

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMEER JACOBS,

Defendant-Appellant.

UNPUBLISHED

October 1, 2002

No. 232004

Wayne Circuit Court

LC No. 99-006419

AFTER REMAND

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appealed as of right his bench-trial conviction of second-degree murder, MCL 750.317, for which he was sentenced to fifteen to twenty-five years' imprisonment. We determined that further findings of fact were necessary to facilitate full review, and we remanded for that purpose. *People v Ameer Jacobs*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 232004) Having retained jurisdiction, the case is now before us to review the record as supplemented. We affirm.

Defendant was charged with first-degree murder for the death of his infant son, Jameel Jacobs. At the conclusion of the proofs, the trial court made the following findings of fact:

On June 8th, 1999, Jameel Jacobs was an infant of approximately one month old, having been born May 12th, 1999. The defendant, Ameer Jacobs was the father of Jameel Jacobs and the custodial parent, along with Soo Kim, the mother of the infant.

On June 8th, 1999, Jameel Jacobs was in good health. During the early morning hours of June 8th, 1999 Ameer Jacobs removed Jameel from the crib and took the infant into the living room of the apartment number 304 located at 741 Seward Street in the City of Detroit, County of Wayne, State of Michigan.

While in the living room at the Seward location, the defendant knowingly or intentionally inflicted multiple blunt force trauma to the head of Jameel Jacobs. After the infant stopped breathing, a call was placed by the defendant to EMS. An EMS team arrived at the apartment and attempted to resuscitate [sic] the infant. Following the attempts the infant was conveyed immediately to Henry

Ford Hospital in Detroit by the EMS personal [sic] in the mobile unit. On June 11th, 1999, Jameel Jacobs died from the blunt force trauma.

Jameel Jacobs brain has [sic] swollen and he had retinal hemorrhage. The manner of death was homicide. The cause of Jameel Jacobs death was blunt force trauma.

The court did hear testimony about two prior allege [sic] falls of Jameel on the stairs and in the kitchen of the apartment. However the court does not find that testimony credible and also find [sic] even if it were credible, those falls did not contribute to the death of Jameel Jacobs.

The defendant on June 9th, 1999 made a statement to the Detroit Police and admitted that he intentionally struck Jameel in the head on June 8th, 1999. When the defendant struck Jameel Jacobs he acted in a wanton and willful disregard for the likelihood that the natural tendency of his conduct was to cause death or great bodily harm.

As a conclusion of law in view of the forgoing finding of fact, the defendant is guilty of the lesser included offense of second degree murder and violation of MCLA 750.317. And that conclusion is in accordance with the People versus Woods, 416 Mich 581 at page 627, a 1982 decision of the Michigan Supreme Court. [Emphasis added.]

Defendant argued that the trial court erred in finding that he admitted to striking Jameel on June 8, 1999, and in concluding that his striking of the child was the direct cause of his death. We agreed with defendant that the trial court clearly erred in finding that defendant admitted to striking Jameel on June 8, 1999, because the record indicates that defendant admitted to police that he struck him on June 4, 1999. In our prior opinion, we stated that it was unclear from the record whether the court's conclusion was based on its erroneous finding that defendant admitted to striking Jameel on June 8, or whether it was based on other evidence. Accordingly, we remanded for further findings of fact. On remand, the trial court made the following additional findings of fact:

In the Defendant's June 9, 1999, statement given the Detroit Police, the Defendant Jacobs admitted striking his infant son on June 4, 1999, and not June 8, 1999. The Court does not find that this striking was one of the fatal blows which caused the death of Jameel Jacobs on June 8, 1999.

However, the admission about the June 4th, 1999, striking, along with the admissions made by the Defendant concerning two alleged accidental falls of June 6th, 1999, caused this Court to find that the Defendant was attempting to cover up the real cause of Jameel Jacobs' death.

Medical testimony from the pediatric expert and Medical Examiner both indicate that Jameel Jacobs was injured on June 8, 1999, the date that the infant lost consciousness. The injuries to Jameel Jacobs were so serious that he could not have remained conscious for long after infliction of those injuries.

On June 8, 1999, prior to receiving those injuries, Jameel Jacobs was in good health.

During the early morning hours of June 8, 1999, the Defendant, Ameer Jacobs, removed Jameel from the crib and took the infant into the living room of the apartment number 304, located at 741 Seward Street in the City of Detroit, Wayne County, Michigan. And while in the living room, alone at that location with the infant, the Defendant knowingly or intentionally inflicted multiple blunt force trauma to the head of Jameel Jacobs. After the infant stopped breathing, a call was placed by the Defendant to E.M.S.

An E.M.S. team arrived at the apartment and attempted to resuscitate the infant. Following the resuscitation, the infant was conveyed immediately to Henry Ford in Detroit by E.M.S. personnel in a mobile unit.

On June 11, 1999, Jameel Jacobs died from blunt force trauma injuries, his brain was swollen and he had retinal hemorrhage. The manner of death was homicide, and the cause of Jameel Jacobs' death was blunt force trauma administered by the Defendant.

Although the court did hear testimony about the two prior alleged falls of Jameel on the stairs and in the kitchen of the apartment, the Court does not find that testimony credible and also finds that even if it were credible those falls did not contribute [to] the death of Jameel Jacobs based on the medical testimony given by the Medical Examiner and the pediatric expert.

When the Defendant struck Jameel Jacobs on June 8th, 1999, he acted in a manner which demonstrated a wanton and willful disregard for the likelihood that the natural tendency of his conduct was to cause death or great bodily harm.

And my conclusion remains the same, that based on those foregoing findings of fact, the Defendant is guilty of the lesser included offense of second degree murder in violation of M.C.L. 750.317. . . .

A trial court's findings of fact in a bench trial are reviewed for clear error and its conclusions of law are reviewed de novo. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996); *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Swirles (After Remand)*, *supra*. This Court must give due regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). Further, when there is conflicting testimony, it is for the trial court to resolve the facts. *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). The trial court's resolutions are given deference by an appellate court. *Id.*

We conclude that the trial court's findings were not clearly erroneous. Defendant and Kim stated that Jameel's falls occurred when he was approximately one or two weeks old, which was days before his admittance to Henry Ford Hospital on June 8, 1999. Defendant's version of

events was contradicted by the medical examiner's finding that Jameel's five areas of injury to the head were sustained at the same time, either on the date he was admitted to the hospital, or shortly before his admittance to Henry Ford Hospital on June 8, 1999. Further, the finding that the falls did not cause Jameel's injuries was supported by the pediatric expert's conclusion that the sheering or retinal hemorrhaging injuries could not have been sustained by a fall down stairs, even if defendant had held Jameel over his head as he walked up the stairs. We find no error in the trial court's finding that a fall did not cause Jameel's injuries. Accordingly, in light of the medical evidence, as well as defendant's admission to striking the child on another occasion, we find no error in the trial court's conclusion that defendant fatally abused Jameel in the early morning hours of June 8, 1999. The record supports the trial court's findings, and based on our review of the entire record, we are not left with a definite and firm conviction that a mistake has been made. *Swirles (After Remand)*, *supra* at 136.

Defendant also argues that his trial counsel was ineffective for failing to raise an intervening cause of death defense. Defendant argues that the EMS unit that treated Jameel wrongly intubated him by inserting the tube into his esophagus instead of his trachea. Defendant failed to move for a new trial or *Ginther*¹ hearing; therefore, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

The decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *Garza*, *supra* at 255. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess trial counsel's competence with the benefit of hindsight. *Id.*; *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). The failure to call witnesses or present certain evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*. See *People v LaVearn*, 448 Mich 207, 212; 528 NW2d 721 (1995).

In light of the record evidence that (1) Jameel's health improved after he was intubated at the scene, and (2) Jameel's official cause of death was homicide as a result of intentional blunt force trauma, we cannot conclude that the record supports an intervening cause of death defense on the basis of the EMS personnel's treatment of Jameel. Defendant has not affirmatively established that Jameel was improperly intubated at the scene, or more importantly, that he was detrimentally affected by the EMS unit's treatment. Therefore, defendant's argument amounts to mere conjecture. Further, we cannot conclude that defendant would have been acquitted even if defendant had established that Jameel was improperly intubated in light of (1) the evidence that

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

his vitals had stopped before the EMS team arrived at the scene, (2) the evidence that he had been without oxygen for some time before the EMS unit arrived, (3) evidence that his condition and color improved after he was intubated at the scene, (4) the ability of the medical staff at Henry Ford Hospital to resuscitate Jameel, and (5) his serious head injuries, which ultimately were determined to be the cause of his death. In sum, the evidence did not support an intervening cause of death defense based on the improper intubation of Jameel by the EMS unit. Accordingly, defendant's claim that trial counsel failed to adequately investigate, research, and present this defense is without merit.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot