STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2012
v	No. 304784 Wayne Circuit Court
STEVEN LYNN NICHOLSON, Defendant-Appellant.	LC No. 10-012115-FC

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of premeditated first-degree murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); first-degree child abuse, MCL 750.136b(2); and second-degree murder, MCL 750.317. The trial court merged defendant's first-degree and felony murder convictions and sentenced defendant to life in prison without the possibility of parole; the court also sentenced defendant to 1 to 15 years' imprisonment for first-degree child abuse and 315 months to 60 years' imprisonment for second-degree murder. For the reasons set forth in this opinion, we affirm.

I. FACTS

Defendant's convictions arise from the October 19, 2010, drowning deaths of his two minor children, 15-month old Ella Grace Stafford, and 13-month-old Jonathan Alan Sanderlin. Ella was born to defendant and Tayler Stafford on July 11, 2009, and Jonathan was born to defendant and Sarah McGee on September 20, 2009. Sometime thereafter, defendant obtained sole custody of Jonathan and both children lived with defendant at his apartment in Allen Park. Tayler would often stay at defendant's apartment with defendant and the two children; Tayler worked and defendant, who was unemployed, cared for the children on a full-time basis. Tayler testified that Ella normally slept through the night and that Jonathan would wake up during the night. Tayler testified that she could normally hear Jonathan when he awoke in the night. Tayler never saw the children climb out of their cribs on their own, play during the night, or turn the bathtub water on by themselves. Tayler testified that defendant never told her that the children could climb out of their cribs on their own.

At trial, several individuals testified concerning defendant's treatment of the children. Tayler testified that defendant called Jonathan a "fat heifer" and that defendant would pick him up by the arm and spank him on the legs and face. She saw defendant pull Jonathan by the arm

and smack him in the face. Tayler testified that defendant stated that his conduct amounted to "tough love." Tayler testified that Jonathan cried constantly from the time he awoke until he went to bed. Tayler observed defendant put his hand over the child's mouth while he was crying and on one occasion defendant put pillows over Jonathan's face while he was crying. Tayler testified that when she tried to pick Jonathan up, he "flinched" in anticipation of physical contact. Tayler stated that on one occasion when she tried to confront defendant about his treatment of Jonathan, defendant "screamed" and "yelled" and "came at [her]." Tayler testified that she called Child Protective Services (CPS) out of concern for Jonathan's safety. Tayler also sent an email to Jonathan's mother to inform her that Jonathan was being abused and neglected.

Windy Moritz, Ella's maternal grandmother, testified that she observed defendant care for Jonathan when defendant occasionally brought the child over to her home. Moritz stated that defendant treated Jonathan different than Ella and would "yank him up by the arm" and call him a "big old crybaby." Moritz testified that Jonathan did not like water as much as Ella did and on one occasion she saw defendant splash freezing water from a swimming pool onto Jonathan's face while he was crying. Moritz testified that defendant let Jonathan fall out of a chair at her home onto cement without regard and instead stated that Jonathan "had to learn." Moritz testified that she last saw Jonathan one or two months before his death and at that time he was just starting to crawl; Mortiz never saw Jonathan try to climb into or out of a bathtub.

Several neighbors from defendant's apartment complex testified about defendant's treatment of the children. One neighbor, Lindsey Cook, testified that defendant left the children in his parked vehicle alone for 45 minutes and picked the children up by the wrists and "carr[ied] them around like books." Cook testified that defendant pushed the children into his apartment with his feet and yelled at the children when they cried and told them to "shut up." Cook did not see defendant act or talk kindly to the children. Cook testified that she called CPS three or four times out of concern for the children. Similarly, Jennifer Lewindowski testified that defendant left the children alone in his vehicle and she indicated that she telephoned the police two or three times out of concern for the children. Another neighbor, Jeweley Peters, testified that she saw defendant with the children two or three times per week. Peters testified that defendant pulled and pushed the children by the head every time she saw them. Peters explained that defendant told his children to "get the 'f' in the house or car," and picked the children up like a "backpack" and "flung" them in a "very uncaring" way. Peters testified that defendant swore at the kids and she saw the children left alone in defendant's vehicle while it was on with the radio blaring and the children screaming. Peters telephoned the police on that occasion.

On Monday October 18, 2010, the day before the children's deaths, Tayler and defendant had an argument. Two neighbors testified that they heard defendant arguing with a female in the hallway sometime between 7:00 p.m. and 8:30 p.m. Another neighbor testified that defendant was arguing on a telephone in the hallway at approximately 9:30 p.m. Three other neighbors, including two who lived on the floors directly above defendant's apartment, testified that they heard water start running at sometime between 7:30 and 9:30 p.m. Testimony indicated that the water continued to run throughout the night and into the early morning hours of October 19, 2010. At 10:00 p.m. on October 18, 2010, Lewindowski, who lived across the hall from defendant, testified that she went out to check her mail and saw defendant "pacing" in the hallway near his door. Lewindowski offered to watch the children for defendant, but defendant declined the offer. Several hours later, at approximately 2:00 a.m. on October 19, Lewindowski

awoke to use the restroom and she heard an argument in the parking lot. Lewindowski looked out a window and saw defendant arguing with someone who she thought looked like Tayler.

At approximately 2:04 a.m. on October 19, 2010, defendant called 9-1-1; when dispatch answered the call, the call disconnected. Defendant called 9-1-1 again and again the telephone call disconnected when the operator answered the call. Operators at the dispatch center called defendant's cellular telephone three times, but each call went unanswered. An operator finally left a voicemail on defendant's cell phone. Defendant eventually called 9-1-1 again several minutes later and reported that his two children drowned while he slept. A few minutes later, Allen Park Police Officers Kevin Gersky and Adam Begley were dispatched to defendant's lower-level apartment. Upon entry, Gersky and Begley found that the lower-level of the apartment complex was hot and humid and flooded with water. Standing water pooled at the entryway into defendant's apartment; the door was open. Gersky and Begley heard defendant yell for help and they entered his apartment. Inside, the officers found defendant sitting on the floor in the master bedroom with his two children lying face-up on the ground with their feet facing defendant. The children were motionless and defendant stated that he tried to resuscitate the children. Immediately thereafter, emergency medical services (EMS) personnel arrived and the children were pronounced dead at the scene. Defendant told police that he put the children to bed at about 8:30 or 9:00 p.m. and then went to bed at 10:00 p.m. Defendant stated that he awoke at 2:00 a.m. and found that his floor was wet. Defendant stated that he then went into the bathroom and found Ella lying face-down on the floor next to the sink and Jonathan lying face-down in the bathtub. Defendant told Officer Gersky that the children had just recently started to walk and both were able to climb out of their cribs.

After removing defendant from the scene, several investigators searched defendant's apartment and they testified about their findings at trial. Police observed that Ella was wearing a diaper and socks and Jonathan was dressed in jeans and a shirt. Jonathan appeared badly burned and the top layer of skin on his hand was "degloved" or completely peeled off. Police did not notice debris on either child. Defendant's apartment was saturated with water throughout and there was less than one inch of standing water on the bathroom floor. The bathtub had water inside and both of the drains inside the tub were clogged with toilet paper. There were several items inside the bathtub including a plastic garbage can and there were pieces of wet toilet paper strewn throughout the bathroom. One police officer testified that the bathroom appeared as if a fight had taken place inside. In the children's bedroom, the mattresses in one of the cribs was wet and the smoke detectors inside the apartment were detached from the wall with the batteries removed. Defendant's bed was "neat" and "made" except for the east-side of the bed. There were numerous other photographs of the interior of the apartment that were admitted into evidence.

Wayne County Medical Examiner Dr. Carl Schmidt, a forensic pathologist, performed an autopsy on Ella and Jonathan's bodies on October 20, 2010. Schmidt testified that 80-percent of Jonathan's body was burned with full-thickness burns where the superficial layer of skin was lost. Schmidt testified that the scalding patterns indicated that Jonathan had been submerged in hot water for a prolonged period of time and he characterized Jonathan as having been "cooked." Schmidt testified that Jonathan's pubic region was spared because he was wearing a diaper and that part of Jonathan's back and chin were spared. Schmidt theorized that Jonathan was submerged in hot water with his back pressed against the bottom of the bathtub with part of his

chin out of water. Schmidt testified that Jonathan was clothed with a shirt and jeans after he was removed from water because there was no sparing pattern to support that Jonathan was clothed while he was submerged in hot water.

Schmidt testified that an internal examination showed significant decomposition that was accelerated by exposure to heat. Schmidt testified that Jonathan drowned before his body was burned because he did not find evidence of any signs of "vital reaction" and because he did not find any inhalation burns. Schmidt found three small foreign objects inside Jonathan's lungs including a fiber filament that could have been from cellulose paper. Schmidt testified that Jonathan inhaled the items in the process of aspirating water when his head was submerged. Schmidt testified that an adult loses consciousness after 30 seconds under water and death ensues a couple minutes thereafter. Schmidt stated that a child would naturally try and remove his head from underneath water. Schmidt testified that, in his medical opinion, Jonathan was intentionally drowned and he listed the manner of death as a homicide. Schmidt explained that it was highly unlikely a child without any neurological impairment and some ability to ambulate would not have removed himself from water. He stated that foreign bodies inside Jonathan's lungs supported that Jonathan was deliberately drowned in that the child actively and "deeply aspirated" water.

Schmidt testified that Ella's body was not burned to the same degree as Jonathan's. Schmidt did not find evidence that Ella aspirated hot water and he testified that Ella drowned before she was placed face-down in hot water. Ella's body was 25-percent burned and Schmidt testified Ella did not have distinct "immersion lines," indicating that she was likely moved several times while in hot water. Schmidt testified that, although Ella was allegedly found on the bathroom floor, the burn patterns on her body showed that she was in hot water long enough to suffer the burns, and then removed from the water and placed on the floor. Schmidt testified that, based on his findings, Ella could not have drowned in water just two or three inches deep. He stated that a child Ella's age would not accidentally drown in two or three inches of water. Schmidt testified that it is rare for a child over the age of one to drown in a bathtub because that is generally the age when an infant becomes ambulatory. Schmidt concluded that Ella died of an intentional drowning and he classified her death as a homicide. Schmidt testified that part of his conclusion was based on the fact that two children drowned and suffered scalding burns with no apparent reaction and without either child making any noise or being able to escape. Schmidt explained that children under the age of one would be easily restrained so he would not expect to see signs of trauma or struggle.

Defendant offered the expert testimony of Dr. Ljubisa Dragovic, a forensic pathologist and Chief Medical Examiner for Oakland County. Dragovic testified that he reviewed the autopsy reports, photographs, microscopic slides, the Michigan State Police crime scene report, photographs and Schmidt's preliminary examination testimony. Dragovic testified that he agreed that the cause of death was drowning, but stated that, based on what he reviewed, there was no evidence to support the conclusion that the drowning was caused by a purposeful act. Dragovic testified that he did not find any evidence to substantiate Schmidt's conclusion that the children's heads were intentionally held under water. Dragovic testified that evidence in a person's lungs could not establish whether a drowning was intentionally inflicted. Dragovic testified that it was possible that Ella drowned on the bathroom floor and he stated that Jonathan was clothed when he drowned because of the sparing patterns on the child's body. Dragovic

agreed that Jonathan was tall enough to climb into the bathtub on his own and may have been unable to climb out of the bathtub. He agreed that Ella may have been unable to exit the bathroom because of a barrier in front of the bathroom door. However, Dragovic testified that he would not classify the deaths as accidental, and nothing from what he examined either proved or disproved homicide. Dragovic testified that he did not know whether it was rare for infants older than 12 months to drown in a bathtub.

The trial court found defendant guilty of second-degree murder for the death of Jonathan and premeditated first-degree murder, felony murder, and first-degree child abuse for the death of Ella. The court reasoned that the interior of the bathroom did not show evidence of child's play, but rather showed evidence of staging, and the court noted that the bathtub drains appeared to be deliberately plugged. The court concluded that defendant's version of events lacked credibility. The court found that it would have been nearly impossible for Jonathan to climb out of his crib given that he had just learned to walk, and it reasoned that Ella was agile, intelligent, and able to walk and climb such that she could have removed herself from danger and would not have drowned on the bathroom floor as defendant claimed she did. The court concluded that defendant held Jonathan's head under water to make him quiet, and then drowned Ella to establish the defense of accident when he realized Jonathan was dead. Defendant appeals his convictions as of right.

II. ANALYSIS

Defendant contends that the trial court violated his due process rights by allowing the prosecutor to introduce evidence of prior acts of child abuse.

We review a trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, the decision to admit evidence frequently "involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We review questions of law de novo. *Id*. A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. An erroneous admission of evidence is a nonconstitutional error. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Id*.

At trial, an alternate judge sitting for the trial court held that evidence of defendant's prior acts of child abuse was relevant and admissible under MRE 404(b) to show absence of mistake or accident. The trial court concluded that the probative value of the evidence was not outweighed by the danger of unfair prejudice given that the case would be tried before a judge as opposed to a jury. As noted above, at trial, Tayler and several of defendant's neighbors testified that defendant committed abusive acts against both children.

Evidence of the character of an accused is generally prohibited pursuant to MRE 404(a); however, evidence of other acts can be admissible under MRE 404(b)(1), which provides:

> 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.

"MRE 404(b) is a rule of inclusion rather than a rule of exclusion." *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011). "To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by [the danger of] unfair prejudice." *People v Kahley*, 277 Mich App 182, 184–185; 744 NW2d 194 (2007).

Logical relevance is the "touchstone of the admissibility of prior acts evidence." *Crawford*, 458 Mich at 388. The inquiry focuses on whether the proffered evidence tends "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; *Crawford*, 458 Mich at 389-390. In terms of other-acts evidence, "404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id*. A prosecutor must show that a defendant's previous acts "establish[] some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in [the case at hand]." *Id*. at 391.

In this case, we find that the trial court did not abuse its discretion in admitting the other-acts evidence under MRE 404(b). Evidence that defendant previously abused his children was logically relevant to show how defendant reacted to parental stress, which in turn tended to support the prosecution's theory that the children did not accidentally drown, but rather defendant purposefully held the children's heads under water and drowned them. Specifically, the other acts evidence showed that defendant's impatience with the children would culminate with him perpetrating physical abuse against the children. The evidence was therefore logically relevant and admissible to show absence of mistake or accident.[1] *Crawford*, 458 Mich at 389-390. Moreover, the probative value of the evidence was not outweighed by the danger of unfair prejudice. *Kahley*, 277 Mich App at 184–185; MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. Here, the other-acts evidence was not marginally probative; rather, the evidence was logically relevant to show absence of mistake or accident, which was critical to whether defendant committed the charged offenses. Further, there was no danger that the trial court, acting as the trier of fact, gave the evidence undue weight. See

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[1] Alternatively, the evidence could have been admitted pursuant to MCL 768.27b, which allows evidence of a defendant's other-acts of domestic violence in cases where the defendant is accused of an offense involving domestic violence.

People v Wofford, 196 Mich App 275, 282; 492 NW2d 747 (1992) ("[u]nlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence").

In addition, defendant cannot show that it is more probable than not that admission of the other-acts evidence undermined the reliability of the verdict. *Elston*, 462 Mich at 766. Here, the trial court made findings of fact on the record and the court's findings indicated that the other-acts evidence did not impact its verdict. Moreover, there was substantial other evidence that supported the trial court's verdict. Schmidt testified that the children were deliberately drowned and stated that it was rare for children over the age of 12 months to drown in a bathtub. Schmidt testified that Jonathan was clothed after he drowned, and evidence that Jonathan's crib was wet supported Schmidt's theory. Further, evidence showed that Jonathan had just started walking, and Tayler testified that she never saw Jonathan or Ella climb out of their cribs. This would have allowed a trier of fact to conclude that the children did not climb out of their cribs and drown in the bathtub on their own accord. Additionally, Schmidt testified that Ella had scalding patterns on her body that had to have occurred in the bathtub, which undermined the defense theory that Ella drowned on the bathroom floor. And, evidence showed that Ella was coordinated and able to walk, which also undermined the defense theory that she could not remove herself from water on the bathroom floor. In addition, evidence would have allowed the trier of fact to conclude that the bathroom was staged. Other evidence showed that defendant did not immediately answer or return the 9-1-1 dispatcher's telephone calls, and instead waited several minutes to contact 9-1-1 after he discovered his children. Evidence also would have allowed a trier of fact to infer that defendant deliberately removed and disconnected the smoke detectors in the apartment so they would not activate from the steam in the bathroom. Other circumstantial evidence supported the trial court's verdict including evidence that defendant's bed was neat and made and did not appear slept on, and testimony showed that neighbors saw defendant pacing outside his apartment at 10:00 p.m.—the same time defendant told police he had gone to bed—and saw him arguing in the parking lot at approximately 2:00 a.m. In sum, defendant cannot show that there is a reasonable probability that the other-acts evidence undermined the reliability of the verdict. *Id*.

Next, defendant contends that MCL 768.37 deprived him of the right to present a defense because the statute conditions the right to offer evidence of voluntary intoxication on a defendant's status as a legal drug user as opposed to an illegal drug user. Defendant has waived this issue for review because he did not offer any evidence of intoxication or diminished capacity at trial. Defendant declined to call the expert that he endorsed on his witness list who was purportedly prepared to offer evidence of defendant's mental state at the time of the offense. Instead, near the close of proofs when the trial court asked defense counsel whether defendant had any other evidence to present, defense counsel stated that the defense rested. Therefore, defendant waived his right, if any, to call additional witnesses and he cannot now claim he was deprived of such right. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the "intentional relinquishment or abandonment of a known right"); *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) ("One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error" (quotation omitted)). Moreover, defendant has not cited any authority to support the proposition that voluntary intoxication of an illegally-obtained substance can be used as a defense to a greater charged offense or that such defense is constitutionally protected. Instead,

the State has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials" where such rules do not infringe on the "weighty interest of the accused" and are not "arbitrary to the purposes they are designed to serve." *Holmes v South Carolina*, 547 US 319, 324-325; 126 S Ct 1727; 164 L Ed 2d 503 (2006). Here, defendant cannot show that he has a constitutionally-protected interest in committing a crime—i.e. consuming illegal drugs—and then using commission of that crime as a defense to a greater offense. Nor can defendant show that the statute is arbitrary. Furthermore, irrespective of whether the Xanex defendant allegedly took was illegally-obtained, defendant cannot show that evidence of his intoxication was otherwise admissible. In particular, nothing in defendant's offer of proof shows that he "did not know and reasonably should not have known that he would become intoxicated or impaired. . ." by ingesting the amount of Xanex he admitted to consuming. Thus, the evidence would not have been admissible under MCL 768.37(2). In sum, defendant was not denied his right to present a defense.

Next, in a Standard 4 brief, defendant raises several questions regarding why certain evidence was not presented at trial and he questions the trial court's interpretation of the evidence. However, defendant fails to make a cognizable legal argument and he does not offer any legal authority in support of his arguments. Defendant does not contend that his attorney was ineffective or cite any reason the trial court would have been biased. Instead, defendant lists bullet points of what he views as "actual facts" and "questionable decisions." As such, defendant has abandoned his arguments for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority"). Moreover, defendant's limited arguments fail to meet the heavy burden of proving his attorney's conduct fell below an objective level of reasonableness. See *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). Defendant's arguments also do not show that there was insufficient evidence to find each element of the crimes beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the prosecution. See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). In sum, defendant has abandoned his arguments for review and after review of all issues raised in his brief, has failed to persuade this Court of any error requiring reversal or remand.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering