STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JANICE PATRICIA ST. JEAN,

Defendant-Appellant.

UNPUBLISHED
December 8, 2005

No. 256444
Oakland Circuit Court
LC No. 02-186373-FH

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

PER CURIAM.

Defendant appeals as of right her jury trial conviction for second-degree child abuse, MCL 750.136b(3). Defendant was sentenced to ninety days in jail and twelve months of probation. We affirm.

I. Basic Facts and Procedure

Defendant locked her seven-year-old daughter in a closet because defendant was convinced the child was possessed by demons. Defendant then called police and claimed the child had threatened her with a knife. Police found the child in a closet, which had been secured against opening by use of a chair. Police found no food, water or means of sanitary relief inside the closet. The light switch was taped to remain off. The child was taken by police to a substation and then to Children's Village, a foster-care facility. During the course of her time with police, the child ate several times but did not otherwise display physical injured or neglect.

At trial, evidence from another daughter who lived in the home was presented to show that the children were physically punished, including being "smacked," having their hair pulled and, in the victim's case, being tied to a chair, told she was possessed by demons, locked in a closet and being made to kneel and hold her arms out as though she were being crucified.

II. Sufficiency of the Evidence

Defendant first contends that there was insufficient evidence to support her conviction for second-degree child abuse. We disagree.

A. Standard of Review

We review de novo claims of insufficient evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Evidence is viewed in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). The Court should not interfere with the jury's role of determining the weight and credibility of witnesses, but must draw all reasonable inferences and resolve credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

Defendant argues that the prosecution failed to prove beyond a reasonable doubt every element of the second-degree child abuse charge. Specifically, defendant argues that the prosecution failed to prove the required intent, claiming that she was disciplining her youngest daughter and, believing her daughter was possessed by demons, locked her in the closet out of fear for defendant's safety and that of her other children.

Second-degree child abuse may be found where one of three possible scenarios is proved:

> (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 child regardless of whether harm results. [MCL 750.136b(3).]

The elements of second-degree child abuse, when subpart (c) of the statute is used, are:

> First, that defendant is the parent or guardian of the alleged abused child.
>
> Second, that the defendant knowingly or intentionally did an act that was cruel to the child.
>
> Third, that the child was under the age of 18 at the time of the alleged abuse. CJI2d 17.20b.

While the prosecution must prove the elements of the crime beyond a reasonable doubt, it is not obligated to disprove every reasonable theory consistent with innocence. *Nowack, supra*, p 400. The prosecution "need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.'" *Nowack, supra*, p 400, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

Here the prosecution proceeded under subsection (c), cruelty to the child. The statute defines "cruel" to mean "brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b). Second-degree child abuse, formerly known as cruelty, may be based on either an affirmative act or an omission. MCL 750.136b(3). For instance, where a second-degree child abuse charge is based on an alleged failure to provide nourishment, there must be direct or circumstantial evidence that would allow a rational trier of fact to conclude that the defendant had willfully failed to properly nourish the child. *People v Todd (On Rem)*, 201 Mich App 216, 217; 506 NW2d 9 (1993), modified and remanded 444 Mich 936 (1994). Reasonable discipline, including reasonable force, is permitted. *People v Sherman-Huffman*, 241 Mich App 264, 266; 615 NW2d 776 (2000).

Second-degree child abuse is a general intent crime. *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003), aff'd on other grounds 470 Mich 289 (2004). "[A] general-intent crime requires only the intent to perform the proscribed physical act." *Maynor*, *supra*, at 240. The intent of the defendant can be inferred from "his words or from the act, means, or the manner employed to commit the offense." *Hawkins*, *supra*, at 458. The prosecution was not required to prove actual harm to the child, only defendant's intent to commit acts cruel to her.

There was sufficient evidence that defendant committed acts cruel to her daughter, who was made to kneel with her arms outstretched, to feel what Christ felt; tied to a chair with no aid coming from her mother; locked in a closet by her mother for eleven hours and with no food, water or toilet inside.[1]

The child was frightened when her mother said she was possessed by demons, and she was naturally scared when defendant locked her in the closet "with all her demon friends." This evidence could have been regarded by the jury as evidence of cruelty, i.e., treatment that is "brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b). A hungry, frightened, and humiliated seven-year-old child could be viewed by the jury as having received treatment that torments.

Even assuming defendant believed that she was disciplining her daughter, such a belief could have been regarded by the jury as unreasonable or not in good faith. A rational jury could find an absence of a good faith belief in such discipline given its alleged premise, and a rational jury could find the discipline used to be unreasonable under the circumstances.

The jury was the judge of credibility, and the jury could have credited the child's testimony and concluded that, notwithstanding the alleged threat by the child to her mother, the

[1] Although defendant claims her daughter had water and an apple, this evidence was disputed, and the jury could have credited the prosecution's evidence on this point. Also, even if the child had water and an apple, defendant did not dispute that there was no toilet inside the closet. Deputy Sheriff Brian Lippard, who released the child from the closet, testified that she was famished after they went to the station and ate three times that morning. The jury could have believed that such evidence proved the alleged apple was insufficient for the eleven-hour confinement for a seven-year-old child.

child was treated cruelly under the circumstances. There was sufficient evidence to support the guilty verdict for second-degree child abuse.

III. Effective Assistance of Counsel

Defendant's second argument is that she was denied the effective assistance of counsel because her attorney failed to call a particular witness. We disagree.

A. Standard of Review

The issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Where a defendant fails to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim, appellate review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant here did not move for a new trial and there was not a *Ginther* hearing in the trial court, this Court's review is limited facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

B. Analysis

The record does not show that this issue was raised in the trial court. Although defendant contends that "there was a post-conviction hearing on this issue with offers of proof regarding facts not of record," there is no documentation of this in the lower court file. Therefore, this Court's review is limited to the existing record.

The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires a defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. *Pickens, supra*, p 338; see also *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *Garza, supra*, p 255. The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590 599; 623 NW2d 884 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy,

nor will it assess counsel's competence with the benefit of hindsight." *Garza*, *supra*, p 255. A counselor's determinations of which witnesses to call, and how to present them, are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).[2]

Defendant claims that her attorney failed to obtain the appearance of Classy Doris, the neighbor and friend of defendant's eldest daughter. It appears that Doris was under subpoena and appeared for the first day of trial but did not appear subsequently.

Defendant questions her counsel's decision not to call Doris as a witness or to secure her presence to testify. Defendant does not specify in what regard Doris' testimony would have assisted the defense and does not specify in what way the failure to secure Doris' appearance prejudiced her defense. As such, the decision not to call Doris as a witness is presumed to be a matter of trial strategy. This Court will not substitute its judgment for that of counsel on decisions of trial strategy. In light of the foregoing, the existing record does not indicate that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[2] Habeas corpus conditionally gtd sub nom *Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999), aff'd 257 F3d 554 (CA 6, 2001), judgment vacated and remanded *Mason v Mitchell*, 536 US 901; 122 S Ct 2354; 153 L Ed 2d 177 (2002), on rem *Mitchell v Mason*, 325 F3d 732 (CA 6, 2003).