STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2002
v	No. 230532 Berrien Circuit Court
MICHAEL TIMOTHY CHILDS, Defendant-Appellant.	LC No. 2000-401923-FC

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to life imprisonment. Defendant appeals as of right. We affirm.

This case arises from the death of defendant's infant son. At trial, the preliminary examination testimony of the victim's mother, Concepcione Rodriguez, was read into the record after Rodriguez failed to appear at trial as scheduled. According to Rodriguez, on the morning of March 26, 2000, she found the six-week-old infant lying in a chair in the apartment she shared with defendant, blue and unresponsive. Emergency personnel were immediately called; however, attempts to revive the child were unsuccessful and he was declared dead upon his arrival at the hospital.

A forensic pathologist later determined that the child died as a result of complications stemming from a number of injuries sustained at the hands of another. Specifically, six internal head bruises, a one-inch fracture at the back of the skull, eighteen rib fractures, four small areas of hemorrhaging in the supportive tissue of the stomach, and a broken left thigh bone. As a result of an investigation into the child's death, defendant was arrested and charged with felony murder, MCL 750.316(1)(b), the predicate felony being first-degree child abuse, MCL 750.136b(2). Although acquitted of the felony murder charge, defendant was convicted of the offense of second-degree murder.

On appeal, defendant first argues that there was insufficient evidence to support his conviction. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

The elements of second-degree murder are a death, caused by an act of the defendant that was committed with malice and without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). With respect to these elements, defendant appears to argue that there was insufficient evidence to support a finding that he caused the injuries that led to the child's death. In support of this claim, defendant asserts that Rodriguez provided the only direct evidence that defendant had abused the child, and that her testimony was not credible. When reviewing the sufficiency of the evidence, however, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478 (1992).[1] Accordingly, we decline defendant's offer to review Rodriguez' testimony in a light other than that most favorable to the prosecution and, upon such review find the evidence sufficient to support a rational trier of fact in concluding that the child's death was the result of actions taken by defendant.

Several witnesses testified at trial that, although they had not seen defendant strike his children, they had heard defendant yell and hit his children on various occasions. One witness also testified that after one such incident, the baby had a bruise on his cheek. Consistent with this testimony, Rodriguez testified that she had seen defendant slap the baby on his face several weeks before the child's death, causing a bruise near the baby's eye. Rodriguez also testified that only two days before the baby died, she saw defendant hit the child's left leg with the edge of his hand, and also strike the baby's back and head with his fist. Rodriguez' testimony in this regard is consistent with the injuries found by the forensic pathologist to have been the cause of the child's death. Circumstantial evidence and the reasonable inferences arising therefrom may constitute satisfactory proof of the elements of an offense. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Accordingly, we find the evidence at trial sufficient to support a rational trier of fact in concluding that it was defendant who caused the injuries to the baby. Because defendant does not contest that the child died as a result of these injuries, we further conclude that there was sufficient evidence to support defendant's conviction for second-degree murder. *Goecke*, *supra*.

Next, defendant argues that the jury's verdict was inconsistent with an acquittal on felony murder and was, therefore, the result of either an impermissible compromise or a misunderstanding of the jury instructions. We do not agree. This issue raises a question of law which is reviewed by this Court de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Contrary to defendant's assertion, a finding that defendant was guilty of second-degree murder does not logically require a finding that he was guilty of first-degree child abuse. Unlike first-degree child abuse, which requires that the defendant knowingly or intentionally act to cause serious physical or mental harm to a child, see *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997), second-degree murder is not a specific intent crime, *People v Herndon*, 246

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[1] Although defendant recognizes this rule, he argues that the "exceptions" delineated in *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) apply in this case. *Lemmon*, however, dealt with the trial court's role in determining witness credibility when reviewing a motion for new trial premised a claim that the verdict was against the great weight of the evidence, and is, therefore, inapplicable to this case. *Id*. at 636-638.

Mich App 371, 386; 633 NW2d 376 (2001). For purposes of a conviction of second-degree murder, it is sufficient that the defendant merely intended to create a very high risk of death or great bodily harm, with knowledge that death or great bodily harm was the probable result of his actions. *Id*. On the basis of the evidence presented at trial, the jury here may well have found that while defendant acted with the intent to create a very high risk of death or great bodily harm in abusing the child, he did not in fact specifically intend to inflict serious physical or mental harm upon the child. Such a conclusion was within the province of the jury as the trier of fact, and would require acquittal of the felony murder charge. Accordingly, the verdicts are not inconsistent.

Moreover, while reversal may be required when it is evident that the jury did not understand its instructions or the verdict was a result of compromise, *People v Lewis*, 415 Mich 443, 450 n 9, 451-452; 330 NW2d 16 (1982), there is no evidence in this case that either situation occurred. First, the jury was polled and each member affirmed the verdict. Second, the court instructed the jury not to compromise, and a jury is presumed to follow the instructions given to it by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we find no error in the jury's verdict as rendered.

Defendant next argues that the introduction of Rodriguez' preliminary examination testimony at trial violated his right to confrontation because the testimony was not "former testimony," and due diligence in locating Rodriguez was not shown. Again, we disagree. We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). A trial court's determination whether the prosecutor exercised due diligence in obtaining the presence of res gestae witnesses is similarly reviewed for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. Admission of a hearsay statement by an unavailable declarant does not, however, violate a defendant's right to confront his accusers if the statement falls within a firmly rooted hearsay exception. *People v Meredith*, 459 Mich 62, 69; 586 NW2d 538 (1998). In this case, the challenged testimony was admitted into evidence pursuant to MRE 804(b)(1), the hearsay exception allowing for admission of former testimony. Pursuant to this rule, where the declarant is unavailable, preliminary examination testimony may be introduced as substantive evidence if the party against whom the testimony is offered had both opportunity and a similar motive to develop the testimony through cross-examination. MRE 804(b)(1).

Here, defendant did cross-examine Rodriguez at the preliminary examination, but contends that he did not have an opportunity to cross-examine her regarding alleged prior acts of abuse by defendant towards their other children because the court curtailed the prosecution's direct questioning in this area. On direct examination at the preliminary examination, Rodriguez was asked whether she ever saw defendant hit the other children, to which she responded that defendant had hit two of their children with a closed fist on their butts and back. The prosecutor tried to establish a time frame concerning when this occurred, at which time the court stated that the questioning was "getting a little far afield," and that the focus needed to be on the infant victim.

In general, cross-examination is limited to the scope of the direct examination. MRE 611(b). While the court's comments may have foreclosed defendant from cross-examining Rodriguez on other alleged instances of abuse, defendant could still inquire about the instance to which Rodriguez did testify. Defense counsel in fact did so when he questioned Rodriguez regarding the frequency of the children's doctor visits specifically because he wished to establish whether there was any evidence to corroborate Rodriguez' claims of abuse. Therefore, we conclude that defendant did have an opportunity to cross-examine Rodriguez on the prior bad acts that were introduced at trial. While defendant did not take full advantage of this opportunity, MRE 804(b)(1) only requires that defendant have the opportunity. It does not require that he take full advantage of that opportunity.

Defendant further contends, however, that he did not have a "similar motive." Whether or not defendant had a "similar motive" to develop Rodriguez' testimony at the preliminary examination as compared to at trial depends on the similarity of the issues for which the testimony was presented at each proceeding. See *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

In this case, the preliminary examination testimony was elicited to establish defendant's guilt and the prosecution sought admission of the testimony at trial for the same purpose. In both proceedings, defendant's purpose in cross-examining Rodriguez was to prove that he did not commit the crimes of which he was charged. Therefore, defendant's motive was similar, to impeach Rodriguez' credibility. In fact, defendant's cross-examination of Rodriguez covered nineteen pages of transcript in which he attempted to impeach her credibility. Furthermore, defendant even recognized at the preliminary examination the possibility of Rodriguez' testimony being used at trial and the importance of preserving the testimony. Accordingly, we reject defendant's claim that his motive for cross-examining Rodriguez at the preliminary examination was not similar to that at trial.

We next need to determine if the declarant was "unavailable." A declarant is considered unavailable if the declarant is absent from the trial and her attendance could not be procured by process or other reasonable means and due diligence is shown. MRE 804(a)(5). Therefore, the Confrontation Clause is not violated by use of preliminary examination testimony as substantive evidence at trial if the prosecution in this case exercised due diligence in trying to produce Rodriguez. *Bean*, *supra* at 682-683.

Whether the prosecutor has exercised due diligence in attempting to obtain a witness' presence is a matter of reasonableness and depends on the facts of each case. *Id.* at 684. The focus is whether diligent good-faith efforts were made to procure the witness, not whether more stringent efforts would have produced the witness. *Id*. Due diligence is the attempt to do everything that is reasonable, but not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

Defendant asserts that the efforts exercised to secure Rodriguez' presence were not as substantial as those in *Bean*, *supra*, or *People v Briseno*, 211 Mich App 11; 535 NW2d 559 (1995), and, therefore, the court clearly abused its discretion in finding that due diligence was shown.

After reviewing a number of decisions regarding whether due diligence was shown, it appears that when the witness was a known flight risk and viable leads were not pursued, the courts are more likely to find a lack of due diligence. See *Bean*, *supra*, and *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988). Conversely, where all reasonable leads were pursued and the prosecution had no reason to believe that the witness would not appear at trial, the court will find that the prosecution exercised due diligence. See *Briseno*, *supra*, and *People v Conner*, 182 Mich App 674; 452 NW2d 877 (1990).

In this case, the prosecution had no reason to believe that Rodriguez would not appear at trial. She testified at the preliminary examination, only three months before the trial, and was personally served with her trial subpoena one month before the trial. Also, the investigating officer had contact with her as late as two weeks before trial and she had given authorities a phone number and address where she could be contacted.

Additionally, the prosecution pursued all leads received concerning Rodriguez' location. All local addresses where Rodriguez might be found were checked multiple times at various times of the day, as well as her parents' last known address in California, to no avail. People at and surrounding these addresses were interviewed.

The investigating officer was told that Rodriguez may have gone to Texas or Mexico, but it was not reasonable to expect that these areas be checked without more specific information. Also, the utilities and phone company were not checked, but it was not reasonable to expect that a person of such a transient nature would have such services in her name. As the United States Supreme Court has stated, in hindsight one will "always think of other things" that could have been done, but "the great improbability" that the effort would result in locating the witness "neutralizes" its reasonableness. *Ohio v Roberts*, 448 US 56, 75-76; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

Accordingly, we conclude that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence in attempting to locate Rodriguez, or that her preliminary testimony was "former testimony" within the meaning of MRE 804(b)(1). Moreover, because MRE 804(b)(1) is a hearsay exception firmly rooted in American jurisprudence, the Confrontation Clause was satisfied when the testimony was admitted under that exception. See *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999).

Lastly, defendant argues that the trial court made an impermissible finding of guilt and sentenced defendant as if he had been convicted of felony murder. Again, we disagree.

The statutory sentencing guidelines under which defendant was sentenced provide that if the minimum sentence imposed was within the guidelines' recommended range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Defendant's sentence was within the guidelines' range, but defendant argues that the court relied upon inaccurate information because it sentenced defendant as if he had been convicted of felony murder, making an impermissible independent finding of guilt.

We disagree with defendant's characterization. The trial court's comment at the end of the trial was nothing more than an indication of its surprise at the verdict, and did not indicate that the court intended to ignore or disrespect the verdict. Also, we believe that the court's comments at sentencing did not constitute an independent finding of guilt, but were simply an indication that the court believed that the crime for which defendant was convicted was heinous and defendant deserved to be punished to the full extent of the law. Accordingly, we must affirm defendant's sentence because it is within the guidelines' recommended range.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot