STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 31, 2009
v	No. 278617 Wayne Circuit Court
ANTHONY RABY, Defendant-Appellant.	LC No. 07-004190-01

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316b, with the predicate felony of first-degree child abuse, MCL 750.136b(2), for each count. Defendant was sentenced to life imprisonment without parole for each count. Defendant appeals as of right, and we affirm.

Defendant's convictions rise from the deaths of two young girls: Kyra Kinds, who was two years old, and Raven Raby, defendant's one-year-old daughter. On August 5, 2000, Kimberly Williams, Kyra Kind's aunt, found her dead body after returning from a party. At trial, Dr. Carl Schmidt, an expert forensic pathologist, testified that she died from blunt force trauma and shaken baby syndrome. He also testified that there was evidence that she had been sexually abused. At the time of Kyra Kind's death, defendant was the only male living in the home with her. Three years after Kyra Kind's death, on May 30, 2003, Nina Amos, Raven Raby's mother, found Raven's dead body. At trial, Dr. Schmidt testified that Raven also died of blunt force trauma, and likely also from shaken baby syndrome.

First, defendant argues that the admission of Kyra Kind's and Raven Raby's autopsy reports prepared by nontestifying medical examiners through Dr. Schmidt's testimony violated his Sixth Amendment confrontation clause rights. Defendant also argues that his trial counsel's failure to object to the admission of the autopsy reports and Dr. Schmidt's testimony denied him effective assistance of counsel. We conclude defendant is not entitled to relief on any of these claims.

To preserve an issue for appeal, a timely objection must be made in the lower court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant failed to object to the admission of the autopsy reports and Dr. Schmidt's testimony on any grounds. Thus, this issue

is unpreserved. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this "bedrock procedural guarantee," which applies to state and federal prosecutions, testimonial hearsay[1] is inadmissible against a criminal defendant unless the declarant is unavailable, and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 38, 58; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). The Court noted that where nontestimonial hearsay is concerned, it is consistent with the Framers' intent to allow states the flexibility to determine the admissibility of such statements under their hearsay laws. *Crawford, supra* at 68.[2]

It is not plain that the 2000 autopsy report (or any part of it) constitutes testimonial hearsay within the meaning of *Crawford*. Initially, the *Crawford* Court stated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," and that "[t]he Sixth Amendment must be interpreted with this focus in mind." *Crawford, supra* at 50. In contrast to the English common-law tradition of "live testimony in court subject to adversarial testing," the civil law condoned "examination in private by judicial officers." *Id*. at 43. But a medical examiner conducting an autopsy and preparing a report based on the autopsy is neither conducting nor being subject to a question and answer examination or other type of interrogation characteristic of taking testimony. Accordingly, use of such a report against a criminal defendant is not within the scope of the principal evil of the use of *ex parte* examinations of witnesses against criminal defendants proscribed by the confrontation clause.

Where the hearsay is nontestimonial, the confrontation clause does not restrict state law in its determination of whether the hearsay is admissible. *Crawford, supra* at 68. "While the [*Crawford*] Court left for another day any effort to spell out a comprehensive definition of what is testimonial, it also stated that statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *McPherson, supra* at 132 (internal quotation

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[1] Under MRE 801(c) hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[2] *Crawford* applies only to substantive evidentiary use of testimonial hearsay. *Crawford, supra* at 59 n 9. The confrontation clause does not bar the use of out-of-court statements, even testimonial ones, for purposes other than establishing the truth of the declarant's assertion. *McPherson, supra* at 133 (citing *Crawford*). In *McPherson*, this Court held that testimonial hearsay was not rendered inadmissible by the confrontation clause because it was not admitted to prove the truth of the declarant's assertion. *McPherson, supra* at 133-134. Rather, the declarant's out-of-court statement to the police (stating that the defendant was the shooter) was admitted to impeach the defendant's trial testimony that the declarant was the shooter. *McPherson, supra* at 134..

marks, brackets and citations omitted). Thus, statements taken by police in the course of interrogations are the quintessential, paradigm exemplar of testimonial hearsay.

Crawford also did not define "interrogation,"[3] but used the term "in its colloquial, rather than in any technical legal, sense." *Crawford*, 541 US 53 n 4, citing *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980), on remand *State v Innis*, 433 A2d 646 (RI, 1981), cert den 456 US 930; 102 S Ct 1980; 72 L Ed 2d 447 (1982). The cited pages of *Innis*, a *Miranda*[4] case, focus on the voluntariness of the statement to the police, indicating that "interrogation" includes "express questioning or its functional equivalent," the latter being "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis, supra*, 446 US 300-301. *Innis* also noted that a purpose of the protections during custodial interrogations is "to vest the suspect in police custody with an added measure of protection against coercive police practices." *Innis, supra*, 446 US 301.

Statements not made during police interrogation are not testimonial. For instance, in *United States v Lopez*, 380 F3d 538, 545-546 (CA 1, 2004), an officer's remark, although it suggested that the case against the defendant was strengthened by discovery of "the stuff," was not designed to elicit an incriminating response; it was a passing remark that could not be construed as the functional equivalent of an interrogation. In *United States v Gibson*, 409 F3d 325, 338 (CA 6, 2005), the court described the statements as nontestimonial where the "statements were not made to the police or in the course of an official investigation . . . [nor in an attempt] to curry favor or shift the blame."

The *Crawford* Court further stated:

> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them. [*Crawford, supra* at 51.]

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[3] In *Crawford*, police interrogated the defendant and his wife, Sylvia, twice. The defendant confessed certain facts, and Sylvia gave a taped statement that incriminated the defendant. *Crawford, supra* at 38-39. At trial, Sylvia did not testify, based on the state marital privilege. But that privilege did not extend to a spouse's out-of-court statements admissible under a hearsay exception, so the prosecution offered, and the trial court admitted into evidence, Sylvia's statement to the police. *Id*. at 40. The Supreme Court held that there was "interrogation" of Sylvia under any definition of that word because her statement was "given in response to structured police questioning," *id.* at 53 n 4, and Sylvia's recorded statement was "testimonial under any definition," *id*. at 61. Accordingly, admission of Sylvia's statement to the police violated the defendant's right to confront the witnesses against him.

[4] *Miranda v Arizona*, 396 US 868; 90 S Ct 140; 24 L Ed 2d 122 (1966).

Statements on the causes of a person's death, by a medical examiner, stated in an autopsy report, bear little resemblance to statements made in response to *ex parte* examination of witnesses for purposes of prosecuting a defendant. This is a significant indication that the use of such an autopsy report, including the 2000 autopsy report at issue, as evidence against a criminal defendant is not plainly proscribed by the confrontation clause. Moreover, the Court referred to hearsay exceptions for business records as covering statements "that by their nature were not testimonial." *Id*. at 56. A medical examiner's report of his own findings and conclusions is akin to a business record that should not be regarded as testimonial, because it does not involve questioning or interrogation.

Defendant did not cite, and we have not found, any United States Supreme Court opinion since *Crawford* addressing whether a report of this nature constitutes testimonial hearsay for confrontation clause purposes. Thus, it is not plain from United States Supreme Court precedent that any findings or conclusions from the 2000 autopsy report, that were admitted at trial, constituted inadmissible testimonial hearsay. We find no plain error.

Defendant also relies on the opinion of Judge (now Chief Judge) Saad in *People v Lonsby*, 268 Mich App 375, 391 n 10; 707 NW2d 610 (2005) (Saad, J.), citing *People v Hernandez*, 7 Misc 3d 568, 570; 794 NYS2d 788 (2005); *Las Vegas v Walsh*, 120 Nev 392; 91 P3d 591, 595, mod 100 P3d 658 (2004), original opinion withdrawn and substitute opinion issued, 121 Nev 899; 124 P3d 203 (2005);[5] and *People v Rodgers*, 8 AD3d 888, 891; 780 NYS2d 393 (2004). But these foreign decisions are not binding precedent, and do not support a finding of plain error. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). In addition, only Chief Judge Saad signed that opinion, as the other two judges concurred in the result only, and therefore, *Lonsby* lacks precedential significance, *In re Kubiskey Estate*, 236 Mich App 443, 448; 600 NW2d 439 (1999), and cannot support a finding of plain error.

It is unclear whether defendant is also arguing that the 2000 autopsy report was inadmissible hearsay under the Michigan Rules of Evidence, independent of his confrontation clause rights. In any event, we find no plain error in the admission of contents of the autopsy report as a matter of Michigan evidentiary law. Under MRE 803(8), the public records exception to the hearsay exclusion, the following types of evidence are admissible regardless of whether the declarant is available:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.[6]

[5] The issuance of the substituted opinion in *Walsh* occurred on December 15, 2005, after the October 13, 2005 date of this Court's decision in *Lonsby*.

[6] MCL 257.624 is not implicated in this issue.

It is undisputed that the autopsy report at issue was prepared by a medical examiner. Medical examiners are county government officials or employees. See MCL 52.201 to 52.201f (detailing procedures related to county level appointment of medical examiners). Accordingly, an autopsy report by a medical examiner is both a report setting forth an activity of a public office, and a report of a matter observed pursuant to duty imposed by law. See MCL 52.202 and MCL 52.207 (setting forth a medical examiner's duty to investigate deaths in certain circumstances). Further, medical examiners are not law enforcement personnel, given that the county medical examiners act, MCL 52.201 et seq., does not grant them authority to make an arrest or engage in other coercive activity traditionally associated with law enforcement.[7] Thus, the testimony about the 2000 autopsy report was admissible under MRE 803(8).

In addition, it was not error for the trial court to allow Dr. Schmidt to testify to his own conclusions as to the cause of Kyra Kind's and Raven Raby's deaths.

Expert witnesses are not required to rule out another's alternative theory. *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008), citing *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 499; 491 NW2d 243 (1992). An expert's opinion must have a sound foundation that is in accord with the facts. *Id.* It is only when the expert's opinions and conclusions are not in accord with the facts that the expert's testimony is objectionable. *Id*. Here, defendant does not argue that Dr. Schmidt's conclusions were outside of the realm of his expertise as a forensic pathologist. Nor does defendant argue that Dr. Schmidt could not reasonably conclude from the facts contained in the autopsy reports his conclusions at trial. Indeed, defendant only argues Dr. Schmidt should not have been allowed to testify to his conclusions because they contradicted the findings of the medical examiner who prepared the report. This argument is unavailing because it is for the jury to determine the weight and credibility of expert testimony. *Surman v Surman*, 277 Mich App 287, 309; 745 NW2d 802 (2007).

Defendant also argues that because his trial counsel failed to object to the admission of the autopsy reports and Dr. Schmidt's testimony he was denied effective assistance of counsel. Since effective counsel is presumed, a defendant who challenges his counsel's assistance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show (1) trial counsel's actions fell below that of a reasonably competent attorney when objectively viewed, (2) but for trial counsel's unreasonable conduct, there was a reasonable probability the outcome of the trial would have been different, and (3) the trial court's verdict prejudiced the defendant. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

First, trial counsel's failure to object to admission of evidence regarding the autopsy report and Dr. Schmidt's testimony did not constitute deficient performance. As discussed

[7] For this reason, *People v McDaniel*, 469 Mich 409; 670 NW2d 659 (2003), a case cited by defendant, does not support a finding of plain error. In particular, our Supreme Court held in that case that a report prepared by a police officer was not admissible under MRE 803(8) in that criminal case. *Id*. at 413.

above, it is not plain that the autopsy report was testimonial hearsay. Further, the autopsy report is considerably different in nature from recognized types of testimonial hearsay such as prior testimony and statements made in response to police interrogation. Accordingly, trial counsel's failure to make the novel argument that the Confrontation Clause barred Dr. Schmidt's testimony about the autopsy report findings did not constitute deficient performance because "defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Also, the testimony about the autopsy report was admissible under MRE 803(8). Further, it is well-established that evidence relied upon by an expert must be admissible at trial. There is no rule that requires an expert to adopt every conclusion contained in documents and reports upon which the expert bases an opinion. For these reasons, it would have been futile for trial counsel to object to the admissibility of the autopsy report and Dr. Schmidt's expert testimony based on Dr. Schmidt disagreeing with certain conclusions in the autopsy report. Failure to make a futile objection is not ineffective assistance of counsel. See, e.g., *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Thus, defendant has not established a claim of ineffective assistance of counsel.

Defendant also argues that the trial court erred in admitting evidence of Raven Raby's murder as evidence he committed Kyra Kinds's murder. Defendant further argues that the trial court erred in allowing the admission of MRE 404(b) or other acts evidence to prove defendant's propensity to commit the murders of Raven Raby and Kyra Kinds. Although defendant did not properly cite MRE 404(b) as a basis of his objection, he properly preserved the argument regarding the evidence of Raven Raby being used to show he murdered Kyra Kinds. However, defendant failed to preserve his claim concerning other evidence, which could constitute MRE 404(b) evidence. Again, we conclude defendant is not entitled to relief based on this issue.

MRE 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other acts evidence is only admissible to prove an issue which is actually in dispute. *People v Brown*, 137 Mich App 396, 404; 358 NW2d 592 (1984). A defendant's denial of culpability places all the elements of a crime in issue. *People v Starr*, 457 Mich 490; 501; 577 NW2d 673 (1998). In this case, since defendant denied any wrongdoing, all the elements of the crimes here were at issue, including identity. Therefore, it was permissible for plaintiff to seek introduction of other acts evidence at trial.

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), our Supreme Court adopted a four-part test first enunciated by the United States Supreme Court in *Huddleson v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988), to determine the admissibility of MRE 404(b) or other acts evidence. *People v Sabin* (*After Remand*), 463 Mich

43, 55; 614 NW2d 888 (2000). First, the evidence offered must be relevant to an issue other than to prove character or propensity. *VanderVliet*, *supra* at 74. Second, the evidence must satisfy the relevancy requirement of MRE 402. *Id*. Third, the evidence must survive the balancing test of MRE 403. *Id*. Lastly, upon request, a limiting instruction can be given to the jury. *Id*.

MRE 402 states "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Evidence is relevant if has a tendency to make a fact in issue more or less probable than without the evidence. MRE 401. However, even relevant evidence is inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. Evidence is not unfairly prejudicial merely because it is damaging to a party's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Evidence is unduly prejudicial if it has "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. The danger of introducing unfairly prejudicial evidence is the possibility the jury would find the evidence more probative of an issue than it deserves. *Id*.

Prior to trial, plaintiff notified defendant of its intention to use the challenged evidence to prove identity, opportunity, intent, and lack of mistake or accident. These are all permissible purposes under MRE 404(b). Plaintiff, through the testimony of Dr. Schmidt and other witnesses, demonstrated a sufficient factual nexus existed between the murder of Raven Raby and the murder of Kyra Kinds, therefore, satisfactorily establishing that the evidence was being introduced for purposes other than propensity or character. Further, the evidence was highly relevant to show that defendant's actions were consistent with a pattern of behavior, and thus purposeful.

Further, in a criminal case involving domestic violence, the prosecution is permitted under MCL 768.27b to introduce evidence of other acts of domestic violence committed by the defendant for any relevant purpose. MCL 768.27b(1). Thus, unlike under MRE 404(b), the prosecution can introduce prior bad acts against a defendant under MCL 768.27b explicitly for the purpose of proving character. Under MCL 768.27b(1), an individual commits domestic violence when he or she causes physical harm to another person with whom the individual resides. MCL 768.27b(5)(a)(i) & (5)(b)(ii). Once evidence is properly admitted under MCL 768.27b, the admissibility of the evidence under MRE 404(b) is immaterial. See *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007).

In this case, evidence of Raven Raby's murder was also admitted under both MRE 404(b) and MCL 768.27(b). Since the facts of this case fall within the bounds of MCL 768.27(b), further analysis of whether the evidence was properly admitted under MRE 404(b) is not warranted.

At trial other bad acts testimony was also introduced. Specifically, there was testimony that while defendant lived with Kyra Kinds, she received a broken leg while at day care. There was also testimony that defendant had encouraged Angela Phillips, Kyra's mother and Nina Amos, Raven's mother, to obtain abortions after they became pregnant with his children. Another witness testified that defendant allegedly told her sometime before Kyra Kinds's death that he did not want to take care of another man's child. Defendant argues this testimony was improperly admitted under MRE 404(b). Since defendant failed to object to the evidence, we review for plain error affecting substantial rights. *Carines*, *supra* at 763.

We find since the testimony concerning Kyra receiving a broken leg at daycare is not relevant to the issue whether defendant is guilty of the crimes charged, the introduction of this evidence was in error. However, because defendant fails to show the outcome of the trial would have been different without this evidence, which obviously did not even implicate defendant, the error was harmless. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005). On the other hand, we do not find it was error to admit the other testimony at issue for several reasons.

First, the testimony from Amos that defendant kicked her in the side while she was pregnant with Raven and her twin sister, was admissible under MCL 768.27b as evidence of defendant's commission of domestic violence. Likewise, the testimony about conversations defendant had with Angela and Amos about having abortions, and the alleged conversation defendant had with Nicole Phillips about not wanting to take care of another man's child are admissible. Such testimony is permissible to show motive. "A motive is the inducement for doing some act; it gives birth to a purpose." *People v Kuhn*, 232 Mich 310, 312; 205 NW 188 (1925). Assuming defendant made these statements, they would help explain why defendant would choose to abuse two young girls that were under his care. While there is a danger that such comments would prejudice the jury, all evidence introduced against a defendant is prejudicial. However, the probative value of this evidence outweighs the prejudicial effect.

Defendant further argues that application of MCL 768.27b in this case violates constitutional ex post facto protections. In *People v Schultz*, 278 Mich App 776, 777; 754 NW2d 925 (2008), this Court rejected the claim that application of MCL 768.27b violated constitutional ex post facto protections. Pursuant to MCR 7.215 (J)(1) we are bound to follow this Court's holding in *Schultz*.

Finally, defendant argues that there was insufficient evidence to support his conviction. We disagree. In a criminal case, a challenge to the sufficiency of the evidence is reviewed de novo in the light most favorable to the plaintiff to determine whether a rational trier of fact could find beyond a reasonable doubt that all essential elements of the plaintiff's case were proven. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "[A]ll conflicts in the evidence must be resolved in favor of the plaintiff." *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). As we have largely indicated above there was sufficient circumstantial evidence of defendant's guilt of the charged murders given evidence of his opportunity to commit the crimes when alone with the girls and the improbability of an innocent person being so closely connected to the highly similar deaths of two infants. In this regard, circumstantial evidence and reasonable inferences therefrom can be sufficient to support a conviction. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens