STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 269957 St. Joseph Circuit Court
JUSTIN WAYNE MONTGOMERY, Defendant-Appellant.	LC No. 02-011413-FH

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant Justin Wayne Montgomery appeals as of right his jury trial conviction for first-degree child abuse, MCL 750.136b(2). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 10 years to 22 years and six months' imprisonment, with credit for 295 days served. We affirm.

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to present the testimony of medical expert Dr. Betty Spivack as a rebuttal witness. We disagree. We review a trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *Figgures*, *supra* at 399. "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id.* Therefore, if a prosecutor's evidence is responsive to evidence or a theory introduced by defendant, it is proper rebuttal, even if it overlaps evidence that was introduced in the prosecutor's case-in-chief. *Id.* Rebuttal evidence is limited in scope in order to, among other things, prevent prosecutors from unduly magnifying evidence by dramatically introducing it late at trial, and to avoid unfairly surprising defendants by informing them of the identity of opposing witnesses. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995), *People v McGillen #1*, 392 Mich 251, 265-266; 220 NW2d 677 (1974).

Dr. Spivack's rebuttal testimony was responsive to evidence introduced by defendant. The prosecutor elicited testimony from Dr. Spivack that responded to several assertions made by defendant's expert witness, Dr. Uscinski, regarding the causation of the victim's injuries, and the likelihood of alternative causation. Because Dr. Spivack's testimony was properly responsive to evidence introduced by defendant, through the direct testimony of his expert, Dr. Uscinski, the trial court did not abuse its discretion by denying defendant's motion to exclude her testimony.

Defendant next argues that the trial court abused its discretion by denying his motion for a new trial, which was based upon the existence of newly discovered evidence. We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). At a post-trial hearing on his motion for a new trial, defendant presented the testimony of two medical experts, Drs. Byrne and Martel, to attempt to show that Dr. Spivack's testimony was "false and incorrect."[1] Defendant argues on appeal that the evidence of the allegedly false nature of Dr. Spivack's testimony was not discoverable at the time of trial, because the prosecutor allegedly changed his theory of the case from "shaken baby syndrome" to "abusive head trauma," and because the only way defendant was able to scrutinize Dr. Spivack's testimony was through "careful review" by "medical experts."

In order to justify a new trial based on newly discovered evidence, a defendant is required to demonstrate that: (1) the evidence itself, and not just its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the defendant, exercising reasonable diligence, could not have discovered or produced the newly discovered evidence at trial; and, (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Newly discovered evidence does not justify a new trial when it would merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). However, discovery that testimony introduced at trial was perjured can, in some circumstances, justify a new trial. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977).

Defendant's evidence does not show that the prosecutor's witnesses committed perjury, or presented false testimony. Instead, the proffered expert testimony merely showed the existence of medical controversy regarding abusive head trauma, and its associated symptoms. Dr. Martel acknowledged that the medical issue was "rather complicated," that there was a "great deal of controversy" about that subject at the time of the hearing, and that the medical community was "in the process of evolution" about the subject. In addition, defendant has not shown that he could not have discovered and presented the testimony of Drs. Byrne and Martel at trial. When it denied defendant's motion for a new trial, the trial court stated;

[1] We take every issue raised on appeal seriously, but an allegation that an attorney has presented false testimony to the jury is of grave concern. All attorneys in this state have taken an oath not to "mislead the judge or jury by any artifice or false statement of fact," an act which would also be violative of the Michigan Rules of Professional Conduct. MRPC 3.3(a)(4).

> Here we had - - two people came in to testify, at this time. I don't know why they - - they didn't come in from before. They could have. They didn't. . . . There was no request for surrebuttal, in this particular situation. . . . As I said, there was no request for sir rebuttal [sic]. We've had ample testimony at prelim [sic] and ample testimony during the trial itself of what the areas of concern were to be and . . . none of the testimony today was taken, at that time, or offered at that time.

At most, the evidence presented by defendant at the hearing on the motion for a new trial showed that two experts disagreed with the opinions offered by the prosecution experts, and that opinions and research on "abusive head trauma" is evolving. Thus, because the prosecutor's expert witnesses did not present false testimony, and because defendant did not establish that he could not have discovered and presented the testimony of his post-trial medical experts prior to trial, the trial court's decision was not outside of the range of principled outcomes. *Babcock, supra*.

We also disagree with defendant's next argument, that the trial court erred by admitting the testimony of defendant's medical experts,[2] because they did not meet the standard required by MRE 702. Generally, we review the qualification of a witness as an expert and the admissibility of the witness's testimony for an abuse of discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). Because defendant did not preserve this issue with a timely and specific objection, our review is for plain error. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). An evidentiary error does not merit reversal in a criminal case unless the defendant can show that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant not only failed to preserve this issue, he arguably waived it. An invited error occurs "when a party's own affirmative conduct directly causes the error" of which that party later complains, *Jones, supra* at 353, and in his appellate brief defendant admits that he refrained from objecting to the prosecutor's medical witnesses "due to trial strategy." Thus, defendant consciously chose to permit the testimony, which in turn precluded the trial court from fully developing the basis for the expert's testimony.

In any event, defendant has not shown that the admission of the prosecutor's medical witnesses constituted plain error. MRE 702 allows expert opinions to be based upon the specialized knowledge or training of a witness, as long as the testimony is based upon reliable principles. The prosecutor's expert witnesses based their opinions on their specialized knowledge and training, such as their clinical experience, and at least one controlled test comparing children with intentionally inflicted head trauma with children who had accidental head trauma. They also based their opinions on medical data such as CT and MRE scans, and medical records reporting objective physical findings. Nothing in the record supports defendant's assertion that the expert's opinions were based on junk science. Thus, the admission of the prosecutor's expert witnesses was not plain error.

[2] Drs. Broadbent, Libby, Palusci, and Spivack.

Defendant next argues that there was insufficient evidence for a rational jury to find the elements of first-degree child abuse. We review challenges to the sufficiency of the evidence de novo, and in a light most favorable to the prosecution, to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and any reasonable inferences arising from such evidence can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To prove first-degree child abuse, MCL 750.136 (B)(2), the prosecution must prove that a person knowingly or intentionally caused serious physical or serious mental harm to a child, with the specific intent to cause the harm, and not merely the intent to do the act, which caused the harm. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Additionally, identity is always an element to be proven in a criminal prosecution. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Viewing the evidence in a light most favorable to the prosecution, the prosecutor presented evidence that on January 21, 2000, the victim was injured by a "really aggressive degree of force," which caused significant brain damage. The prosecutor also presented evidence that the victim was injured during a period of time when he was in the sole care and custody of defendant. Stephanie was not home during the day the victim was injured. Defendant even admitted that, while Stephanie was at work, the victim consumed a normal amount of formula at 7:30 a.m., but was not able to normally consume formula when Stephanie returned, at 3:30 p.m. This admission supported the conclusion that defendant caused the victim's injuries. Additionally, while defendant argues that there was no evidence to establish his intent to cause serious physical or mental harm to the victim, the evidence of the serious nature of the victim's injuries, specifically a bruise on his right temple, bulging fontanels, and fresh retinal hemorrhaging, and the force necessary to cause them was sufficient evidence from which a rational jury could find the element of intent. In addition, Dr. Spivack opined that the injuries were not accidental. Defendant's intent may be inferred from circumstantial evidence, including the victim's injuries, and, because of the difficulty of proving intent, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Therefore, viewed in a light most favorable to the prosecutor, there was sufficient evidence from which a rational jury could find defendant guilty of first-degree child abuse.

Defendant's final argument is that the trial court abused its discretion in scoring defendant's sentence under the sentencing guidelines. Specifically, defendant argues that the trial court misscored prior record variable (PRV) 3, and offense variable (OV) 13. A preserved challenge to the trial court's scoring under the sentencing guidelines is reviewed for an abuse of discretion, *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002), though the interpretation of the sentencing guidelines is reviewed de novo. *Babcock, supra* at 253. This Court will uphold the trial court's scoring if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Defendant first argues that the trial court erred in scoring 50 points for PRV 3, MCL 777.53. PRV 3 is the prior record variable for "high severity juvenile adjudications," MCL 777.53, and requires the trial court to score 50 points to defendants with three or more high severity juvenile adjudications. Defendant argues that his three breaking and entering

adjudications should not have been counted, because he did not sufficiently waive his right to counsel at the proceedings. Although, juvenile adjudications obtained without the right to counsel cannot be used to enhance a criminal sentence, *People v Carpentier,* 446 Mich 19, 28; 521 NW2d 195 (1994), a defendant must establish that the conviction was obtained in violation of his right to counsel. *Id*. at 31. A defendant can meet this burden by: (1) presenting proof that a previous conviction was obtained without counsel; or (2) presenting evidence that the sentencing court either failed to reply to a defendant's request for records of the defendant's previous adjudicatory proceedings, or refused to furnish copies within a reasonable time. *People v Moore,* 391 Mich 426, 440-441; 216 NW2d 770 (1974). Here, the transcript of the juvenile proceeding demonstrates that defendant made a voluntary and knowing waiver of his right to counsel. The transcript shows that defendant was informed by the hearing referee that he could hire an attorney, request an appointed attorney, or waive his right to an attorney. Defendant informed the hearing referee that he "was thinking I don't need an attorney," after which the referee informed defendant that he could change his mind at any time during the proceedings. Therefore, the trial court correctly found that defendant knowingly and intelligently waived his right to counsel, and thus defendant's high severity juvenile adjudications were properly scored in his sentence.

Defendant also argues that the trial court incorrectly scored OV 13, MCL 777.43, at 25 points. Twenty-five points are scored under OV 13 when a defendant engages in "a pattern of felonious criminal activity" involving three or more offenses against a person, including the sentencing offense, within the last five years. MCL 777.43; *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). The criminal activity does not need to have resulted in a criminal conviction. MCL 777.43 (2)(a). While defendant is correct that juvenile adjudications are different than criminal convictions because they are civil offenses, the language of MCL 777.43 does not limit the allocation of points based on adult criminal proceedings. The statute requires the scoring of points for any felonious criminal activity, and we enforce the plain and unambiguous language of the statute as written. Therefore, the trial court did not abuse its discretion by scoring 25 points to OV 13.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray