STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2008
v	No. 273060 Oakland Circuit Court
TRACEY ANN BROSCH, Defendant-Appellant.	LC No. 2006-206798-FH

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant Tracy Ann Brosch appeals as of right from her jury conviction of first-degree child abuse.[1] The trial court sentenced Brosch to eight to fifteen years' imprisonment. We affirm.

I. Basic Facts And Procedural History

This case arose when Brosch, after admittedly spending the night alone with her 14-month-old daughter, took her daughter to the doctor with bruises and severe head trauma. Brosch claimed that the baby suffered from congestion and that she had tried to revive the baby by pressing on her back on the floor. The baby was rushed to the hospital and directly into emergency surgery to drain blood from her head. At the hospital, it was also determined that both of the baby's eyes had severe internal bleeding that made her temporarily blind. Doctors at the hospital concluded that the injuries were inconsistent with what Brosch stated had happened because they only could have happened from nonaccidental head trauma. However, a defense expert testified that the bleeding was chronic (slow and long term), not acute. Fortunately, the child survived.

II. Prosecutorial Misconduct

A. Standard Of Review

Brosch argues that she was denied her due process right to a fair trial because the prosecutor committed misconduct during closing argument by improperly impugning the

[1] MCL 750.136b(2).

integrity of her expert witness and thus, by implication, improperly impugning defense counsel for hiring the expert. Generally, we review de novo a claim of prosecutorial misconduct.[2] However, we review unpreserved claims of error under the plain error standard.[3] With regard to such unpreserved claims, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."[4] Reversal is not required "where a curative instruction could have alleviated any prejudicial effect."[5]

B. Legal Standards

We review prosecutorial misconduct claims on a case-by-case basis, looking at the prosecutor's comments in context, and in light of the defense arguments and their relationship to evidence admitted at trial.[6] A prosecutor may not argue facts not entered into evidence,[7] but may otherwise argue the evidence and all reasonable inferences it creates.[8]

C. Applying The Standards

Brosch claims that it was misconduct for the prosecutor to argue that her expert was not to be relied on because he always testifies for the defense, that he always testifies to the same thing (chronic subdural hematomas), that he never examined the baby directly, and that he accepted $12,000 to testify. Indeed, the prosecutor stated that, "I bet you can get anybody to say anything for $12,000." But all of those arguments are based on facts entered into evidence. Brosch's expert was admittedly paid $12,000 to testify, he did admit that he never testified for the prosecution, he did not come up with any examples of cases where he testified that a subdural hematoma was not chronic, and he never examined the baby directly. Brosch accurately states that a prosecutor "may not attempt to inject unfounded prejudicial innuendo into the proceedings,"[9] but that is not what happened here. Rather, the prosecutor raised logical reasons from the evidence to question the defense expert's credibility. The factual record supported the prosecutor's statements, and as such, the prosecutor was allowed to argue the evidence and all reasonable inferences it created.

Additionally, Brosch claims that the prosecutor's attack on her expert's credibility was also an improper attempt to imply that defense counsel was trying to fool the jury by hiring the expert to testify. But the prosecutor never made any direct statements to that effect. Rather, as

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[2] *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

[3] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[4] *Id*.

[5] *Id*. at 329-330.

[6] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[7] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[8] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[9] *People v Pearson*, 123 Mich App 462, 464; 332 NW2d 574 (1983).

discussed above, the prosecutor made proper arguments challenging the expert's credibility. This did not constitute an improper personal attack on defense counsel.[10]

III. Sufficiency Of The Evidence

A. Standard Of Review

Brosch argues that there was insufficient evidence to support her conviction of first-degree child abuse because there was no evidence establishing that she knowingly and intentionally injured her child. To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, and decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt.[11]

B. Legal Standards

The child abuse statute defines first-degree child abuse as a person "knowingly or intentionally caus[ing] serious physical or serious mental harm to a child."[12] The child abuse statute defines "person" as a child's parent or guardian or someone with custody or authority over the child, no matter how short the duration.[13] The statute then defines "serious physical harm" as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, *subdural hemorrhage or hematoma*, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut."[14] Thus, the three elements of first-degree child abuse are (1) that the defendant is the parent or guardian of the relevant child or a person who has custody or authority over the child, (2) that the defendant had such custody or authority at the time of the abuse, and (3) that the defendant knowingly or intentionally caused a serious physical or mental injury to the child.

C. Applying The Standards

There is no dispute in this case that Brosch was the child's parent, that she had custody and authority over the child, and that the child sustained a serious physical injury, a subdural hematoma. The only open issue was whether Brosch knowingly or intentionally caused this injury. Brosch contends that this has not been established because none of the experts that the prosecutor called could definitively say that she had the requisite intent. She also contends that the fact that she promptly brought her daughter to the hospital showed her concern for the

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[10] See *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003) (holding that a prosecutor's perhaps impatient remark to defense counsel "cannot reasonably be construed as a personal attack on defense counsel").

[11] *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

[12] MCL 750.136b(2).

[13] MCL 750.136b(1)(d).

[14] MCL 750.136b(1)(f) (emphasis added).

welfare of her child. But circumstantial evidence can prove a defendant's intent.[15] The circumstances in this case provide sufficient evidence of Brosch's intent. The injuries sustained by the baby did not correspond to Brosch's explanation of what happened. All of the medical experts who treated the baby at the time determined that the injuries were acute and nonaccidental. Brosch, by her own admission, was the only person with the baby at the time the injuries were sustained. Those facts, looked at in the light most favorable to the prosecution, are enough for a jury to infer that Brosch intentionally caused the baby's nonaccidental injuries. Therefore, there was sufficient evidence to support Brosch's conviction of first-degree child abuse.

IV. Sentencing

A. Standard Of Review

Brosch claims that the trial court improperly exceeded the sentencing guidelines range for her sentence because the factors that the trial court used to justify the sentence were already scored or considered within the sentencing guidelines or were improperly based on disputed facts that the prosecutor did not establish beyond a reasonable doubt. We review for an abuse of discretion a trial court's determination that there was a substantial and compelling reason to depart from the sentencing guidelines.[16] In this context, there is no abuse of discretion if the sentence is within the range of reasonable and principled outcomes.[17] However, we review for clear error the existence of a factor relied on for a guidelines departure.[18] And we review de novo whether such a factor is objective and verifiable.[19]

B. Legal Standards

Initially, the prosecutor is not required to prove factors relied on in sentencing beyond a reasonable doubt. Rather, facts relied on in sentencing need only be proven by a preponderance of the evidence.[20] If a trial court departs from the sentencing guidelines without a substantial and compelling reason for the departure, we must remand for resentencing.[21]

> [T]he words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure

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[15] *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

[16] *People v Babcock*, 469 Mich 247, 265-266; 666 NW2d 231 (2003).

[17] *Id*. at 269-270.

[18] *Id*. at 265.

[19] *Id*.

[20] *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

[21] MCL 769.34(11); *Babcock*, *supra* at 265.

> should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence.[22]

Further, only "objective and verifiable" factors may be relied on as substantial and compelling reasons to depart from the sentencing guidelines.[23] "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed."[24]

However, a factor already part of the sentencing guidelines calculations can be used as a basis for departing from the guidelines if the trial court finds that the factor has been given inadequate or disproportionate weight.[25] If the trial court departs from the guidelines and "its sentence is not proportionate to the seriousness of defendant's conduct and his criminal history," the case must be remanded to the trial court for resentencing.[26]

C. Applying The Standards

The trial court stated four reasons for departing from the guidelines with Brosch's sentence. First, the trial court cited Brosch's perjurious testimony and her conduct during questioning at trial. Perjury by a defendant may be used as a factor in sentencing.[27] Here, there was objective and verifiable evidence of Brosch's perjury given that medical evidence discussed by multiple experts contradicts the version of events to which she testified.

The second, third, and fourth reasons given by the trial court to justify exceeding the guidelines were the fact that the victim was a defenseless infant, the fact that there were excessive and appalling injuries to the infant, and the fact that the injuries would have been fatal but for the actions of the doctors who attended the child. These are all factors covered under the sentencing guidelines and all were scored corresponding points under the guidelines. The trial court scored Brosch ten points for exploitation of a vulnerable victim (Offense Variable [OV] 10), 50 points for sadism, torture, or excessive brutality (OV 7), and 25 points for life threatening or permanent incapacitating injuries to the victim (OV 3). However, at sentencing, the trial court

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[22] *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).

[23] *Babcock*, *supra* at 257-258.

[24] *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004).

[25] *Babcock*, *supra* at 272.

[26] *Id*. at 273.

[27] See *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988) ("[W]hen the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence.").

stated that that the guidelines failed to give the articulated factors adequate weight.[28] Specifically, the trial court stated as follows:

> The defendant was convicted by a jury as stated previously. The offense involves an injury by the . . . defendant to a defenseless infant. The injuries to the infant at the hands of this defendant were extensive and appalling. But for the actions of the doctors who attended the child, her injuries could have been fatal.
>
> This defendant's testimony was perjurious. Her conduct during the trial questioning were [sic] reprehensible.[29] The guidelines do not adequately account for the vulnerability of the infant.
>
> The extent of the injuries suffered by the victim, the defendant's perjurious testimony; additionally, the horrendous injuries suffered by this child.
>
> I listened carefully to the remarks made by this defendant. She would have probably been better off allowing her lawyer to speak for her as he did in the sentencing memorandum.
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> I think the guidelines should be exceeded because of the reasons I've stated. It's the sentence of this Court you be incarcerated . . . for a minimum of eight years, a maximum of 15 years[.]

In a case where an infant is injured close to the point of death by her own parent, the above factors certainly "keenly" and "irresistibly" grab one's attention as particularly disgusting and egregious conduct.[30] In this regard, the injuries to the infant in this case may reasonably be viewed as being at the extreme end of conduct covered by the crime of first-degree child abuse, which encompasses broadly conduct causing serious physical harm to a child and, thus, includes causing injuries that are not life threatening.[31] Further, the fact that the vulnerability is that of a helpless infant certainly goes beyond the bare requirements of the elements of the offense, which only require a child under the age of 18.[32]

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[28] *Babcock*, *supra* at 272.

[29] We note that Brosch testified that she has Turner's syndrome, a chromosomal condition affecting her reproductive organs, which she alleged affects her hormonal balance and causes her to act inappropriately when she is nervous. However, there does not appear to be any question regarding her competency to stand trial. Indeed, a psychological evaluation submitted with her sentencing memorandum states that "she is not mentally ill, that is, she does not suffer from a substantial disorder of thinking or mood."

[30] *Fields*, *supra* at 67.

[31] See MCL 750.136b(1)(f) (defining "serious physical harm" for purposes of the child abuse statute to include *inter alia*, bone fractures, dislocations, sprains, and severe cuts).

[32] See MCL 750.136b(1) (defining a child for purposes of the child abuse statute as an unemancipated person less than 18 years of age).

It is instructive that in another horrific case, *People v Reincke* (*On Remand*), this Court found that it was within the range of principled and reasonable outcomes to exceed the guidelines where the victim was a three-year-old child who was also subjected to a single horrific injury while alone in the care of the victim's mother's boyfriend.[33] In that case, this Court affirmed a severe departure from the guidelines, going from a highest minimum sentence of 135 months (11 years, 3 months) under the guidelines to a minimum sentence of 30 years, nearly triple the high point of the guidelines.[34] Conversely, here, the trial court exceeded the guidelines by three years, going from five years to eight years, not even doubling the time and not increasing the time to the theoretical highest possible minimum of 10 years, given the 15-year maximum sentence for first-degree child abuse.[35] Thus, we conclude that the trial court did not abuse its discretion because the sentence was within the range of reasonable and principled outcomes.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Brosch claims that she was denied the effective assistance of counsel because defense counsel failed to call any witnesses, failed to object to prosecutorial misconduct, failed to object to inaccuracies in police and presentence reports, and failed to adequately represent her interests. Where, as in this case, there is no request for an evidentiary hearing or a motion for a new trial, we limit our appellate review of a defendant's claim of ineffective assistance of counsel to the existing record.[36]

B. Legal Standards

The United States and the Michigan Constitutions guarantee the right to counsel.[37] Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different, and the result that did occur was fundamentally unfair or unreliable.[38]

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases.[39] There is therefore a strong

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[33] *People v Reincke* (*On Remand*), 261 Mich App 264, 266-267, 272; 680 NW2d 923 (2004).

[34] *Id*. at 265.

[35] MCL 750.136b(2). See also MCL 769.34(2)(b) (providing that, even with a guidelines departure, a minimum sentence shall not exceed two-thirds of the statutory maximum sentence).

[36] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[37] US Const, Am VI; Const 1963, art 1, § 20.

[38] *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

[39] *Pickens*, *supra* at 325.

presumption of effective counsel when it comes to issues of trial strategy.[40] An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence.[41]

C. Applying The Standards

First, Brosch's claim that her counsel was ineffective for failing to call any witnesses is clearly without merit because her counsel did call an expert witness to testify on her behalf.

Second, Brosch's claim that her counsel's failure to object to prosecutorial misconduct amounted to ineffective assistance of counsel is without merit. As noted above, the prosecutor did not engage in any misconduct on the grounds that Brosch claimed, so any objection would have been futile.[42]

Third, Brosch's claim that her trial counsel failed to call more witnesses and that defense counsel misrepresented to her his expertise cannot be addressed absent a *Ginther* hearing.[43] Further, Brosch has given no indication of what additional witnesses could have been called and what they might have testified to, providing no reason for us to consider whether a *Ginther* hearing would be necessary. And Brosch's claim that her counsel admitted in closing that this was his first time trying this sort of case is not supported by the record. The most he said was that he never had a case before where "he had to cross-examine so many doctors."

Fourth, Brosch's freely chose to testify against the advice of counsel. Given that the trial court later said that her perjurious testimony was part of the reason it exceeded the sentencing guidelines, it is difficult to see how this was defense counsel's fault when Brosch ignored her counsel's advice not to testify. It is well settled that a defendant is entitled to testify on his or her own behalf, even if defense counsel objects.[44]

Finally, Brosch claims that defense counsel was ineffective because he did not spend sufficient time preparing for trial. But Brosch does not point out any particular area where this caused a deficiency other than the complaints outlined above. In sum, nothing Brosch complains of amounts to ineffective assistance of counsel and so she is not entitled to relief on that basis.

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[40] *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

[41] *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

[42] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (stating that defense counsel has no obligation to object where an objection would be futile).

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

[44] See *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985).

VI. Due Process Right To Fair Trial

A. Standard Of Review

Brosch claims that she was denied her due process right to a fair trial by judicial bias as evidenced by the trial court's unwillingness to grant more time to find substitute counsel, the trial court's failure to address errors with the police and presentence reports, the trial court's claim that she perjured herself, the trial court's failure to maintain proper performance standards, and the overall evidence of the trial court's bias. We review unpreserved claims of error under the plain error standard.[45]

B. Legal Standard

MCR 2.003(B)(1) provides that "a judge is disqualified when the judge cannot impartially hear a case" including when a "judge is personally biased or prejudiced for or against a party or attorney[.]"

C. Applying The Standard

Brosch's first counsel on this case, Mark Satawa, was granted an emergency motion to withdraw as counsel after Brosch withdrew her initial guilty plea to second-degree child abuse in reaction to the trial court's indication it would not follow the agreement and stay within the guidelines. At that time, Satawa had multiple pending cases that prevented him from properly preparing this case for trial in the time available. The trial court ordered Satawa to stay on as counsel through Brosch's preliminary examination on April 28, 2006, and gave Brosch one week to find substitute counsel. Brosch's trial counsel, Richard Lustig, entered his appearance on May 8, 2006. On June 6, 2006, Lustig filed a motion to continue the trial for ten days to allow his experts to testify. Trial started on June 19, 2006.

Thus, defense counsel had six weeks between the time of appearance and trial, and his brief asking for a continuance indicated that he was ready for trial before that, although he had a scheduling issue with his experts. There is no basis to conclude that six weeks was insufficient time to prepare for trial. There is nothing in the record to indicate that the trial court acted with any bias against Brosch. To the contrary, the trial court allowed extra time for her experts.

Regarding Brosch's claims about the police and presentence reports, there is nothing in the record to indicate that she ever objected to the presentence report. Similarly, her claim that the trial court showed bias by not maintaining proper standards for counsel is also without merit. Brosch does not explain exactly what she means by this and provides no concrete examples. One cannot simply announce a position or assert an error and leave it up to the Court to do her research and develop her arguments and then accept or reject her position.[46]

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[45] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[46] *Casco Twp v Sec'y of State*, 472 Mich 566, 605 n 83; 701 NW2d 102 (2005).

In sum, Brosch's claims of bias are vague and cursory, are unsupported by the record, and simply do not rise to the level of plain error affecting her substantial rights. Brosch is not entitled to relief on the basis of judicial bias.

Affirmed.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra