STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 284245 Wayne Circuit Court
CAROL ANN POOLE, Defendant-Appellant.	LC No. 06-014443-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, first-degree child abuse, MCL 750.316(1)(b), and involuntary manslaughter, MCL 750.321. The trial court vacated the involuntary manslaughter conviction and sentenced defendant to concurrent prison terms of 20 to 35 years for the second-degree murder conviction and 10 to 15 years for the first-degree child abuse convictions. Defendant appeals as of right. We affirm.

This case arises from the death of defendant's two-year-old foster daughter, Allison, from a skull fracture and a brain injury. The child died on September 22, 2006, as a result of injuries sustained on September 21, 2006, at the family home. The prosecutor's theory of the case was that defendant intentionally injured the child and the injuries resulted in the child's death. The defense theory of the case was that defendant accidentally dropped the child over the second-floor banister to the floor below while playing a game of "whirly bird."[1] Whirly bird involved the child putting her knees against someone's chest, with that person putting their arms behind the child's back and spinning around.

I. Prosecutorial Misconduct

[1] Defendant gave four different explanations for the child's injuries. First, she indicated that the child injured herself in her toddler bed. Second, she indicated that the child fell in the bathtub. Third, she indicated that the child fell off the vanity cabinet in the bathroom. Fourth, she indicated that the child accidentally went over the second-floor banister during a game of whirly bird.

Defendant first argues that she was denied a fair trial by several instances of prosecutorial misconduct. Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where an alleged error is not preserved with an appropriate objection at trial, this Court's review is limited to plain error affecting the defendant's substantial rights. *Id.* at 274. Further, this Court will not reverse if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction upon request. *People v Joezell Williams II*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor is afforded great latitude in closing argument. He is permitted to argue the evidence and reasonable inferences that arise from the evidence in support of her theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id.* at 283. While prosecutors have a duty to see that a defendant receives a fair trial, they may use "hard language" when the evidence supports it and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant first argues that the prosecutor wrongfully suggested that defendant was pretend crying at trial and then questioned a witness about whether defendant's behavior at trial was consistent with her behavior at the hospital the night of the incident. Specifically, when the prosecutor asked a witness if she had "heard her go [indicating] no tears and then stop?" defendant objected on the ground that the prosecutor was attempting to introduce evidence into the record that suggested defendant was not crying during the trial, and asserted that the jury should make its own conclusions regarding defendant's demeanor. The trial court, after noting that the witness indicated she was not looking at defendant during her testimony, sustained the objection.

The prosecutor's question did not deny defendant a fair trial. The trial court sustained defendant's objection to the question, and the prosecutor ceased his line of questioning. The jury was subsequently instructed that the lawyers' questions to witnesses are not evidence. Thus, any prejudice was cured. Further, preserved, nonconstitutional errors do not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). It does not affirmatively appear that the prosecutor's isolated comment, to which an objection was sustained, affected the outcome of defendant's trial. Therefore, reversal is not required. *Id.*

Defendant next argues that the prosecutor improperly mocked the defense expert, Dr. Rothfeder, during cross-examination when he was questioning Dr. Rothfeder with regard to whether defendant could have generated the force necessary to inflict the type of injury suffered by the child if defendant banged the child's head against a wall. Dr. Rothfeder responded, "Probably," and then the following colloquy occurred:

> [Defense counsel]: Judge, I think it should be noted for the record that Mr. Dorsey is like shaking his head at the doctor –

> [The prosecutor]: (Interposing) What does the shaking –
>
> THE COURT: (Interposing) Hold it. Hold it. One at a time.
>
> [Defense counsel]: If the witness is answering, and he's using body language and speaking at the same time he's talking, Judge, I think a fair characterization of what Mr. Dorsey is doing is mocking this person and, Judge, I think there's absolutely no place for that in a Court of Law, and I think he [sic] behavior is becoming distracting to the jury and it's completely unnecessary.
>
> [The prosecutor]: And, Judge, if the jury thinks that I am doing something that's distracting or inappropriate they, the jury, can look at me and draw whatever conclusions they want. He was shaking his head yes, and I was – well, that's all.
>
> THE COURT: Yes, I saw you with your hands extended, you know. The jury can make whatever they want of Mr. Dorsey's antics.

It's difficult to comprehend precisely what gestures the prosecutor was making. Nonetheless, defense counsel did not raise a specific legal challenge to the prosecutor's conduct, but rather wanted the court to admonish the prosecutor not to engage in such conduct. The trial court emphasized that the jury was able to observe the prosecutor's conduct and could "make whatever they want" of his antics. At the conclusion of the trial, the trial court instructed the jury "evidence includes only the sworn testimony of witnesses, the Exhibits entered into evidence, and anything else I told you [to] consider as evidence." Thus, any prejudice was cured. Further, defendant has failed to demonstrate that it is more probable than not that the prosecutor's conduct affected the outcome of defendant's trial.

Next, defendant argues that the prosecutor made an improper argument during his closing argument regarding defendant's reactions during trial:

> And I gave you my opening and I talked about Carol Poole being a liar and murderer, and I – well, I was not very kind to her. And all the while I was doing that, Carol Poole never responded, never made a sound.
>
> Defense counsel got up, walked around, and he appeared to say something to her or touch her, and as soon as he got in front of you and started talking, she started – (indicating sobbing) – and no tears.

Because no objection was made to the prosecutor's challenged conduct here, this Court reviews the claim for plain error that affected defendant's substantial rights. *People v. Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant argues generally that the prosecutor's argument infected the trial with unfairness. Defendant does not expand upon this general statement. Nonetheless, a review of the prosecutor's argument reveals that it was designed to induce the jury to compare and contrast the demeanor of defendant during the prosecutor's opening statement and defense counsel's opening statement to determine which version of events they found to be credible. Defendant has failed to demonstrate error.

Defendant next argues that the following rebuttal argument by the prosecutor was improper:

> I usually start my rebuttal by going from the very top of when he first starred [sic] addressing you down through the argument, but it struck me when he was talking that he took great pain to call her a fully dedicated and protective mother. Is there anything in this case, even if you accept what I say are her lies, that shows she's a dedicated and protective mother?
>
> If the child fell over the banister just like she said, it doesn't make any sense to me – it doesn't make any sense in light of everything you heard – but if you believe that, does anything about what she did make her a dedicated and protective mother? Even a dog with puppies would have given their child more attention than Carol Poole did.

No objection was made to the prosecutor's challenged conduct here.

Defendant again has failed to attach a specific legal argument to this issue, but rather argues that the argument was unfair. A prosecutor may respond to defense counsel's closing argument, and his remarks will be considered in light of those of defense counsel. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Here, the prosecutor did not refer or compare defendant to a dog. Rather, the prosecutor was refuting defense counsel's argument that defendant was a wonderful and protective mother by arguing that a dog would have protected her puppies better than defendant did when she allegedly chose to swing the child on a second floor landing. The prosecutor's argument was not improper.

Defendant next argues that she was denied a fair trial when the prosecutor referenced defendant's socio-economic status during his rebuttal closing argument.

During defense counsel's closing argument, defense counsel remarked, "Carol and Alan were both employed, that they both had good jobs." Defense counsel remarked that defendant and her husband were married eight years and had tried unsuccessfully to have a child. Defense counsel stated that the child moved into defendant's home following an extensive background check, criminal background check, and interviews. He argued that defendant was caring, loving, and patient. Defense counsel argued that the prosecution failed in its proofs with regard to the murder and child abuse charges because defendant was not negligent, wanton or reckless, and lacked the specific intent. Counsel also argued that the separate charge of manslaughter was premised on defendant's failure to perform a legal duty, and was not proven by the prosecution because defendant checked on the child after the fall and asked her if she was okay. Counsel also argued that since there was no evidence that established that the victim would have survived had she been taken to the hospital, proofs on that charge failed also. Counsel reiterated that defendant loved the child and was a patient, nurturing, and dedicated mother.

In rebuttal, the prosecutor argued:

> I said in my original closing that the whirly bird story only make sense if you believe Carol Pool and the whirly bird story, that story only allows you to

find her guilty of involuntary manslaughter. If you believe that, that's it. No question about.

I'm telling you – and than it's amazing to me – he would have you believe that Carol Poole, this college educated, protective mother would play whirly bird at the top of the second floor landing with a two year old child, and then let her fall or drop her or the child jumps out of her arms, and then go into a fog and not go and get her help, and that all that was happening because she was in this fog.

Now, I'm telling you, if you believe that story, there's only one thing to do with it – she should have taken that baby to the hospital when she fell over that banister and got her up. And that's involuntary manslaughter.

I don't want you to get hung up on voluntary manslaughter. I believe the facts in this case show that this is felony murder. Don't let this stuff that Carol Poole, this suburban woman, this great job –

Defense counsel objected:

Judge, this is the fourth time Mrs. Dorsey – I don't know what he's trying to imply by saying that Carol Poole was an educated woman from suburbia with a good job. And he's said it four times during closing argument but it's coming dangerously close to an argument that is completely improper and has no place in a courtroom.

THE PROSECTOR: Judge, as this Court heard, the Defense Counsel made great pains to say that she has a great job, educated, etc., and all I'm doing is commenting on the things that he said about Carol Poole and that those kinds of people don't commit murder.

DEFENSE COUNSEL: What kind of people, Judge? White people from Canton – is that what he's trying to say?

THE PROSECUTOR: I never mentioned her color, Judge.

THE COURT: All right. There don't need to be anymore references to education nor social class.

The prosecutor made a record concerning his rebuttal remarks. He explained that his argument:

was designed to tell this jury simply because Carol Poole had a good job, lived in suburbia, had no prior arrest doesn't mean she can't be a murderer. If you would listen to Defense Counsel's argument it suggested that people in Carol Poole's position don't commit murder, they only have tragic accidents. That's what my closing was designed to do. I was disappointed when the court stopped me in my argument to admonish me that the last reference I made was unnecessary. I

> believe the law gives me the right to make reference to all things Counsel made in their closing argument and anything said during the course of this trial . . .

The trial court responded that it

> had indicated in response to that objection that [the prosecutor] not make anymore references about Mrs. Poole's education or social status or community. The reason I did that is because it was becoming redundant. There was, I recall in the testimony of Dr. Rothfeder when he was being examined – I think in cross-examination about whether he could tell people were abusive or telling the truth about an injury to a child based on their education or whether or not they had criminal backgrounds, or conditions like that which as, I understand that testimony, that certain kinds of people just don't do child abuse. That's the way I viewed his testimony. So, the references that Mr. Dorsey made earlier in his argument concerning education, social status, and so forth, I think it addressed – fairly being made to address that testimony of Dr. Rothfeder. However, when it came up for a fourth time, I think it was redundant. It had been said enough and it was time to move on.

The trial court properly recognized that the prosecutor's comments were based on the evidence and were proper in light of defense counsel's argument. Upon defense counsel's objection, the trial court sustained the objection and advised the prosecutor to refrain from referring to defendant's economic status and to move on. Under these circumstances, the prosecutor's argument, to which an objection was sustained on the grounds of redundancy, did not affect the outcome of defendant's trial.

Lastly, defendant argues that the cumulative effect of the above errors denied her due process of law. In determining the effect of error, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand),* 235 Mich App 429, 448; 597 NW2d 843 (1999). Because no errors exist, any argument regarding the cumulative effect of errors is misplaced.

II. Admission of Evidence

Defendant argues that the trial court erred by admitting similar acts evidence because there was no evidence that previous "bumps and bruises" suffered by the child were abuse or that defendant inflicted such injuries. The abuse of discretion standard of review applies to decisions regarding admission of similar acts evidence. *People v McMillan,* 213 Mich App 134, 137; 539 NW2d 553 (1995).

Defendant makes no mention in her brief on appeal of the specific evidence or testimony to which she objects. Rather, she argues only that the admission of "prior bumps and bruises" was error. We assume that defendant is referring to the admission of similar acts evidence the prosecutor sought to admit in a notice filed on August 24, 2006. This notice concerned the testimony of two day care workers who would testify with regard to prior statements made by defendant as to the manner in which the child was injured with respect to injuries observed during the summer before her death.

At a hearing on the motion regarding the similar acts evidence, the prosecutor argued that defendant, in a statement to the police in this case, explained that the child's injuries were caused because she was a head banger, and that she banged her head on her bed and injured herself. The prosecutor asserted that he wanted to bring in the day care workers who saw the victim on at least two occasions in defendant's custody, and to whom defendant explained injuries to the victim as being caused by head banging. The prosecutor explained that he was attempting to show that defendant had a pattern of lying regarding the child's injuries, and that one of the lies repeatedly told was that the victim was a head banger. Defendant told this same story the morning of September 22, 2006.

Regarding the theory of admissibility, the prosecutor argued that defendant's theory was accident, and the prosecutor sought to refute the accident theory by showing that defendant had lied before about how the victim sustained injuries. Thus, there was no mistake or accident, but only an intentional act by lying about the victim being a head banger. The prosecutor intended to call the child's former foster parent, as well as a former nanny, to testify that the victim was never a head banger.

Defense counsel argued that there was no evidence that the injuries were the result of abuse and that the evidence did not establish who caused the injuries. Defense counsel also argued that the evidence was not relevant because the fact that a child has bruises does not mean that the child was abused.

The court found that "if the testimony is going to be that Miss Poole told this Cheryl Majeske that the child ['s] suspected injuries in July were the result of her being a head banger, which is the same thing that Miss Poole allegedly told people following the September incident, I do find that relevant." The court found the evidence not unfairly prejudicial and noted that the defense could counter the evidence.

MRE 404(b)(1) provides, in relevant part:

> 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. [Emphasis added.]

For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b)(1), the proponent of the evidence must show three things: (1) that the other acts evidence is for a proper purpose (other than to show character and action in conformity therewith), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand*), 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Here, the prosecutor sought to admit defendant's statements to day care workers about how the victim was injured on prior occasions. The prosecutor did not offer the evidence for a propensity purpose, but rather to dispute defendant's accident theory by showing that she offered the same explanation for the child's injuries on previous occasions as she did in the present case.

The evidence was relevant for this purpose. The evidence was probative and its probative value was not outweighed by the danger of undue prejudice. MRE 403.

III. Motion to Suppress

Defendant argues that the trial court erred in denying her motion to suppress his statements made at the University of Michigan Hospital in response to questions posed to her by detectives, without advice of her *Miranda*[2] rights, and under circumstances where she was not free to leave. This Court reviews de novo the question whether defendant was in custody at the time she made the statements at issue. *People v Herndon,* 246 Mich App 371, 394; 633 NW2d 376 (2001). This Court also reviews a trial court's ultimate decision on a motion to suppress de novo. *People v Akins,* 259 Mich App 545, 563; 675 NW2d 863 (2003).

Miranda warnings must be given to an individual "at the time he is in custody or otherwise deprived of his freedom in any significant way." *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). A person is in custody when he "has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Peerenboom,* 224 Mich App 195, 197; 568 NW2d 153 (1997). "To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances with the key question being whether the accused reasonably could have believed that he was not free to leave." *People v Zahn,* 234 Mich App 438, 449; 594 NW2d 120 (1999). This is determined by considering the objective circumstances of the interrogation rather than the subjective views of either the officers or the person being questioned. *Id.*

Defendant concedes that she was not under formal arrest at the hospital. However, she argues that she was "secured" by police at the hospital and therefore in custody. Defendant's conclusion that she was secured is based on the fact that she was driven to the hospital by a police officer, as well as her assertion that the officer had orders to "stay with her" and "effectively guarded her."

Following a hearing on the motion to suppress, the trial court made the following findings of fact:

- Defendant accepted a police offer to drive her to the hospital. She was placed in the rear seat of the police vehicle but was not handcuffed or searched. In addition, she was allowed to keep her cell phone.

- Defendant was driven to the University of Michigan Hospital by the officer, escorted into the general emergency waiting room and then placed in a smaller room where an officer stood outside the door but did not enter. The defendant was not under formal arrest and was free to leave.

[2] *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

- The defendant consented to be interviewed by two detectives and was interviewed in a room with several couches and large enough to hold twelve people. Doctors came in after about an hour, and then left. Defendant was permitted to go to the pediatric unit and see the victim while accompanied by the officers.

- The officers never told defendant she could not see the victim until she made a statement.

- Defendant was not handcuffed or searched.

- The defendant was also interviewed by social workers. She was not interviewed for the entire time she was at the hospital, went to the bathroom when she wanted, and was never prevented from leaving the room.

- Defendant was not arrested until several days after talking to the police.

On the basis of the objective circumstances of defendant's interrogation by the detective, the trial court did not clearly err in finding that defendant's freedom had not been infringed upon. Neither the fact that an officer offered to drive defendant to the hospital, nor the presence of police officers outside defendant's hospital door, constituted an infringement of defendant's freedom sufficient to warrant a determination that she was "in custody" and was entitled to *Miranda* warnings. First, defendant was never aware that the police officer outside her hospital door had orders to stay with her until detectives arrived at the hospital and, therefore, this order had no bearing on defendant's objective understanding of the circumstances of the interview. See *Zahn, supra* at 449-450 (the trial court erred in finding defendant was in custody on the basis of the evidence that the interrogating officer intended to prevent the defendant from leaving the room where he was being questioned, when the officer's intent was never conveyed to the defendant and therefore had no bearing on defendant's understanding of the situation). Second, defendant was not subjected to a formal arrest or subjected to a restraint of movement associated with a formal arrest. *People v Kulpinski* 243 Mich App 8, 25; 620 NW2d 537 (2000), citing *Peerenboom, supra* at 197-199. Considering the totality of the circumstances in an objective fashion, the evidence does not show that defendant could have reasonably believed that she was not free to leave, and the trial court properly refused to suppress defendant's statement on the basis that she was not in custody at the time of her interrogation and entitled to *Miranda* warnings.

IV. Sufficiency of the Evidence

Defendant argues that the evidence presented was insufficient to support her conviction of first-degree child abuse and second-degree murder. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201; 489 NW2d 748 (1992). "Circumstantial evidence and reasonable

inferences arising there-from can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

First-degree child abuse, MCL 750.136b(2), requires that the prosecution show that defendant "intended to cause serious physical or mental harm to the [child] or that [defendant] knew that serious mental or physical harm would be caused [by his actions]." *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Defendant contends that she did not intend to seriously injure the child and that she did not know that her actions would result in serious physical harm to the child. This Court has held that with respect to the first-degree child abuse statute, " 'knowingly' ... means the same thing as the word 'intentionally.' " *People v Gould*, 225 Mich App 79, 84; 570 NW2d 140 (1997). "An actor's intent may be inferred from all of the facts and circumstances, ... and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518, 583 NW2d 199 (1998).

Defendant's argument presumes first that the jury had to accept her theory that the child accidentally went over the second-floor banister during a game of whirly bird. She then argues the prosecutor failed to present sufficient evidence to support a finding that she knew that playing a game of whirly bird would result in serious physical harm to the child.

However, the evidence must be viewed in a light most favorable to the prosecutor. The prosecutor's theory was that defendant intentionally harmed the child, either by intentionally striking the child's head against a hard object such as a wall or the floor, or by intentionally throwing her over the banister to the floor below. Viewing the evidence in a light most favorable to the prosecution, the prosecutor presented evidence that on September 22, 2006, the victim was injured when her head forcefully struck an object, which resulted in a skull fracture that caused brain death. While defendant argues (based on her whirly bird story) that there was no evidence to establish her intent to cause serious physical or mental harm to the victim, the evidence of the serious nature of the victim's injuries, specifically a cracked skull, subdural hematomas, and fresh retinal hemorrhaging, and the force necessary to cause them, was sufficient evidence from which a rational jury could find the element of intent. In addition, Dr. Dev opined that the injuries were not accidental, and defendant failed to seek medical treatment for the child. Defendant's intent may be inferred from circumstantial evidence, including the victim's injuries and the failure to seek medical care, and, because of the difficulty of proving intent, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Therefore, viewed in a light most favorable to the prosecutor, there was sufficient evidence from which a rational jury could find defendant guilty of first-degree child abuse.

Defendant also argues that the evidence was not sufficient to convict her of second-degree murder.

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich

App 528, 531; 659 NW2d 688 (2002), quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

Defendant argues that the prosecutor failed to present evidence that defendant was aware that by playing whirly bird she was engaging in an activity that was wanton or reckless or that she knew that the activity would be likely to cause death or great bodily harm. Again, defendant's argument presumes that the jury accepted her version of events. However, as noted above, the evidence must be viewed in a light most favorable to the prosecution, and the evidence presented was sufficient to allow rational trier of fact to find that defendant had the intent to cause great bodily harm to the child.

V. Motion to Quash

Defendant asserts that the trial court abused its discretion by denying her motion to quash the charges of first-degree child abuse and felony murder. This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information. *People v Fletcher*, 260 Mich App 531, 551-552; 679 NW2d 127 (2004).

A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime. *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id.*, citing MCL 766.13; MCR 6.110(E). Guilt need not be established beyond a reasonable doubt, but there must be "evidence of each element of the crime charged or evidence from which the elements may be inferred." *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).

To bind defendant over on the felony murder charge, the prosecutor had to demonstrate probable cause that defendant had committed a murder in the course of committing first-degree child abuse. Specifically, the prosecutor had to present evidence that the child was killed, that defendant had the intent to kill, to do great bodily harm, or to create a very high risk of great bodily harm with knowledge that death or great bodily harm was the probable result, and that the child was killed while defendant was committing first-degree child abuse. With regard to the first-degree child abuse element, the prosecutor had to present evidence that defendant intended to cause serious physical or mental harm to the child or that defendant knew that serious mental or physical harm would be caused by her actions.

Defendant challenges the issue of malice. She argues that the prosecutor failed to present evidence that defendant had the intent to kill, to do great bodily harm, or to create a very high risk of great bodily harm with knowledge that death or great bodily harm was the probable result. A review of the preliminary examination testimony reveals that medical testimony evidence was presented that the cause of the injury was an impact to the back of the head, and that the injuries were characteristic of the head striking a hard surface with a very forceful impact. Such an injury could come from a 12-foot fall where the child lands on the back of the head, or it could

come from swinging the child's head at a wall or floor, or throwing the child over a banister. Because the injury was consistent with either an accidental or intentional injury, the medical witness was unable to determine the manner of death. However, the medical witness testified that it would have been significant to him to have known that defendant told four different stories about the cause of the child's injuries.

The trial court found that in relevant part:

> It [the jury instruction on first degree felony murder] says secondly that the defendant had one of these three states of mind and the only one that I think is pertinent in this case is that she knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would likely be the cause of her actions.
>
> Again, I believe this to be a question of fact.

The evidence cited above was sufficient to create an inference that defendant committed felony murder, and the trial court properly bound defendant over for trial on the felony murder charge. Additionally, any error in the bindover on the charge of first-degree child abuse was harmless as defendant was convicted of this offense at trial. *People v Libbett,* 251 Mich App 353, 357; 650 NW2d 407 (2002).

VI. Motion for Directed Verdict

Defendant argues that the trial court erred by denying defendant's motion for directed verdict on the charges of first-degree child abuse and felony murder. In reviewing the circuit court's denial of a motion for directed verdict, this Court views the evidence in a light most favorable to the prosecution to determine if there was sufficient evidence from which a rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. *People v Gillis,* 474 Mich 105, 113; 712 NW2d 419 (2006).

Defendant's argument regarding both the felony murder and first degree child abuse charges is premised on the alleged lack of evidence of the specific intent required for a conviction of first-degree child abuse. No other specific argument is made with regard to the felony murder charge. As discussed in Issue IV, however, the evidence presented at trial was sufficient and, therefore, the trial court properly denied the motion for directed verdict with regard to both charges.

VII. Jury Instruction

Defendant argues that the trial court erred by sua sponte instructing the jury on the offense of second-degree murder as a lesser-included offense of felony murder. Such instruction "is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza,* 468 Mich 527, 533, 545; 664 NW2d 685 (2003), citing *People v Cornell,* 466 Mich 335, 357; 646 NW2d 127 (2002).

"[A]n instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder ... will be proper if ... [an] element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *Cornell, supra* at 357 n 13.

Because the element differentiating second-degree murder from first-degree felony murder is that the latter is committed in the perpetration or attempted perpetration of an enumerated felony, MCL 750.316(1)(b), the ultimate question here is whether a factual dispute existed at trial over defendant having committed a felony. Because there was an evidentiary dispute regarding whether defendant committed first-degree child abuse, the trial court did not err by instructing the jury on the offense of second-degree murder.

Defendant also argues that the trial court erred by refusing to give defendant's requested special jury instructions on reasonable doubt and on the mens rea instruction for first- and second-degree murder and manslaughter. Contrary to defendant's assertion, the trial court properly instructed the jury on the offenses of first-degree child abuse, felony murder, second-degree murder, and manslaughter. In relation to each individual charge, the trial court gave a detailed intent instruction. These instructions sufficiently conveyed to the jury the necessary intent to commit these offenses and comported with the standard criminal jury instructions. With regard to defendant's argument regarding the giving of a specific intent instruction with regard to the charge of first-degree child abuse, our Supreme Court held, in *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004), that it is unnecessary to instruct a jury on specific intent for first-degree child abuse "as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm," which the trial court did in this case.

The trial court also gave an instruction on reasonable doubt that comported with the standard criminal jury instructions. The fact that the jury asked questions regarding the elements of first-degree child abuse does not indicate that the standard jury instructions as given were confusing, misleading, or prejudicial.

VIII. Cumulative Error

Defendant argues that the cumulative effect of the above errors denied her due process of law. In determining the effect of error, only actual errors are aggregated to determine their cumulative effect. *Rice, supra* at 448. Because no errors exist, any argument regarding the cumulative effect of errors is misplaced.

IX. Sentencing

This Court reviews the trial court's application of the sentencing guidelines de novo but reviews a preserved challenge to the scoring of a sentencing variable for an abuse of discretion. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). See also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Defendant argues that Offense Variable (OV) 5 was incorrectly scored at 15 points because the evidence did not show the requisite psychological harm to the victim's family.

Specifically, defendant argues that because the child had been removed from her biological parents and placed in foster care at the time of her death, her biological parents could not have suffered psychological harm as a result of her death. Defendant has offered no authority in support of his argument.

The guidelines provide that 15 points may be scored for OV 5 "if the serious psychological injury to the victim's family may require professional treatment," even though "the fact that treatment has not been sought is not conclusive." MCL 777.35(2). At defendant's sentencing, the trial court noted that a victim's impact statement had been provided, and that the presentence investigation report indicated that Kenneth Newman, the child's biological father, was receiving psychiatric treatment as a result of the child's death. This evidence was sufficient to allow the trial court to assign 15 points under OV 5 because it was evidence of serious psychological injury to the victim's family.

Defendant also argues that OV 6 was improperly scored at 50 points. OV 6 scores the defendant's intent to kill or injure, and requires that the trial court "score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). A score of 50 is appropriate if "The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit . . . child abuse in the first degree . . ."

The prosecutor sought a score of 50 points for OV 6. Defense counsel requested that OV 6 be scored at 25 points to be consistent with the jury's verdict. On appeal, defendant argues that OV 6 should be scored at zero points because the offense of first-degree child abuse was not proven beyond a reasonable doubt. As discussed earlier, however, the evidence was sufficient to support the jury's finding that defendant committed first-degree child abuse. Thus, this argument is without merit. Defendant argues that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), prohibited the trial court from using judicially ascertained facts to fashion a sentence is misplaced. Defendant acknowledges that our Supreme Court held in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), that *Blakely* does not apply in Michigan, but argues that *Drohan* was wrongly decided. This argument is also without merit.

Defendant argues that the trial court improperly scored ten points for OV 10, which involves exploitation of a vulnerable victim. MCL 777.40. Ten points is scored if the defendant exploited, among other things, a victim's youth. MCL 777.40(1)(b). Defendant cites to MCL 777.40(2), which provides that "[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability." Specifically, defendant contends the record failed to demonstrate that she "exploited" the victim, which is statutorily defined as the manipulation of "a victim for selfish or unethical purposes." MCL 777.40(3)(b).

Defendant cannot reasonably dispute the vulnerability of this victim. The child was two years of age and left in the sole care of defendant. She was unable to avoid defendant's conduct or to secure help. Because defendant was entrusted with the minor child's care, her conduct constituted an abuse of her authority over the child. As such, there can be no legitimate contention of error regarding a determination of the child's vulnerability based on her "readily apparent susceptibility ... to injury." MCL 777.40(3)(c).

It is defendant's contention that OV 10 was improperly scored because she did not exploit or "manipulate the child for selfish or unethical purposes." Even accepting defendant's theory that she did not intentionally injure the child, sufficient evidence existed within the record of exploitation or manipulation by defendant to support a scoring of ten points on this offense variable. Defendant's theory was that she accidentally dropped the child over a banister to the floor twelve-feet below, but did not seek medical attention for the child. Instead, defendant placed the child back in her bed to manipulate the situation to avoid detection of her abusive behavior and allow defendant to avoid responsibility or police involvement. The evidence in the record supported the scoring of OV 10 at ten points.

Finally, defendant argues that the sentence imposed for second-degree murder is not proportionate to the circumstances of the case. Second-degree murder is an offense subject to the legislative guidelines. The principle of proportionality is generally inapplicable to sentences determined under the legislative guidelines. *People v Babcock*, 244 Mich App 64, 78; 624 NW2d 479 (2000). Rather, proportionality is an inherent function of the guidelines, *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003), and thus a challenge based on proportionality cannot be considered. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). The trial court's minimum sentence of 20 years was within the minimum sentence range of 225 – 375 months. A sentence that is within the guidelines must be affirmed on appeal unless it was based on inaccurate information or an error in the scoring of the guidelines is shown. MCL 769.34(10). Defendant has not demonstrated an error in the scoring of the guidelines or the use of inaccurate information by the trial court in determining her sentence and therefore this Court must affirm.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder