STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2005
v	No. 256616 Monroe Circuit Court
CHRISTINA MAY BOUDRIE, Defendant-Appellant.	LC No. 03-033328-FH

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

PER CURIAM.

Defendant appeals as of right her jury trial conviction for first-degree child abuse, MCL 750.136b(2). Defendant was sentenced to 6 to 15 years' imprisonment for the first-degree child abuse conviction. We affirm.

This case arises out of defendant's abuse of her 21-month-old baby ("the victim") on November 8, 2003. Defendant's first issue on appeal is that the trial court erred in admitting a series of photographs depicting the victim's injuries under MRE 403 because the photographs were more prejudicial than probative and excited passion or prejudice in the jurors. We disagree. The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

In *Mills*, when addressing the steps necessary to determine the admissibility of photographs, the Supreme Court concluded that the first inquiry is whether the evidence is relevant under MRE 401, which requires that the evidence have any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* at 66-67. If the evidence is relevant under MRE 401, it must be determined whether the evidence should be excluded under MRE 403, which addresses whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 66. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (citations and quotation marks omitted). The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility, and effect of the evidence. *People v Albers*, 258 Mich App 578, 588; 672 NW2d 336 (2003).

At trial, defendant argued that the injuries occurred when the victim accidentally fell out of the bed and hit the alarm clock on the floor, while the prosecution argued that defendant's beating or shaking the victim caused the injuries. The photographs of the injuries were, therefore, relevant to determine whether the injuries occurred from falling or from a beating or shaking, as the types of wounds could make defendant's argument that the victim's injuries were accidental less probable than it would be without the evidence. The extent of the injuries was also relevant to the child abuser's identity, as one of defendant's defenses was that either her 11 year old sister, Rebekah Lynn Boudrie, or her boyfriend, Logan Cloum, caused the victim's injuries. Moreover, the prosecutor must prove every element of a crime beyond a reasonable doubt, *Mills*, *supra* at 69-70, and "serious physical harm" is one of the elements of first-degree child abuse, MCL 750.136b(2). The photographs were, therefore, relevant to show the severity of the harm. MRE 401.

Still, defendant maintains that the probative value of the photographs depicting the victim's injuries was substantially outweighed by the danger of unfair prejudice under MRE 403. Defendant suggests that the admitted photographs only inflamed passion and prejudice in the jury. Defendant's claim has no merit because the close-up photographs of the victim's injuries, depicting the extensive bruising on both sides of the forehead, cheeks, and ears, and the swelling to the lips, were not particularly gruesome and they were a fair and accurate representation of the victim's injuries on the morning and afternoon of November 8, 2003. The photographs "did not present an enhanced or altered representation of the injuries." *Mills, supra* at 77. Moreover, these photographs were highly probative because they corroborated the testimony of the treating doctors, Dr. Jeffery Couturier and Dr. Randall Scott Schlievert, that the victim had abusive head trauma, that the injuries to her head were not self-inflicted, and that the victim's injuries were not consistent with falling out of bed and hitting an object on the carpeted floor. Photographs may properly be used to corroborate a witness' testimony. *Id.* at 76. Also, the photograph showing the darkening of the victim's bruises and the victim being on a respirator was relevant to the doctors' testimony that the victim's condition deteriorated after she was admitted, that she was on a respirator, and that she was in critical condition. The mere fact that defendant stipulated to the victim's injuries and that the witnesses can orally testify regarding the nature or extent of her injuries does not render evidence regarding these matters inadmissible. The photographs provided a visual depiction of the doctors' testimony about the injuries, and photographs are not excludable merely because they go to an undisputed point or a witness can testify about what they depict. *Id*. As such, we conclude that the trial court did not abuse its discretion in admitting the challenged photographs and in determining that they were more probative than prejudicial. *Id*.; MRE 403.

Defendant's second issue on appeal is that the trial court should have granted her motion for a directed verdict and found that the prosecution presented insufficient evidence to prove the essential elements of first-degree child abuse beyond a reasonable doubt. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove defendant guilty of first-degree child abuse**,** the prosecutor had to show that defendant "knowingly or intentionally caused serious physical or serious mental harm to a child." MCL 750.136b(2). The only element disputed in this case was the identity of the person who harmed the victim. Although there was no direct or physical evidence linking defendant to the victim's injuries, we find that the circumstantial evidence, when viewed in a light most favorable to the prosecution, supported an inference that defendant intended to cause serious physical harm to the victim.

Here, the testimony of Dr. Couturier and Dr. Schlievert, who treated the victim, as well as the testimony of other witnesses, established that the injuries most likely occurred between the time the victim was seen acting normally, without bruising, at 11:30 P.M. on November 7, 2003, and the time the victim was found lying on the floor at 3:30 A.M. on November 8, 2003. It is undisputed that, during that four-hour time frame, defendant, Rebekah, Cloum, and defendant's father, Ledyard Martin Boudrie, were the only people in the house and that someone in the house inflicted the injuries on the victim. Among those four people, circumstantial evidence shows that defendant was the person with the greatest opportunity to harm the victim. The evidence clearly establishes that Ledyard had no motive or opportunity to hurt the victim because he stayed mostly outside and did not go upstairs to see the victim in the house during the time period. Regarding Rebekah, the testimony of Dr. Schlievert and Dr. Couturier established that a child of Rebekah's age and weight could not likely inflict such injuries. Also, Rebekah had no motive to hurt the victim because she was not the primary caretaker of the victim. The evidence shows that, after Rebekah failed to put the victim to sleep, she brought the victim downstairs to defendant at approximately 11:30 P.M. and the victim at that time was playing and acting normally. After the victim went to sleep, Rebekah watched a movie downstairs and did not go upstairs to check on the victim. Regarding Cloum, the evidence shows that he only briefly saw the victim sleeping on the Rebekah's bed, facing toward the window, at approximately 1:30 A.M., and he did not discover the victim's injuries until he and defendant checked on the victim at 3:30 A.M. The evidence shows that, although the victim did not like Cloum, he was never seen acting unkind to the victim.

On the date of the incident, defendant told other witnesses that the victim's injuries were accidental and no one in her house abused the victim. After police asked defendant whether she hurt the victim, however, defendant got angry and accused Rebekah, and later Cloum, of causing the victim's injuries. Defendant told Detective David Davison on November 11, 2003, and also on April 29, 2004, that Rebekah was responsible for the victim's injuries because she saw Rebekah hitting the victim and bouncing her on the air mattress. When Detective Davison told defendant that the doctors would testify that Rebekah was not capable of inflicting the victim's injuries, defendant changed her story again and told Detective Davison that Cloum was responsible for the victim's injuries. A month after the incident, defendant also told Ledyard and defendant's stepmother, Jennifer Lee Boudrie, that Rebekah or Cloum may have caused the victim's injuries. The evidence, however, clearly shows that the victim exhibited no symptoms of the injuries before defendant took the victim upstairs and put her to sleep at 12:30 A.M. on November 8, 2003. The evidence shows the victim cried for a half hour before defendant put her to sleep and that defendant checked up on her throughout the night. Also, after defendant got the victim to go to sleep, defendant made damaging statements to Cloum that she had to whip the victim to put her to bed and, after defendant checked on the victim at approximately 1:30 A.M. on November 8, 2003, she told Cloum that she may have hurt the victim. In addition, the medical

testimony established that the victim had old head injuries, more than a dozen scars on her arms and cigarette burns on her hands while she was in defendant's care. Allowing for reasonable inferences to be drawn and taking the facts in the light most favorable to the prosecutor, *Aldrich, supra* at 122, a reasonable trier of fact could have found beyond a reasonable doubt that defendant intended to harm the victim. As such, we conclude that the trial court did not err in denying defendant's motion for a directed verdict and finding that there was sufficient evidence to support defendant's first-degree child abuse conviction.

The third issue on appeal is that the trial court erred in admitting defendant's statement to a protective services worker from the Family Independence Agency (FIA), Carol Gustafson, because defendant was not provided with *Miranda*[1] warnings before giving that statement. We disagree. The trial court's factual findings after a suppression hearing are reviewed for clear error. *People v Herndon,* 246 Mich App 371, 395; 633 NW2d 376 (2001). The critical issue whether defendant was in custody, however, is reviewed de novo. *Id.*

Here, following a suppression hearing, the trial court allowed Gustafson to testify regarding defendant's statement, determining that there was no need for Gustafson to advise defendant of her *Miranda* rights. We agree with the trial court's ruling. Defendant specifically contends that because she was the focus of the investigation, she was entitled to *Miranda* warnings. We find no merit in defendant's contention because this Court has clearly held:

> *Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of the investigation. Custodial interrogation is "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" [*Herdon, supra* at 395-396 (footnotes omitted).]

In other words, "an officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with formal arrest." *People v Peerenboom,* 224 Mich App 195, 197; 568 NW2d 153 (1997). Here, it is undisputed that defendant was not in custody and was free to leave at the time of her interview with Gustafson. As such, it was unnecessary to advise defendant of her *Miranda* rights. *Id.* at 198.

Defendant further relies on *Grand Rapids v Impens*, 414 Mich 667; 327 NW2d 278 (1982), to argue that because the coordinated effort between Gustafson and the police constituted state action, she was entitled to *Miranda* warnings. This case, however, does not support defendant's argument. In *Impens,* the Supreme Court noted that constitutional protections apply only to governmental action, and thus, a person who is not a police officer, and not acting in concert with or at the request of police authority, is not required to give *Miranda* warnings before eliciting a statement. *Id.* at 673. Accordingly, it has been held that private security guards not acting at the instigation of the police or functioning with their assistance or cooperation need not give *Miranda* warnings before eliciting an inculpatory statement, *id.* at

[1] *Miranda v Arizona,* 384 US 536; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

677-678, and that a Department of Social Services caseworker who was not charged with the enforcement of criminal laws and was not acting at the behest of the police was not required to advise the defendant of his *Miranda* rights, *People v Porterfield*, 166 Mich App 562, 567; 420 NW2d 853 (1988).

Similar to private security guards in *Impens*, and the Department of Social Services caseworker in *Porterfield*, Gustafson was not acting in concert with or at the request of police authority. Gustafson testified that she was a child protective services worker, working only for the interest of her employer, the FIA, and that her interview with defendant was not initiated or motivated by the police. She did not exceed the scope of her duties to interview defendant under the FIA policy. She did not have the authority to arrest or detain anyone. There was no evidence that Gustafson was working at the behest of the police. Thus, contrary to defendant's contention, Gustafson was not a police agent for purposes of *Miranda*, and was not required to give defendant *Miranda* warnings. *Porterfield*, *supra.* Because defendant's statement to Gustafson was not initiated by the police, but freely and voluntarily given to Gustafson, we conclude that the trial court did not err in admitting defendant's statement.

Defendant's fourth issue on appeal is that her Fifth Amendment right against self-incrimination was violated when, during voir dire, the prosecutor improperly commented on the issue of defendant's right not to testify and shifted the burden of proof to defendant. We disagree. Because no objection was raised to the prosecutor's comment at trial, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

"A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the 'presumption of innocence.'" *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995) (citing US Const, Am V; Const 1963, art 1, § 15). Thus, a prosecutor may not comment on a defendant's failure to testify. *Id*. at 108-109. Defendant challenges the prosecutor's following statements made to the jury during voir dire:

> [*The Prosecutor*]: All right. I'm not saying it's easy. I'm not saying it's easy. Now, here the – the defendant doesn't have to prove anything. The defendant doesn't have to take the stand. The burden of proof is on the People. But if the defendant takes the stand, is there anybody who would give her testimony special weight or special consideration because she is the one accused of the crime?
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> [*The Prosecutor*]: Okay. Is there anybody else who would give the defendant's testimony more weight or more credibility because she's the one that's accused?
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> (No verbal response)
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> [*The Prosecutor*]: And, Mr. Larrow, you look confused. Let me ask the question a little bit differently. The judge is going to instruct you guys, at the

> end of the trial I believe, that you're supposed to, you know – everyone's testimony is to be judged by the same weight. Everyone's testimony is supposed to be judged by the same weight. And the fact someone might be a police officer or a defendant, if they take the stand, or an expert witness, doesn't meant that they automatically get extra points or extra credibility. You're to evaluate everyone's testimony by the same standards. Is there anyone who would have a problem following those sort of instructions?

We find that the prosecutor's comment in this case was not a comment on defendant's right not to testify. In context, the prosecutor's comment only emphasized for the jury that if defendant testifies, the jury should judge defendant's testimony in accordance with the same standards used to evaluate the testimony of other witnesses. Moreover, immediately before making the challenged comment, the prosecutor noted, "The defendant doesn't have to prove anything. The defendant doesn't have to take the stand. The burden of proof is on the People." Thus, defendant's argument that the prosecutor's comment shifted the burden of proof to defendant has no basis. Furthermore, the trial court clearly instructed the jurors both during voir dire and in his instructions that a defendant was presumed innocent, that a defendant's decision not to testify cannot be used against him, that the lawyers' comments were not evidence in the trial, and that they should judge the testimony of all the witnesses by the same standards. As jurors are presumed to follow the trial court's instructions, *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), we cannot conclude that the prosecutor's comment affected the outcome of defendant's trial. As such, defendant failed to establish a plain error that affected her substantial rights. *Carines*, *supra* at 763-764.

Defendant's final issue on appeal is whether, pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 403 (2004), defendant's Sixth Amendment right to a jury trial was violated when the sentencing judge enhanced defendant's sentence based on facts not found by a jury beyond a reasonable doubt or conceded by defendant. Here, the sentencing guidelines indicated a range of 45 to 75 months, but the sentencing judge increased defendant's sentence 6 to 15 years.

Contrary to defendant's argument, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), a majority of the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's indeterminate sentencing system, stating:

> "Michigan, in contrast [to Washington's system], has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum. The maximum is not determined by the trial judge but is set by law. MCL 769.8. The minimum is based on guidelines ranges as discussed in the present case and in [*People v*] *Babcock*, [496 Mich 247; 666 NW2d231 (2003)]. The trial judge sets the minimum but can never exceed the maximum (other than in the case of a habitual offender, which we need not consider because *Blakely* specifically excludes the fact of a previous conviction from its holding.) *Accordingly, the Michigan system is unaffected by the holding in Blakely that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment*." [Emphasis added.]

Recently, the United States Supreme Court found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*. *Untied States v Booker*, 543 US 220, 125 S Ct 738; 160 L Ed 2d 621 (2005) (opinion of STEVENS, J.). Thus, the Court held that the mandatory nature of the federal guidelines rendered them incompatible with the Sixth Amendment's guarantee to the right to a jury trial. *Id.* at 759 (opinion of BREYER, J.). In so ruling, the Court applied its holding in *Blakely* to the Federal Sentencing Guidelines and explicitly reaffirmed its rationale first pronounced in *Apprendi v New Jersey*, 530 US 466; 147 L Ed 2d 435; 120 S Ct 2348 (2000), that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, *supra* at 756 (opinion of STEVENS, J.). We find, however, that the holding in *Booker* is not controlling in Michigan because *Booker* dealt with the federal sentencing scheme, which is different from Michigan's indeterminate sentencing scheme. Accordingly, we hold that defendant's challenge to the trial court's sentencing procedure is without merit.[2]

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[2] We note that the Supreme Court has recently granted leave in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), to consider the sole issue whether *Blakely* and *Booker* apply to Michigan's sentencing scheme. See *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005).