STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2007
v	No. 269255 Grand Traverse Circuit Court
PHILLIP JON FAHRNER, Defendant-Appellant.	LC No. 05-009872-FH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree child abuse, MCL 750.136b(2). We affirm.

Defendant first argues that his counsel was ineffective in part because he was distracted from fully representing defendant by his own personal legal issues. Defendant further argues that counsel did not conduct adequate research to effectively defend the case, and that he unlawfully delegated said research to his paralegal, whom he neglected to supervise. Defendant does not cite specific examples of how counsel improperly delegated research, but states that the paralegal would be willing to testify as to these alleged improprieties.

In order "to find that a defendant's right to [the] effective assistance of counsel was so undermined that it justified reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations and emphasis omitted). But, effective assistance of counsel is presumed and the defendant bears a "heavy burden" of proving otherwise. *Id*.

With regard to defendant's claim that defense counsel did not vigorously defend his case because of his issues with the bankruptcy court, defendant states that the United States Supreme Court has held that an attorney is presumptively ineffective when he labors under an actual conflict of interest. In support of this claim, defendant cites the Court's opinion in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); however, defendant

misrepresents the Court's holding. In *Strickland*, the Court stated that "prejudice is presumed when counsel is burdened by an actual conflict of interest." *Id*. at 692. The Court found that a conflict of interest occurs in situations where counsel has breached the "duty of loyalty," but cautioned that prejudice will be "presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id*. at 692, quoting *Cuyler v Sullivan*, 446 US 335, 348, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Defendant has not met the burden set forth by the Court in *Strickland*.

Defendant states that he was prejudiced by counsel's interest in litigating his case "quickly and quietly" so as to escape the notice of his lawful creditors. However, defendant does not provide evidence for this claim, nor does he show that his defense was hampered in any way by counsel's ostensibly unrelated professional or financial problems. Defendant's trial was litigated over three days, and defense counsel presented witnesses and cross-examined the prosecution's witnesses. There is no evidence in the record that the trial should have gone on longer but for defense counsel's negligence and desire to hurry the case to its conclusion. In *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998), our Supreme Court held that

> there is no automatic correlation between an attorney's theoretical self-interest and an ability to loyally serve a defendant. . . . [W]e recognize the potential for an attorney's self-interest to conflict with the representation of a defendant and that in such a case a finding of ineffective assistance of counsel would be warranted. If a convicted defendant believes that his attorney's representation was below an objective standard of reasonableness, the appropriate procedure is to seek a *Ginther*[1] hearing.

In the instant case, a *Ginther* hearing was held, and the trial court made a decision on the record that counsel was not presumptively ineffective based on his personal issues with creditors, because there was no actual conflict of interest involved in hiding money from creditors and effectively representing defendant. This finding is not clearly erroneous and, accordingly, defendant has not established an ineffective assistance of counsel claim based on the purported conflict of interest.

Defendant also argues that his counsel was ineffective because he did not conduct adequate research to effectively defend the case, and because he delegated his research duties to an unsupervised paralegal. The issue of defense counsel's preparation was also addressed at the *Ginther* hearing, with the court making extensive findings on the record regarding counsel's performance at trial. The court stated in regard to defense counsel's cross-examination of one of the prosecution's medical experts, "[t]hese are not questions asked by somebody who failed to prepare on the issue of infant death due to blows or being shaken. He obviously had done some preparation on the subject." The court also found that counsel's opening statement and closing argument "reflect[ed] preparation and thought as to how to argue the case." Defendant does not

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

offer any evidence that the trial court's findings were in error. Thus, his claim that he was denied the effective assistance of counsel fails. See *Pickens*, *supra* at 302-303.

Next, defendant objects to the testimony of Dr. Annamaria Church (a medical expert witness for the prosecution) as unduly prejudicial and argues that her opinions were admitted as evidence in violation of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993). Defendant is correct in indicating that Michigan evidentiary law has effectively adopted the *Daubert* standard, as our Supreme Court has referred to the current version of MRE 702 as having been adopted "explicitly to incorporate *Daubert*'s standards of reliability." *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court did not abuse its discretion in admitting Dr. Church's expert testimony as to the cause of Cameron's injuries.

Dr. Church was the interim head of the child protection team at DeVos Children's Hospital. She began a residency in pediatrics in 1979 and, since May 1981, had been involved in working with children who were victims of child abuse. Dr. Church was also involved in teaching and training residents in pediatrics. Her conclusions based on the medical evidence as to the cause of Cameron's injuries—essentially that they were not accidentally caused and that they were caused by the use of substantial physical force against him—appear to have been rationally based on her examination of him and other medical evidence as to his injuries considered in light of her knowledge, skill, experience, training, and education as a highly experienced pediatrician with substantial expertise in treating abused children. Even if some of her conclusions could be debated or questioned, this Court has observed with regard to the admissibility of evidence under MRE 702 and *Daubert* that "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007).[2] Rather, the proper role of a trial court in a *Daubert* analysis

> is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily

[2] The portions of *Chapin* we cite are from Judge Davis' lead opinion in that case. Judge Meter, in his separate opinion in *Chapin*, stated that he concurred in Judge Davis' opinion, *Chapin*, *supra* at 141 (Meter, J., concurring), but he provided some additional observations. Accordingly, Judge Davis' lead opinion constituted a majority opinion of this Court.

> correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Id*. at 139.]

It is apparent that Church's testimony as to the cause of Cameron's injuries was rationally derived from the sound foundation of her expertise and the medical evidence. Thus, the trial court did not abuse its discretion in admitting that testimony.

Next, defendant argues that he is entitled to a new trial because "critical evidence" was not presented to the jury for its deliberation, and new evidence has been discovered that was not available prior to trial. After review for an abuse of discretion of the trial court's decision to deny defendant's motion for a new trial, we disagree. See *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

At the hearing on his motion for new a trial, defendant's appellate counsel cited reports from his experts that found that the complainant's victim had "mixed density blood" in his system following his admission to the hospital. According to defendant's experts, this condition indicated the presence of both old and new injuries. The court noted that a physician who had operated on the victim attributed the mixed fluids to the presence of spinal cord fluid in his blood, not to an old injury; however, appellate counsel argued that whatever the explanation for the fluid, the matter should have been submitted to the jury. On appeal, defendant argues that the reports of his experts should be submitted to the court as part of a second motion for a new trial.

Our Supreme Court has stated that in order "[f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Cress*, *supra* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Defendant has not met the burden required for any of the four elements of the test.

First, defendant has not shown that the evidence is newly discovered. Defendant alleges that the victim's x-rays and brain images were not given to the defense until after trial. Defendant does not claim, however, that he was unable to access these medical records prior to trial. Second, this purported newly discovered evidence was cumulative with regard to defendant's claim that the subdural hematoma suffered by the victim was a re-bleed of an old injury in that Dr. John Kopec did acknowledge during defense counsel's cross-examination that possibility. Third, as mentioned above, there is no indication that defendant could not have produced this evidence during trial. Finally, in light of these circumstances, a different result on retrial is not probable. In addition to the fact that the alleged evidence of a re-bleed was available during trial, ample evidence was provided at trial suggesting that defendant was responsible for the child's injuries. Admission of the experts' reports would not negate the testimony from the investigating officer regarding defendant's evolving stories of how the child's injuries occurred, nor would it likely override defendant's testimony about how those injuries occurred.

Incidentally, defendant also argues on appeal that other "critical evidence" was not presented to the jury and that evidence presented by the prosecution was not effectively challenged by defense counsel. Therefore, defendant argues, he should be afforded an

opportunity to go before the lower court for an evidentiary hearing to consider the "several flaws in the State's [medical] evidence" cited by defendant's "multiple experts." This argument is both vague and unsubstantiated by defendant's brief and the record. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Thus, we reject this claim.

Finally, defendant argues that he is entitled to resentencing because the trial court improperly scored him under the guidelines. We disagree.

First, defendant claims that offense variable (OV) 7 was improperly scored at 50 points. We disagree. We review a trial court's scoring decision for an abuse of discretion and a scoring decision will be upheld if there is any evidence in support of it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.37 governs OV 7, aggravated physical abuse, and provides that 50 points may be scored if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Defendant claims that his conduct, as characterized by the prosecution, was that of someone merely "out of control," and not the conduct addressed by the variable. At his sentencing, defendant argued that the only part of the statute that potentially applied was "excessive brutality," which was already covered by the charge of child abuse because child abuse inherently involves a certain amount of brutality. We disagree.

The evidence included that (1) defendant struck the 11 month old child victim with an open hand hard across the left side of his face after the child threw his bottle to the floor, (2) while the child was crying after being slapped, defendant allowed the child to stand up on or near a coffee table and fall, striking his head on the table, (3) defendant then let the child fall again and strike his head on the floor, (4) after the child laid on the floor crying for minutes, defendant picked up the child who vomited on defendant, (5) defendant then "tossed" the child onto the floor from a height of over four feet causing the child to strike the back of his head on the kitchen floor, and (5) as defendant was exiting the house to take the child, who was exhibiting signs of serious injury, to a neighbor for assistance, defendant allowed the child's head to hit a door and then the door to hit the child in the head, a second time, while defendant was carrying the child.

"Brutality" is not defined in the statute, but *Random House Webster's College Dictionary* (1995) defines it as "the quality or state of being brutal," and "brutal" as "savage; cruel; inhuman." We cannot conclude that the trial court abused its discretion when it determined that OV 7 should be scored at 50 points considering the numerous and varied forceful impacts to the child's head and body, as well as defendant's callus and repeated disregard for the child's well-being. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) (an abuse of discretion occurs when the result is outside the principled range of outcomes).

Next, defendant claims that he is entitled to resentencing because the court departed from the sentencing guidelines without articulating a substantial and compelling reason for its upward departure. We disagree.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so, and states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock*, *supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). With regard to such departures, we review the existence of a particular factor supporting departure for clear error, the determination whether that factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock*, *supra* at 264-265.

Here, among other reasons, the trial court stated that it was departing from the guidelines because of their failure to adequately address the severity of the victim's injuries as relates to the impact those injuries have on the victim's mother and other family members. The reasons given by the trial court for its departure exist, are objective and verifiable, and are substantial and compelling. Defendant's conduct resulted in the severe and permanent mental and physical impairment of the child victim. Although the victim's injuries are at least partially addressed by the statute governing defendant's conviction, the impact of the crime on the victim's family was not addressed. Certainly the severe and permanent nature of the injuries sustained by the 11 month old child victim caused his mother considerable psychological distress as well as other significant hardships associated with providing almost constant care to the child—as she discussed at sentencing. Because this factor was not considered by the guidelines, the court's sentencing departure was not improper.

Finally, defendant argues that he is entitled to resentencing because the trial court relied on facts that were neither admitted to by defendant nor found beyond a reasonable doubt by the jury. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), for the argument that *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), requires a jury to find all facts underlying sentencing beyond a reasonable doubt. However, our Supreme Court has determined that *Blakely* does not apply to Michigan's sentencing scheme. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007). Therefore, this argument must be rejected.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh