STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2009
v	No. 285483 Oakland Circuit Court
TERRELL ALBERT BISHOP, Defendant-Appellant.	LC No. 2008-219162-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree child abuse, MCL 750.136b(3), and two counts of third-degree child abuse, 750.136b(5).[1] He was sentenced to concurrent terms of two to four years' imprisonment for the second-degree child abuse conviction, and one to two years' imprisonment for each third-degree child abuse conviction, with 76 days' credit for time served. He appeals as of right. We affirm.

I. Basic Facts

Defendant, a former police officer, was convicted of abusing his live-in girlfriend's two daughters, three-year-old SH and 23-month-old LH. The mother and her two daughters lived with defendant in his long-term rental room on the fifth floor of a hotel. The mother testified that on the evening of January 24, 2008, defendant returned home intoxicated and took a nap. When defendant awoke, he "touch[ed] on" her, said that they were "gonna have sex," and pulled down her pants. The mother refused, indicating that they needed to wait until the children were asleep. The mother explained that after she refused defendant, he became angry with her and the children and started "acting crazy," yelling loudly and referring to her and the children as "bitches." She indicated that when LH came toward her, defendant leaned over and pushed LH against the headboard, causing her to cry. The mother further indicated that SH "was real scared" and crawled into a corner, but defendant dragged her on the floor, picked her up by her leg, and threw her onto the floor. Defendant then picked up LH by one leg, held her upside-

[1] Defendant was acquitted of an additional count of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), involving the victims' mother.

down, opened the window, and said that he was going to throw her out of it. As LH was screaming and crying, defendant threw her onto the floor and said that he was "just playing." The mother testified that defendant continued referring to the children as bitches, sat down briefly, and then kicked both girls in their stomachs and legs while wearing heavy construction boots. Because the girls were still screaming and crying, defendant picked up a pillow, "started hitting on them," then picked up both girls and threw them on the bed. The mother indicated that during the episode, she was crying and asking defendant to stop. Defendant, in turn, was yelling for her to pack her items, leave, and take the children with her. The mother explained that she was scared of defendant because she had seen him with a gun in the past. The mother eventually told defendant that she needed some air because she could not breathe and, in response, he sent her to purchase beer and allowed her to take only SH. Once downstairs, the mother summoned the police.

Police officers testified that when they arrived, the mother was shaking, frantically screaming, and pleading for them to get LH out of the room. The mother explained that defendant had kept one of her children as "collateral" so that she would return, and that she had seen defendant with a gun in the past. Several officers went to defendant's room and requested entry numerous times, but defendant did not comply. He eventually agreed to open the door if the officers moved from the immediate area. When the officers moved, defendant quickly opened the door and shoved LH outside, causing her to fall face first. The police then forcibly entered the room and arrested defendant. An officer noted that defendant had been drinking. According to the mother and police witnesses, SH had bruising on her cheek and "a big bruise" on her neck beneath her hairline. The mother also indicated that LH had scratches on her face and, on the day following the incident, she observed additional bruises on SH's thigh and back.

At trial, defendant denied requesting sex from the mother or harming the children. In explaining the mother's accusations against him, defendant claimed that the mother was upset that he had broken up with her a week earlier, and he claimed that she told him that if he made her leave or did not comply with her wishes, she would tell the police that he beat her and her children. He claimed that she said that she had gotten her baby's father arrested and that there was nothing like her revenge.[2] With regard to the children's injuries, defendant claimed that when he returned home on the day of the incident, the girls were fighting with each other and their fighting caused the bruises. Defendant further claimed that later that day, the mother said that she was going to the store, he gave her $20, and she left with SH. He claimed that without warning, security guards claiming to be police officers knocked on his door, indicating that a woman had claimed that he beat her. He opened the door, told them they had the wrong room, and latched the door. Defendant claimed that when actual police officers later knocked on the door and requested LH, he opened the door for the child to leave, she tripped on the way out, and then an officer kicked in the door and arrested him.

II. Sufficiency of the Evidence

[2] During cross-examination, the mother denied threatening to file a complaint against defendant, nor did she indicate that she had filed other assault complaints against people who did not carry out her demands.

Defendant argues that the evidence was insufficient to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we 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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A person is guilty of child abuse in the second degree if "[t]he person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results," or if "[t]he person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results." MCL 750.136b(3)(b), (c). A person is guilty of child abuse in the third degree if "[t]he person knowingly or intentionally causes physical harm to a child." MCL 750.136b(5)(a).

A. "Person" under MCL 750.136b

Defendant argues that his convictions must be vacated because there was no evidence that he was the children's custodian or caregiver and, therefore, he could not be convicted under the child abuse statue. Under MCL 750.136b(1)(d), "'[p]erson' means 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."

There was evidence that at the time of the incident, defendant had allowed the mother and the children to live with him in his room for more than four months. During this time, defendant paid for the room and provided the children with food and clothing. Defendant testified that on the day of the incident, he cooked breakfast for the children while the mother slept, he called the mother while he was out to ask "if the kids need[ed] anything," and he purchased household items before returning. After he returned home, he got on the bed with the girls and went to sleep. Both the mother and defendant testified that LH was later left with defendant when defendant gave the mother money to go to the store, and defendant testified that he cooked dinner for LH and they watched TV together during that time. Defendant testified that he "loved those babies," and had not made the mother leave his room because of his concern for them. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to reasonably infer that defendant cared for and had custody of the children and, therefore, was a "person" within the meaning of MCL 750.136b and subject to criminal liability for second and third-degree child abuse.

B. Conviction for Second-Degree Child Abuse Conviction Involving LH

Defendant challenges his second-degree child abuse conviction, arguing that there was no evidence that he committed a cruel act or an act that was likely to cause LH any serious physical or mental harm. "'Cruel' means brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b). "'Serious mental harm' means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a

substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(g).

There was evidence that as LH screamed and cried, defendant picked up the child by one leg, opened the window of his fifth floor hotel room, and declared that he was going to throw the child out the window. Immediately before picking up the child and declaring his intent to throw her out the window, defendant had pushed her into the headboard, called her a b----, and assaulted her older sister. Further, during the episode, defendant was "acting crazy," yelling loudly, and said that he "don't give a s--- about [the] idiot kids." Deferring to the jury's assessment of the testimony and viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to reasonably infer that defendant knowingly engaged in a cruel act or an act likely to cause serious mental harm when he created a terrifying environment during which he held the screaming child upside down by one leg and threatened to throw her out of an open fifth floor window. Consequently, sufficient evidence was presented to sustain defendant's conviction for second-degree child abuse.

C. Convictions for Third-Degree Child Abuse

Defendant challenges his third-degree child abuse convictions, arguing that there was no evidence that he had the requisite intent. To prove third-degree child abuse, the prosecution must demonstrate that the defendant intended to commit the act with either the intention of causing physical harm or the knowledge that physical harm would be caused by his act. MCL 750.136b(5). "'Physical harm' means any injury to a child's physical condition." MCL 750.136b(1)(e). Minimal circumstantial evidence on the issue of intent is sufficient to establish defendant's state of mind. *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

Here, defendant's words and actions support a rational trier of fact in finding beyond a reasonable doubt that defendant had the requisite intent. Evidence showed that defendant pushed LH against the headboard, picked up three-year-old SH by her leg and threw her onto the floor, and threw LH onto the floor after threatening to throw her out the window. Defendant then kicked both young girls in their stomachs and legs while wearing large, heavy construction boots. During the episode, defendant referred to the children in a derogatory manner and said he did not "give a s---" about them. Even when the police came to retrieve LH, defendant shoved the child out the door causing her to fall "face first on her entire face." Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to reasonably infer that defendant knowingly or intentionally caused physical harm to the children. Consequently, sufficient evidence was presented to sustain defendant's convictions for third-degree child abuse.

III. Compromise Verdict

We reject defendant's claim that reversal is required because the jury compromised when it convicted him of child abuse and acquitted him of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1). Despite framing this as a compromise verdict claim, defendant basically reiterates his insufficiency of the evidence claim. Defendant cursorily reasons that his child abuse convictions were likely the result of a jury compromise, but then he repeats the identical insufficiency of the evidence arguments made earlier in his brief. Other than the verdict itself, defendant has offered nothing to demonstrate that the jury engaged in

impermissible compromise requiring a new trial. Furthermore, as previously discussed, sufficient evidence was presented to sustain defendant's child abuse convictions. Moreover, the mother's testimony provided a reasonable basis for the jury's verdict of acquittal on the CSC charge. "[T]he elements of assault with intent to commit CSC involving penetration are simply (1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). At trial, the mother testified that defendant did not assault her, force her pants down, or force her to have sex, and that he left her alone and stopped when she said "no." Consequently, this unpreserved claim does not warrant reversal. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

IV. Effective Assistance of Counsel

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. Failure to Investigate the Mother's Threat against Defendant

Defendant argues that his counsel failed to investigate defendant's claim that the mother said that "she would set him up the way that she had set up her baby-father and ex-boyfriend by calling the police on him for beating up her kids because he was putting her out." At trial, defendant testified regarding the mother's threat. Defense counsel cross-examined the mother about this matter and she denied threatening defendant or telling him that she had filed a false claim against her former boyfriend. On appeal, defendant has not provided any witness affidavits or other record evidence to support either his claim that the mother had threatened to falsely accuse him or that the mother had previously filed criminal charges against her children's father. Moreover, given the mother's trial testimony and the police testimony concerning the mother's disposition when they arrived, defendant's conduct, and the children's injuries, there is no basis for concluding that there is a reasonable probability that, but for counsel's failure to investigate the claim, the jury's verdict would have been different. *Id*.

B. Failure to Investigate the Mother's Recantation Voicemail Message

We also reject defendant's claim that defense counsel was ineffective for failing to investigate his claim that the mother had left defendant a voicemail message recanting her accusations against him. The matter of the voicemail message was first raised during the prosecution's cross-examination of defendant:

Q. And next thing you know, out of the blue, security and police are pounding on your door?

A. Yes. I'm still in shock . . . .

Q. And she's downstairs, you heard the officers testify, multiple officers testify how [the mother is] downstairs at the front desk, balling her eyes out?

A. She's left me a message since I've been in jail saying she was sorry that she lied and she's called your office and she said she didn't want to press charges and she is sorry. She never think it—thought it would go this far.

Q. Actually the only message I received is that you were harassing her.

A. Well, she left me a message stating that she told you she did not want to press charges; that it was a mistake and she's sorry and she said—she left me the exact same message.

* * *

Q. Do you have that message?

A. I wasn't able. I [sic] been in jail. I got it from the jail phone.

When asked if the message was on the jail's phone, defendant admitted that he did not personally hear the message, but another inmate's relative had called defendant's voicemail and heard the unidentified caller's message. The prosecutor questioned defendant about his ability to obtain the message from his voicemail, and defendant gave reasons why he could not obtain a copy. Also, defendant admitted that despite the importance of the message, he did not initially communicate with anyone about it, and he only "mentioned" it to defense counsel the day before trial. Even on appeal, defendant has failed to provide evidence that the voicemail actually exists or the content of any message that may have been left. In addition, defendant has not provided the name of the inmate or the inmate's relative who supposedly heard the message. Because there is no evidence to support defendant's claim that the mother left a recantation voicemail message on defendant's phone, defense counsel was not ineffective for failing to pursue this claim. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

Affirmed.

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