STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2008
v	No. 279352 Oakland Circuit Court
GANNON DESHON MATHIS, Defendant-Appellant.	LC No. 2006-211580-FH

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, second-degree child abuse, MCL 750.136b(3) and (4), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to 7 to 15 years' imprisonment on the manslaughter conviction, 2 to 4 years' imprisonment on the child abuse conviction, and 93 days' imprisonment on the marijuana conviction. Defendant appeals as of right the convictions, arguing insufficiency of the evidence, and the sentences, contending that the trial court improperly scored various offense variables and ordered reimbursement of court-appointed attorney fees without considering defendant's ability to pay. We affirm the convictions because there was sufficient evidence to sustain the jury's verdicts and, with respect to the sentences, they are also affirmed, except as to the matter regarding payment of attorney fees, which requires remand for compliance with *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), and MCL 769.1k(1)(b)(iii).

This case arises out of the death of two-year old Jayvon Fuller. Jayvon's father is George Taylor and his mother is Meshell Fuller. Taylor and Fuller were never married and stopped living together around the time of Jayvon's birth. Taylor had custody of Jayvon and, although there was no formal visitation agreement, Fuller would regularly visit Jayvon. Fuller worked as a prostitute and defendant was her pimp. Defendant and Fuller lived together, but they did not reside at any fixed residence. Rather, they would move from hotel to hotel. At times, Fuller would visit with Jayvon at whatever hotel she and defendant were currently staying. There was evidence that defendant always paid for the hotel room in which Fuller would visit with Jayvon. There was also evidence that defendant and Fuller shared the costs for Jayvon's food during visits, defendant bought shoes for Jayvon, defendant would consistently provide Fuller with money, and that defendant frequently helped Fuller take care of Jayvon during hotel visits. Further, the record indicates that defendant shared in the responsibility of changing Jayvon's

diapers, bathing him, and disciplining Jayvon. When Fuller and defendant visited with Jayvon at the various hotels, Fuller would at times engage in acts of prostitution while defendant babysat Jayvon.

On March 25, 2006, Taylor dropped Jayvon off at the home of Fuller's mother for a visit, a regular occurrence, and Fuller and defendant thereafter picked up Jayvon from the home of Fuller's mother and took him to a local hotel, also a regular occurrence. At the beginning of this visit, Jayvon appeared happy and healthy. During the week that defendant and Fuller cared for Jayvon at the hotel, Fuller engaged in at least five acts of prostitution, at which time defendant cared for Jayvon. Several days into the visit at the hotel, on a Wednesday, defendant gave Jayvon a "whooping " for urinating on the bed, which included defendant striking Jayvon in the abdomen. According to Fuller, Jayvon's appearance and health then began to change. He started vomiting, refused to get out of bed, was lethargic, and, although he attempted to eat, Jayvon could not keep any food down. Fuller and defendant, who were staying in the same hotel room along with Jayvon, did not seek medical attention for Jayvon. Fuller called her mother about the situation, and she opined that Jayvon probably had the flu. Jayvon's health continued to deteriorate on Thursday and Friday, yet no medical attention was sought. On that Thursday, Jayvon's abdomen began to swell, and on Friday night defendant called a pharmacist who recommended that Jayvon be given Tylenol and that Jayvon's abdomen be rubbed with ice wrapped inside a towel. Defendant administered the Tylenol to Jayvon, but no other steps were taken. Jayvon's condition further deteriorated, he continued vomiting, and on Saturday morning defendant discovered that Jayvon was no longer breathing, which he communicated to Fuller, who called 911.

A responding police officer testified that Jayvon was unresponsive, had no pulse, and was not breathing, and the officer indicated that Jayvon's abdomen was extremely distended, looking like an "overfilled basketball." The officer stated that the appearance of Jayvon's abdomen was "very abnormal" and that the distention was immediately apparent. Another responding officer testified that defendant stated that Jayvon had been vomiting for three days, and the officer further indicated that she observed vomit-stained sheets and towels in the hotel room, vomit on the room's two beds, and vomit around the beds. Marijuana was also found in the room. Jayvon did not respond to efforts by paramedics to revive him. One paramedic, who had treated children in the past, testified that Jayvon's abdomen was extremely swollen, hard, and very abnormal. He had never before observed such a severe condition in a child.

A treating physician testified that Jayvon's abdomen was extremely distended, approximating the size of a basketball, and that the extent of the distension was unusual. The physician inserted a needle into Jayvon's abdomen, resulting in a release of air and a foul smell. Medical personnel detected a shallow pulse and some blood pressure, and the treating physician found it necessary, and received approval, to perform an operation to determine the source of Jayvon's abdominal distension. During the procedure, the physician discovered that Jayvon's bowel "was all matted together and stuck." He opined that Jayvon had been suffering from the symptoms of the abdominal condition for several days. The physician located a perforation of the bowel, and he was of the opinion that a child could sustain a perforated bowel as a result of being punched in the abdomen or some comparable trauma, which causes the bowel to be squeezed against the spine. He could not state with certainty, however, what caused Jayvon's perforated bowel. Jayvon could not be saved, and the physician testified that he could have

saved the child had he been able to perform surgery several days earlier. He concluded that it was unlikely that Jayvon sustained the trauma that caused the perforation more than three days before the child's death. The treating physician testified that, within 24 hours of a blunt force trauma, symptoms of a perforated bowel would be experienced, including great pain, vomiting, fever, and lethargy. He opined that a layperson would readily recognize the degree of extension that he observed with respect to Jayvon's abdomen. The physician discounted the possibility that a fall from a merry-go-round occurring before the visitation, of which there was some evidence, would have caused the perforated bowel.

The deputy medical examiner (ME) who performed the autopsy determined that Jayvon had suffered from "acute peritonitis due to [a] perforated small bowel." The ME testified that peritonitis is very painful, especially when the abdomen becomes distended, but it can be successfully treated if discovered early. A toxicological evaluation revealed that Jayvon had ingested or otherwise consumed marijuana. The ME could not ultimately determine the manner of death, which would explain why the prosecution proceeded on a theory of involuntary manslaughter predicated on defendant's failure to seek medical care for Jayvon, rather than on the basis that defendant caused Jayvon's death by striking him in the abdomen.

During an interview with police, defendant stated that Jayvon had been supervised exclusively by defendant and Fuller during the previous week. Defendant denied ever hitting or otherwise striking Jayvon. Defendant conceded that he had brought marijuana into the hotel room.

Defendant was convicted of involuntary manslaughter, MCL 750.321, second-degree child abuse, MCL 750.136b(3) and (4), and possession of marijuana, MCL 333.7403(2)(d).[1] He appeals as of right.

Defendant first argues that the evidence was insufficient to establish that defendant had a legal duty to seek medical care for Jayvon and that, assuming such a duty existed, the evidence was insufficient to show that he willfully neglected or refused to perform said duty. Therefore, according to defendant, he was not guilty of involuntary manslaughter. In support of his position, defendant contends that "the legal duty of care in this case vested in [Fuller], to whom the child was released a full week before his death and in whose company the child remained . . . in the hours before his death." Defendant also maintains that the evidence did not show that he assumed a parental function. Regarding performance of a presumed duty, defendant argues that the culture of poverty that reverberates in defendant's and Fuller's world, where health insurance and affordable healthcare are virtually nonexistent, explains their actions, or lack thereof, and that they did all that could reasonably be done under the circumstances. Calling Fuller's mother and the pharmacist was sufficient in defendant's eyes. Defendant further argues that the evidence presented at trial was insufficient to show that he fit the statutory definition of a "person" for purposes of second-degree child abuse under MCL 750.136b(3), and thus could not

[1] We note that Fuller entered a plea of nolo contendere to charges of involuntary manslaughter and second-degree child abuse.

be held accountable for the crime. Defendant's sufficiency arguments lack merit and do not warrant reversal.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003), our Supreme Court defined the crime of involuntary manslaughter as "the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." (Citations omitted.) In *People v Sealy*, 136 Mich App 168, 172; 356 NW2d 614 (1984), a case in which the defendant failed to seek medical assistance before the death of his infant daughter, this Court stated:

> To convict a defendant of involuntary manslaughter for his failure to seek medical assistance, the following elements have to be proven beyond a reasonable doubt: (1) legal duty; (2) capacity, means and ability to perform the duty; (3) wilful neglect or refusal to perform the duty; and (4) death as a direct and immediate consequence of a failure to act. [Citations omitted; see also *People v Hegedus (On Remand)*, 182 Mich App 21, 24; 451 NW2d 861 (1990)(describing elements for involuntary manslaughter based on failure to perform a legal duty); CJI2d 16.13.][2]

In *People v Beardsley*, 150 Mich 206, 210; 113 NW 1128 (1907), our Supreme Court observed that "'one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from . . . infancy, sickness, age, . . . or other incapacity of mind or body, is bound to execute the charge with proper diligence and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die."' (Citation omitted.)[3] There must be a legal duty to act in order to support a charge of involuntary

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[2] We note that CJI2d 16.13, which was read to the jury here, and *People v Giddings*, 169 Mich App 631, 635; 426 NW2d 732 (1988), speak of a need to prove that the failure to perform was grossly negligent to human life. *Sealy* does later state that "[t]o convict of involuntary manslaughter, a defendant must have been grossly negligent." *Sealy, supra* at 172.

[3] The omission in the performance of a duty owed by a parent to provide necessary care for a child's health and well-being can give rise to a charge of involuntary manslaughter when death ensues. *People v Ogg*, 26 Mich App 372, 381; 182 NW2d 570 (1970).

manslaughter; a mere moral obligation in and of itself is insufficient. *Id.* at 213. A legal duty can arise by implication from the facts and circumstances of the case. *Id.* at 214; *People v Giddings*, 169 Mich App 631, 635; 426 NW2d 732 (1988).

In *People v Thomas*, 85 Mich App 618; 272 NW2d 157 (1978), the defendant was a work coordinator at a religious practical training school, and he inflicted severe, physical punishment on a young male resident, in the guise of discipline, resulting a week later in the resident's death. The defendant was convicted of involuntary manslaughter, and on appeal he argued that the prosecution failed to establish the elements of involuntary manslaughter. This Court ruled:

> Involuntary manslaughter may be based on the failure to perform a legal duty. *People v Beardsley*, 150 Mich 206; 113 NW 1128 (1907). Defendant was a supervisor of Oak Haven, stood in a position of authority over the victim and, by talking with the victim's parents and obtaining their permission to discipline the decedent, he directly and voluntarily assumed a parental function, and stood in a position of *loco parentis* to the decedent. Under such circumstances, defendant's beating of the victim coupled with his failure to provide medical attention, when decedent was unable to obtain same himself, violated defendant's legal duty to care for the victim. The elements of involuntary manslaughter were adequately established. [*Thomas, supra* at 624.]

"*In loco parentis*" means "in the place of a parent," as where a person acts "as a temporary guardian of a child." Black's Law Dictionary (7th ed).

Consistent with the trial court's jury instruction on the "legal duty" element of involuntary manslaughter, and on the strength of the authorities cited above, defendant would owe a legal duty of care to Jayvon, a sick two-year-old child, if there was sufficient evidence of an express or implied agreement by defendant to care for Jayvon, or sufficient evidence that defendant, if even temporarily and by implication, voluntarily undertook or assumed a parental function relative to the child, i.e., the care and custody of Jayvon. Here, there was more than sufficient evidence to find that defendant owed a legal duty to Jayvon to act. The fact that defendant was not Jayvon's parent or legal guardian did not excuse him from acting properly in response to Jayvon's medical condition. Defendant, acting voluntarily, and Fuller shared in caring for Jayvon while staying at the hotel during the period of time leading up to the child's death. And when Fuller was out engaging in acts of prostitution, defendant was the sole caregiver, exercising custody, care, and control over Jayvon. Defendant changed Jayvon's diapers, bathed him, disciplined him, provided money for his care, including food, and the hotel stay, gave him Tylenol, contacted the pharmacist in relation to Jayvon, belatedly sought medical care for him, and otherwise acted in the role of a caregiver, deficiently, but a caregiver nonetheless. Jayvon was exclusively in the care of defendant and Fuller, or defendant alone, during the relevant timeframe, and Fuller allowed defendant to care for Jayvon. The evidence established that defendant had more than a mere moral obligation to seek timely medical care. The existence of a legal duty was easily established under the facts and circumstances.

Furthermore, defendant's contention that the legal duty of care for Jayvon vested only in Fuller, the child's mother, is wholly without merit. First, defendant fails to cite any authority in support of the proposition that a person who voluntarily assumes a parental function is excused from acting to protect a child simply because a parent is concomitantly exercising care and

custody. "'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)(citation omitted). Moreover, in general, two persons can each be held accountable for a person's injuries if both owed a common duty to the injured person to refrain from acting negligently. See *McCoy v DeLiefde*, 376 Mich 198, 207; 135 NW2d 916 (1965). Defendant and Fuller shared a common duty to seek appropriate medical care for Jayvon. The duty owed to Jayvon by Fuller was not mutually exclusive of any duty owed by defendant to Jayvon.

With regard to defendant's claim that the evidence was insufficient to show that he willfully neglected or refused to perform the legal duty now established, we disagree.

In *People v Moye*, 194 Mich App 373, 376; 487 NW2d 777 (1992), rev'd on other grounds 441 Mich 864 (1992), this Court, citing *Giddings*, *supra* at 635, and *Sealy*, *supra* at 172-173, stated that "[w]ilful neglect, or gross negligence, is defined as (1) knowledge that a situation existed requiring the use of ordinary care to prevent injury; (2) having the capacity, means, and ability to avoid the harm by the use of ordinary care; and (3) failing to use ordinary care where it would have been apparent to an ordinary mind that harm would result from such failure." "Put another way, a defendant who does not seek to cause harm, but is simply reckless or wantonly indifferent to the results, is grossly negligent." *People v Lanzo Constr Co*, 272 Mich App 470, 477; 726 NW2d 746 (2006)(discussing gross negligence element of involuntary manslaughter), citing *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997).

There was layperson and/or medical evidence that Jayvon had a readily-apparent distended abdomen, which was equated to the size of an "overfilled basketball" and described as "very abnormal" and highly unusual, that there was voluminous and continuous vomiting by Jayvon, that he was lethargic and refused to get out of bed, that Jayvon had exhibited symptoms for three days, that even a layperson would have easily recognized Jayvon's severe and deteriorating medical symptoms and condition, that Jayvon suffered a perforated bowel resulting in painful peritonitis, and that no legitimate reason prevented defendant from seeking timely medical care for Jayvon. Viewing this evidence in a light most favorable to the prosecution, a rational juror could reasonably have found that the prosecutor proved beyond a reasonable doubt that defendant had knowledge that a situation involving a very sick child existed requiring the exercise of ordinary care, defendant had the capacity, means, and ability to avoid the harm by the use of ordinary care, i.e., taking Jayvon to a doctor or a hospital's emergency room, and that defendant failed to take ordinary care where it was apparent that harm would result from a failure to seek medical assistance. Thus, the evidence was sufficient to conclude that defendant was grossly negligent, willfully neglectful, and that he refused to perform a legal duty.

In regard to the sufficiency argument relative to the conviction of second-degree child abuse, MCL 750.136b(3)(a) provides that "[a] person is guilty of child abuse in the second degree if . . . [t]he person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child." A "person" is defined as "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person." MCL 750.136b(1)(d). The evidence presented at trial cited above in support of our conclusion that defendant owed Jayvon a legal duty because he

voluntarily assumed a parental function equally supports a conclusion that defendant cared for, had custody of, and exercised authority over Jayvon. Accordingly, we reject defendant's argument that he was not a "person" under § 136b(1)(d) for purposes of the second-degree child abuse conviction pursuant to § 136b(3)(a). There was more than sufficient evidence to show that defendant cared for, had custody of, and exercised authority over Jayvon; therefore, defendant was a "person" under the statute and subject to criminal liability for second-degree child abuse.

In sum, there was sufficient evidence to sustain the convictions of involuntary manslaughter and second-degree child abuse.

Defendant next challenges the trial court's scoring of four offense variables (OVs) under the statutory sentencing guidelines, specifically, OV 5, OV 10, OV 14, and OV 19. We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Scoring decisions for which there is any evidentiary support will be upheld. *Id.* We conclude that resentencing is not required.

With respect to OV 5, we find that the trial court did not err in scoring 15 points on the basis that "[s]erious psychological injury requiring professional treatment occurred to a victim's family," MCL 777.35(1)(a),[4] where Jayvon's father testified that he left the child happy and healthy and next saw him lifeless at the hospital having died from a slow, painful death. The trial court observed that it watched the father during his testimony and that "[t]here was definitely a psychological impact upon [him]." Reversal is unwarranted on OV 5.

With respect to OV 10, we find that the trial court did not err in scoring ten points on the basis that defendant "exploited a victim's . . . youth or . . . [that defendant] abused his or her authority status," MCL 777.40(1)(b). The evidence reflected that defendant, by keeping Jayvon in the hotel room and away from medical personnel, took advantage of Jayvon's inability, in light of his age, to ask for or seek medical care on his own so that defendant could continue his illegal, moneymaking enterprise working as a pimp out of the hotel without interruption. An effort by defendant to seek medical care for Jayvon could also have interfered with defendant's marijuana procurement and would have raised questions of potential criminal conduct arising out of the "whooping" given to Jayvon, which included striking him in the abdomen. Defendant clearly exploited and manipulated Jayvon for selfish and unethical purposes, MCL 777.40(3)(b), and Jayvon necessarily deferred to defendant's authority, which status was certainly abused, MCL 777.40(3)(d). Reversal is unwarranted on OV 10.

With respect to OV 14, we find that the trial court did not err in scoring ten points on the basis that defendant "was a leader in a multiple offender situation," MCL 777.44(1)(a), when

[4] MCL 777.35(2) provides, "Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive."

considering "[t]he entire criminal transaction," MCL 777.44(2)(a), where defendant directed Fuller's actions as a prostitute, brought marijuana into the hotel room, personally disciplined Jayvon, contacted the pharmacist, and otherwise controlled the situation. Reversal is unwarranted on OV 14.

With respect to OV 19, we find that the trial court did not err in scoring ten points on the basis that defendant "interfered with or attempted to interfere with the administration of justice," MCL 777.49(c), where defendant lied to police about striking Jayvon and other matters during police interrogations. This Court has interpreted interference with the administration of justice under OV 19 to include conduct that occurred during the criminal investigation, such as providing false information to the police. *People v Passage*, 277 Mich App 175, 179-180; 743 NW2d 746 (2007). Reversal is unwarranted on OV 19.

Because we conclude that the trial court did not abuse its discretion in scoring defendant's OVs, we need not consider defendant's accompanying argument that the case should be assigned to a different trial judge for resentencing. We note that defendant only makes this argument in the context of the scoring error claims and not the issue concerning the assessment of court-appointed attorney fees, on which matter we do remand for reasons discussed infra. Nevertheless, we observe nothing in the record that supports reassignment for purposes of the remand issue. See *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997)(discussing three-part test in determining whether reassignment for resentencing is proper).

Finally, defendant argues that the trial court improperly ordered him to reimburse the costs of his court-appointed attorney where the court failed to first assess his ability to pay. Defendant also complains that, assuming reimbursement is proper, no particular dollar amount was set by the trial court with respect to the payment of attorney fees. This Court has held that a trial court may not order a defendant to pay attorney fees relative to the costs of his court-appointed counsel unless there is some indication that the court considered the defendant's current and foreseeable ability to pay. *Dunbar*, *supra* at 255-256. There is no indication in the record that the trial court contemplated defendant's current and foreseeable ability to pay. We therefore vacate the attorney fee assessment and remand to the trial court for consideration of the issue concerning attorney fees under the principles espoused in *Dunbar* and MCL 769.1k(1)(b)(iii).[5] If the court again assesses fees, it is to set a dollar amount.

We affirm the convictions and, with respect to the sentences, they are also affirmed, except that we vacate that portion of the judgment of sentence that orders defendant to reimburse

[5] As noted in *Dunbar*, *supra* at 255 n 14, "[j]ust as an evidentiary hearing is not required at the trial level, one is not required on remand. The court may obtain updated financial information from the probation department." Further, *Dunbar* states that a court's decision to make a defendant reimburse attorney fees must be included in a separate order, not the judgment of sentence, because Michigan lacks a statutory sentencing scheme authorizing repayment of court-appointed attorney fees. *Id.* at 256. However, the Legislature has since enacted MCL 769.1k(1)(b)(iii), which allows the court to impose "[t]he expenses of providing legal assistance to the defendant" in the judgment of sentence. Thus, a separate order is no longer necessary.

court-appointed attorney fees and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald