STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON A. BOWDISH,

Defendant-Appellant.

UNPUBLISHED
September 8, 2000

No. 213408
Recorder's Court
LC No. 97-009943

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to ten to fifteen years' imprisonment for the first-degree child abuse conviction, and to forty to eighty years' imprisonment for the second-degree murder charge. The victim in this case was a two-year-old boy. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to convict him of first-degree child abuse and second-degree murder. According to defendant, the circumstantial evidence presented at trial did not lead to the reasonable inference that he harmed the victim. We do not agree.

In reviewing sufficiency of the evidence claims, this Court must determine if the prosecution presented sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. In doing so, this Court must view the evidence in the light most favorable to the prosecution. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). First-degree child abuse requires that the defendant knowingly or intentionally cause serious physical harm to a child in his care. *People v Gould,* 225 Mich App 79, 84-85, 87; 570 NW2d 140 (1997). A second-degree murder conviction requires that the defendant kill the victim either with the intent to kill or commit great bodily harm, or with wilful and wanton disregard of the likelihood that the natural tendency of his actions would be to cause death or great bodily harm. *People v Johnson (On Rehearing),* 208 Mich App 137, 140; 526 NW2d 617 (1994). Defendant argues only that the prosecution failed to present sufficient evidence that he harmed the victim.

We agree with defendant that no direct evidence existed that he harmed the victim. However, circumstantial evidence and reasonable inferences can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). In reviewing an argument that the evidence was insufficient to support a conviction, this Court refrains from interfering with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In the present case, the prosecution presented circumstantial evidence which, when taken along with reasonable inferences, justified the jury's finding of guilt. The testimony at trial established that defendant shoved the victim into a corner and spoke to him in a loud voice. The victim was acting normally when his mother and her acquaintance, Michael Taylor, left the residence for a period of less than ten minutes. The victim was in defendant's care, and defendant was the only person present other than the victim's eleven-month-old brother. When the mother and Michael Taylor returned, the victim was not wearing the sweatshirt he had been wearing when they left. The victim was unresponsive, he had difficulty breathing, and he had blood coming from his mouth. Defendant reacted violently when the victim's mother asked him what had happened – defendant hit her and cursed at her.

Defendant also argues that the evidence was insufficient because the medical testimony did not raise an inference that defendant caused the victim's death. Defendant emphasizes the fact that the medical experts disagreed on the cause of death. Dr. Bernadino Pacris opined that the victim died from multiple blunt force trauma as the result of having his head struck against a flat surface at least three times. Dr. Vijay Bhardwaj concluded that the victim died from sudden impact (or shaken impact) syndrome. Both doctors testified that, contrary to defendant's version of the events, the cause of death was not from the victim falling off a couch onto a nearby space heater. The jurors had the duty to determine what weight and credibility to give each witness. The jurors were free to dismiss the testimony of one of the medical experts, or consider both. *Wolfe, supra* at 514-515. In reviewing the testimony of the medical experts, in this Court's view, the prosecution presented sufficient evidence that the child's death was not accidental. The jury could reasonably have inferred that defendant's actions caused the death.

Defendant also argues that the evidence was insufficient because the medical experts did not testify regarding the amount of time that must pass between the injury and the victim's becoming comatose. We find this argument to be unpersuasive because a reasonable juror could infer from the circumstantial evidence that the amount of time would be relatively short, and therefore conclude that defendant caused the injury. Dr. Pacris testified that the split in the skull could not have been caused by an older injury, because the first manifestation of an increase in cranial pressure would have been the victim's becoming comatose. Here, the victim was fine before his mother left him alone with defendant. From this testimony, the jury could have inferred that the injury caused a nearly immediate increase in cranial pressure, which put the victim into a coma within the ten minutes that his mother was absent.

The circumstantial evidence, and inferences therefrom, when viewed in the light most favorable to the prosecution, were sufficient to justify a rational trier of fact in finding defendant guilty beyond a reasonable doubt for both the first-degree child abuse and second-degree murder convictions.

Next, defendant argues that the trial court committed error requiring reversal when it endorsed the testimony of Dr. Bhardwaj. To preserve an argument that the trial court made improper comments in the presence of the jury, a defendant must object at trial. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Defendant in this case did not object to the trial court's comments. Therefore, our review is for plain error that affected substantial rights. *Carines*, *supra* at 774. We find neither in this case. The court merely thanked Dr. Bhardwaj for the clarity of his testimony on a complicated topic. Furthermore, the court alleviated any potential error with its instructions to the jury.

Lastly, defendant argues that he is entitled to resentencing because the trial court did not resolve his objections to the presentence information. We do not agree.

Defendant challenged the accuracy of the presentence report in several respects. Defendant objected to the allegation that the crime had two victims, the child and his younger brother. Defendant asserted that he did not harm the younger brother, and pointed to the fact that the prosecution never charged him with doing so. Defendant also objected to the allegation in the presentence report that he owed child support, arguing that he was not the father of the child for whom the support was owed. Defendant further challenged the trial court's scoring of an offense variable which indicated that he received another criminal conviction subsequent to the events from which the present case arose. The trial court informed defendant that it was not going to consider any allegations that he harmed the younger child, other than the impact that the victim's death had on the younger child's life. Moreover, defendant conceded that at the time of the sentencing hearing, he had an outstanding warrant for child neglect from another Michigan court. Defendant also challenged a statement that he was verbally and physically abusive to another woman with whom he had had a relationship in the past. Defendant admitted, however, that he and the woman had many arguments and that he once threw a shoe at her.

MCR 6.425(D)(3) provides:

> If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not be taken into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to:
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> (a) correct or delete the challenged information in the report, whichever is appropriate, and
>
> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

The purpose of the presentence report is to give the court as much information as possible so that it may tailor the sentence to both the offense and offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997).

When a defendant challenges the factual accuracy of information contained in the presentence report, the trial court has a duty to resolve the challenge. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991). In response to the challenge, the court may determine the accuracy of the information, accept the defendant's version, or disregard the challenged information. *Newcomb*, *supra* at 427; MCR 6.425(D)(3). If the court finds the contested information to be inaccurate or irrelevant, the court must make its finding on the record and must either correct the information or strike it from the report. MCL 771.14(6); MSA 28.1144(6); MCR 6.425(D)(3)(a);

In this case, the court informed defendant that it would not consider any of the younger child's injuries, except insofar as defendant's actions had a psychological impact on the child. The court further stated that it would only consider the offense for which the jury convicted him. The court therefore disregarded the challenged information. Moreover, defendant admitted that he had an outstanding civil warrant against him for child neglect, thereby resolving the crux of that challenge to the report himself. Moreover, defendant's attorney acknowledged, in reference to the alleged child support, that defendant "may owe it," but contended that defendant was not the father of the child for whom support was owed. The presentence report, however, did not assert that defendant was the father of the child. Therefore, to the extent that defendant challenged paternity, his challenge was not to an assertion contained in the presentence report.

Based on the foregoing, we conclude that resentencing is unnecessary in this case. However, because the trial court did not strike the disputed matter from the presentence report, we remand so that it may do so. See *People v Thompson*, 189 Mich App 85, 87; 472 NW2d 11 (1991); *People v Landis*, 197 Mich App 217, 219; 472 NW2d 11 (1991); MCR 6.425(D)(3)(a).

With respect to defendant's challenge regarding the scoring of an offense variable for a crime that he was not convicted of, we note that a putative error in the scoring guidelines is simply not a basis on which an appellate court can grant relief, absent a showing that the factual predicate was wholly unsupported, materially false, and that the sentence was disproportionate. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999).

Defendant's sentence in this case was not disproportionate. MCL 750.136b(2); MSA 28.331(2)(2) authorized the trial court to sentence defendant to as much as fifteen years' imprisonment for the first-degree child abuse conviction, and MCL 750.317; MSA 28.549 authorized the court to impose life imprisonment on defendant for his second-degree murder conviction. Both sentences were within the statutory limit. Defendant's prior criminal history also indicated that he was unable to conform his conduct in accordance with the law. In our view, defendant's sentences were proportionate to both the seriousness of his crimes and his prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Because defendant's sentence was proportionate, we reject defendant's claim that the court erred in declining to respond to his challenge to the scoring of the offense variable.

Affirmed, but remanded for correction of the presentence investigation report. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck