STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 1999
v	No. 208982 Isabella Circuit Court
SANDRA LEA BROWN, Defendant-Appellant.	LC No. 96-007608 FH

Before: Smolenski, P.J., and Gribbs and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions and sentences on two counts of first-degree child abuse and one count of fourth-degree child abuse, MCL 750.136b(2) and (5); MSA 28.331(2)(2) and (5). She was sentenced to 10 to 45 years in prison. Defendant alleges excessive delay between alleged offense and arrest, improper expert testimony at trial, insufficient evidence of first-degree child abuse, failure to rebut substantial evidence of the insanity defense, and excessively harsh sentence. We find no error and accordingly affirm.

I Facts

In April 1995, defendant's youngest of three children, then five months old, was admitted to the hospital. According to uncontroverted evidence, the infant-victim was seriously underweight from malnutrition, and suffered from respiratory distress, severe bruises and abrasions on his head, and bruises on his chest and arm. Subsequent tests revealed a rib fracture, stress ulcer, hemorrhage and swelling of the brain, a leg fracture indicating multiple breaks, and several chip fractures, plus damage to the eyes indicative of shaken-baby syndrome. At the time of defendant's trial, twenty months later, the victim was completely blind in one eye and legally blind in the other, and suffered from severe mental retardation, daily seizures, impaired hearing, and dental problems. The child could walk, but could not talk, was not toilet trained, could not feed himself, and continuously wore a shunt to drain fluid from his brain.

Hospital employees promptly reported suspected child abuse, and the Family Independence Agency commenced an investigation, this effort culminating in petitions to remove the victim, along with

defendant's two older children, from defendant's custody. In December 1995 of that year, the probate court terminated defendant's rights to the victim, while the older two children remained in foster care.

Defendant saw a therapist in early June, 1995, who referred her to a licensed counselor at Catholic Family Services whom defendant saw weekly from June 15, 1995 until January 1997. A meeting took place in January 1996 including defendant, her therapist, and the FIA investigator concerning defendant's remaining children. Defendant maintains that she felt pressured to incriminate herself concerning her youngest child as a condition of having her remaining children returned to her. Defendant's therapist testified that defendant said, "I'm sure that I am responsible for the injuries. However, I can't specify where each of them happened because I don't remember." The FIA investigator promptly turned defendant's incriminating statements over to the prosecutor's office. Defendant ultimately regained custody of her two older children, but the prosecutor brought criminal charges against defendant in connection with her youngest in March 1996. Defendant was charged with first-degree child abuse for the head injuries, with a second count of first-degree child abuse for the arm and leg injuries, and with fourth-degree child abuse for failure to provide adequate nourishment.

Defendant's jury trial took place in early December 1997. The evidence presented included that defendant had persistently disfavored the victim, suffered from severe postpartum depression, and had shaken the victim by the arms and legs and slapped him in the face. Defendant pursued an insanity defense, arguing that her postpartum depression, aggravated by excessive dosages of caffeine and Fastin, a prescribed amphetamine, caused her to go into a psychotic state. Defendant was convicted as charged. The trial court sentenced her to concurrent terms of ten to fifteen years' imprisonment for the first-degree counts plus one year for the fourth-degree count, with credit for time served.

II Pre-Arrest Delay

Defendant points out that she was criminally charged approximately eleven months after the conduct giving rise to the charges occurred, arguing that there was no justification for the delay and that the delay prejudiced her defense. Defendant moved the trial court to dismiss on the ground that the pre-arrest delay violated her due process rights. After a hearing, held August 11, 1997, the trial court denied the motion. We will not disturb a trial court's findings of fact unless they are clearly erroneous, MCR 2.613(C), but we review constitutional issues de novo, *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

The right to due process is guaranteed by the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 17. "The threshold test for determining whether a delay constitutes a denial of due process is whether the defendant suffered prejudice. Once the defendant has shown prejudice, the burden of persuasion shifts to the prosecution to show that the reasons for delay were sufficient to justify the prejudice." *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989) (citations omitted). Considerations bearing on this inquiry are whether the delay was deliberate, the explanation for the delay, and whether the defendant suffered undue prejudice. *People v Bisard*, 114 Mich App 784, 787; 319 NW2d 670 (1982). "When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim. Where, however,

there is a justifiable reason for the delay, the defendant must show . . . that the prejudice resulting from the delay outweighs any reason provided by the state." *Id.* at 790.

Deliberate pre-arrest delay for purposes of establishing a violation of due process is a delay perpetuated in bad faith to prejudice the defendant. *Id.* at 787. Defendant argues that the delay was used to coerce incriminating statements from her. We reject this characterization of events. Defendant does not suggest that the prosecutor had been following the case all along, lying in wait, cynically plotting to capitalize on a confession offered under duress. Nor does defendant dispute that the FIA investigator was required by law to refer evidence of serious child abuse to the prosecutor. Indeed, the evidence indicates that the prosecutor became involved only in January 1996, when defendant's statements to the FIA investigator provided the first indication of who was actually responsible for the victim's injuries. This sequence of events not only defeats the argument that the prosecutor engaged in bad-faith delay tactics in order to prejudice defendant, it also establishes the obvious reason why the criminal prosecution began several months after the victim was injured—until defendant provided incriminating statements to the FIA investigator, there had been no basis for identifying the person responsible for the victim's injuries.

Defendant argues that she suffered prejudice from the pre-arrest delay because it resulted in a loss of exculpatory evidence, hindering her ability to demonstrate that she had suffered from postpartum depression pursuant to her insanity defense. There is no merit in this argument. Because defendant was examined and treated for depression since June 1995, used the postpartum depression defense throughout the probate proceedings, and was always free to seek treatment for, and develop records concerning, any psychological problems, defendant would hardly have stood in a better position to develop her insanity defense had criminal prosecution commenced closer to when the victim's injuries first came to the attention of authorities.

Because the prosecutor had good reason for not proceeding against defendant until she implicated herself in the abuse of the victim, and because defendant suffered no undue prejudice from the delay, the trial court properly denied defendant's motion to dismiss on the basis of pre-arrest delay.

III Expert Testimony

Defendant argues that the trial court improperly allowed the prosecutor's expert witness to testify regarding the law of intoxication and insanity. This argument is without merit. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). The only defense objection concerning the expert's statements regarding the law took place within the following exchange:

> [PROSECUTOR]: So if family members and friends would say that she had a good day and a bad day and a good day where she seemed normal, would that indicate that it is not this type of problem which you have just explained?

[EXPERT]: Yes, although it would be possible if you could account for—if the person had been psychotic every single time that they did an act, then they stopped being psychotic, that might account for the behavior. Unfortunately or fortunately, depending on your view, there is another part of the law that also comes into effect at this point.

[PROSECUTOR]: And what is that?

[EXPERT]: Well, this is the law that governs intoxication, you know, as part of the insanity defense. If one takes a substance, okay, a controlled drug or a[n] illegal drug, it doesn't matter, and one takes it to the point that one makes themselves crazy, and then does an illegal act, my understanding of the law is that . . . .

[DEFENSE COUNSEL]: I'm going to object. His understanding of the law is incorrect. The court hasn't instructed that instruction. We'd request that the instruction on voluntary intoxication be read to the jury at this point.

[PROSECUTOR]: First of all, your honor, he hasn't even said what his understanding of the law is. And his understanding of the law is necessary in his evaluation as to whether or not there's voluntary or involuntary intoxication. He is not telling the jury what the law is. He qualified it as his understanding, and how that understanding plays into his evaluation. [Defense counsel] is correct. At the end of these proceedings there will be a reading of what the law is, and the court will instruct the jury to follow the law as this court gives it to them. So it is necessary that this man be allowed to provide the results of his evaluation based on his understanding.

THE COURT: I think the witness can give his understanding of the law, and how that interacts with his opinion. Clearly the court will be giving an instruction.

[DEFENSE COUNSEL]: Will the court instruct the jury at this point, that the court can only instruct the jury on what the law is, and the jury is to follow the court's instruction on what the law is[?]

THE COURT: Well, the court will instruct the jury in that regard when I instruct the jury. I think at this point I'll let the doctor proceed.

[PROSECUTOR]: Please continue, doctor.

[EXPERT]: Well, let me preface my remarks with saying that I am asked to come up with an opinion as to whether or not someone meets or doesn't meet my understanding of the law. What the law is will be told to you by the court. But my understanding of this circumstances is that an individual who voluntarily ingests drugs . . . would normally be barred from an insanity defense. . . .

The record thus indicates that the only objection raised[1] concerned the accuracy of the expert's understanding of the law of intoxication, and the timing of the court's instruction in that regard. In fact, the expert had not yet presented his understanding of the law, and defendant points to no error in this regard in the expert's continuing testimony. The expert conceded that instructions on the law would come from the court, but explained the he was trying to express his opinion in the proper legal context. The trial court tendered a proper instruction on intoxication at the close of proofs. Because the expert in fact did not mislead the jury regarding the law of intoxication, the jury was reminded throughout that instructions on the law must come from the court, and the court eventually provided the proper instruction, there was no perversity of will or defiance of judgment in the trial court's decision to allow the expert to proceed, or in its decision to withhold the instruction on intoxication until the end of proofs.

IV Sufficiency of Evidence

After the prosecutor's case-in-chief, defendant moved for a directed verdict on the first count of first-degree child abuse, arguing that although the prosecutor had presented some evidence that defendant shook the victim by the arms and legs, it had nonetheless failed to produce any evidence that defendant caused the victim's head injuries. The trial court denied the motion. Defendant challenges this decision on appeal, arguing that the prosecutor failed to present sufficient evidence to support the finding that defendant inflicted the victim's head injuries or had the specific intent to cause that harm. We disagree. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence of record in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). First-degree child abuse is a specific-intent crime, meaning that "it must be shown that the defendant intended to harm the child, not merely that the defendant engaged in conduct that caused harm." *People v Gould*, 225 Mich App 79, 84-85; 570 NW2d 140 (1997).

In this case, expert testimony indicated that the victim's head injuries were likely caused by violent shaking or other blunt force. Defendant herself testified that she had shaken the victim; although she insisted she did not do so violently, that mitigating consideration was a factual one for the jury to assess. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses."). Defendant also testified that she confessed to improper treatment of the victim when talking to the FIA investigator in January 1996 in hopes of getting her older children back, but that she in fact remembered nothing of the sort, providing fabrications under pressure from the investigator. Again, the jury was free to believe defendant's inculpatory statements to the FIA investigator and disbelieve defendant's explanation that she lied to the investigator under pressure. Further, the FIA investigator testified that defendant admitted to slapping the victim in the face, and defendant herself testified that while under the influence of the amphetamine Fastin, "there were times when . . . I believe I was extremely violent."

Additionally, there is no dispute that defendant was the victim's primary caregiver, had the most access to him, and was normally in the best position to notice and act upon any indications that something was amiss with the child. These indications provide circumstantial evidence linking defendant to the victim's injuries. "Circumstantial evidence and reasonable inferences drawn therefrom may be

sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

This evidence is sufficient to persuade a reasonable trier of fact that defendant was the person who caused the victim's head injuries, and that she did so specifically intending to harm the child.

V Insanity Defense

Defendant argues that the prosecutor failed to offer sufficient evidence to rebut her insanity defense. We disagree. Insanity is an affirmative defense that the defendant must prove by a preponderance of the evidence. MCL 768.21a; MSA 28.1044(1). Once the defendant introduces evidence of insanity, the prosecutor has the burden of proving the defendant's sanity beyond a reasonable doubt. *People v Murphy*, 416 Mich 453, 455-456, 465; 331 NW2d 152 (1982).

Defendant maintains that the combination of postpartum depression and Fastin caused her to enter into psychotic episodes. Defendant presented evidence that she experienced memory blackouts, that Fastin sometimes caused her to become violent or otherwise inclined to lose her temper, and that in one instance she imagined cockroaches on a kitchen baseboard that caused her to remove the baseboard and clean it with a toothbrush. Further, the psychiatrist defendant engaged to conduct an independent evaluation testified that defendant had suffered major depression, then that upon taking Fastin "she suffered from a psychotic illness on top of drug induced psychosis on top of her major depression illness." Although the doctor opined that defendant was not psychotic at the time of the examination, and that she was competent to stand trial, he concluded that defendant met the legal definition of "mentally ill" at the time in question, and that she had experienced insanity. In addition, defendant's therapist with Catholic Family Services confirmed that defendant suffered postpartum depression and added that "there was some psychotic behavior."

The amount and type of evidence required to rebut the defense of insanity depends on the extent of the evidence of insanity. *Id.* at 464. Defendant's personal family doctor, who prescribed the Fastin for appetite and weight control, testified that psychosis as side effect seemed hardly more likely with proper use of Fastin than with a placebo. Defendant's therapist testified that defendant sometimes took excessive dosages of Fastin. "An individual who was under the influence of voluntarily consumed . . . controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the . . . controlled substances." MCL 768.21a(2); MSA 28.1044(1)(2).[2]

In March 1997, while in the county jail, defendant met the state's expert, a forensic psychologist with the state Center for Forensic Psychiatry, for an evaluation. This expert testified that defendant did not suffer from a "non voluntarily produced settled condition," that "to the extent that there was any evidence of mental illness that would've come during the time of this injury, it was voluntarily produced . . . ," and that "it would be more appropriate to consider that equivalent to a voluntary intoxication." The expert elaborated:

> She was to some extent depressed, to some extent making herself—you know, abusing these substances. But one would have to say, well, was there anything that caused her to not know that taking too many—that taking four pots of coffee, eight soda pops and medication when it says take one a day and taking three a day was wrong? Well, I didn't get that. I never got that there was anything to produce that. So for me it has the same status as an abuse of medication.

The state's expert further opined that genuine psychosis is very noticeable, and that defendant's husband could hardly have lived with defendant if she had been truly psychotic.

Defendant's independent psychiatrist testified that his conclusion that defendant had been mentally ill stemmed entirely from information he got from defendant herself. This expert agreed that defendant's use of Fastin was voluntary.

Several friends and acquaintances of defendant, including her husband, testified that defendant demonstrated no peculiar behavior during the time in question, except for some indications that defendant had been compulsive about cleanliness. Defendant's therapist from Catholic Family Services, whom defendant's husband characterized as a family friend, indicated that her written summaries included no mention of hallucinations on defendant's part, and that she was not sure whether she had ever mentioned them in any reports.

We defer to the jury's assessment of the credibility of witnesses. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). In this case, the jury was free to doubt the accounts of defendant's psychiatrist and therapist while crediting those of the state's expert. Further, the jury could well have doubted defendant's veracity in maintaining that she remembered many details of her life, including her mental and physical conditions, during the time in question, but had no recollection of harming the victim. We conclude that the prosecutor presented sufficient evidence of defendant's sanity at the time in question to persuade a reasonable factfinder beyond a reasonable doubt that defendant was in fact sane.

VI Sentencing

Defendant argues that in light of her impaired mental state at the time of the alleged child abuse, plus her lack of a criminal record, the trial court erred in imposing the maximum sentence allowed for first-degree child abuse. We disagree.

A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In this case, the trial court reminded defendant that had she killed the victim she would be facing life imprisonment, but that she had injured the victim in ways that might be considered worse than killing him. We agree with the trial court that despite the mitigating considerations of defendant's depression and lack of a criminal record, because she "[r]epeatedly . . . brutalized" her infant victim in "cruel and unmerciful" ways, this was an "egregious" case that "illustrates

the limitations of the law." For these reasons, we find no abuse of discretion in the trial court's imposition of the maximum sentence for first-degree child abuse.

Affirmed.

/s/ Michael R. Smolenski
/s/ Roman S. Gribbs
/s/ Peter D. O'Connell

[1] To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997).

[2] "The one exception to this is if the voluntary continued use of mind-altering substances results in a settled condition of insanity before, during, and after the alleged offense." *People v Caulley*, 197 Mich App 177, 187 n 3; 494 NW2d 853 (1992). This exception is inapplicable here. Defendant alleges only momentary incapacitation attendant to the injury of the victim, not a "settled condition."