STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 246273 Oakland Circuit Court
TANESHA KOSHEAN ANTHONY, Defendant-Appellant.	LC No. 2002-184590-FH

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant's 1½-year-old daughter suffered severe burns to her buttocks and vaginal area, and defendant was charged with inflicting the injuries. She was convicted, following a jury trial, of first-degree child abuse, MCL 750.136b(2), and sentenced to five to fifteen years' imprisonment. Defendant appeals as of right, challenging the sufficiency of the evidence and raising claims of ineffective assistance of counsel. This case is submitted without oral argument pursuant to MCR 7.214(E). We affirm.

I. BASIC FACTS

The testimony of police officers indicated that they were dispatched on March 13, 2002, to defendant's apartment, where she lived with her husband and three children, after authorities received an anonymous tip concerning the welfare of one of defendant's children, a 1½-year-old little girl. A police officer testified that he found the child in a bedroom lying on a mattress, and she was covered by a single sheet and wearing a tee shirt. The child had burns and open sores that had not scabbed located on her lower back, part of her buttocks, and in her vaginal area, but no where else on her body. The officer noticed that the burn on the buttocks appeared unusual in that there was a spot not burned but yet surrounded by burns. According to the officer, the child winced when he pulled back the sheet. An ambulance was called to take the child to the hospital.

The officer testified that he spoke with defendant, and she asserted that the child received the burns while using the bathtub on either March 7th or 8th. Defendant's account of the incident as told to the officer reflected that she was home alone with the three children and preparing to bathe them. She was busy outside the bathroom with the other two children when she heard screaming and hollering coming from the bathroom. Defendant indicated that the child had climbed into a tub of hot water and was burned. She told the officer that the child was lying in the tub, balancing on her bottom, with her legs and arms raised upward out of the water.

Defendant then pulled her from the tub and, when drying the child off with a towel, discovered that her skin was peeling off. Defendant did not take the child for medical care, and instead called her mother for advice. On the basis of her mother comments, defendant merely treated the burns with cream.

The police officer did not believe defendant's account of events because of the nature of the burn marks and the lack of any splash-mark burns; the officer thought that the child would have been flailing about in a tub of hot water and received burns over all of her body. The officer also testified that in looking through the home, he found it unusual that one, and only one, of the burners from the home's kitchen stove was missing.

The prosecutor also presented the testimony of another police officer who observed the child at the hospital. She testified that the child had burns to the left buttock area extending into the vaginal area. There were no burn marks to the hands or feet. The area of the burns was pink, red, and raw with pieces of hanging dead skin. The officer stated that hospital personnel administered morphine to the child for pain and held her down while scrubbing off the dead skin. Defendant was not at the hospital. The officer also went to the apartment and spoke with defendant. Defendant again indicated that she was home with her three children when the incident occurred; her husband was not present. Defendant told the officer that she turned on the bath water to heat it up, and that subsequently she found the child in the tub balancing on her bottom with her hands and feet in the air and the water still running. The officer testified that defendant's account was inconsistent with the burn marks. The officer noticed a large burner missing from the kitchen stove. The burner was found on the top of the refrigerator behind some bags. Defendant told the officer that the burner was being cleaned because it had been smoking.

A registered nurse, who treated the child, testified that there were severe second and third degree burns to the buttocks and vaginal area. The burn areas were infected and dead skin was removed with the child being administered morphine for pain. The nurse found defendant's story to be inconsistent with the burn marks. The burns were very well-defined with distinct areas of demarcation, and there was a lack of any splash burn marks. She did testify that splash burns are typically first-degree and could heal within a week. There were no burns to the feet, arms, and legs.

A detective testified in a manner consistent with the officer testimony discussed above. The detective also testified that defendant's husband was out of town on the date that defendant claimed the burns occurred. He further stated that defendant was emotionless in discussing the incident with him. The detective found it unusual that, in a home that was cluttered, a mess, and dirty, including the kitchen and stovetop area, the one area that was immaculately clean was the area of the burner that had been removed.

The prosecutor next presented the testimony of a physician who was qualified as an expert in pediatric and child physical abuse. The physician-expert, who examined the child, testified that the burns were second degree and were unusual because there were clear and sharp lines of demarcation with an area not burned but yet surrounded by burn marks. The burns were indicative of contact-type burns as opposed to splash or flow-type burns.

The physician further testified:

Q. If she were sitting directly under the spigot and it was pouring out hot water, could that cause these kind of burns?

A. Not that I can imagine. Again, most people when they're sitting are going to sit their front sides up, so most of her burns were on the buttocks, so one would have to assume that she's on all fours to do that. If one were to assume that she's on all fours and let's say the spigot is falling right down onto her buttocks than I don't get an explanation for the sharp demarcation. I don't have an explanation for the spared area [area without burn encircled by burns][,] and I don't have any explanation for why there wouldn't be a flow mark.

The doctor indicated that "sparing" can occur in an immersion burn, which, by way of example, is where one is placed in scalding water with a portion of the body pushed hard against the cool bathtub.

On cross-examination, the following testimony was elicited:

Q. The question is this: Super hot water collecting near the drain, baby hops in, gets burned, then sticks her legs up. She [has] now burned the bottom part of her buttocks, her lower vaginal area, consistent with these pictures. Possible? I'm asking is it possible? Super hot water, little pool of it there?

A. My take on your hypothetical is that it is not consistent with the pattern of the burn?

Q. Why is that? Assume there's a little pool of hot water near the drain, the child climbs in, sits in it, gets burned. You said that a –

* * *

A. First of all, if one envisions an almost two year old climbing into the tub they will typically do one of two things. They will either step like you or I step into a tub or they will sit on the edge, swing their legs around and step with both feet in.

The other way they do it if they're really short and they can't get to the point of sitting on the edge is they do a superman. They kind [of] flop themselves over the edge and kind [of] tumble in.

Now, [under] any of those scenarios[,] the point of burns doesn't match what we've got on this child where it's just buttocks.

Defendant questioned the physician-expert incessantly on whether it was possible that the burns marks could have resulted where the child climbed into the tub containing a shallow pool of hot water and sat in the hot water. The doctor repeatedly responded that the burn pattern was inconsistent with that theory. She did acknowledge that splash burns were typically first-degree and might not be visible after a week or so. She was of the opinion that defendant's account of

events was inconsistent with the burn marks, that the bathtub story would not have resulted in the burn patterns found on the child, and that the burns were intentionally inflicted.

The treating pediatric physician testified that the burns were second-degree and located on the buttocks and vaginal area, and he was ninety-nine percent sure the burns were not accidental because of their nature and location. He indicated that he had treated many burn victims in his career but nothing as severe as this case. The physician believed that there was a high possibility that the burns were immersion burns. If the child had fallen into the bathtub containing hot water, she would have flailed around, causing burns all over and not localized with lines of demarcation. However, if hot water was running into the tub with the drain open and no water filling the tub, an immersion burn would not have occurred. The physician further testified, on cross-examination:

> *Q*. Assume that there's water running out of the spigot, hot water, the baby climbs into the bathtub. Let's assume the baby turns off the cold for some reason and that there's hot water, very hot water, this is an apartment building. . . . Would that change your opinion as to whether you have a 100% opinion that this was not an accident. Might there have been some room in your opinion now that this could have been an accident if the hot water is running and the baby climbs in the tub, under the spigot and gets burned? Is this possible that it could have happened that way?
>
> *A*. It's possible, sure.
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> * * *
>
> *Q*. Earlier you testified that you thought this was an immersion burn. Can you tell me what you meant by that?
>
> *A*. If the child would be forced to sit in the bathtub with water inside for a while.
>
> *Q*. What if the child just hopped into the tub. I mean, it doesn't mean that the child was held?
>
> *A*. As I said when you immerse a child, you keep the child in the water for a long time without any movement. The burn would be demarcated.
>
> * * *
>
> *Q*. If the water was coming out of the spigot and running on the vaginal area of the child and pulling under the buttocks, wouldn't that cause exactly the same sort of injury that we saw here, the hot water?
>
> *A*. Yes.

Defendant testified on her own behalf. She stated that she was running bath water for "wash up" with the drain plug removed. Defendant took one child out of the bathroom who was crying and then told the other two children to remove their clothes. While defendant was outside the bathroom, the child, who was subsequently burned, went back into the bathroom, and

defendant then heard the child screaming. The child was lying in the tub with her legs and arms raised upward, and defendant pulled her out. The water was hot and smoking. Defendant indicated that her husband was not there at the time. Defendant further testified that she did not intentionally harm her child, and that she did not take her for medical care because she was afraid that the authorities would take her children. With respect to the burner, it had caught fire and was smoking; therefore, it was removed from the stove.

Defendant called some additional witnesses associated with the apartment complex who testified in regard to a problem with scalding hot water in the complex, but the witnesses could not pinpoint a timeframe during which the problem was occurring.

II. ANALYSIS

A. Sufficiency of the Evidence

Defendant's position at trial was that the child climbed into the bathtub and fell under the spigot while hot water was running and incurred the injuries. On appeal, defendant asserts that the defense theory below was consistent with the nature of the injuries and the expert testimony, and that the evidence was insufficient to support a first-degree child abuse conviction.

MCL 750.136b(2) provides that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." This case involves the infliction of serious physical harm, which is defined as:

> any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, *burn or scald*, or severe cut. [MCL 750.136b(1)(f)(emphasis added).]

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

While there was minimal testimony at best indicating that defendant's theory of the case could "possibly" have explained the resulting injuries, there was strong evidence that the injuries were not consistent with defendant's account and testimony, nor were they consistent with an accidental injury. Considering the evidence regarding the nature and pattern of the burns, defendant's testimony placing her with the child, the evidence of an inconsistency between defendant's version of events and the injuries incurred, and the expert testimony suggesting intentional infliction of the injuries as opposed to an accidental burn, there was sufficient evidence to support the conviction. Viewing the direct and circumstantial evidence in a light

most favorable to the prosecution, with all conflicts being resolved in the prosecution's favor and credibility determinations being reserved for the jury, a rational juror could have found that defendant knowingly or intentionally caused serious physical harm to her daughter.

B. Claims of Ineffective Assistance of Counsel

Defendant argues that trial counsel was ineffective for failing to file a motion in limine to exclude lay testimony by the police and nurse witnesses that the child had been subject to physical abuse, which was solely within the purview of experts. Additionally, defendant maintains that the relevance of the lay witness opinions was substantially outweighed by the danger of unfair prejudice. Defendant also argues that trial counsel should have filed a motion in limine to exclude any evidence regarding the stove burner because there was no opinion submitted that the burns were consistent with the burner. Finally, defendant argues that trial counsel was ineffective for failing to rehabilitate a defense witness who testified that she would not have noticed that chunks of her skin were coming off after being struck by hot water in the apartment complex if she was drying herself with a "dark" towel.

Whether a person has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to mistakes apparent on the record because no *Ginther*[1] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

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

Regarding the testimony of the "lay" witnesses, MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989), this Court addressed MRE 701 and concluded that it permitted two police officers to testify that dents in a car could have been made by bullets despite the fact that the officers were not ballistics experts. The *Oliver* panel noted that MRE 701 had been liberally construed in order to assist a jury in developing a clearer understanding of the facts. *Id.* at 50. In support, the Court cited *Heyler v Dixon*, 160 Mich App 130; 408 NW2d 121 (1987), wherein lay witnesses, on the basis of personal observations, were permitted to render an opinion in regard to whether an individual was intoxicated. *Oliver, supra* at 50. Reliable conclusions predicated on given facts which people in general could make are allowable under MRE 701 as long as they are not overly dependent on scientific, technical, or other specialized knowledge. *Id.* (citation omitted).

Here, the gist of the challenged testimony was not specifically that defendant committed child abuse, but rather that the burns, personally observed, were inconsistent with defendant's version of events. We find that such a conclusion was rationally based on the perception of the witnesses. People in general are clearly capable of noticing and identifying severe burns or injuries as found here and reaching a conclusion on whether the injuries are consistent with a particular story given them, especially where it relates to a common occurrence such as a child's use of a bathtub. Moreover, the evidence was helpful to the determination of a fact in issue, i.e., whether defendant's account was truthful. Further, we see no danger of *unfair* prejudice on this relevant issue. MRE 403. Defense counsel is not obligated to make meritless or futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Additionally, even without the specific testimony on the consistency between defendant's version of events and the nature of the injuries, defendant fails to show, in light of the admissible expert testimony, the existence of a reasonable probability that, but for counsel's assumed error, the result of the proceeding would have been different. *Carbin, supra* at 599-600.

With respect to the stove burner, there was no testimony concluding that the burns were consistent with a burner. The physician/child-abuse expert believed that the burn was a contact burn with something that had sharp edges, but she also testified that it would not have been a "stiff" object. The treating emergency room physician thought that it was probably an immersion burn, thus having no connection with a burner. If this matter had been presented to the trial court, it is arguable that, under MRE 401-403, the evidence should have been excluded. However, assuming that the evidence should have been excluded, we cannot conclude that defendant has shown the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. There was strong evidence showing that the injuries were not accidental and not consistent with defendant's story. Reversal is not mandated.

Finally, in regard to rehabilitating one of the defense witnesses who responded illogically to a question presented by the prosecutor, we doubt that rehabilitation was possible, and it was

probably a matter of sound trial strategy not to further pursue the matter and go deeper into the abyss. Moreover, assuming ineffective assistance, we find no resulting prejudice.

III. CONCLUSION

There was sufficient evidence to support a rational trier of fact's determination that the prosecutor had proven all the essential elements of the crime of first-degree child abuse. Further, there is no viable claim of ineffective assistance of counsel as asserted by defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski