

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DAVID CARTER,

Defendant-Appellant.

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UNPUBLISHED

March 14, 2000

No. 212193

Tuscola Circuit Court

LC No. 97-007254-FC

Before: Smolenski, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). Defendant was sentenced to terms of imprisonment of life without the possibility of parole for the felony-murder conviction, forty to eighty years for the CSC conviction, and ten to fifteen years for the child-abuse conviction. We affirm defendant’s conviction of felony murder, but we vacate the CSC and child-abuse convictions as violative of double jeopardy, being predicate felonies for the felony-murder conviction.

Defendant was accused of sexually penetrating and causing a massive head injury to the victim, a thirteen-month-old girl that defendant was baby-sitting on September 10, 1997. The victim suffered tears and bruising to her rectal area, retinal hemorrhaging, and brain damage from blunt-force head trauma. The victim never regained consciousness from the head injury, and she was pronounced dead two days later.

Defendant was a friend of the victim’s mother, Janie Irvine, and began baby-sitting the victim on September 4, 1997. On September 10, 1997, Janie received a telephone call from defendant, who said that the victim had slipped in water in the hallway, fallen, and hit her head. Defendant said that she was unconscious, but still breathing. Janie told defendant to call 911.

At about 11:00 a.m., paramedics were dispatched to Janie’s residence. They found the victim lying on a daybed. She was ashen colored, with bluish lips and purple fingertips. She was unresponsive

to stimuli. The paramedics discovered a bruise on the back of her head. Defendant explained the bruise by telling them that the victim had slipped, fallen, and hit her head. The victim was transported to Caro Community Hospital, then sent to St. Luke's Hospital in Saginaw.

Defendant went to the hospital, as well. He told some of the victim's family members that she fell and hit her head. He said that she slipped on water while running in the hallway. Defendant told one family member that she hit her head on the washing machine, but then he said it was the dryer, and then he said it was the furnace.

Dr. Dennis Cotcamp, Medical Director of the Pediatric Intensive Care Unit at St. Luke's Hospital, testified that a cat scan revealed a severe global brain injury to the victim. She also suffered bilateral retinal hemorrhaging, meaning bleeding in the back of both her eyeballs. Dr. Cotcamp concluded that the victim's head injury was inconsistent with a slip and fall accident, and that the force needed to inflict her head injury was the equivalent of a high-speed automobile accident or a fall from a third- or fourth-floor window onto a hard surface.

Dr. Kristan Outwater, Pediatric Critical Care Specialist at St. Luke's Hospital, testified that the victim was essentially brain dead upon arrival at St. Luke's. She suffered swelling and bleeding in her brain, as well as retinal bleeding. Dr. Outwater also concluded that the victim's head injury was inconsistent with a slip and fall accident, and that the injury would be more consistent with an adult using all his force to slam a child's head into a wall. Dr. Outwater also discovered trauma to the victim's rectal area. Her rectal opening was bruised and torn. The rectal trauma appeared to be recently suffered, and it was consistent with the forceful, perhaps repeated, insertion or partial insertion of an adult penis.

Dr. Kanu Virani, the Oakland County Deputy Chief Medical Examiner, performed an autopsy on the victim. He concluded that the cause of death was blunt-force head trauma and that the manner of death was homicide. The severity of the victim's head injury indicated that she had not suffered a normal slip and fall accident. Rather, the force needed to inflict the injury was the equivalent of an automobile accident or a fall from a building.

DNA evidence was taken from the victim and from samples of defendant's clothing. The victim's blood was found on defendant's boxer shorts and in the hallway. Also, a semen stain on defendant's boxer shorts contained sperm that was consistent with defendant's and a mixture of fluid that contained DNA consistent with both the defendant and the victim.

The Michigan Family Independence Agency (FIA) was alerted by the hospital that an infant was injured while in the care of a baby-sitter. The FIA in turn notified the Michigan State Police. Detective Sergeant Michael Larsen testified that he took multiple statements from defendant about what happened to the victim. At the hospital, defendant gave a handwritten statement, in which he claimed that the victim slipped on water and hit her head. Defendant was taken to the Frankenmuth Police Department, where he stated that the victim had fallen near the washing machine. After Detective Larsen told him that his story was not consistent with the extent of the injury the victim suffered, defendant said that his first account of what happened was not true. He said that the victim fell backward off the daybed while

they were playing peek-a-boo and that she hit her head on the floor. Defendant claimed that he was initially dishonest because he was afraid of being blamed, since the victim was injured while playing with him. Detective Larsen told defendant that his second account was also inconsistent with the victim's injury. Defendant vehemently denied sexually assaulting the victim. Detective Larsen arrested defendant at the end of the interview. While driving to Caro, defendant told Detective Larsen that he had shaken the victim for ten to fifteen minutes to try to revive her after she fell off the daybed.

Detective Larsen examined the victim's residence and noted that the daybed was only twenty inches from a carpeted floor. He was also informed of the victim's rectal injury. He then interviewed defendant again, telling him that new information had been brought to his attention at the hospital and that defendant knew what that information was. At this, defendant put his head down and silently nodded yes. However, defendant initially denied any type of penetration of the victim's anus. Eventually, defendant admitted that he had inserted his finger in the victim's anus, but stated that he did so to determine whether she was constipated. Defendant claimed that a former co-worker told him to do this when a baby might be constipated. However, defendant's former co-worker testified at trial that he had never discussed with defendant how to care for young children, and had never told defendant to insert a finger into a child's anus to check for or to relieve constipation. Defendant told Detective Larsen that, when he removed his finger, it had a small amount of feces and blood on it, which he wiped on the carpet.

Defendant also told Detective Larsen that his earlier accounts of the victim's head injury were not true. He now claimed that he was swinging the victim in his arms playfully, when she slipped out of his grasp and her head hit the wall. However, defendant then said that this story was also not true, and that what really happened was that he was playing with the victim on the floor, pushing and pulling her, when her head hit the carpeted floor forcefully, knocking her unconscious. Defendant gave a videotaped statement to this effect that was played for the jury.

Defendant's motion for a directed verdict was denied, and defendant then presented multiple character witnesses, including his mother and father. These witnesses testified that defendant did not have a reputation in the community concerning truthfulness or untruthfulness, concerning being assaultive or not being assaultive, or concerning having unusual or usual sexual practices. One witness testified that defendant did have a reputation of being truthful with his friends.

Defendant testified at trial, claiming that the victim had fallen and hit her head a number of times while he was baby-sitting her. He stated that on September 10, 1997, he was swinging her in his arms, when she came down too fast and her head hit a toy. She lost consciousness, and he tried to revive her and eventually called 911. Defendant admitted that all the previous accounts he had given about the victim's head injury were untrue. In explaining the victim's rectal injury, defendant testified that he inserted his finger in her anus to check for constipation, since she had not had a bowel movement when he had changed her diaper earlier. Defendant maintained that he learned this technique from his former co-worker, even though the co-worker denied this. Defendant denied that he inserted his penis into the victim's anus.

Defendant presented an expert witness, Dr. Laurence Simson, Jr., a forensic pathologist who had reviewed the medical records and autopsy report in this case. Dr. Simson concluded that the victim's rectal injury was not severe enough to have been caused by the full insertion of an erect adult penis. However, he also testified that the mere insertion of an adult finger would not cause an injury as serious as what the victim suffered. Rather, some force was required to inflict this injury. Dr. Simson could not exclude the possibility of partial penile penetration. Additionally, Dr. Simson concurred with the prosecutor's expert witnesses regarding the victim's head injury. He concluded that the cause of death was blunt force head trauma and that the manner of death was homicide. He testified that the head injury was not consistent with a slip and fall, or with hitting a wall while playfully swinging. Rather, Dr. Simson concluded that the injury required major force.

On appeal, defendant claims that his convictions for first-degree CSC and first-degree child abuse violated his constitutional protections against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Specifically, defendant claims that because those crimes were both listed as the predicate felonies for his felony-murder conviction, he could not be convicted of both felony-murder and those predicate felonies. The prosecutor admits error. A conviction of and sentence for both felony murder and the predicate felony constitutes multiple punishments for the predicate felony, in violation of the constitutional protections against double jeopardy. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Therefore, we vacate defendant's first-degree CSC and first-degree child-abuse convictions and sentences.

Defendant also argues that the prosecutor presented insufficient evidence of the first-degree CSC and first-degree child-abuse charges, therefore precluding a conviction of felony murder based on these predicate felonies. When we address challenges to the sufficiency of the evidence presented at trial, 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 proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). In doing so, we bear in mind that we must not interfere with the jury's responsibility to weigh the evidence and determine the credibility of testimony. *Id.* at 514-515. We are also mindful that the elements of a crime may be sufficiently proved by circumstantial evidence and reasonable inferences drawn from that evidence. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

We conclude that the prosecutor presented sufficient evidence to allow the jury to find defendant guilty beyond a reasonable doubt of first-degree CSC and first-degree child abuse. First-degree CSC is the sexual penetration of a victim under thirteen years of age. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The prosecutor presented evidence that the victim suffered rectal injury consistent with the forceful and perhaps repeated entry of an adult finger or penis. This constitutes sexual penetration under MCL 750.520a(1); MSA 28.788(1)(1), and it is undisputed that the victim was under thirteen years of age. Defendant admits penetrating the victim's anus with his finger, but claims that the penetration was not sexual and that he was merely checking to see whether the victim was constipated. However, defendant's own expert witness testified that the insertion would have to be forceful to have inflicted the injury the victim suffered. Although defendant's witness believed that the

injury was not severe enough to have been caused by the full insertion of an erect adult penis, he could not exclude the possibility of partial insertion. Moreover, one of the prosecutor's expert witnesses testified that the victim's rectal injury was consistent with the insertion or partial insertion of an adult penis. The prosecutor presented sufficient evidence that defendant committed first-degree CSC. The prosecutor need not disprove all reasonable theories of innocence, *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996), and any credibility disputes between the expert witnesses was for the jury to resolve. *Wolfe, supra* at 514-515.

The prosecutor also presented sufficient evidence that defendant committed first-degree child abuse. First-degree child abuse is knowingly or intentionally causing serious physical or serious mental harm to a child. MCL 750.136b(2); MSA 28.331(2)(2). The prosecutor presented evidence that the victim suffered a massive head injury that resulted in her death. Defendant gave various accounts of how this injury occurred, but admitted that most of those accounts were untrue. The prosecutor presented expert witnesses that all concluded that the victim's head injury was caused by a great amount of force and was not the result of a normal household accident. Defendant's own expert witness testified that the cause of death was head trauma and the manner of death was homicide. Defendant argues that the prosecutor has not proved that he intended to cause injury to the victim. However, intent may be inferred from the surrounding circumstances. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Also, because it is difficult to prove state of mind, minimal circumstantial evidence is required. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). The evidence presented at trial was that the victim's injury was not accidental, but was rather the result of a severe amount of force, such as an adult using all his force to slam a child's head into a wall. This evidence was sufficient to allow a rational trier of fact to infer that defendant knowingly or intentionally caused serious physical harm to the victim.

Defendant next argues that the first-degree CSC statute, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), is unconstitutionally vague where it permits a finding a criminal culpability for a legal act. More specifically, defendant claims that the definition of "sexual penetration" contained in MCL 750.520a(1); MSA 28.788(1)(1), does not require the prosecutor to prove that the penetration was for a sexual purpose. Therefore, defendant argues, the jury was permitted to convict him on the basis of his innocent act of inserting his finger into the victim's anus to check for constipation. However, defendant did not raise this argument before the trial court, and this issue is not preserved for appellate review. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). An unpreserved constitutional claim is forfeited, unless the defendant demonstrates that a plain (i.e., clear or obvious) error occurred that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even if the defendant demonstrates outcome-determinative plain error, reversal is warranted only where the error resulted in the conviction of an actually innocent defendant or where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* In this case, the evidence overwhelmingly demonstrated that defendant forcefully inserted either his finger or his penis into a thirteen-month-old girl, causing bruising and tearing of her rectal area. In any event, even were we to conclude that the CSC statute is void for vagueness as applied to this case, the evidence was sufficient to convict defendant of felony murder based on the predicate offense of first-degree child

abuse. Defendant has not demonstrated plain error that was outcome determinative and has therefore forfeited this unpreserved issue.

Defendant also argues that the trial court's jury instructions were erroneous. However, defendant did not object to the instructions given, and defendant has accordingly forfeited review of this issue because he has not demonstrated plain error that was outcome determinative. *Carines, supra* at 763-764, 766. Defendant argues that it was error for the court to instruct the jury, "The prosecution has introduced evidence of a statement which it claims the defendant made," when the prosecutor actually introduced evidence of more than one statement. We reject defendant's contention that this instruction confused the jurors, given the emphasis during the entire trial on the different statements that defendant gave. Defendant also claims that the trial court did not sufficiently define the penetration element of first-degree CSC, so that the jury could convict based on his innocent act of checking for constipation. However, the court instructed the jury that the prosecutor must prove that defendant "engaged in a sexual act" that involved penetration. We find no plain error in this instruction. Defendant also claims that the trial court improperly defined "serious physical harm." However, any departure from the statutory definition contained in MCL 750.136b(1)(e); MSA 28.331(2)(1)(e), was minimal and did not result in outcome-determinative plain error.

We reject defendant's claim that trial counsel was ineffective for failing to ensure that the jury was properly instructed. Defendant has not demonstrated that counsel's performance "fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Because the jury instructions fairly presented to the jury the issues tried and sufficiently protected defendant's rights, *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998), defendant was not deprived of a fair trial.

Finally, defendant argues that he was denied a fair trial by improper arguments by the prosecutor. Defendant did not object to the alleged misconduct at trial, and the issue is unpreserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). Defendant has therefore forfeited this claim absent outcome-determinative plain error. *Carines, supra* at 763-764. We review claims of prosecutorial misconduct by examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We conclude that defendant received a fair and impartial trial, and we find no outcome-determinative plain error.

Defendant claims that it was improper for the prosecutor to elicit sympathy for the victim. Although the prosecutor may not make appeals to the jury for sympathy with the victim, *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), the remarks defendant cites "were not blatant appeals to the jury's sympathy and were not so inflammatory that defendant was prejudiced." *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Rather, the display of the victim's photograph was only a brief part of the prosecutor's comments. *Id.* Any possible prejudice could have been cured by an instruction had defendant objected. *Id.*

Defendant also claims that the prosecutor improperly denigrated defendant by referring to him as a liar. However, the prosecutor was merely arguing from the facts that defendant was not worthy of belief. This was a proper argument. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant also argues that the prosecutor improperly vouched for the credibility of the police witness. However, the prosecutor was not personally vouching for the witness's credibility, but was arguing from the facts that the witness was credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). Moreover, the comments were a response to defense counsel's attack on the manner of the police investigation. Even an otherwise improper remark by the prosecutor "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Defendant has not demonstrated that he was denied a fair and impartial trial by the prosecutor's remarks. *Paquette*, *supra* at 342.

Defendant's felony-murder conviction and sentence is affirmed. Defendant's first-degree CSC and first-degree child-abuse convictions and sentences are vacated.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Peter D. O'Connell