# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 11, 2010 |
| v | No. 289079<br>St. Clair Circuit Court |
| JOHN WILLIAM GONZALES,<br><br>Defendant-Appellant. | LC No. 08-00147-FC |

Before: CAVANAGH, P.J., and O'Connell and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). He was sentenced as a second offense habitual offender, MCL 769.10, to concurrent prison terms of life for felony murder and 10 to 22 years and 6 months for first-degree child abuse. He now appeals as of right. We affirm.

The victim in this case is defendant's one-year-old son. The victim was fatally injured when he received a blow to the head in July 2005. The resulting fracture to the base of the victim's skull was 9.2 centimeters in length, with the majority of the fracture running entirely through the bone. After the killing, defendant and his family moved to Fort Wayne, Indiana. In December 2007, the police there received information about a body in defendant's home. A subsequent search led to the discovery of the victim's mummified remains in a plastic container in the living room. At first, defendant denied having any knowledge of the victim. Eventually, he admitted the boy was his and that he had died, but asserted that he was accidentally injured while he was playing with defendant.

Defendant first argues that the trial court erred in admitting into evidence several autopsy photographs of the victim because they were overly gruesome and prejudicial. However, the photographs supported and contextualized the medical examiner's testimony by illustrating the depth, location, and severity of the skull fracture. This was relevant to the element of intent, particularly in light of defendant's claim that the injury was accidental. MRE 402; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995) ("Photographs may . . . be used to corroborate a witness' testimony."); *People v Mesik* (*On Reconsideration*), 285 Mich App 535, 544; 775 NW2d 857 (2009). "[W]hile gruesome photographs should not be admitted solely to garner sympathy from the jury," *Mesik* noted, "a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details." *Mesik*, 285 Mich App at 544. Rather, *Mills* explains, "[t]he proper inquiry is

always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 77. Because the record does not indicate that the photographs were unfairly prejudicial, the trial court did not abuse its discretion in admitting the photographic evidence.

Defendant also challenges the trial court's admission of other acts evidence regarding defendant's abuse of his other children. Plaintiff sought admission of the evidence under both MRE 404(b) and MCL 768.27b. To be admissible under MRE 404(b), evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). MCL 768.27b states that "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" MRE 403.

The evidence of other instances of child abuse by defendant was offered for the proper purpose of showing defendant's pattern of conduct, involving intentional abuse against children. The evidence demonstrated a lack of mistake or accident in defendant's actions. MRE 404(b)(1); *People v Johnigan*, 265 Mich App 463, 466; 696 NW2d 724 (2005) ("a prosecutor may introduce evidence of other acts for the proper purpose of demonstrating a lack of mistake (or fabrication) in a witness's accusations."). The evidence was probative of whether defendant knowingly and intentionally caused serious physical harm to the victim. MCL 750.136b(2). The record does not establish that the tendency existed that the evidence would be given preemptive or undue weight. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Unfair prejudice is not established merely because of the abhorrent nature of prior assault. *Id.* Furthermore, they jury was specifically instructed stated that the other acts evidence was to be considered only for "certain purposes," specifically that defendant "specifically meant to do great bodily harm," "acted purposefully," "not by accident or mistake, or because he misjudged the situation." Generally, a jury is presumed to have followed its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, the other acts evidence cannot be characterized as unfair, and the trial court did not abuse its discretion when it admitted this evidence.

Next, defendant asserts that he should be granted a new trial because the trial court failed to instruct the jury on second-degree child abuse, MCL 750.136b(3). However, defendant waived any claim of error by accepting the instructions as given. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

In a related argument, defendant asserts that he was denied the effective assistance of counsel because his attorney failed to request an instruction on second-degree child abuse, MCL 750.136b(3)(a), which he maintains is a necessarily included lesser offense of first-degree child abuse. To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

"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).

"Intentional" is defined to mean "'done with intention or on purpose. . . .'" *In re Certified Question from the US Court of Appeals for the Sixth Circuit*, 468 Mich 109, 114; 659 NW2d 597 (2003), quoting Random House Webster's College Dictionary (1991). "Knowledge" is defined as, "An awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Black's Law Dictionary (8th ed).

In contrast, MCL 750.136b(3) provides, in relevant part:

> A person is guilty of child abuse in the second-degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.

In *People v Gregg*, 206 Mich App 208, 212; 520 NW2d 690 (1994), this Court quoted the following definition of "reckless" from Black's Law Dictionary (6th ed):

> "Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be 'reckless' it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended."

This Court also quoted The Random House College Dictionary, Revised Edition, defining "reckless" as:

> 1. utterly unconcerned about the consequences of some action; without caution; careless . . . 2. characterized by or proceeding from such carelessness. [*Id.*]

Assuming, without deciding, that second-degree child abuse is a lesser included offense of first-degree child abuse, defendant has failed to demonstrate a reasonable probability that the outcome would have been different if his attorney had requested the instruction. *Grant*, 470 Mich at 486. In finding that defendant knowingly or intentionally caused serious physical harm to the victim to support the first-degree child abuse conviction, the jury clearly did not find credible defendant's defense that the injury was an accident caused by pushing the victim while playing with him. Therefore, defendant was not prejudiced by his attorney's failure to request an instruction that defendant merely acted recklessly or with indifference to the consequences.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder