STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
v	No. 286173 Kent Circuit Court
JEFFERY MICHAEL MATA, Defendant-Appellant.	LC No. 07-009738-FC

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant Jeffery Mata, appeals by right his jury trial conviction of first-degree felony murder with the predicate felony of first-degree child abuse, MCL 750.316(1)(b). We affirm.

Defendant was charged as a result of the death of his live-in girlfriend's 8-month-old daughter. Defendant was caring for the child while his girlfriend was at school. Defendant dropped the child and then, when she was crying, shook her. A short time later, the child had difficulty breathing and experienced seizures. After a telephone call to the child's mother, and at her prompting, defendant called an ambulance. The child was admitted to the hospital with severe brain and retinal hemorrhaging, and visible bruising to her head and face. She died the next day. Physicians testified that the child's cause of death was head injury, and that the manner of death was homicide, given that the child's extensive internal injuries revealed a significant impact to her head inconsistent with a child being dropped from an adult's arms, and hemorrhaging consistent with violent shaking.

Defendant first argues that the trial court erred in denying his motion to suppress his statements to police because he reasonably believed he was in custody at the time that he made his statements and he was not advised of his *Miranda*[1] rights. We review a trial court's ultimate decision on a motion to suppress de novo, *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004), but review a trial court's factual findings for clear error. *People v Custer*, 248 Mich App 552, 558; 640 NW2d 576 (2001).

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

The Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. To protect this right, custodial interrogation must be preceded by advice to the accused that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda, supra* at 444-445. "It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda, supra* at 444-445; *Coomer, supra* at 219. When determining whether defendant was in custody at the time of interrogation, this Court reviews "the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave." *Id.*

Viewing the totality of the circumstances, we conclude that defendant could not have reasonably believed that he was in custody at the time he made his statements to the police. The record shows that Detective Daniel Adams told defendant at the beginning of the interview that he was not under arrest, he was not in custody, he could leave at any time, and he did not have to talk to the officers. Defendant stated that he understood and then proceeded to speak to Detective Adams, who was dressed in plain clothes. Although the other two officers who accompanied Detective Adams were in uniform, they did not participate in the interview of defendant. One of the officers was watching Jennifer Teunis' son while the interview was being conducted and the other officer was standing outside. Although the officers' weapons may have been visible to defendant, no weapon was ever drawn. No threats against defendant appear in the record. At no time did defendant indicate that he wanted the officers to leave or that he wanted to end the interview. He simply answered Detective Adams' questions.

Furthermore, the interview took place at defendant's residence, while seated at the dining room table, while defendant's son and Teunis' son were at the residence. "'Interrogation in a suspect's home is usually viewed as noncustodial.'" *Id.* at 220, quoting *People v Mayes*, 202 Mich App 181, 196; 508 NW2d 161 (1993). Although the decision to arrest defendant was made around the same time defendant was writing out a statement, there is no evidence that this decision was communicated to defendant before he prepared his written statement. See *Coomer, supra* at 219-220 (whether a defendant is in custody "depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned"). Because defendant was not in custody at the time that he made the statements, the trial court properly admitted the statements.

Defendant next argues that the trial court erred in failing to instruct the jury on the specific intent required for first-degree child abuse, and that his counsel was ineffective for failing to request such an instruction. Because these challenges are unpreserved, we review for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. MCL 750.136b(2). The plain language of this statute requires "the prosecution to establish, and the jury to be instructed that to convict it must find, not only that defendant intended to commit the act, but also that

defendant intended to cause serious physical harm or knew that serious physical harm would be caused by [his] act." *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004).

> The recommended standard jury instruction for first-degree child abuse, CJI2d 17.18, correctly focuses the jury by directing it to this method of analysis. [I]t is unnecessary for the jury to be given further instruction on "specific intent" such as that found in CJI2d 3.9. The need to draw the common-law distinction between "specific" and "general" intent is not required under the plain language of the statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm. [*Id.* at 295-296.]

In the instant case, the trial court used the exact language from CJI2d 17.18 to instruct the jury with regard to the predicate felony of first-degree child abuse. Because the trial court properly instructed the jury, there was no error. Moreover, because there was no error, defense counsel was not ineffective for failing to request a specific intent instruction. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("Defense counsel is not required to make a meritless motion or a futile objection.").

In reaching our conclusion, we note that although defendant argues (despite the holding in *Maynor, supra*) that the trial court's mere reading of the statutory language was insufficient to properly guide the jury after the jury specifically asked for guidance on the issue of intent, defendant cites no authority to support this proposition. This Court will not search for authority to sustain a party's position. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

Defendant next argues that the evidence was insufficient to convict him of felony murder. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a reasonable trier of fact could find that all of the elements of the crime were proven beyond a reasonable doubt. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The elements of first-degree felony murder are: (1) the killing of a human being; (2) with malice; (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony; in this case, first-degree child abuse. MCL 750.316(1)(b); *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (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 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). A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. MCL 750.136b(2). This requires the prosecution to prove, and the jury to find, not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would result from his act. *Maynor, supra* at 291. Defendant argues that the prosecution failed to prove that he intended to harm the victim or that he acted with malice. We disagree.

"A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense. In other words, a defendant's intent can be proved by circumstantial evidence." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to

determine the weight to be afforded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The evidence in this case shows that the child was a healthy, normal child before being left in defendant's care. A few hours later, the child was having trouble breathing, was not responsive, and was seizing. Before calling an ambulance, defendant called his girlfriend, asking whether the child had asthma. Later, defendant told the police that he accidentally dropped the child and then, when she was later crying, shook her.

Physician witnesses testified that the constellation of injuries present in the deceased child indicated, to a reasonable degree of medical certainty, that the injuries were not accidentally caused, but rather were intentionally inflicted injuries that had to have been caused by a force comparable to that of being ejected from an automobile during a crash and hitting pavement, or falling three or four stories from a building. From this evidence, it was reasonable for the jury to infer that defendant either acted with the intention of causing serious physical harm to the child or knew that serious physical harm to the child would result from his actions. This same evidence also allowed the jury to reasonably infer that defendant intended to cause great bodily harm or intended to violently shake the child in wanton and willful disregard of the likelihood that the natural tendency of such shaking would cause death or great bodily harm. Thus, the evidence was sufficient to convict defendant of first-degree felony murder with the predicate felony of first-degree child abuse.

Defendant argues that the Legislature did not intend the use of the very same acts as both the predicate felony and the murder itself, with regard to felony murder. In *People v Magyar*, 250 Mich App 408, 412; 648 NW2d 215 (2002), we specifically held that the same act that constitutes the predicate felony can also constitute the felony murder because the language of the felony murder statute, MCL 750.316, clearly and unambiguously allows all murders committed in the perpetration or attempted perpetration of the enumerated felonies to be treated as first-degree murder. Because the Legislature intended the same acts used to prove the predicate felony, first-degree child abuse, to be used to prove the murder itself, defendant is not entitled to reversal of his conviction. We note that while defendant argues that *Magyar*, *supra* at 408, was wrongly decided, we are bound by the principle of stare decisis to follow its holding. MCR 7.215(C)(2); MCR 7.215(J)(1).

Defendant further argues that the felony murder statute is unconstitutional on grounds of vagueness because it fails to give notice of what conduct is prohibited, and it gives the trier of fact "unstructured and unfettered discretion" to determine whether the law has been violated. We review this unpreserved issue for plain error. *Carines*, *supra* at 764. Defendant was charged with felony murder. MCL 750.316(1)(b) states in pertinent part that:

> A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
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> ***
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> Murder committed in the perpetration of, or attempt to perpetrate . . . child abuse in the first degree.

This Court has held that the plain language of the statute clearly and unambiguously allows the same act to constitute both the predicate felony and the murder. *Magyar, supra* at 408. Thus, if one kills his victim while committing the act of first-degree child abuse, he is guilty of felony murder. Persons of ordinary intelligence can fairly ascertain the meaning of the statute by reading its plain language and referencing this Court's decisions interpreting it. Accordingly, the statute is not vague. *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (1999).

Further, MCL 750.316(1)(b) requires the fact finder to conclude that a murder occurred and that one of the enumerated felonies occurred. The crime of murder has been clearly defined in our case law, *People v Johnson*, 208 Mich App 137, 140; 526 NW2d 617 (1994) (murder is the killing of a human being with malice), and the crime of first-degree child abuse, the predicate felony in this case, is clearly defined by statute, MCL 750.136b(2). Because the felony murder statute clearly and plainly sets out the elements the prosecution must prove beyond a reasonable doubt in order to obtain a conviction, the statute does not give unstructured and unfettered discretion to the jury in determining guilt.

Defendant also asserts that the felony murder statute is ambiguous and, therefore, the "rule of lenity" requires reversal of the felony murder conviction. "The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The rule is only properly applied in situations where the statute's penalty language is ambiguous, or in the absence of any firm indication of the legislative intent. *Id.* at 700 n 12. The penalty for felony murder is clear and unambiguous: life imprisonment. The "rule of lenity" does not apply.

Next, defendant argues that the trial court erred in failing to instruct the jury on second-degree child abuse because his actions were reckless, not intentional, and defense counsel was ineffective for failing to request such an instruction. This issue is waived on appeal because after the jury was instructed defense counsel stated he had no objections to the instructions as given. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Additionally, a trial court's failure "to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29.

Further, even when considered in the context of an ineffective assistance of counsel claim, we hold that defense counsel was not ineffective for failing to request an instruction on second-degree child abuse. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To succeed on such a claim, defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the representation so prejudiced him that he was deprived of a fair trial. *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003).

In this case, the prosecution charged defendant solely with first-degree felony murder. Therefore, the trial court was only required to instruct the jury on, and the jury was only permitted to consider, the charged offense of first-degree felony murder, any necessarily included lesser offenses of first-degree felony murder, and an attempt to commit first-degree felony murder. *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), overruled in part on other grounds, *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

At trial, defendant did not dispute that: (1) he dropped the victim, (2) he shook the victim, and, (3) as a result of his dropping and shaking, the child died. Thus, defendant does not dispute that he committed a homicide. *People v Dykhouse*, 418 Mich 488, 506-507; 345 NW2d 150 (1984) ("Homicide is the killing of one human being by another.") The only dispute at trial was defendant's state of mind or mens rea while committing the homicide.

> [T]he sole element distinguishing manslaughter and murder is malice. . . Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse. A homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004) (internal citations omitted).

Defense counsel chose to argue that defendant was guilty only of involuntary manslaughter (a charge consistent with defendant's claim of accident or negligence), which carries a much lesser penalty than either first-degree murder or second-degree murder. Once again, this was a homicide prosecution and the only questions for the jury was the defendant's guilt or innocence and, if there was a determination of guilt, the degree of the homicide. Defendant was not ineffective for failing to request an inappropriate instruction. *Goodin, supra* at 433.

Defendant additionally argues that the prosecution's improper comments deprived him of a fair trial. We review these unpreserved claims for plain error. *Carines, supra* at 764.

Defendant contends that the prosecution's comments during closing argument that he was uncaring and hated the victim improperly denigrated him. The prosecution is not permitted to denigrate a defendant with "intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Although the prosecution may not make a factual statement to the jury that is not supported by the evidence, *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), prosecutors are afforded great latitude during argument, and they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case. *Id.* at 282. Here, the evidence supported the prosecution's argument.

While defendant's girlfriend testified that defendant treated the victim and her other child like his own children, and that he was loving, kind, considerate, and thoughtful to them, there was also evidence that the victim's grandmother observed bruises on the victim shortly after defendant began watching her. The physicians' testimony regarding the extent and cause of the victim's injuries and her resulting death also supported an inference that defendant was uncaring and /or may have hated the child.

Defendant also argues that the prosecution misstated the evidence and injected issues broader than his guilt or innocence into the trial by stating that defendant's "whole concern during his statement was, 'I – I still want to have sex with [Teunis] and have a family with her. I still want to be in her life. I don't want to get in trouble.'" While the prosecutor did include a reference to sex in defendant's statement, isolated remarks that are not blatant or so inflammatory as to prejudice the defendant, such as the one at issue, will not rise to the level of

prosecutorial misconduct. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Moreover, the court properly instructed the jury that the lawyers' statements and arguments were not evidence that could be considered during deliberations. Therefore, the instructions cured any potential prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Finally, defendant contends that the prosecution argued that defendant did not prove his defense, thereby impermissibly shifting the burden of proof to defendant. "In a closing argument a prosecutor may comment upon the evidence presented at trial and upon the witnesses' credibility." *People v Green*, 131 Mich App 232, 236-237; 345 NW2d 676 (1983). However, the prosecution may not suggest that defendant must prove something, or explain damaging evidence, as it tends to shift the burden of proof. *Id*. at 237. Although, merely commenting on weaknesses in the defendant's defense does not shift the burden of proof to the defendant. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995).

In this case, the prosecution was attempting to comment on the weakness of defendant's defense. The prosecution did not shift the burden of proof. Even if we were to agree that the prosecutor misstated the facts when making the challenged argument, that misconduct did not prejudice defendant because the court's instructions cured any alleged prejudice to defendant. *Long, supra*. There was no plain error requiring reversal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey