 16.13 was not error. Overall, the trial court did not exclude a material defense, and therefore defendant was not denied a fair trial. See *People v Johnson*, 215 Mich App 658, 673; 547 NW2d 65 (1996).

II

Next, defendant contends that defense counsel's failure to object to the trial court's omission of CJI2d 16.13 constituted ineffective assistance of counsel. We disagree. Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Here, counsel's failure to object to the trial court's failure to read CJI2d 16.13 did not result in ineffective assistance, because the involuntary manslaughter instruction, read as whole, adequately presented defendant's theory of the case and did not deny defendant a material defense or impinge upon his chances of acquittal. See *Id.*

III

Next, defendant contends that the trial court abused its discretion in admitting evidence of the deceased infant's rectal tearing, defendant's prior 911 calls, previous injuries to the deceased infant, defendant's psychiatric history, defendant's ingestion of eighty Tylenols, and defendant's statement to a nurse that he wished his daughter were dead. We disagree. The trial court's admission of evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

With regard to the rectal tearing evidence, there was no evidence presented at trial that defendant was the perpetrator of the rectal tearing, or that he had committed sexual abuse in the past. Yet, the rectal tearing evidence was highly relevant to the circumstances surrounding her death. A jury could infer from this evidence that suspicious circumstances existed, and the evidence aided the jury to understand why the police became involved in this case. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993).

In addition, the trial court did not abuse its discretion by admitting evidence of defendant's prior 911 calls, the previous injuries to the victim, defendant's psychiatric history, and defendant's Tylenol overdose. Evidence of a prior bad act does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. Thus, other acts evidence is admissible whenever it is relevant on a noncharacter theory, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. MRE 404(b); *Ullah*, 216 Mich App at 674.

Here, defendant's theory of the case was that his daughter died as the result of an accident, caused in part by his failure to check on her after putting her to sleep. The fact that defendant was involved in two prior "accidents" with his daughter, attempted to commit suicide after one of these instances, and was hospitalized for a week for psychiatric treatment was relevant to whether the infant's

death was truly an accident, and to his intent to injure her on the day of her death. Consequently, the evidence was admissible under MRE 404(b) to show absence of mistake or accident. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, no reversal is warranted as to this allegation of error.

Defendant also asserts that the trial court abused its discretion in admitting pursuant to MRE 404(b) a nurse's testimony that defendant had stated several months before the fatal incident, that he wished his daughter were dead. We disagree. Although defendant had moved in limine to suppress this statement on hearsay grounds, the trial court had held that the statement was admissible under MRE 803(3) (then-existing mental emotional or physical condition). No other grounds for exclusion were lodged during trial. An objection based on one ground is insufficient to present an appellate attack based on a different ground. Therefore, because defendant did not raise this issue at trial, it is not properly before this Court. See *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988). Therefore, no reversal is necessary as to this allegation of error.

IV

Next, defendant asserts that he was denied a fair and impartial trial due to prosecutorial misconduct. However, defendant failed to object below, and we find that a proper instruction would have cured any alleged prejudice. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, no manifest injustice will result from our failure to review defendant's claims of misconduct.

Finally, defendant argues that the prosecutor's questions during trial regarding defendant's prior bad acts constituted prosecutorial misconduct requiring reversal. We disagree. At the hearing on defendant's motion in limine to suppress evidence of the prior bad acts evidence, the trial court determined that the evidence would be admissible. Thus, the prosecutor's subsequent questioning of witnesses about the prior bad acts at trial cannot be deemed prosecutorial misconduct. Moreover, as we held above, the trial court did not abuse its discretion in admitting the prior bad acts evidence. Therefore, this allegation is without merit.

Affirmed.

/s/ Kathleen Jansen

/s/ Henry William Saad

/s/ Michael D. Schwartz