STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2009
v	No. 281621 Berrien Circuit Court
SHANEKA WASHINGTON, Defendant-Appellant.	LC No. 2007-400907-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right her convictions for first-degree murder, MCL 750.316(1)(b), first-degree child abuse, MCL 750.136b(2), and third-degree child abuse, MCL 750.136b(5). Defendant was sentenced to life imprisonment for her first-degree murder conviction, 120 to 180 months' imprisonment for her first-degree child abuse conviction, and 203 days in jail for her third-degree child abuse conviction. For the reasons set forth in this opinion, we affirm defendant's convictions and sentences.

This case arises from the death of one of defendant's children and serious injuries suffered by two of her other children. Early in the morning on February 20, 2007, emergency personnel were summoned to defendant's residence; one of her daughters was having difficulty breathing and was unresponsive to treatment. Two days later, the child died from cranial cerebral trauma, and the death was declared by Dr. Stephen Cohle to have been a homicide. Defendant's other children were removed from the home. When medical personnel examined the children, they found a recent "loop-shaped abrasion across her son's abdomen; bruises on his left thigh, bruising on his left buttock, a scar on his right cheek, and an abrasion across his right clavicle." Another daughter of defendant's had bruises and abrasions on her body, and x-rays revealed that she also had two skull fractures.

Police officers interviewed defendant and inquired about the cause of the trauma to the children. Defendant offered varying explanations for the childrens' injuries, including that they had fallen off a couch or a bed and that she had lifted the deceased child up by her arms and legs to place her back in the bed. There was evidence that defendant had complained to her boyfriend, who was incarcerated for reasons unrelated to the children, that she no longer had any freedom because of the children and that she had not "enjoyed [her]self in three years." Defendant also wrote to her boyfriend, with whom she was to have a child, imploring him, "[p]lease don't make me keep this baby." During one visit with her boyfriend, defendant told

him that "she be whoopin [sic] the kids[,]" that "she throw [sic] them on the floor" when they cried, and that she had punched one of her children in the eye.

Defendant was charged with first-degree child abuse, felony murder, and second-degree murder for allegations relating to her deceased daughter. She was also charged with first-degree child abuse for allegations relating to her other daughter and third-degree child abuse for allegations relating to her son. At trial, defendant denied causing the injuries to her children, claiming that "[m]y baby fell off the bed," and that "anything could happen." However, defendant admitted that she was the only adult present when the injuries could have occurred. Defendant also denied making statements to her boyfriend that she had thrown the children onto the floor. Defendant claimed that she told her boyfriend that she punched one of the children in the eye to see how he would react. As to her deceased child, defendant testified: "I thought my baby had a disable [sic] problem. I was supposed to get on that but I never got a chance to get around to it."

The jury found defendant guilty of first-degree murder, first-degree child abuse, and third-degree child abuse. This appeal then ensued.

Defendant argues that she was denied effective assistance of counsel because her trial counsel failed to raise or preserve an insanity or temporary insanity defense. Because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on a claim of ineffective assistance of counsel, a defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy. *Id.* at 58. Defendant must prove that trial counsel's performance was deficient, and that but for that deficient performance, the outcome of the trial would have been different. *Id.* at 57-58.

Trial counsel renders ineffective assistance of counsel by failing to investigate and present a meritorious insanity defense. *People v Shahideh*, 277 Mich App 111, 119; 743 NW2d 233 (2007). MCL 768.21a(1) provides in part: "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense." "An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). A defense of temporary insanity may arise "when the chemical effects of drugs or alcohol render the defendant temporarily insane." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992).

Defendant has not provided any affidavits or documentation indicating that she had any medical or psychological condition at the time of the offenses to support her assertion that exploration of an insanity defense might have been reasonable. "Insanity is a burden-shifting affirmative defense, placing the burden of going forward with evidence of insanity on the defendant." *People v Mette*, 243 Mich App 318, 328; 621 NW2d 713 (2000). Given the lack of any evidence that defendant had a history of mental illness, we cannot find within the record before us, a basis for trial counsel to have raised an insanity defense. Hence, given that there are no facts indicating that defendant was legally insane when she committed the charged offenses, and no support for her claim that she had a meritorious insanity defense, defendant failed to

establish the necessary factual predicate of her ineffective assistance claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Moreover, defendant's defense at trial was to deny injuring her children. While a defendant may present inconsistent defenses, *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), such an alternate defense would have undermined her defense. The failure of defense strategy does not constitute ineffective assistance of counsel, *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996), and we will not substitute our judgment for that of trial counsel regarding matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Next, defendant asserts that the trial court deprived her of her constitutional rights by failing to take into account all mitigating evidence during sentencing. Our review of unpreserved allegations of sentencing errors is limited to review for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Defendant has failed to cite or identify any mitigating evidence that the trial court should have considered. Defendant bore the burden of furnishing this Court with a record to verify the factual basis of any argument upon which reversal was predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). She has not done so here, and we conclude that this issue is abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Nevertheless, we find that the trial court reviewed defendant's presentence investigation report (PSIR) and her sentence information report (SIR); thus, there is no evidence that the trial court failed to consider any relevant mitigating evidence in sentencing defendant. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

Defendant also contends that the trial court committed numerous sentencing errors with respect to the imposition of her sentence for her first-degree child abuse conviction. We reject each of these challenges as legally and factually insufficient.

First, defendant argues that the trial court failed to consider defendant's rehabilitative potential. To support this argument, defendant provides only a self-serving assertion that she has strong family support. At sentencing, the trial court noted that it reviewed the PSIR, which contained information regarding defendant's familial history. Where, as in this case, the record indicates that the trial court implicitly relied on the sentencing guidelines as provided by the defendant's PSIR, the trial court's articulation requirement is satisfied. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Defendant has failed to establish plain error affecting her substantial rights.

Second, defendant asserts that the trial court should have departed downward in sentencing defendant, because she had serious mental health issues. A trial court may depart from the properly calculated guidelines only for "substantial and compelling" reasons. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). A substantial and compelling reason is one that is objective and verifiable and irresistibly grabs the court's attention; is of considerable worth; and exists only in exceptional cases. *People v Claypool*, 470 Mich 715, 724; 684 NW2d 278 (2004). There is no evidence indicating that defendant had a history of mental illness, and defendant's argument essentially asks this Court to conduct a psychiatric evaluation based on very limited information. On the record before us, we conclude

that there is no objective and verifiable information related to any mental health issues that would irresistibly grab the court's attention and exists only in an exceptional case. *Id.*

Third, defendant contends that trial court failed to conduct an assessment of her rehabilitative potential pursuant to MCR 6.425(A)(5).[1] This contention lacks merit because there is no requirement for a trial court to conduct an assessment of defendant's rehabilitative potential under MCR 6.425(A)(5). The PSIR contained no information regarding defendant's medical and substance abuse history, and there was no evidence that she ever used or abused drugs or alcohol. The PSIR also noted that defendant had been evaluated in the past, and the evaluator "found nothing clinically wrong with her." Defendant's PSIR complied with MCR 6.425(A)(5).

Fourth, defendant argues that the trial court imposed her sentence without complete and accurate information. The record refutes defendant's argument that her sentence was not based on accurate information. Defendant failed to object to her PSIR at sentencing. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Even on appeal, defendant does not claim that the PSIR is inaccurate, but merely provides self-serving conclusory statements that the trial court sentenced her without accurate information because it failed to assess her rehabilitative potential. Any allegation of error related to the completeness or accuracy of the PSIR must be rejected, because defendant may not challenge the accuracy of her PSIR unless she raised the issue at or before sentencing. *People v Bailey*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Fifth, defendant asserts that her sentence constitutes cruel and unusual punishment because it was disproportionate and the trial court failed to assess her rehabilitative potential. There is no indication that the trial court failed to consider defendant's rehabilitative potential. Moreover, defendant's sentence for first-degree child abuse is within the applicable guidelines range; thus, that sentence is presumed proportionate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). A sentence falling within the sentencing guidelines or a proportionate sentence does not constitute a cruel of unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004).

Sixth, defendant claims that the trial court failed to consider all of the factors used to determine the appropriateness of a sentence. Generally, a sentencing court should consider the following factors: "(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses." *People v Rice*, 235 Mich App 429, 446; 597 NW2d 843 (1999). "[T]here is no requirement that the trial court expressly mention each goal of sentencing when imposing sentence." *Id.* Thus, defendant's claim of error lacks merit.

Finally, defendant contends that the trial court's sentence violated the principles expressed in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our

[1] MCR 6.425(A)(5) provides in pertinent part that a presentence report must include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report."

Supreme Court has repeatedly rejected such a contention, holding that Michigan's indeterminate sentencing scheme is unaffected by *Blakely* principles. *People v McCuller*, 479 Mich 672, 676-678, 698; 739 NW2d 563 (2007).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello