

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SONYA JOHN MOUSSAED,

Defendant-Appellant.

UNPUBLISHED

March 20, 2008

No. 275730

Monroe Circuit Court

LC No. 06-035337-FC

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder. MCL 750.316. Defendant was sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant raises four issues on appeal. First, defendant argues that the trial court erred in instructing the jury that it could not find defendant guilty of more than one of the four offenses upon which the jury was instructed. However, a defendant's affirmative statement indicating her satisfaction with the jury instructions constitutes express approval of the instructions and waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Given that defense counsel affirmatively expressed approval of the jury instructions, this issue is waived. *Id.*

Defendant's second argument on appeal is that her counsel was ineffective for failing to object to the aforementioned instructional error. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally

unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

In light of the fact that the evidence could have supported a conviction on more than one of the four offenses,¹ we find that the trial court did indeed err when it instructed the jury that it could only convict defendant of one of the offenses. Thus, defense counsel erred in not objecting to the erroneous instruction. However, notwithstanding counsel's error, defendant is not entitled to a new trial because she cannot establish an error affecting the outcome of the proceeding. There was ample evidence that defendant committed first-degree child abuse and caused the death of 17-month-old Gracie Simmons. On the evening in question, Joseph Simmons, Gracie's father, left a healthy, uninjured Gracie in the sole care of defendant, his girlfriend. A few hours after Simmons returned home the next morning, he discovered Gracie limp, blue and without a pulse. Despite medical personnel's extensive efforts to revive her, Gracie was pronounced dead that morning. The emergency room physician testified that Gracie died as a result of suffering multiple serious injuries, including a skull fracture. Gracie had injuries around her mouth, six bruises on her head, hemorrhaging in her brain, eyes and ears, a bruise on her forehead, neck and shoulder, bruises along her back, injury to her deep internal structures, including her ribs, kidneys, pelvis and diaphragm, and what appeared to be a cigarette burn on her ankle.

The medical examiner, Dr. Schmidt, opined that Gracie's injuries arose from child abuse, likely in the nature of Gracie being forcefully shaken, stomped and punched, and her head being thrown up against a hard surface several times. Looking at the totality of Gracie's injuries, Dr. Schmidt was convinced that they resulted from child abuse. He concluded that, although Gracie's injuries could hypothetically have been caused by something other than child abuse – like a serious car accident or a fall down a flight of stairs – such a scenario would be very rare. Dr. Schmidt stressed that he was unaware of any mechanism of injury apart from child abuse that could have inflicted so much serious injury to so many different parts of Gracie's body. Dr. Schmidt concluded that Gracie's cause of death was "multiple blunt trauma to the head," and the manner of death was homicide. Furthermore, child abuse expert Dr. Schlievert opined that Gracie's injuries constituted child abuse and were caused by severe direct trauma, like from someone forcefully striking Gracie or throwing her against something hard. The doctor explained that it was possible – but very unlikely – that Gracie's injuries resulted from falling down the stairs or any other sort of accident.

Defendant's statements regarding the events of the evening in question were highly inconsistent. When defendant spoke to Simmons on the phone on the night in question, she told him that, while she was in the kitchen, Gracie suffered a cut to her lip when she had fallen in the hallway of their home and later during a trailer park walk. She mentioned nothing of a fall down

¹ The trial court instructed the jury on the following crimes: (1) felony murder with an underlying felony of first-degree child abuse, (2) second-degree murder, (3) second-degree child abuse, and (4) involuntary manslaughter.

the stairs. The next morning, defendant told her friend, Bobbie Lambert, that Gracie's injuries were caused by a fall in the bathroom. In a statement to Detective Bryan Gee later that same day, defendant stated that Gracie did not fall during the trailer park walk, but rather, fell in the hallway of her home. She did not mention a fall down the stairs. In yet another statement that same day, defendant told a social worker that Gracie fell during the trailer park walk; she again did not mention a stair fall. A few days later, defendant told Simmons that her statement to police had not been truthful. Approximately three weeks later, defendant gave a statement to Sergeant Scott Beard, stating that, while she was in her bedroom, Gracie fell in the hallway and cut her lip. She further stated that when she was carrying Gracie up the stairs, she slipped on a plastic tarp at the top of the stairs and dropped Gracie, who fell down the stairs and suffered a cut to her lip.² Later in the same statement, she admitted to Sergeant Beard that she was not being completely truthful with him. She stated that Gracie's injuries were more serious than she had initially let on. She indicated that after falling down the stairs, Gracie had blood in the back of her mouth and was wheezing.

In sum, the evidence against defendant was strong. Although defense expert Dr. Werner Spitz opined that Gracie's injuries could have been caused by a fall down the stairs, the totality of Gracie's injuries and the remaining medical experts' testimony – including the testimony of a child abuse expert – supported a finding of severe child abuse. Regarding a possible motive, an acquaintance of defendant's testified that defendant told her that she resented Gracie because she viewed her as an intrusion upon her family. Further, defendant told Simmons that she was angry that she had to babysit Gracie while Gracie's mother was out having fun. Despite defendant's defense that Gracie fell down the stairs, defendant's oft-changing statements cast major doubt on her credibility. The totality of the evidence is such that defendant cannot establish that the outcome of her trial would have been different had her counsel objected to the instructional error. Accordingly, defendant's ineffective assistance claim fails.

Next, defendant argues that the trial court erred in denying her motion for a directed verdict. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of felony murder are: “(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony murder statute.” *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). First-degree child abuse, which is an enumerated felony pursuant to MCL 750.316(1)(b), is committed when the person knowingly or intentionally causes serious physical or serious mental harm to a child. MCL 750.136b(2).

² Notably, Simmons testified that there was never a plastic tarp at the top of the stairs, and there was no reason for the tarp to be placed there.

There was ample evidence from which a rational jury could conclude that defendant committed felony murder. The evidence presented by the prosecution supported a finding that defendant, Gracie's sole caretaker at the time that Gracie sustained her injuries, inflicted Gracie's injuries. Furthermore, all medical experts agreed that Gracie died as a result of sustaining the instant injuries, which were substantial. Regarding the intent necessary to convict defendant of felony murder, the severity and vastness of Gracie's injuries was such to allow a jury to infer that defendant had the requisite intent to commit first-degree child abuse. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995) (evidence of the injuries inflicted is probative of an intent to kill); *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (an actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient). Two medical experts indicated that Gracie's injuries were highly inconsistent with a fall down the stairs; her injuries were too severe and too spread about her body to have been caused by a simple fall down the stairs. Dr. Schmidt opined that Gracie's injuries likely arose from Gracie being slapped in the face, forcefully shaken, stomped and punched, her head being thrown up against a hard surface several times, and her torso being met with significant blows. Dr. Schlievert opined that Gracie's injuries were caused by severe, direct trauma, like from someone forcefully striking Gracie or throwing her against something hard. Given the totality of the evidence, namely the medical evidence of Gracie's injuries and the fact that defendant's statements of the events were highly inconsistent, the trial court did not err in denying defendant's motion for a directed verdict.

Finally, defendant argues that there was insufficient evidence to support her felony murder conviction. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* As explained in the analysis above, there was abundant evidence from which a rational jury could find that defendant committed felony murder. Therefore, defendant's insufficiency claim fails.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder