STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 10, 2009
v	No. 285485 Oakland Circuit Court
STEVEN LINDSEY MCBURNEY, Defendant-Appellant.	LC No. 2007-214651-FC

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and first-degree child abuse, MCL 750.136b(2). Defendant was sentenced as a second-felony habitual offender, MCL 769.10, to concurrent prison terms of 30 to 60 years for the murder conviction and 15 to 22-1/2 years for the child abuse conviction. We affirm.

Defendant's convictions arise from the death of his 11-month-old daughter. The medical examiner determined that the victim died as a result of blunt force trauma to the head and related complications caused by subdural hemorrhaging, including loss of blood flow and oxygen supply to parts of the brain. In a statement to the police, defendant admitted that while caring for the victim, he could not get her to stop crying and screaming. He explained that he became angry and frustrated, and then threw the victim into her crib from approximately two feet away, causing her head to strike the padded bars. The victim immediately had a seizure and became unresponsive.

At trial, the prosecution presented evidence that in 1998, while caring for another child who was 4-1/2 months old, defendant became angry and frustrated when the child would not stop crying. He began shaking and bouncing the child hard, causing subdural hematomas, retinal hemorrhages, a subarachnoid hemorrhage, and a skull fracture.

I. Prosecutorial Misconduct

Defendant first argues on appeal that the prosecutor unfairly impeached and attacked his defense expert, Dr. Ronald Uscinski, thereby denying him a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123

(1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Defendant objected at trial to the prosecutor's questions concerning Dr. Uscinski's testimony and fees in other cases, and the percentage of his income that was attributable to testifying in cases involving children with head injuries, thereby preserving those claims. However, he did not object to the prosecutor's questions concerning Dr. Uscinski's fees or whether they had met before, or to the prosecutor's comments during closing argument. Accordingly, these latter issues are unpreserved. We review unpreserved claims of misconduct for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).[1] "[A]ppellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble*, *supra* at 660; see also *Schutte*, *supra* at 721-722.

Defendant argues that the prosecutor improperly referred to facts not in evidence by stating that she and Dr. Uscinski had met before. "A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, however, the challenged conduct involves a question at the beginning of the prosecutor's cross-examination in which she asked Dr. Uscinski whether they had met before. Dr. Uscinski responded that the prosecutor looked familiar. This conduct does not involve any argument regarding evidence not presented to the jury. Thus, there was no plain error. Further, the jury was aware that Dr. Uscinski had testified in other cases. We fail to see how defendant was prejudiced by this brief exchange.

Defendant next argues that it was improper for the prosecutor to question Dr. Uscinski about his fees in this and other cases. We disagree. In *People v Unger*, 278 Mich App 210, 236-237; 749 NW2d 272 (2008), this Court stated that while a prosecutor may not denigrate defense counsel,

> [t]he prosecution is free to argue that defense counsel had "bought" [an expert]'s testimony by paying him a substantial amount of money. This statement did not denigrate defense counsel as much as it tended to denigrate the expert witness himself. Moreover, counsel is always free to argue from the evidence presented at trial that an expert witness had a financial motive to testify. The record supports the prosecution's argument that [the expert] was substantially compensated for his testimony, and we therefore find no error in this regard. [Citations omitted.]

Thus, a prosecutor does not commit misconduct by arguing that a defense expert has been "bought" and has a financial motive to testify. In the present case, it was not improper for the prosecutor to attempt to show that defendant had "bought" Dr. Uscinski's testimony, that Dr. Uscinski had a financial motive to testify in a certain manner, that Dr. Uscinski had a niche, and that his testimony should not be believed. There was no misconduct.

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[1] Abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant also argues that the prosecutor improperly impeached Dr. Uscinski by using transcripts from other cases in which he had testified, for the purpose of showing that Dr. Uscinski had a pattern of testifying that brain injuries in children are caused by chronic subdural rebleeds. We disagree.

The prosecutor attempted to use the transcripts to unsuccesfully refresh Dr. Uscinski's recollection. The transcripts were not read to the witness for impeachment, and were not introduced into evidence. A prosecutor is entitled to show that a defendant has "bought" an expert's testimony, and that the expert should not be believed. *Unger*, *supra* at 236-237. By attempting to refresh Dr. Uscinski's recollection concerning his testimony in other cases, the prosecutor was attempting to elicit evidence in support of an argument that Dr. Uscinski is a professional witness, with a financial motive and a particular point of view, and that he should not be believed. A finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble*, *supra* at 660 (citation omitted). There was no misconduct.

Defendant further argues that it was improper for the prosecutor to argue during closing argument that, for a price, one could find a witness to say anything, and that Dr. Uscinski was that witness. We again disagree. As defendant correctly observes, an unsupported, prejudicial attack on a defendant's expert can require reversal. *People v Howard*, 226 Mich App 528, 545; 575 NW2d 16 (1997). However, such attacks are not improper if supported by the record. *Id*. at 545-546. In the present case, the prosecutor was entitled to forcefully attack the credibility of defendant's expert, and her attacks were properly founded in the evidence. See *Unger*, *supra* at 236-237. Accordingly, there was no misconduct.

II. Evidence of Prior Acts of Domestic Violence

Defendant argues that the trial court erred in admitting evidence of his prior abuse of another child, and that the cautionary instruction provided to the jury was insufficient to cure the resulting prejudice. Defendant further argues that the admission of the other child's medical records violated his right of confrontation. We disagree.

A. Prior Acts of Domestic Violence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility, such as whether a rule or statute precludes the admission of the evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The prosecutor offered the evidence of defendant's prior abuse of another child under MCL 768.27b(1), which provides:

> Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible *for any purpose for which it is relevant*, if it is not otherwise excluded under Michigan rule of evidence 403. [Emphasis added.]

Defendant does not dispute that the evidence of his abuse of another child involved an act of domestic violence that qualifies for admission under MCL 768.27b(1). Instead, defendant argues that the evidence should not have been admitted because it was irrelevant, tended to prove his propensity to physically abuse children, and was more prejudicial than probative.

In *People v Pattison*, 276 Mich App 613, 615-616; 741 NW2d 558 (2007), this Court considered a related statute, MCL 768.27a, which addresses evidence of other acts of criminal sexual conduct rather than evidence of other acts of domestic violence. The Court examined the statute in relation to MRE 404(b)(1), which prohibits evidence of prior bad acts to prove the character of a person in order to show action in conformity therewith. The Court recognized that in enacting MCL 768.27a, the Legislature made a policy decision to allow the admission of certain kinds of evidence for any relevant purpose, including proving a defendant's propensity to commit certain kinds of acts, regardless of MRE 404(b). *Id*. at 620-621. In *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008), this Court recognized that because of the similarities between MCL 768.27a and MCL 768.27b, the *Pattison* Court's comments concerning MCL 768.27a(1) were equally applicable to MCL 768.27b(1).

Thus, under *Pattison* and *Schultz*, defendant's argument that the evidence of his prior abuse of another child was not admissible to show his propensity for abusing children is without merit. Nonetheless, we note that the prosecutor in this case did not offer the evidence for a propensity purpose, but rather to prove defendant's knowledge and intent. Moreover, we disagree with defendant's argument that the evidence was not relevant to these purposes or that its admission was unduly prejudicial under MRE 403.

To convict defendant of first-degree child abuse, MCL 750.136b(2), the prosecutor was required to prove that defendant "knowingly or intentionally" caused serious physical harm to the victim. To convict defendant of murder, the prosecutor was required to prove that he acted with malice, which "is defined as either the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

Evidence that defendant previously became exasperated with another child's crying and shook the child hard until the child went limp and stopped breathing, and that the child suffered subdural hematomas, a subarachnoid hematoma, retinal hemorrhages, and a skull fracture, was relevant to defendant's knowledge of what would happen to the victim in this case if she was shaken or forcefully thrown into her crib from a distance of approximately two feet. The evidence was probative of whether defendant knowingly and intentionally injured the victim, and whether he acted in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm to the victim. Defendant's knowledge and intent were the principal issues in the case. While the evidence was prejudicial, its prejudicial effect did not substantially outweigh the probative value of the evidence. Therefore, the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues that the admission of the other child's medical records, which contained a medical diagnosis of shaken baby syndrome, violated his Sixth Amendment right of confrontation. We again disagree. We review constitutional questions de novo. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

In *Crawford v Washington*, 541 US 36, 53-56; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, a testimonial statement of a witness absent from trial is not admissible for its truth unless the declarant is unavailable and there has been a prior opportunity for adequate cross-examination. As such, *Crawford* is applicable only to substantive use of testimonial hearsay. *Id.* at 59 n 9. The Confrontation Clause does not prohibit the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *McPherson*, *supra* at 133, citing *Crawford*, *supra* at 59 n 9. In this instance, the challenged medical records were offered not to prove a propensity by defendant for abuse or to establish the allegations regarding his abuse of Madison. Rather, the records were introduced to show that defendant understood or had reason to know the consequences of his improper handling of a young child and the risk of injury. As such, the records did not violate defendant's right of confrontation pursuant to *Crawford.* Based on our determination regarding the admissibility of the challenged evidence, we need not address defendant's contention regarding the adequacy of the cautionary instruction provided by the trial court to the jury.

A defendant is entitled to a new trial if his or her right to confrontation is violated unless the error is deemed harmless beyond a reasonable doubt. *People v Bauder,* 269 Mich App 174, 179; 712 NW2d 506 (2005). Although we have determined that defendant's right to confrontation was not violated, even if admission of the child's medical records comprised error, the evidence of defendant's guilt was sufficiently established that any error would have been harmless and a new trial would not be warranted. *Id.* at 179-180.

III. Sentencing

Defendant argues that the trial court erred in scoring 50 points for offense variable ("OV") 7 of the sentencing guidelines, and by considering his failure to admit responsibility for this crime. We disagree.

Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). When scoring the guidelines, "[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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). Absent an error in the scoring of the guidelines or reliance on inaccurate information, a minimum sentence that is within the guidelines range "shall" be affirmed on appeal. MCL 769.34(10); *Libbett*, *supra* at 363-364.

MCL 777.37(1)(a) provides that 50 points may be scored for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The trial court determined that 50 points should be scored because defendant treated the victim with excessive brutality. Because the statute uses the word "or" as a disjunctive, a court can properly assess 50 points for excessive brutality without demonstrating that a defendant acted for the purpose of increasing the victim's fear and anxiety.

The evidence showed that defendant became angry and frustrated when the 11-month-old victim would not stop crying. He threw her from a distance of approximately two feet into her

crib, causing her head to strike the padded bars. The victim sustained an epidural hemorrhage to her spine, at the lower neck and upper back area. Her head moved with sufficient force that blood vessels in the subdural region of her brain were damaged, causing bleeding. She suffered a subdural hematoma that led to brain swelling, retinal hemorrhaging, brain herniation, pre-mortem necrosis of brain tissue, and eventually death. Considering the child's age, size, and helplessness, the evidence supports the trial court's finding that defendant acted with excessive brutality. The trial court did not abuse its discretion in scoring 50 points for OV 7.

Defendant also argues that the trial court improperly enhanced his sentence because of his failure to admit responsibility for this crime. We disagree. It is well established that "a sentencing court cannot, in whole or in part, base its sentence on a defendant's refusal to admit guilt." *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987). The trial court did not punish defendant for his refusal to admit guilt. Rather, the trial court was responding to defendant's comments and explaining why it did not find defendant's purported acceptance of responsibility to be genuine. Regardless, the trial court sentenced defendant well within the sentencing guidelines range of 225 to 468 months or life. Because defendant has not established a scoring error or reliance on inaccurate information, we must affirm defendant's sentences. MCL 769.34(10).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens