

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

STEPHANIE LYNN OLSA, a/k/a STEPHANIE
LYNN PRICE-OLSA,

Defendant-Appellant.

UNPUBLISHED
February 27, 1998

No. 202230
Kent Circuit Court
LC No. 96-004853-FH

Before: Hood, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and sentenced to five to fifteen years' imprisonment. Defendant appeals from her conviction as of right. We affirm.

Defendant first argues that the trial court erred in instructing the jury respecting the prosecution's burden to prove defendant's guilt beyond a reasonable doubt. Our review of an alleged instructional error is de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). We must decide whether the reasonable doubt instruction, when read in its entirety, adequately imparted to the jury the burden placed upon the prosecution and defined what constituted a reasonable doubt. *Id.* Before trial, defendant moved the trial court either to instruct the jury with the standard jury instructions defining reasonable doubt, CJI 1.9(3); CJI 3.2(3), or, alternatively, not to tender any definition of reasonable doubt to the jury. Over defendant's objection, however, the trial court crafted its own definition of reasonable doubt and tendered it to the jury. After reviewing the trial court's reasonable doubt instruction in its entirety, we find that the instruction adequately conveyed to the jury the burden placed upon the prosecution and the concept of reasonable doubt.

Defendant next alleges several instances of prosecutorial misconduct, only two of which were properly preserved by a timely objection. We review allegations of prosecutorial misconduct case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test for prosecutorial

misconduct is whether the challenged prosecutorial remarks denied defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant's first contention of prosecutorial misconduct concerns the prosecutor's comment, in closing argument, that defendant had failed to produce an expert sufficiently qualified to rebut the testimony given by the prosecution's experts. Defendant submits that this assertion had the effect of shifting the burden of proof to the defense. We disagree. The extent of a witness' expertise is usually for the jury to decide. *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986). A prosecutor's challenge to the weight and credibility of defense evidence and witnesses does not constitute improper burden-shifting argument but, instead, entails permissible argument relating to the testimony and evidence presented. *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). In this case, we find that the prosecutor's comment consisted of proper argument respecting the qualifications of the defense witnesses and thus did not deny defendant a fair and impartial trial.

Defendant also contends that the prosecutor engaged in misconduct by suggesting to the jury that in order for defendant to establish her innocence, she must prove that someone else committed the crime. Again, we disagree. Although a prosecutor may not suggest in closing argument that a defendant must prove something, because such an argument tends to shift the burden of proof, *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983), the prosecutor in this case did not make a comment that shifted the burden of proof. Rather, the prosecutor merely commented that defendant had not directly accused the victim's parents of abuse. Given defendant's theory that the abusive episode giving rise to the victim's injuries did not transpire while the victim was under defendant's care, the prosecutor's argument was entirely permissible.

Defendant's remaining contentions of prosecutorial misconduct are either unpreserved, without merit, or not sufficiently briefed. This Court is precluded from reviewing allegations of prosecutorial misconduct that were not objected to at trial unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). We conclude that manifest injustice will not result if we decline to review defendant's remaining allegations of prosecutorial misconduct.

Defendant next argues that the trial court erred in precluding the testimony of a defense expert witness on the ground that defendant deliberately failed to comply with the discovery requirements imposed by MCR 6.201(A)(1). If a party fails to comply with MCR 6.201, the trial court has the discretion to fashion a remedy, including ordering that testimony or evidence be excluded. MCR 6.201(I). The remedy imposed for a discovery violation, however, must fairly balance the interest of the courts, the public, and the parties, and the exclusion of otherwise admissible evidence should occur only in the most egregious cases. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). We review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

MCR 6.201(A)(1) provides that a party upon request must disclose all lay and expert witnesses whom the party intends to call at trial. In this case, defendant notified the prosecution of her intent to call the expert witness only three days before trial. Referencing a history of perceived discovery abuses

on the part of the defense during the trial and a previous trial that resulted in a hung jury, the trial court concluded that the timing of the disclosure was a deliberate attempt by the defense to gain a tactical advantage over the prosecution. Accordingly, the trial court ruled that the integrity of the judicial process demanded exclusion of the expert's testimony. We decline to disagree with the trial court's ruling. As the trial court correctly noted, the closer to the date of trial that a party makes a mandatory disclosure, the more likely it is that the party has engaged in conduct designed to create a tactical advantage, and the more justified is the trial court in excluding the evidence, *People v Lucas (On Remand)*, 193 Mich App 298, 303; 484 NW2d 685 (1992). Given the trial court's observations that the defense had repeatedly engaged in conduct designed to circumvent the discovery rules, coupled with the trial court's finding that allowing the expert witness to testify following such late disclosure would have unfairly prejudiced the prosecution's case-in-chief, we cannot say that the trial court abused its discretion in excluding the expert's testimony.

Defendant next argues that the trial court erred in admitting into evidence a report prepared by a Child Protective Services Investigator respecting his interviews of defendant. Defendant submits that the report should not have been admitted because the investigator's handwritten notes, which he used to prepare the report, were unavailable at trial. Assuming that the admission of the investigator's report did constitute error, reversal is not required. A defendant must show prejudice from the admission of erroneously admitted evidence in order to secure a reversal of his conviction. *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995); MCL 769.26; MSA 28.1096. Here, after reviewing the contents of the investigator's report in relation to the properly-admitted trial evidence, we conclude that the report was entirely cumulative in nature and therefore did not affect the outcome of the trial. Accordingly, because defendant cannot show prejudice resulting from the admission of the report, we decline to address the merits of defendant's contention that the admission of the report constituted error.

Defendant next argues that the trial court erred in denying her motion to strike the testimony of a prosecution expert witness on the ground that the prosecution failed to supply the defense with certain reports prepared by the expert. Defendant, however, does not contend that the trial court's ruling constituted an abuse of discretion--the appropriate standard of review for rulings respecting the admissibility of evidence, *Taylor, supra*, 195 Mich App 60. Rather, defendant merely argues that, because the trial court suppressed the testimony of a defense expert for failure to comply with discovery, it should have done the same with the testimony of the prosecution's expert so as to avoid putting the defense at a disadvantage and creating a perception of bias. This is not a proper legal argument. Although we agree that a trial court should avoid even the appearance of partiality when it hands down a ruling and that a trial court's ruling should not leave a party unfairly disadvantaged, we find that the trial court in this case dispassionately and properly exercised its discretion in overruling defendant's motion to strike the expert's testimony. The trial court's unrelated decision to suppress the testimony of a defense expert witness has no bearing on its decision to deny defendant's motion to strike the testimony of a prosecution expert.

Defendant next argues that the prosecution failed to present evidence sufficient to support a conviction of first-degree child abuse. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could

find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). In order for the prosecution to convict a defendant of first-degree child abuse, the prosecution must establish that the defendant knowingly or intentionally caused physical or mental harm to a child. *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997). Notably, the crime of first-degree child abuse is a specific-intent crime; therefore, the prosecution must establish that the defendant did the act causing harm to the child with the intent to cause harm. *Id.*, 86.

It is undisputed in this case that the victim was under defendant's exclusive care from approximately 9:45 a.m. until roughly 3:00 p.m. on March 30, 1996, when the victim first manifested symptoms of an injury. Each of the prosecution's experts testified that the victim exhibited symptoms indicating that she had been subjected to a severe shaking episode. One expert opined that the shaking probably occurred within four hours of his examination of the victim that evening. Another opined that the extent of the victim's injuries revealed that the onset of symptoms and the shaking episode must have been nearly simultaneous occurrences. Although the victim also exhibited signs of previous injuries, the prosecution's experts agreed that those injuries could not have caused the victim's emergent condition on March 30, 1996. Defendant's experts, on the other hand, testified that it was possible that the victim's condition on March 30, 1996, was the result of preexisting injuries that manifested as a result of a resuscitative movement or a spontaneous re-bleeding of a previous injury.

In viewing the evidence in the light most favorable to the prosecution, we avoid weighing the proofs or determining what testimony to believe. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). Rather, we must resolve all conflicts in the evidence in favor of the prosecution. *Id.* Accordingly, we find that the evidence presented was sufficient to allow the jury to find, beyond a reasonable doubt, that defendant engaged in conduct that caused harm to the victim. In other words, based upon the evidence, the jury could have reasonably concluded that the victim experienced a violent shaking at the hands of defendant. Further, because intent and knowledge can be inferred from one's actions, *Gould, supra*, 225 Mich App 87, we conclude that if the jury chose to believe that the victim was abused by defendant, the jury could also reasonably infer that defendant possessed the specific intent to cause harm to the child. Therefore, the prosecution presented evidence sufficient for the jury to convict defendant of first-degree child abuse.

Finally, because we have concluded that no errors occurred at trial, we reject defendant's argument that the cumulative effect of the errors requires reversal. *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992).

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ William B. Murphy