STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2004
v	No. 242378 Wayne Circuit Court
HAROLD REED, Defendant-Appellant.	LC No. 01-010386

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Defendant appeals by right his convictions of felony murder, MCL 750.316, and first-degree child abuse, MCL 750.136b(2), following a jury trial. The trial court vacated defendant's additional conviction of second-degree murder, MCL 750.317, at sentencing and sentenced defendant to life imprisonment for felony murder and eight to fifteen years' imprisonment for first-degree child abuse. The trial court vacated defendant's conviction of first-degree child abuse in its order denying defendant's motion for a new trial. We affirm, but direct the trial court to complete an amended judgment of sentence vacating defendant's conviction and sentence for first-degree child abuse.

I. Facts and Proceedings

On the night of August 3, 2001, Sheniqua Betty fled her home in Detroit with her three-month-old son, the victim in this case, after a physical altercation with her boyfriend. Betty testified at trial that she wrapped the victim in a towel after bathing him and left home without wearing her shoes or carrying a purse. She walked to the nearby intersection of State Fair Avenue and Woodward Avenue to call her family on a pay phone. She soon realized that because she did not have money to make a call, she needed to go back to her house. Distressed, she sat down and cried at a bus stop on State Fair. Approximately five minutes after she sat down, a man she identified at trial as defendant sat down next to her and engaged in friendly conversation with her. Betty testified that after talking with defendant for a while, she explained to him that she needed to return to her house but that she feared for the victim's safety if she took him with her. She asked defendant to watch the victim until she returned or, if she did not return within a short time, to carry the victim down the street toward her home. She then left the victim with defendant. The victim, who was in good health at the time, had not suffered any injuries in the course of Betty's altercation with her boyfriend. When Betty arrived at home, her boyfriend threw her purse outside to her but would not give her the items she needed for her son. A

stranger driving by stopped to see if she needed help and drove Betty back to the bus stop after she explained her situation to him. Defendant and the victim were not at the bus stop when she returned.

Defendant's niece, Diana Dellihue, testified that defendant knocked on her door around 3:00 a.m. on August 4, 2001. When she opened the door, defendant told her he was there because of an emergency, asked her for some water and a blanket, and told her that there was "a baby" on Carmel Street. She asked him to bring her the baby, but defendant responded only that he was going to get the baby. She said that she could tell that defendant had been drinking alcohol, but she believed that he was still in control of his actions. Her husband gave defendant a blanket, and defendant left in the direction of Carmel Street. Twenty to thirty minutes later, she saw defendant walking back toward her home. He was not carrying a baby.

Some time later, Dellihue watched a news program that broadcasted a story concerning a child missing from the intersection of State Fair and Woodward. As part of the story, the program aired a security video from a nearby gas station that showed a man carrying a baby. Dellihue recognized the man as defendant, ran to a pay phone, and called her mother. When her mother confirmed that defendant was at her house, Dellihue instructed her to hold defendant there, called 911, and informed the police where they could find defendant.

Ira Todd, a violent crimes investigator for the Detroit Police Department, testified that he interviewed defendant at police headquarters on August 8, 2001, regarding the victim's disappearance. During the interview, defendant told Todd that he believed that the victim was alive and that he could show Todd where to find the victim. Todd and another officer drove defendant to the location to which defendant directed them, an abandoned house at 999 Penrose Street in Detroit. Once inside, defendant took them upstairs to a bedroom. The officers found the victim's body under a mattress in the bedroom.

Todd also testified that defendant later provided another statement in which he said that on the night in question he waited at the bus stop for a few minutes and then started walking around the neighborhood looking for the victim's mother. He said that the victim cried while he held him but then stopped breathing. Panicking, he left the victim on a corner, went to his niece's house, returned to the victim, who was still not breathing, and took him to the abandoned house. Defendant said he fell down with the victim "a couple of times" while carrying him near the corner of Woodward and Balmoral. Defendant stated that he did not kill the victim and could not explain how he died.

Officer Moises Jimenez of the Detroit Police Department testified that he interviewed defendant on August 10, 2001. Because defendant wanted to take a polygraph examination, Jimenez transported him to a laboratory and turned him over to another officer. After meeting with other officers for approximately three hours, defendant told Jimenez that he needed to talk to him to "clear some things up." When they returned to the police station, defendant gave a statement in which he indicated that while looking for the victim's mother, he carried the victim to the gas station. Then, after carrying the victim for a couple of blocks, he accidentally dropped the victim, the victim landed on his head, and defendant fell on top of him. Because defendant had been drinking a lot that night, he subsequently fell again.

Defendant also said that after he retrieved a blanket from his niece and returned to the victim, the victim was not moving or breathing. He then took the victim to the abandoned house on Penrose and placed him under the mattress. He did not contact the police because he was afraid and was too drunk to make good decisions. Defendant further indicated, however, that he did not mean to hurt the victim. Later, defendant told Jimenez that after he dropped the victim, he lost control because of his intoxication and struck the crying victim with his hand five or more times on his head, both sides of his face, and on his chest.

Investigator Andrew Sims from the Detroit Police Department testified that, although he interviewed defendant at the laboratory, defendant did not take a polygraph examination. Defendant, however, did provide him with a written statement in which he said that he hit the victim on his head and face and chest with his fist. Investigator Sims also testified that by the time he interviewed defendant, he was aware of the conclusions reached concerning the cause of the victim's death.

Dr. Boguslaw Pietak, an assistant medical examiner, testified that when the victim's body was transported to the medical examiner's office, it had reached an advanced state of decomposition and, because of a lack of remaining external skin tissue, several injuries were readily observable. Examination of the victim's skull revealed three fractures: one on the back of the right side of the victim's head, one on the back of the left side of his head, and one on the left side of the top of his head. The victim also had a fracture on the left side of his lower jaw and the right side of his lower jaw. Dr. Pietak classified the skull fractures as life threatening, stating that the fractures would cause unconsciousness within seconds and death within less than thirty minutes. He determined that multiple blunt force injury caused the victim's death and that the victim died as the result of a homicide. He also testified that, considering the location and number of injuries, the injuries were not inflicted accidentally.

The defense rested without presenting any proofs. In his closing argument, defense counsel argued that the victim was already injured when Betty left him with defendant, that the medical examiner's opinions were not conclusive, and that the police coerced defendant to say that he hit the victim. On the charge of first-degree premeditated murder, the jury convicted defendant of the lesser offense of second-degree murder. The jury convicted defendant of felony murder and first-degree child abuse as charged. At sentencing, the trial court vacated defendant's conviction of second-degree murder on double jeopardy grounds.

After he filed a claim of appeal in this Court, defendant filed a motion for a new trial in the trial court and, among other things, asked the trial court to vacate his conviction of felony murder because it violated his double jeopardy protections. The trial court denied defendant's motion for a new trial but agreed that defendant's dual convictions for felony murder and the predicate felony of first-degree child abuse violated defendant's double jeopardy protections. However, the trial court agreed with the prosecution that the appropriate remedy for this violation was to vacate defendant's conviction for first-degree child abuse rather than felony murder. Accordingly, the trial court issued an order vacating defendant's conviction of first-degree child abuse. This appeal followed.

II. Standards of Review

We review de novo preserved claims of constitutional error. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003). We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record because defendant did not raise the issue in the trial court. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). The trial court's decision on a motion for a directed verdict is reviewed de novo by this Court. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2003). Likewise, we review de novo claims of instructional error, *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003), and the question of law whether an offense is a necessarily included lesser offense of a greater offense, *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). "[W]hether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

III. Analysis

Defendant first argues that multiple convictions for causing the victim's death violates his constitutional protection against double jeopardy. We agree, but conclude that relief in addition to that which the trial court has already granted is not required. The trial court vacated defendant's conviction of second-degree murder and signed an amended judgment of sentence reflecting its decision. The trial court also entered an order vacating defendant's conviction of first-degree child abuse, the predicate felony supporting defendant's conviction of felony murder, but did not sign an amended judgment of sentence vacating this conviction and sentence. Accordingly, if the trial court has not already done so, we direct it to prepare an amended judgment of sentence and forward a copy of the amended judgment of sentence to the Department of Corrections.

We disagree with defendant's contention that the proper remedy for this double jeopardy violation is to vacate his conviction of felony murder rather than his conviction of first-degree child abuse. The appropriate remedy for this type of double jeopardy violation is to vacate the conviction and sentence for the predicate felony. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Defendant's reliance on *People v Martin*, 398 Mich 303; 247 NW2d 303 (1976), is misplaced. In that case, our Supreme Court vacated the conviction of the greater offense rather than the lesser offense because of instructional error. *Id.* at 313. The Court recognized, however, that vacating the conviction of the lesser offense is generally the remedy for this type of double jeopardy violation. *Id*.

Defendant next argues that he was deprived of a fair trial because a prospective juror made prejudicial comments during voir dire, resulting in an impartial jury. We disagree. Because defendant did not raise this issue during voir dire when the matter could have been immediately addressed and any perceived error corrected, we can decline to address the merits of this issue. *Ho, supra* at 183. Nevertheless, because defendant raised this issue in his motion for a new trial, we will briefly address it.

Defendant's claim pertains to statements that a prospective juror made in response to the prosecution's inquiry whether the prospective jurors could decide the case on the basis of

testimony from only one witness. The prospective juror in question stated, "I have a question. The testimony of the just [sic] one person cause [sic] there's always two side [sic] to any story." In response to this comment, the prosecution reminded the prospective juror that defendant did not have a responsibility to present evidence and that the prosecution carried the burden of proving its case beyond a reasonable doubt. After the prospective juror indicated that he wanted to hear what defendant had to say, the prosecution again reminded him that defendant was not obligated to present evidence. The prospective juror eventually stated that he would not hold against defendant a decision to not present evidence. Defendant's attorney, when questioning this prospective juror, also reiterated the prosecution's burden of proof. When the attorneys finished questioning the prospective jurors, the trial court dismissed this prospective juror for cause.

"A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999), citing MCR 6.431(B). Because defendant did not demonstrate that he was deprived of an impartial jury, the trial court did not abuse its discretion by denying defendant's motion for a new trial. The trial court excused the prospective juror for cause before trial, and the record does not indicate that the prospective juror's comments influenced the entire panel of prospective jurors. See *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998). In fact, the other prospective jurors confirmed on the record that they could accept that defendant did not have to present witnesses or testify.

Defendant further argues, however, that his trial attorney rendered ineffective assistance by failing to request a mistrial or a new panel of jurors in response to the prospective juror's comments. We disagree. "To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact-finder would not have convicted the defendant." *People v Musser*, 259 Mich App 215, 221; 673 NW2d 800 (2003).

Because defendant has not demonstrated that the prospective juror's comments tainted the venire, he has not demonstrated that he was prejudiced by his trial attorney's failure to request a mistrial or a new panel of prospective jurors. For the same reason, defendant has not demonstrated a reasonable likelihood that the trial court would have granted a motion for a mistrial or a request for a new panel of jurors. Counsel does not render ineffective assistance by failing to argue a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). We also deny defendant's request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), in light of the fact that the record does not support defendant's claim of prejudice. *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Defendant also argues that introduction of testimony concerning a polygraph examination violated his constitutional right to due process. We disagree. Although defendant did not object to this testimony at trial, he raised this issue in his motion for a new trial, which the trial court denied. We conclude that the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Although it is generally impermissible to refer to a polygraph examination at trial, such a reference does not necessarily require reversal. *People v Nash*, 244 Mich App 93, 97-98; 625 NW2d 87 (2000). Here, the record discloses that defense counsel injected this issue into the trial by mentioning in his opening statement that defendant had requested a polygraph examination. Thereafter, testimony introduced in the prosecution's case-in-chief supported defense counsel's assertion. However, contrary to defendant's arguments in his motion for a new trial and on appeal, trial testimony did not reflect that defendant actually took a polygraph examination. Rather, Inspector Sims specifically testified that defendant did not take a polygraph test. Defense counsel emphasized this point in his cross-examination of Inspector Sims.

To permit defendant to intentionally refer to a polygraph examination at trial and then claim reversible error as a result of these references would permit defendant to harbor error as an appellate parachute. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), citing *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). This we will not condone. Moreover, because trial testimony showed that defendant did not actually take a polygraph examination, we reject defendant's claim that the jury could have concluded that he failed a polygraph examination.

Next, defendant argues that the trial court violated his right to due process by erroneously denying his motion for a directed verdict. We disagree. To determine whether the trial court properly denied defendant's motion for a directed verdict, we examine the evidence presented by the prosecution to determine whether, viewing the evidence in a light most favorable to the prosecution, a rational jury could conclude that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *Werner*, *supra* at 530.

After the prosecution presented its case, defendant moved for a directed verdict on count one of the complaint, first-degree premeditated murder, arguing that the prosecution had not presented sufficient evidence of premeditation and deliberation. The trial court denied defendant's motion. On appeal, defendant asserts that the trial court improperly denied his motion for a directed verdict but he presents no argument concerning the subject of the directed verdict motion, first-degree premeditated murder. Accordingly, defendant has abandoned this issue on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). To the extent that defendant argues that he did not possess the requisite intent to commit second-degree murder, it is unclear whether defendant is challenging the sufficiency of the evidence to support his conviction or arguing that the great weight of the evidence preponderated against the jury's verdict. Regardless, defendant has failed to preserve any claim attacking the quantum of evidence supporting his conviction of second-degree murder because he did not address it in his statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), citing MCR 7.212(C)(5); *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Defendant also argues that the trial court erred by denying his request that the trial court instruct the jury on the lesser offenses of manslaughter and second-degree child abuse. We agree in part, but find any errors harmless.

During the period of time between defendant's trial and his commencement of this appeal, our Supreme Court stated in *People v Cornell*, 466 Mich 335, 353-354, 357; 646 NW2d 127 (2002), that only necessarily included lesser offenses may be considered by the jury as "inferior" offenses under MCL 768.32(1) and that instructions on such offenses are appropriate

only "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence" would support the instructions. See also *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). However, the Court limited application of *Cornell* to "cases pending on appeal in which the issue has been raised and preserved." *Cornell, supra* at 367. Because defendant's case was not pending on appeal when our Supreme Court decided *Cornell*, *Cornell* does not apply to this case.

The law in effect before *Cornell* required the trial court to instruct the jury on necessarily included lesser offenses without considering evidentiary support for the instructions; it also required the trial court to instruct the jury on cognate lesser offenses upon request if the evidence supported the request. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Burns*, 250 Mich App 436, 441; 647 NW2d 515 (2002). In the present case, the trial court did not explicitly state on the record that manslaughter constitutes a cognate lesser offense of murder. However, because the trial court decided not to instruct the jury on manslaughter because the evidence did not support the instruction, we assume that the trial court viewed manslaughter as cognate lesser offense. Although at the time of the trial court's ruling legal precedent stated that manslaughter was not a necessarily included lesser offense of murder, see, e.g., *People v Van Wyck*, 402 Mich 266; 262 NW2d 638 (1978), our Supreme Court overruled these cases in *Mendoza, supra* at 544, and reiterated that both voluntary and involuntary manslaughter constitute necessarily included lesser offenses of murder. *Id.* at 541. Accordingly, if the trial court considered manslaughter a cognate lesser offense, it erred as a matter of law. *Mendoza, supra* at 531. Moreover, because pre-*Cornell* law required instructions on necessarily included lesser offenses without examining the evidentiary support for the instructions, *Lemons, supra* at 454, the trial court erred by refusing to instruct the jury on voluntary and involuntary manslaughter.

Nevertheless, we conclude that this error was harmless; therefore, reversal is not required. The harmless error doctrine, which applies to an improper refusal to instruct the jury on a lesser offense, *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992), states that a preserved nonconstitutional error is presumed harmless and that the defendant has the burden of proving that the error resulted in a miscarriage of justice.[1] *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000), citing *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); see also *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002). "'[T]o overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error . . . was outcome determinative. . . . An error is deemed "outcome determinative" if it undermined the reliability of the verdict.'" *Rodriguez, supra*, quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

Defendant has not sustained his burden of demonstrating that it was more probable than not that the jury would have convicted him of manslaughter instead of murder. Because the evidence did not show that defendant killed the victim in the heat of passion, see *Mendoza, supra*

[1] Defendant, having improperly classified these instructional errors as constitutional errors, has failed to address whether the errors were harmless.

at 535, failing to instruct the jury on voluntary manslaughter does not undermine the reliability of the verdict.

Similarly, failing to instruct the jury on involuntary manslaughter does not undermine the reliability of the jury's verdict. Involuntary manslaughter has been described as

> the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty. [*Mendoza, supra* at 536.]

In the present case, the medical examiner testified that the victim died from blunt force trauma to his head that did not result from an accident. Additionally, defendant stated that he hit the victim five or more times on his head, both sides of his face, and his chest. Because such actions naturally tend to cause great bodily harm to an infant, we cannot say that it was more probable than not that the failure to instruct the jury on the first type of involuntary manslaughter was outcome determinative. Likewise, the evidence did not support convicting defendant of the second and third forms of involuntary manslaughter. Although defendant claimed in some of his statements that he accidentally dropped the victim and fell on him, according to the medical examiner, an accident or omission did not cause the victim's death. Therefore, the trial court's failure to instruct the jury on this crime was not outcome determinative.

The trial court did not clearly indicate on the record its reason for refusing to instruct the jury on second-degree child abuse. The prosecution contends that the trial court impliedly agreed that the evidence did not support instructing the jury on second-degree child abuse, but the record does not confirm the prosecutor's position. Assuming without deciding that the trial court erred by denying defendant's request for jury instructions on second-degree child abuse, we conclude that any error was harmless. First-degree child abuse occurs "if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). Second-degree child abuse occurs when:

* * *

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b(3).]

Defendant has not met his burden of demonstrating that it was more probable than not that the jury would have convicted him of second-degree child abuse, rather than first-degree

child abuse, if it had the opportunity to do so. Because the evidence showed that the victim died from non-accidental blunt force trauma, the jury was not more likely to conclude that defendant's conduct amounted to only an omission[2] or reckless act, as discussed in MCL 750.136b(3)(a). Additionally, we conclude that instructions based on MCL 750.136b(3)(b) and (c) would not have resulted in a different verdict. Defendant's attorney argued in his closing argument that the police coerced defendant to state that he hit the victim; he did not argue that defendant intentionally hit the victim but did not specifically intend to cause the victim serious physical harm.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

[2] An omission, for purposes of this statute, is defined as "a willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child." MCL 750.136b(1)(c).