

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT RAMON DUNCANS,

Defendant-Appellant.

UNPUBLISHED

September 21, 2010

No. 292283

Wayne Circuit Court

LC No. 09-001152-FC

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of involuntary manslaughter, MCL 750.321, and second-degree child abuse, MCL 750.136b(3). He was sentenced to concurrent prison terms of 100 months to 15 years for the manslaughter conviction, and 23 months to 4 years for the child abuse conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the death of the 17-month-old child of his live-in girlfriend. The child died from swelling in the brain caused by head trauma, consistent with shaken baby syndrome. After the child died, defendant gave a statement to the police in which he denied shaking the child. Defendant later stated that the child appeared to be having a seizure, so he shook the child for about 30 seconds to try to get him to respond. Dr. Elaine Pomeranz, a pediatric emergency specialist who attempted to resuscitate the child after he was brought to the hospital, and Dr. Bader Cassin, who conducted an autopsy of the child, both testified that the child's injuries required a degree of force that any adult person would recognize as dangerous to a child. Over defendant's objection, Katherine Beaudrie, a relative of the child, was permitted to testify that two or three months before the child's death, she saw defendant shake the child and throw him onto a couch. When she asked defendant why he did that, he replied, "It's not my f***ing kid."

Although defendant had been charged with first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), the trial court found him guilty of the lesser offenses of involuntary manslaughter and second-degree child abuse. At sentencing, the trial court departed from the sentencing guidelines range of 43 to 86 months for the manslaughter conviction and sentenced defendant to a minimum term of 100 months for that conviction.

I. ADMISSIBILITY OF OTHER ACTS EVIDENCE

Defendant argues that the trial court erred in admitting Beaudrie's testimony regarding the prior shaking incident under MRE 404(b)(1). Defendant argues that the evidence should not have been admitted because the prosecution failed to provide reasonable notice of its intent to introduce the evidence in advance of trial, because the evidence was not relevant for a purpose other than to show his bad character, and because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

We review the trial court's decision to allow the evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) prohibits evidence of a defendant's prior bad acts to prove the defendant's character to show action in conformity therewith, but permits such evidence 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." To be admissible: 1) the evidence must be offered for something other than a character or propensity theory, 2) it must be relevant under MRE 401, and 3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004); *People v Smith*, 282 Mich App 191, 194-195; 772 NW2d 428 (2009). In a criminal case, the prosecution must also provide reasonable notice of its intent to introduce the evidence in advance of trial, or during trial if the court excuses pretrial notice on good cause shown. MRE 404(b)(2).

Defendant first argues that the prosecution failed to provide reasonable notice of its intent to introduce the evidence at trial. The record is unclear as to exactly when prior to trial defendant received notice of the prosecutor's intent to introduce Beaudrie's testimony, however, the trial court addressed the issue on the first day of trial, before trial began. Even assuming that notice to defendant was untimely, the trial court did not abuse its discretion in excusing the late notice for good cause shown. The prosecutor explained that she did not provide earlier notice because she had only recently learned of the evidence. Further, defendant was not prejudiced by the late notice because he had the opportunity to interview Beaudrie two days before she testified. Defendant did not move for an adjournment or otherwise explain how the late notice affected his ability to prepare for trial. In addition, after Beaudrie testified, defendant was permitted to recall his girlfriend to testify regarding her recollections of the alleged prior shaking incident and Beaudrie's alleged bias against defendant. Because the record indicates both that there was good cause for the late notice and that defendant had the opportunity to prepare for and respond to the challenged testimony, the trial court did not abuse its discretion in excusing the late notice.

We also disagree with defendant's arguments that the evidence was not relevant for a proper, noncharacter purpose, or was unduly prejudicial. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127 (2004). Here, the evidence was relevant to the issue of defendant's intent and to show defendant's scheme or system of

responding to the child. These were principal issues in the case, particularly in light of defendant's claim that any shaking that did occur was not done with any malicious intent, but rather merely in an attempt to elicit a response to the child's alleged seizure. Furthermore, because defendant was tried in a bench trial, there was little risk of unfair prejudice. "A judge, unlike a juror, possesses an understanding of the law which allows him to . . . decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Here, the trial court was aware of the limited, permissible uses for which the evidence could be considered. Accordingly, the probative value of the evidence was not outweighed by the danger of unfair prejudice. Thus, the trial court did not abuse its discretion in admitting the prior acts evidence.

II. SCORING OF THE SENTENCING GUIDELINES

Defendant challenges the trial court's scoring of offense variables 3, 7, 9, and 10 of the sentencing guidelines. Although defendant preserved his challenges to the scoring of OV 3, OV 7, and OV 9 by objecting to those scoring decisions at sentencing, defense counsel informed the trial court with respect to OV 10 that "We're not going to contest that." Because defense counsel affirmatively relinquished defendant's right to contest the scoring of OV 10, any error in the scoring of that variable has been waived. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Therefore, our consideration of this issue is limited to OV 3, OV 7, and OV 9.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). To the extent this issue also involves a question of statutory interpretation, our review is de novo. *Wilson*, 265 Mich App at 397.

The trial court scored 25 points for OV 3, which is appropriate where a "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). It is undisputed that the child victim sustained an injury that caused his death. Although defendant contends that it is inappropriate to score 25 points where the sentencing offense is a homicide, he concedes that this argument was rejected in *People v Houston*, 473 Mich 399, 401, 405; 702 NW2d 530 (2005), and that the decision in *Houston* supports the trial court's 25-point score. Therefore, on the basis of *Houston*, we uphold the trial court's score of 25 points for OV 3.

The trial court scored 50 points for OV 7 on the basis of its determination that the child victim was treated with excessive brutality. MCL 777.37(1)(a). The evidence that the child was subjected to a violent shaking that caused severe head trauma, leading to his death, supports a finding that the child was treated with brutality. Further, Dr. Cassin testified that a lay person would have recognized that the magnitude of shaking that caused the child's injuries was unsafe for a child. In addition, when asked about the force that would be necessary to cause the child's injuries, Dr. Pomeranz replied, "It's a force beyond anything that one would use to care for a child or to play with a child. It's not like, you know, bouncing the baby on your knee or you know, trying to soothe the baby by [j]iggling the baby in your arms. It's much more forceful than that." This evidence is sufficient to establish that defendant's violent shaking of the child

was excessive. Therefore, the trial court did not abuse its discretion in scoring 50 points for OV 7.

MCL 777.39 governs the scoring of OV 9 and provides in part that the trial court assess ten points if “2 to 9 victims . . . were placed in danger of physical injury or death.” MCL 777.39(1)(c). The sentencing court is to count “each person who was placed in danger of injury or loss of life as a victim.” MCL 777.39(2)(a). The evidence indicated that defendant’s other children were present when defendant violently shook the child victim. The trial court did not err in finding that the other children were placed in danger of injury and, therefore, they were also victims for purposes of scoring OV 9. Defendant was the only adult present in the home with the children; he was the only person available to provide them care. His violent shaking of the 17-month-old child involved a loss of self-control that placed the other children in danger of injury. Thus, the trial court did not err in scoring ten points for OV 9.

III. DEPARTURE FROM THE GUIDELINES

Defendant also argues that the trial court erred when it departed from the sentencing guidelines range of 43 to 86 months for his manslaughter conviction and sentenced him to a term of 100 months to 15 years for that conviction. He argues that the trial court improperly found that there were substantial and compelling reasons for a departure, and improperly based its departure decision on factors that were already considered in the scoring of the guidelines. We disagree.

MCL 769.34(3) provides that “[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” A court may not base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007). A “substantial and compelling reason” for departure must be “objective and verifiable” and one that “keenly” or “irresistibly” grabs a court’s attention and is of “considerable worth” in deciding the length of a sentence. *Babcock*, 469 Mich at 257-258 (citation omitted). In reviewing whether substantial and compelling reasons exist to justify a departure from the guidelines, the determination “whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion.” *Id.* at 265. The extent of a trial court’s departure from the sentencing guidelines range is also reviewed for an abuse of discretion. *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005).

In this case, the trial court articulated two reasons for its departure: (1) defendant’s violation of the trust the child’s mother had placed in him, and (2) the need to protect children in society from adults who harm them. Defendant’s conduct involved the brutal shaking of a 17-month-old child, causing fatal brain injuries. The evidence supported an inference that defendant committed similar acts against the child at least twice before, one or two weeks before the fatal injury (as evidenced by older hemorrhaging in the brain that was detected during the child’s autopsy) and more than a month before that (as shown by Beaudrie’s testimony). Although the guidelines were scored for defendant’s aggravated physical abuse that led to the child’s fatal injuries, they did not adequately address defendant’s repeated violations of the trust afforded to

him as the child's caregiver. Further, the evidence that defendant's conduct was not an isolated occurrence, but rather was part of a pattern of similar acts against the child objectively supports the trial court's finding that children need to be protected from defendant. See *People v Reincke*, 261 Mich App 264, 272; 680 NW2d 923 (2004). The trial court sufficiently explained why a departure from the guidelines was warranted, and its statements were sufficient to justify its departure from the guidelines range by 14 months. *People v Smith*, 482 Mich 292, 304; 745 NW2d 284 (2008).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly