STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2008
v	Nos. 273366; 280678 Wayne Circuit Court
PRISCILLA KATHRYN SCROI,[1] Defendant-Appellant.	LC No. 06-003962-01

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In Docket No. 273366, defendant appeals by right her bench-trial conviction of third-degree child abuse, MCL 750.136b(5). The trial court sentenced her to three years' probation. In Docket No. 280678, defendant appeals by right the trial court's determination that she violated a condition of her probation. The trial court ordered her to continue the original term of her probation and to attend anger management classes. We affirm in part and reverse in part.

Defendant's conviction of third-degree child abuse in Docket No. 273366 arises from an allegation that she hit her minor son (the victim) four times with a belt on his upper back after he refused to turn off the television and go to bed. Defendant first argues that there was insufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that she committed third-degree child abuse. We disagree.

When reviewing a claim of insufficient evidence, we review the record de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Third-degree child abuse is knowingly or intentionally causing physical harm to a child. MCL 750.136b(5); *People v Sherman-Huffman*, 466 Mich 39, 41; 642 NW2d 339 (2002). In this case, the victim testified that when he refused to go to his room and go to bed, defendant hit him

[1] We note that defendant's middle name is spelled variously throughout the lower court record as "Kathyn" and "Kathryn."

four times on his upper back with a belt. The victim's father and stepmother testified that they took photographs of bruises on the victim's back the following evening. The photographs they took, as well as some taken by police, were admitted at trial. According to the testimony, the photographs showed "red marks in a linear form across the back, across the shoulder blades." It was for the trier of fact to weigh the credibility of the witnesses, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), and the trial court could reasonably have believed this testimony as well as that of the victim. Despite defendant's assertions on appeal, we conclude that there was sufficient evidence to support her conviction. The trial court's finding that the marks depicted in the photographs were consistent with the victim's account of the alleged abuse was not "speculative" merely because no witness specifically testified that the marks depicted in the photographs were consistent with the abuse described by the victim. On the contrary, it was appropriate for the trial court, as the finder of fact, to make that determination itself.

Defendant next argues in Docket No. 273366 that the trial court erred by failing to qualify a child protective services worker who interviewed the victim as an expert, and by disallowing the worker from offering expert or lay opinion testimony. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). "Similarly, a trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion." *Id*. An abuse of discretion standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion, and it is thus proper for the reviewing court to defer to the trial court's judgment. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party." *Dobek*, *supra* at 93.

At trial, defense counsel primarily argued that the protective services worker's opinion was admissible as lay testimony. To the extent that defendant argues on appeal that the protective services worker should have been allowed to offer opinion testimony as an expert witness, trial counsel waived this argument by affirmatively conceding that she could not elicit expert testimony from the witness. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, defendant has abandoned this issue on appeal by failing to explain how the protective services worker's opinion would have been admissible as expert testimony under MRE 702. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citations and quotation omitted). "Such cursory treatment constitutes abandonment of the issue." *Id*.

Nor did the trial court abuse its discretion by precluding defense counsel from offering the protective services worker's opinion concerning the marks on the victim's back as the opinion of a lay witness. Under MRE 701, "If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The protective services worker testified that the photographs admitted at trial depicted "red marks in a linear form across the [victim's] back, across the shoulder blades." However, he did not actually see these marks when he met the victim; he observed only a small abrasion on the victim's lower back. Thus, the worker's testimony concerning the marks on the victim's back was based on the photographs only, and was not based on the worker's in-person observation of the marks. Any opinion that the protective services worker might have given concerning whether the lines on the victim's back were consistent with the victim's account of the abuse would therefore not have been helpful to the court. Indeed, the court was in the same position as the protective services worker with respect to its opportunity to observe the photographs. The trial court did not abuse its discretion by preventing defense counsel from eliciting lay testimony from the protective services worker on this matter.

Defendant also argues in Docket No. 273366 that she was denied the effective assistance of counsel (1) when her trial attorney failed to properly use the preliminary examination transcript to effectively impeach the victim's testimony, and (2) when her trial attorney failed to elicit opinion testimony from the child protective services worker. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In general, we review a trial court's findings of fact for clear error. However, because defendant failed to preserve this issue by moving for a new trial or a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then [s]he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We review questions of constitutional law de novo. *LeBlanc*, *supra* at 579.

Even if counsel's performance was deficient, defendant has not established that counsel's alleged errors were prejudicial. First, defendant claims that trial counsel failed to properly impeach the victim's trial testimony with the preliminary examination transcript. It is true that defense counsel had significant difficulty in attempting to impeach the victim's trial testimony using the preliminary examination transcript. The trial court repeatedly stopped defense counsel to tell him how to properly use the transcript for impeachment purposes. However, defendant does not cite any specific testimonial inconsistencies that counsel failed to point out, and defendant does not even suggest that the result of trial would have been different had counsel successfully impeached the victim's testimony. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Matuszak*, *supra* at 59 (citations and quotation omitted). "Such cursory treatment constitutes abandonment of the issue." *Id*. Moreover, the inconsistencies in the victim's statements regarding the abuse were readily apparent from his trial testimony. On cross-examination, the victim admitted that after having given his account of the alleged abuse, he later told his father

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

and the assistant prosecutor that his mother had never hit him with a belt. Then the following exchange took place between the victim and defense counsel:

Q. But now you're saying maybe she did hit you with a belt. Do you know how important it is to tell the truth right now?

A. Yes.

Q. Okay. She didn't hit you with a belt, did she?

A. No. She didn't.

Defense counsel then concluded his cross-examination and the prosecutor began redirect examination:

Q. What did you just say? Did you say no she didn't? She did or no she didn't?

A. Yes. She did.

The court then allowed defense counsel to ask the question again:

Q. After I asked you the question about your dad, about you telling your dad that your mother didn't hit you with the belt and that he had a talk with you and that he was upset, I then asked you the question, did she hit you with the belt?

A. Yes.

Q. Three times? Four times? Two times?

A. Four times.

The inconsistencies in the victim's statements were obvious regardless of any deficiency in trial counsel's attempts to impeach the victim's testimony. Accordingly, we cannot conclude that defendant was prejudiced by counsel's allegedly deficient impeachment of the victim.

Defendant also claims that trial counsel was ineffective for failing to lay a proper foundation to qualify the protective services worker to testify regarding whether the photographs of the victim's back were consistent with the victim's account of the alleged abuse. Citing a deposition given by the protective service worker, defendant argues that because the protective services worker "was of the opinion four days after the incident that there were no marks on the victim's back indicative of being struck with a belt or any other object," the protective services worker would likely have provided exculpatory testimony had counsel laid a proper foundation.

The protective services worker testified that he was shown photographs of the victim's back, which the victim's father had taken immediately following the alleged abuse, that showed "red marks in a linear form across the back, across the shoulder blades." However, the worker also testified that when he met with the victim a few days after the alleged abuse, he did not see any marks or lines on the victim, other than a small abrasion on the lower back. Following an objection by the prosecution, the protective services worker was not permitted to opine whether

he believed that the marks he observed in the photographs were consistent with the victim's allegations of abuse. Defendant has not stated what other "exculpatory" testimony the protective services worker might have given had he been allowed to offer his opinion on the matter. Nor has defendant explained how she was prejudiced by the absence of additional testimony from the worker. The record before us does not support defendant's claim of ineffective assistance of counsel. *Davis*, *supra* at 368.

In Docket No. 280678, defendant argues that there was insufficient evidence for a rational trier of fact to conclude by a preponderance of the evidence that she had violated her probation. We agree.

When reviewing a claim of insufficient evidence, this court reviews the record de novo. *Lueth*, *supra* at 680. When considering a challenge to the sufficiency of the evidence in a probation violation matter, this Court considers whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded by a preponderance of the evidence that the defendant violated her probation. *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992).

Defendant's August 2006 order of probation provided that she was to have only supervised visitation with the victim until the family court issued its ruling. The order did not prohibit supervised overnight visits. Thereafter, the Wayne Circuit Court entered a consent order modifying custody, which provided that "commencing May 18, 2007, [defendant] shall have supervised parenting time until September 1st, 2007, on alternating weekends from Friday at 6:00 pm until Sunday at 6:00 p.m." At her probation violation hearing, defendant testified that she resumed visitation with the victim on May 18, 2007, and had overnight visits with the victim from May 18, 2007, until May 20, 2007. However, defendant testified that she was never alone with the victim during this time. She also testified that she stopped the visits as soon as her probation officer told her that she had violated the terms of her probation.[3] Despite the lack of evidence that defendant had any unsupervised visits with the victim, the trial court found that defendant had violated this term of her probation. Even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have concluded by a preponderance of the evidence that defendant violated her probation by having unsupervised visits with the victim. See *People v Ison*, 132 Mich App 61, 66; 346 NW2d 894 (1984).

We affirm defendant's conviction and sentence for third-degree child abuse in Docket No. 273366. We reverse defendant's conviction and sentence for violating her probation in Docket No. 280678.

[3] The probation officer testified only that she had received information that defendant had overnight visits with the victim. The probation officer never stated that the visits had been unsupervised.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen