

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHELDON JAMES MCDONALD,

Defendant-Appellant.

UNPUBLISHED

October 26, 2010

No. 293015

Kalkaska Circuit Court

LC No. 08-003028-FC

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder (murder in perpetration of first-degree child abuse), MCL 750.316(1)(b), first-degree child abuse, MCL 750.136b(2), second-degree murder, MCL 750.317, and obstruction of justice, MCL 750.505. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve concurrent prison terms of life, 180 to 270 months, 50 to 80 years, and 47 to 90 months for the respective convictions. Defendant appeals as of right. We affirm defendant's convictions for felony murder, first-degree child abuse, and obstruction of justice, but vacate defendant's conviction for second-degree murder, as well as the corresponding sentence, and remand for entry of an amended judgment of sentence.

Defendant's convictions arose from the death of three-year-old Cody Cross. Defendant had been involved in a romantic relationship with Cody's mother, Pamela Buning, and the three lived together at Buning's apartment. Defendant became involved in disciplining Cody and eventually began administering hard spankings on a daily basis, often multiple times a day.

On August 1, 2008, defendant had been left alone with Cody while Buning was at work. When Buning returned home, Cody was unresponsive, and defendant did not provide a reason for Cody's condition. Several hours later, Cody's condition had not improved and an ambulance was summoned. Defendant, Buning, and Heather Batchelor, a friend who had been at the apartment earlier in the day, concocted a story that Cody had been left with a babysitter who disappeared after reporting that Cody had fallen down the stairs.

Upon being admitted at the local hospital, Cody's treating physicians evaluated Cody's condition as critical. Cody was taken to another hospital with a children's trauma center. Tests revealed that Cody had severe brain swelling. In addition, he was suffering from numerous severe bruises all over his body, which resulted in renal failure. Cody also had multiple rib

fractures in varying stages of healing, which indicated that the fractures resulted from separate injuries. Surgery to alleviate the pressure in Cody's brain was unsuccessful. Doctors informed Cody's family that there was no hope of further recuperation, and he was taken off of life support. An autopsy followed and concluded the cause of death was from swelling of the brain. The forensic pathologist determined the numerous injuries were assaultive and ruled Cody's death a homicide.

I

Defendant argues he was denied the effective assistance of counsel associated with two alleged errors in the jury instructions. We disagree.

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Failure to move for a new trial or a *Ginther*¹ hearing limits this Court's review to mistakes apparent on the record. *Id.* at 659.

A defendant who claims that he "has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id.* Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defense counsel's failure to object to a proper jury instruction does not constitute ineffective assistance of counsel because defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

After the proofs were presented at trial and prior to closing arguments, a separate hearing was held to address the proposed jury instructions. Defendant was present and indicated that he had been actively involved in crafting the jury instructions. Neither he nor his counsel objected to the jury instructions at issue in this appeal. Following the trial court's delivery of instructions to the jury, both defendant and his counsel indicated on the record that they had no objections or corrections to the jury instructions. Moreover, defense counsel indicated that he was satisfied with the instructions. Finally, both defendant and his counsel personally signed a copy of the final jury instructions, indicating their approval as to form. Although defendant has at the least forfeited, if not outright waived, his right to appeal the allegedly defective jury instructions, we will consider whether defense counsel was ineffective for failing to pursue corrections to the allegedly defective jury instructions.

Defendant first alleges that his defense counsel should have requested a jury instruction indicating that he could only be convicted of felony murder if he knowingly and intentionally

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

caused Cody serious physical or mental harm when he inflicted blunt force trauma to Cody's head. During final instructions, the trial court read the following instruction:

Now turning to the specific charges in this case; as to 1st degree murder - - correction, 1st degree felony murder, . . . to prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the defendant caused the death of Cody Cross; that is, that Cody Cross died *as a result of injuries resulting from blunt-force trauma to his head*.

Second, that the defendant had one of these three states of mind; he intended to kill or he intended to do great bodily harm to Cody Cross, or he knowingly created a very high risk of death, or great bodily harm knowing that death or such harm would be likely the results of his actions. That's the second element.

The third element; that when he did *the act that caused the death* of Cody Cross, the defendant was committing the crime of 1st degree child abuse. [Emphasis added.]

The trial court then explained what constituted first-degree child abuse.

Defendant argues that the instructions outlined above failed to properly convey to the jury that in order to convict him of felony murder, it had to find that he caused Cody's head wound, which was the cause of death. Defendant appears to argue that because there was substantial evidence presented to the jury of other acts that would qualify as first-degree child abuse, but that were not the cause of Cody's death, the jury may have convicted him of felony murder based on those other acts. We disagree.

Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). They must include all elements of the charged crime and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Even if jury instructions "are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Aldrich*, 246 Mich App at 124.

When the challenged instruction is read in its entirety, it is plain that the jury was instructed that to convict defendant of felony murder, it was required to find that he caused Cody's death by inflicting a head injury, while engaged in an act that constituted first-degree child abuse, and with the requisite intent. We cannot find any support for defendant's contention that the instruction opened the door for the jury to convict him of felony murder based on some other act that constituted first-degree child abuse. The instruction specifically identified Cody's cause of death as "blunt-force trauma to [the] head" and stated that a required element of the crime was that defendant caused the death while engaged in an act of first-degree child abuse. It logically follows that the jury had to find that defendant caused the head injury in order to convict him. Because the challenged jury instruction adequately reflected the law and protected

defendant's rights, defense counsel cannot be deemed ineffective for failing to object. See *Torres*, 222 Mich App at 425.

Defendant also argues that his counsel should have objected to a jury instruction that allowed the jury to consider prior inconsistent statements of a witness "in determining the facts of the case," or as substantive evidence rather than for purposes of impeachment. During final instructions to the jury, the trial court stated:

Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether you - - whether the testimony at this trial was truthful and in determining the facts of the case.

Defendant specifically takes issue with the instruction in conjunction with statements the jury heard Batchelor make during a taped interview with a police officer. Defendant maintains that the jury was able to consider as substantive evidence Batchelor's statements regarding possible sexual abuse, which in turn could have affected the result of the trial because such testimony was highly prejudicial. We disagree.

First, the taped statements defendant now claims were impermissibly prejudicial were played at his insistence and against the advice of counsel. A party is not entitled to appellate relief on the basis of an error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). Second, while prior inconsistent statements are typically not permitted to be used as substantive evidence, Batchelor's taped statements were admissible as substantive evidence at trial under MRE 801(d)(2)(E) on the issue of whether defendant conspired with Batchelor and Buning to obstruct justice in concocting a story regarding the origin of Cody's injuries. As to the statements' prejudicial effect, it is clear from the tape that Batchelor was merely repeating something she had heard from Buning. The medical examiner testified at trial that there was no evidence of sexual abuse. The jury was specifically instructed that it must find that the prosecution had proven each of the required elements for each charge in order to convict defendant. Moreover, the jury was cautioned against allowing prejudice to influence its decision. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, defendant's claim of ineffective assistance of counsel on this issue is without merit.

II

Defendant also argues that his convictions for felony murder and second-degree murder of a single victim violate double jeopardy. We agree.

Generally, double jeopardy issues constitute questions of law that this Court reviews de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, unpreserved double jeopardy issues are reviewed for plain error affecting the defendant's substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

The Double Jeopardy clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. US Const, Ams V, XIV;

Const 1963, art 1, § 15. Multiple murder convictions arising from the death of a single victim violate constitutional double jeopardy protections. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Here, both defendant's felony murder conviction and second-degree murder conviction arose from Cody's death. Consequently, defendant's conviction for second-degree murder, and the corresponding sentence, must be vacated. See *id.* at 429-430.

The conviction of second-degree murder and corresponding sentence are vacated, and this matter is remanded for entry of a corrected judgment of sentence. In all other respects, defendant's convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly