STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENDA LEE McCOY,

Defendant-Appellant.

UNPUBLISHED
April 23, 1999

No. 204067
Berrien Circuit Court
LC No. 96-504938 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT McCOY,

Defendant-Appellant.

No. 204070
Berrien Circuit Court
LC No. 96-504938 FH

Before: MacKenzie, P.J., and White, and Smolenski, JJ.

PER CURIAM.

Defendants, who are husband and wife, were each convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, in connection with the death by dehydration of their adopted seven-year-old daughter, Sequoia. Both defendants were sentenced to five to fifteen years' imprisonment. Defendant Brenda McCoy's motion for new trial was denied and, in Docket No. 204067, she appeals of right. In Docket No. 204070, defendant Herbert McCoy appeals of right. We affirm in both cases.

I

The McCoys were married in 1984 and later arranged to adopt Sequoia and her brother, Antonio. The children began living with them in December 1992, when they were six and seven years old, respectively. Before living with the McCoys, Sequoia had been neglected and abused,[1] and had behavioral problems, of which the McCoys were aware prior to the children's placement in their home. Antonio was in special education.

While living with the McCoys, beginning in January 1993, Sequoia went to first grade and was an A student, although she exhibited serious behavioral problems. Her first grade teacher, Ms. Ertman, testified that Sequoia was bright and outgoing, but very angry at her natural mother. She testified that Sequoia made good progress during the term and that her behavior improved over time.

Sequoia sustained an eye injury in February 1993, an arm injury in April 1993, and a head injury in July 1993. The head injury was severe and resulted in her being hospitalized for nine months. When she was released to defendants' care in April 1994, Sequoia functioned at the level of a four-year-old.

The July injury became the subject of a protective services investigation. That case was closed on December 6, 1993, based on information from a number of persons and doctors that Sequoia's injury could have occurred accidentally from hitting her head when she and Antonio were playing, and that having a seizure and oxygen deprivation could have brought about her condition. The report stated that there was no credible evidence that Brenda or Herbert McCoy were in any way responsible or involved in the head injury suffered by Sequoia.

On August 2, 1993, Sequoia was transferred to Tri-State Hospital, where she spent nine months in rehabilitation. On admission, Sequoia weighed forty pounds. Dr. Luzzi, a pediatric specialist, testified that Tri-State Hospital was a rehabilitation hospital for brain-injured patients. She testified that when she first saw Sequoia, she was in very poor condition neurologically, unable to move independently even in bed, was not seeing very much, could not sit, walk, or crawl, was unable to speak or swallow, and depended on a gastrostomy tube to be fed. Dr. Luzzi tried to wean her off the gastrostomy tube several times early on in her stay but was unsuccessful. Dr. Luzzi testified that she remembered the McCoys visiting Sequoia numerous times, and that they interacted positively with Sequoia. Dr. Luzzi had testified at an adoption hearing on December 12, 1993, that "support that Sequoia gets from Mr. and Mrs. McCoy is phenomenal. The little girl is totally bonded to them. They reinforce everything we're doing and I can see her spurt even further a day or two after they've been there."

Dr. Luzzi testified that over the nine-month stay, Sequoia made dramatic progress, but was developmentally at the stage of a four-year-old. Sequoia "was speaking, she was able to crawl anywhere," and she was able to walk with a walker about one hundred feet. Periodically, Sequoia would fall. Several days before her discharge, Sequoia was weaned from the gastrostomy tube and Dr. Luzzi was satisfied that Sequioa was not dependent on the gastrostomy tube for nourishment. Sequoia weighed about fifty-nine pounds on discharge. Before being discharged, Sequoia had gone home for several visits and the McCoys had received training in how to feed and care for her. Sequoia was discharged on April 25, 1994.

An occupational therapist, Elizabeth Parrott, testified that on April 27 or 28, 1994, Brenda began bringing Sequoia to therapy. Parrott testified that Sequoia could not walk reliably, did not speak well, and was functioning like a four-year old. Her records indicated that Sequoia had poor judgment and safety awareness of her movement, and that she appeared to have a close relationship with Brenda. She testified that Sequoia would fall into things and that Sequoia never complained to her that anyone was hurting her. Parrott testified that Sequoia came to therapy three times a week, and that she last saw her on June 1, 1994. After three visits were missed, on June 6, 1994, Parrott called the McCoy home and was told by Brenda, who was in tears, that Sequoia had passed away that morning. Parrott testified that she did not notice during the therapy that Sequoia was losing weight.

Parrott worked with a physical therapist and a speech pathologist. The physical therapist, Bonnie Dent, testified that she saw Sequoia four times and that she did not notice that Sequoia was losing weight. Dent testified that she helped Sequoia learn to walk, and with her standing balance. Dent testified that Sequoia had a lot of problems with balance, and had reactions "where you put your hand out to catch yourself but they were very delayed and they were not real predictable."

On June 6, 1994, approximately forty days after Sequoia's discharge from Tri-State, paramedics responded to a call from the McCoys at 7:18 a.m. and found Sequoia dead, in bed, with rigor mortis setting in. An abrasion on her temporal lobe was observed, as were lines on her chest, and the police were called.

Officer Pace of the Benton Harbor police testified that he responded to the scene. He testified that Brenda told him she had put Sequoia to bed around 10:00 p.m. the previous night and that at 11:00 p.m. Sequoia asked for water and she gave her a glass of water. The next morning, Herbert tried to awaken Sequoia and she did not respond. Brenda then called for an ambulance.

Detective Boyce also responded to the scene, and was told by Brenda that Sequoia had been sleeping with her and Herbert, but she had been keeping Herbert awake, so they put her in her own bedroom and put the mattress on the floor. Brenda told Boyce that Sequoia had eaten some bologna the morning of June 5 and had several sips of Sprite before going to bed that night. She also told Boyce that Sequoia ate on a regular basis, but only about half as much as Antonio. Boyce questioned Brenda regarding what kinds of punishment she used and defendant reported that the only type of punishment was loss of television privileges; she used no physical discipline. Brenda told Boyce that Sequoia was not sick the day before, but that when they found her that morning there was a small amount of vomit in the middle of the bedroom. Boyce testified that when he was in Sequoia's bedroom he did not notice any vomit. Several days later, Boyce again talked to Brenda and asked her about the marks on Sequoia's body. Brenda told him that the injuries to Sequoia's head and chest must have happened when she hit her head on the portable toilet in her bedroom and that she constantly banged her head and body on that toilet. Boyce testified that when he was in Sequoia's room, he had picked up the toilet and that it was hollow aluminum with a plastic seat and "real light."

Dr. Cohle, a forensic pathologist, performed the autopsy on the afternoon of June 6 and noted that Sequoia weighed forty-two pounds, her skin was very dry and lacked elasticity, and there was a lot of debris and dirt in her hair. Dr. Cohle testified that the condition of Sequoia's skin and the fact that

her eyes were sunken were evidence of dehydration. He testified that Sequoia had a number of healing injuries, including a band-like injury beginning just past the edge of the eye and touching the top of the ear, two adjacent circular healing bruises behind the left ear, a band-like area of healing abrasion on the left upper chest, bruises on both hips, a bruise just above the right buttock, bruises on the arm and forearm, and several well-healed scars on the backs of her legs.

Dr. Cohle concluded that Sequoia died of dehydration. He testified that he did not observe any other natural disease process that could have caused her death and that he eliminated her head injuries as a cause of death. He opined that Sequoia had died about three or four hours before the paramedics arrived at the McCoy home, and that her condition at 10:00 p.m. on the previous night would have been near death, probably comatose, and exhibiting shallow breathing. Dr. Cohle acknowledged that one symptom of severe dehydration is that the kidneys shut down, and that that had not occurred in Sequoia's case. He testified that of the seventeen-pound weight loss Sequoia had experienced between her discharge from Tri-State and her death, five to ten pounds could have been from dehydration. He further opined that the remaining weight loss was from malnourishment, and that Sequoia was not getting enough food and was utilizing her own muscle and fat tissue for energy.

Ann Cuhran, an adoption specialist for the Berrien County Family Independence Agency, formerly the Department of Social Services, testified that she monitored Sequoia and Antonio in the McCoy home and reported their progress to the court every three months, maintaining contact with the children and the McCoys, and sometimes making unannounced visits. Cuhran testified that she saw the children about twenty-three or twenty-four times over the course of their placement with the McCoys, and that each visit was for between thirty minutes and two hours. Cuhran testified that she would normally take the children out shopping or to eat and that they appeared fine. Sequoia was always clean, and cleanly dressed. She had no reason to believe the children were anything but happy. Sequoia never indicated to Cuhran that anyone was mistreating her, or not feeding her or providing water. Cuhran testified that she saw Sequoia several times after she was discharged from rehabilitation and did not notice that she was losing weight. She saw Sequoia the day after she was discharged from Tri-State hospital, and testified that Sequoia appeared happy, although thin and frail. Cuhran noticed that after Sequoia was discharged, Sequoia sometimes flailed her arms when trying to reach for something and witnessed Sequoia hitting a coffee table, sofa, and a chair because of her jerky movements.

Cuhran testified that she spent one or two hours with Sequoia and took her to a Dairy Queen on June 2, 1994, four days before her death, and that Sequoia looked fine and was looking forward to going out. Sequoia ate some ice cream, but had a hard time steering the cone to her mouth, so Cuhran had the ice cream put in a cup. Sequoia still had difficulty swallowing and negotiating the spoon. Cuhran testified that she did not notice that Sequoia had lost weight. Cuhran told investigators investigating Sequoia's death that she doubted that the McCoys intentionally withheld fluid from Sequoia and that she believed that Sequoia's condition was misjudged by the medical community and the McCoys.

Dr. Dominic Sanfilippo testified as an expert in pediatrics and child abuse for the prosecution that he had reviewed Sequoia's medical records and autopsy report and concluded that Sequoia was

very severely malnourished. He testified that he had no reason to dispute Dr. Cohle's conclusion that dehydration was the primary mechanism of death. Dr. Sanfilippo opined that Sequoia was suffering from marasmic malnutrition, where there is a low calorie intake with some protein intake. He testified that with this type of malnutrition, the patient could have had a balanced diet, but was not getting enough calories.

Dr. Sanfilippo testified that he could not conclusively state that the spiral arm fracture was the result of child abuse. He testified that for twisting to produce a spiral fracture, the joints at the ends of the broken bone had to be confined, so that they did not simply rotate and prevent break, and that a fall down stairs would be a highly unusual cause for this fracture unless the child's arm had been caught in a handrail.

Regarding Sequoia's head injury, he did not agree that it could have been caused by a gravity fall or from being thrown during a ring-around-the-rosie game. He testified that at 10:30 or 11:00 p.m. on the night before Sequoia died she would have been listless, sleepy, low energy, unable to walk, and difficult to wake up.

Raymond Mays testified for the defense that he had worked with Herbert McCoy for several years at a grocery store, including when the McCoys adopted the children, and that Herbert had an excellent character and reputation for honesty. Mays testified that Herbert was "full of joy" when he learned they were getting the children. His and other testimony at trial indicated that Herbert worked two jobs.

John Fuse, a certified nursing assistant at Tri-State Hospital who helped care for Sequoia, testified that he had grown up with Herbert McCoy and that he had an excellent reputation for honesty and truthfulness. Fuse testified that the McCoys visited Sequoia frequently, appeared to be good parents, and that Sequoia lit up and calmed down when they were with her. Fuse testified that Sequoia was fed orally at the end of her hospital stay, by people that had been trained to feed patients with swallowing difficulties, and that a metal piece had to be dipped in ice and placed on the side of her throat to encourage the swallowing reflex. Fuse testified that Sequoia was not eating consistently, that she would sometimes eat one meal a day only. Fuse testified that he was concerned that Sequoia was not taking in adequate amounts of food and reported it to others he worked with. He testified that Sequoia was losing weight and that, about three weeks before her discharge, he reported his concerns to the charge nurse. Fuse testified that a meeting was called to devise strategies for ameliorating the problem before Sequoia went home and that he believed that after that Sequoia's weight held and did not drop. He testified that the hospital was having financial difficulties at the time, that staff was laid off, and eventually the hospital closed.

Fuse testified that, like many head-injured patients, Sequoia was self-abusive and had to be restrained, for example when she was being fed. He testified that she scratched herself, pulled her hair, and that she would injure herself in her wheelchair by kicking and her constant jerks of her limbs. Sequoia's hospital bed was encased with netting to protect her. At times Sequoia wore a helmet to prevent further head injury and had problems standing and walking, because of an unstable gait, and would fall.

Calvin McCoy, Herbert's uncle and a pastor, testified that the McCoys were honest, clean, hard-working, loving, and church-going people, and that Herbert had a reputation for truthfulness and honesty. He testified that Sequoia and Antonio "played wild and rough," that he felt the children were getting away with a lot and should have been disciplined, but that he never saw them being physically disciplined and only saw Herbert saying "you all stop playing like that." He testified that Sequoia and Antonio were always well-dressed and that he had never seen them dirty.

McCoy further testified that he was concerned that Sequoia was released prematurely from the hospital because of her difficulties swallowing and her difficulty with speech. He testified that Herbert told him he did not like the quality of care Sequoia was receiving at the hospital, and that he was concerned when Sequoia's gastrostomy tube was removed that she should not be released from the hospital. He further testified that the McCoys were glad to have Sequoia back home and they bought her things, took her out, and tried to get her back on her feet.

Gladys King, Brenda's twenty-three year old sister, testified that she saw the children almost every other day after the McCoys adopted them. She testified that Sequoia acted "just like any other child," was rambunctious and jumped around. She also testified that she knew that Sequoia was prone to hurting herself. King testified that she never saw Brenda or Herbert physically discipline Sequoia. King testified that she visited Sequoia about twice a month during her nine month stay at Tri-State Hospital, that she saw Sequoia at home after her release about twice a week, and that Sequoia seemed happy to be home. King testified that two days before Sequoia died, she babysat for her and did not observe any marks on Sequoia's body. Sequoia did not vomit or have diarrhea and seemed fine. King washed her hair and french-braided it, and Sequoia ate that evening.

King testified that she had lived with Brenda after their mother's death in 1991 or 1992, when she was a teenager, that Brenda cared for her like a mother would, never hit her, and never withheld food from her, and that she felt safe with Brenda.

Leontine King, another of Brenda's younger sisters, testified that Brenda was like a second mother to her, and provided for her emotionally and physically when their parents separated. She testified that she observed Brenda interacting with her children and that Brenda was loving and kept the children well-groomed and with good eating habits, and that Sequoia responded positively to being loved. She also testified that Sequoia and Antonio rough-housed alot and Sequoia was always injuring herself. The McCoys were at her house in Grand Rapids when Sequoia injured herself. The children told them that they had been playing ring-around-the-rosie, and Sequoia had cried for a while, but Sequoia was not bleeding and her injury did not seem serious to King. The McCoys left her house soon after the injury.

King testified that she visited Sequoia at Tri-State Hospital and that Sequoia was always happy to see Brenda. She testified that she told Brenda that she believed that Sequoia was being discharged from the hospital prematurely and that Sequoia needed a lot more attention than Brenda was going to be able to give her.

Rosalynn Long, a friend of Brenda's since seventh or eighth grade, testified that in 1988 Brenda took of care of her six-year-old daughter who has sickle cell anemia and required that her medications be given as prescribed to avert a crisis. She testified that Brenda would keep her daughter overnight when she was working double-shifts and that she felt good about Brenda's care.

Janet Clem testified that she met Brenda in the spring of 1994 when her son was a patient at Tri-State Hospital, and that one day when she was looking for her son in other patient's rooms, she observed Sequoia in the bathroom banging the back of her head very heavily against a porcelain toilet. Sequoia was not wearing a helmet at the time. Clem testified that her son was discharged in April 1994 and that she did not receive special training from the hospital for her son. She testified regarding the care the children received at Tri-State that there was not a lot of supervision of the children. Clem testified that the medication Dr. Luzzi prescribed for her son made him fall down a lot and that he was losing weight, so about a week after his discharge she consulted another doctor.

Rosemary Jackson, a nurse's aid at Tri-State Hospital, testified that she took care of Sequoia and bathed her many times. Jackson testified that she noted during the bathing that Sequioa had scars on her body and one large scar on the upper back that looked like an old burn.

The jury convicted both defendants of involuntary manslaughter. Brenda's motion for new trial on the basis of denial of due process, evidentiary error, ineffective assistance of counsel, and error in the admission of scientific evidence, was denied following an evidentiary hearing.

This appeal ensued. We first address issues raised by both defendants.

II

Both defendants argue that the trial court erroneously admitted prior acts evidence in contravention of MRE 404(b). We disagree.

The trial court granted the prosecution's pre-trial motion to introduce evidence of prior acts on the basis that it was relevant to show a lack of accident in Sequoia's death. The trial court read a limiting instruction to the jury.

We review a trial court's admission of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Evidence of an individual's other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. *Id.* at 383; MRE 404(b). Such evidence may be admissible, however, for other purposes under MRE 404(b)(1), such as absence of accident or knowledge. The following formulation guides admission of other acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Crawford, supra* at 385, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).]

The prosecution had to establish that Sequoia's death resulted from a criminally negligent act or omission by either or both of the McCoys. See *People v Datema*, 448 Mich 585, 595-597; 533 NW2d 272 (1995).

The prosecution articulated proper noncharacter purposes for admission of the evidence -- absence of accident or mistake, and knowledge of Sequoia's condition prior to her death. *Crawford, supra* at 386. Absence of accident or mistake, and knowledge of Sequoia's physical condition before her death, were material because Brenda's defense was that an undiagnosed medical condition[2] or other unknown cause brought about Sequoia's death, that she did not have knowledge of the gravity of her condition, and that Sequoia's death was thus unforeseeable. Herbert's defense was that he was working when the injuries occurred, that he had no reason to suspect Brenda was abusing Sequoia, and that he lacked knowledge that water or food were being withheld from Sequoia. Thus, knowledge was material.

> The final exception listed in Rule 404(b), 'absence of mistake or accident,' is simply a special form of the exception that permits the use of other crimes to prove intent. In some applications it overlaps the exception for knowledge in that proof that the defendant was aware of the nature of an act at an earlier point in time makes it unlikely that he would have forgotten that information at the time of the charged crime. Often the absence of mistake or accident is proved on a notion of probability, i.e., how likely is it that the defendant would have made the same mistake or have been involved in the same fortuitous act on more than one occasion. The relevance of other crimes for this purpose depends very much on the nature of the act involved; one might inadvertently pass more than one counterfeit bill but two accidental shootings of the same victim seem quite unlikely.
>
> The justification for admitting evidence of mistake or accident is the same as for the other exceptions involving proof of the defendant's state of mind. When offered for this purpose, no inference to any conduct of the defendant is required and, in addition, in many cases the evidence does not require any inference as to the character of the accused. [*VanderVliet*, *supra* at 80 n 37, quoting 22 Wright & Graham, Federal Practice & Procedure, § 5247, pp 517-518.]

Prior acts were held admissible to show absence of accident in *People v Biggs*, 202 Mich App 450; 509 NW2d 803 (1993), a case in which the defendant was convicted of second-degree murder after having confessed to smothering her two-year-old child with a pillow. The defendant had smothered and revived the child on several previous occasions, pretending that he was having seizures, and had previously also given the child an excessive dose of her mother-in-law's heart medicine and badly burned the child's hand. *Id.* at 451. On appeal, this Court rejected the defendant's argument that evidence that she had previously burned the child and given him a drug overdose was improperly admitted:

> . . . . Defendant argues that the other bad acts are not probative of her intent and also that, even if they are, their probative value is substantially outweighed by the danger of unfair prejudice. We disagree.
>
> Other instances when defendant deliberately injured her child are probative of malice. That is, of defendant's intent to kill or cause great bodily harm, or of her wilful and wanton disregard for the natural consequences of her actions. They are also probative of the absence of mistake or accident. Malice is an element of second-degree murder and is therefore material; lack of accident or mistake is also material because accident was defendant's only defense. Further, given defendant's confession and the unchallenged evidence of other instances of smothering, the danger of unfair prejudice flowing from the evidence of other bad acts does not substantially outweigh its probative value. [*Id.* at 452-453.][3]

Prior injuries were also admitted to show lack of accident or mistake in several federal cases involving death of a child, including *United States v Boise*, 916 F2d 497, 501-502 (CA 9, 1990), and *United States v Harris*, 661 F2d 138, 142 (CA 10, 1981). In *Boise*, the defendant was found guilty of second-degree murder of his six-week-old son, who died from skull fractures that resulted in severe subdural hemorrhaging. The United States Court of Appeals for the Ninth Circuit concluded that the district court had not abused its discretion by admitting autopsy evidence of prior injuries, rejecting claims identical to several claims defendants make in the instant case, i.e., that there was insufficient evidence to support a jury finding that defendant committed the other acts, and that the evidence was more prejudicial than probative:

> Boise contends that Quinton's prior injuries were inadmissible under Rule 404(b) because there was insufficient evidence to support a finding that he inflicted them. Applying *Huddleston [v United States*, 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988)], we find that the district court did not abuse its discretion when it admitted the evidence.
>
> First, the prior abuse of Quinton was under Rule 404(b) probative of a material issue other than character; that is, it was evidence of malice and absence of accidental death.
>
> Second, the evidence of prior injuries was relevant under *Huddleston* only if the jury could reasonably conclude that the injuries occurred and that Boise inflicted them. The autopsy report revealed that Quinton had several prior injuries, including head injuries that had caused brain hemorrhaging, a broken left arm and 15 broken ribs. These were not accidental. The older head injuries, probably the result of excessive shaking, were inflicted a day or two before death. Boise was then the primary caretaker. Although Sheri Boise also had access to Quinton, she testified that she never shook him.
>
> Quinton's left arm and 15 ribs were broken when the Boises were in Nevada. Although physicians could not pinpoint the exact date of injury, the evidence showed that Boise and his wife were the primary care-takers during March. There was

> evidence that Boise inflicted the fatal blows to the head. *See Huddleston*, 108 S. Ct. at 1502 (court reviews not only the direct evidence but also considers the evidence surrounding the crime actually charged). Given this evidence, the jury could reasonably have concluded that Boise inflicted the injuries. The court properly allowed this evidence to go to the jury. *See* [*United States v*] *Harris*, 661 F.2d [138,] 141 [(CA 10, 1981)] (sufficient circumstantial evidence to permit jury to infer that defendant struck child on prior occasions); [*United States v*] *Colvin*, 614 F.2d [44,] 45 [(CA, 5 1980)] (sufficient proof linking the appellant to prior injuries).
>
> Third, Boise contends that the district court abused its discretion in admitting evidence of the prior injuries because under Fed.R.Evid. 403 the probative value was substantially outweighed by the danger of unfair prejudice. This argument lacks merit. Although that evidence may have been prejudicial, it was highly probative on the question of intent and absence of accident. *See* [*United States v*] *Lewis*, 837 F.2d [415,] 419 [(CA 9, 1988)] (prior abuse not excluded under Rule 403 because of probative value in disproving claims of intent or accidental death); . . . *Harris*, 661 F.2d at 142; *Colvin*, 614 F.2d at 45.

In *Harris, supra,* the defendant was convicted of second-degree murder of his eight-month-old son, who died of severe brain and abdominal injuries, and of having fractured his son's left leg approximately four months earlier. The defendant's theory of the case was that the injuries were the result of accident, and that the last injuries occurred after a fall. 661 F2d at 139. The district court admitted evidence of prior injuries that were evident on autopsy, including fractures of the clavicle, ribs, wrist, leg, and possible fracture of the arm, and gave a limiting instruction to the jury. *Id.* at 141. The fractures were in various stages of healing, indicating the injuries occurred during the two or three months immediately preceding the infant's death. The prosecution introduced evidence from babysittters and other persons that the injuries had not occurred in their care. Medical experts testified that a baby rarely breaks bones in a fall, as the bones are quite pliable, and that the fractures sustained more likely came from external blows of considerable force. *Id.* at 140. The United States Court of Appeals for the Tenth Circuit rejected the defendant's argument that the prior acts were improperly admitted, noting that, although there was perhaps no direct evidence, there was sufficient circumstantial evidence to permit a jury to infer that it was the defendant who struck his child on the other occasions, as well as the occasion resulting in the leg fracture, and the subsequent brain and abdominal injuries that caused the child's death, where the evidence showed that the child was with the defendant an ever-increasing amount of time and the defendant had reported having urges to harm his children. *Id.* at 141. The defendant's argument that the evidence was more prejudicial than probative was also rejected. *Id.* at 142.

Brenda argues that there was not sufficient evidence to support a finding by the jury that defendants had committed the other acts because the DSS and police investigations concluded there had not been child abuse. Herbert similarly argues that there was not sufficient evidence to support a finding by the jury that he inflicted the prior injuries. We reject both arguments.

Prior acts evidence need only be sufficient to permit a reasonable jury to find by a preponderance of the evidence that the defendant committed them. *VanderVliet, supra* at 68-69, n 20.

> [Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b) . . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence. [*Id.*, quoting *Huddleston, supra.*]

The evidence showed that Sequoia's prior injuries occurred either while at home under Brenda's supervision, or when Sequoia was under both Brenda's and Herbert's care. Although the testimony was clear that Brenda was Sequoia's primary caretaker, there was also testimony from which a jury could infer that Herbert spent at least some weekends with his family, such as when they traveled to defendant's sister's in Grand Rapids, and attended church. There was testimony that Sequoia was not injured while at school.

A reasonable jury could have inferred from the testimony of several of the physicians and experts that Brenda and Herbert's explanations for the head injury, which defendants maintained occurred at least in part on a weekend when both were supervising Sequoia, were not credible. Similarly, there was medical testimony to support, and a reasonable jury could thus have inferred, that defendants' explanations for Sequoia's spiral fracture were not in accord with the evidence. The discolored eye, the spiral fracture, and Sequoia's head injury occurred within a seven- or eight- month period when she was under defendants' control. After Sequoia's discharge from a nine-month stay in the hospital for rehabilitation, she was again under defendants' care. When Sequoia was admitted to the hospital for the head injury, numerous marks and bruises were observed on her body, in varying stages of healing. Similarly, numerous marks and bruises were observed on Seqouia's body on autopsy. A reasonable jury could infer that the unusual and severe injuries Sequoia suffered while under defendants' care, along with defendants' questionable explanations for the injuries, evidenced a pattern of suspicious injuries which made it more likely than not that Herbert and/or Brenda were responsible for the prior injuries.

Regarding defendants' asserted absence of knowledge of Sequoia's condition, a reasonable jury could have inferred that Herbert knew or should have known that Sequoia had received major injuries and numerous bruises and abrasions while in Brenda's care, indicating that his continued delegation of Sequoia's care to Brenda was negligent. Further, a reasonable jury could have inferred from the fact that Sequoia spent nine months in a rehabilitation hospital, during most of which she was being fed by a gastrostomy tube, and during which both defendants visited her, that both defendants had knowledge of her difficulties with swallowing, eating, and drinking, and knew that her food and liquid intake had to be monitored very carefully. A reasonable jury could have inferred that a seventeen-pound weight loss between the time of her discharge from Tri-State Hospital and her death could not have gone unnoticed by either defendant.

We reject Brenda's argument that the prior acts evidence was of limited relevance because none of the prior injuries to Sequoia involved the omission to perform a legal duty. "Where the proponents' theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused, similarity between charged and uncharged conduct is not required." *VanderVliet*, *supra* at 69. The level of similarity required when disproving innocent intent is less than when proving modus operandi, and the charged crime and the proffered other acts need only be of the same general category. *Id.* at 80, n 36. Thus, the prior acts in the instant case need not have been strikingly similar to the charged offense because the prosecution's proffered purpose for their admission was to show absence of accident, or knowledge.

We also reject defendants' argument that the probative value of the evidence was substantially outweighed by its potential for unfair prejudice. The other acts evidence placed Sequoia's otherwise mysterious death in context. Further, the trial court gave limiting instructions both before and after testimony was taken, minimizing any unfair prejudice to defendants.

We conclude that the trial court did not abuse its discretion in admitting the other acts evidence.

III

Both defendants also argue that the trial court erred in admitting the results of the laboratory analysis of vitreous humor[4] from Sequoia's eye without the requisite foundation and through a witness who did not have personal knowledge. Herbert argues that he was denied his right of confrontation because he had no opportunity to cross-examine the personnel who performed the tests.

Forensic pathologist Dr. Steven Cohle testified that the cause of Sequoia's death was dehydration. Dr. Cohle based that conclusion on the dryness, elasticity and tenting of Sequoia's skin; her sunken eyes; the osmotic nephrosis of the cells lining the kidneys; the lack of any other explanation for her death; and chemical tests performed on samples of Sequoia's eye fluid (vitreous humor). Dr. Cohle testified that he used the results of the vitreous humor tests to confirm his suspicions that dehydration had caused Sequoia's death. Dr. Cohle testified that had the vitreous humor tests not confirmed his suspicion of dehydration, his opinion as to Sequoia's cause of death would have been "indeterminable because there was nothing else that would explain the death."

When Dr. Cohle began to testify about the pattern of chemicals in Sequoia's vitreous humor, Herbert's counsel objected, arguing that insufficient foundation had been laid to show the reliability of the tests performed because the performer of the tests was not testifying:

> MR. SORCI: Your Honor, I'm going to have to object at this point in time. I'm not objecting to the scientific reliability of this particular test, I'm objecting pursuant to Michigan Rules of Evidence 703, Basis of Opinion Testimony by Expert. He's going to testify I believe to lab tests of the vitreous humerus [sic]. The lab test are [sic] not in evidence in this particular case. We do not know how they were necessarily collected, who did the test in regard to this analysis and therefore any results that were derived from that collection of the vitreous humerus [sic] we do not have any form of reliability

> and therefore it's not relevant unless there's proper foundation. I guess the proper foundation here should have been that they actually have someone from the lab who comes and testifies that to [sic] the proper procedure that was taken so that we know that the specimen was properly analyzed.
>
> * * * *
>
> Your Honor, the issues [sic] is this, if the analysis was performed improperly of the vitreous humerus, the doctor ends up getting some specific numbers in regards to potassium let's say, sodium in the blood, this doctor did not do the lab analysis in regards to that. So therefore those specific numbers and findings, if he gets numbers that are inaccurate his basis is upon faulty evidence. The Prosecution has the burden of bringing forward the underlying evidence in this regard. Now they have failed to do so in this regard. I believe it should be improper for this doctor to testify because how could he make a proper opinion if the underlying assumption he's relying on is flaud [sic]. And that's my point.

The court then questioned Dr. Cohle regarding the process of obtaining vitreous humor and testing it. Dr. Cohle stated that a vitreous humor test is routinely done on autopsy, and that it is done in standard fashion by inserting a needle into the eye and withdrawing fluid. He testified that he was present and directed the obtaining of the fluid from Sequoia's eye, and that the analysis was done in his chemistry laboratory, the Blodgett Chemistry Lab, which has instruments to test for the various substances. He stated that the testing methodology is standard and had been done for many years in the Blodgett lab. He was not present when the laboratory test, called Astra-7, was conducted. He stated that the Astra-7 test is performed by persons who must be certified medical technologists, and that the procedure is that they run positive and negative controls with every run of the machine to make sure the results are valid. Dr. Cohle stated that there was nothing in the results that would cause him to question their accuracy. The Astra-7 machine performed seven tests, three of which he particularly relied on for his opinion. He testified that these tests showed elevated levels of sodium, chloride, and urea nitrogen in the vitreous humor. He testified that "if for some reason one test were wrong it would seem unusual to the extreme that three would be so far off the scale as to be in the—just ironically in a pattern that fits dehydration." Dr. Cohle further stated that the lab's procedure is that if the test results were not valid, the test would be repeated or he would at least have been notified that the results were invalid.

In response to Herbert's counsel's objection, the prosecution argued that defense counsel had had the vitreous humor test results since the preliminary examination and had not challenged them, and offered to subpoena the persons who performed the tests. Neither of defendants' counsel took the prosecutor up on the offer.

The trial court ruled that the absence of the test performer went to the weight and not the validity of Cohle's tesimony under MRE 703.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court **may** require that underlying facts or data essential to an opinion or inference be in evidence. [Emphasis added.]

Michigan Court Rules Practice, Evidence, Rule 703, p 614, states in pertinent part:

> The third permissible means by which an expert witness may acquire knowledge for the opinion is by being presented with the data outside of court. Under pre-MRE Michigan law, the admissibility of expert testimony was restricted by the rule that '[t]here must be facts *in evidence* which require or are subject to examination and analysis by a competent expert.' Rule 703 altered this rule by allowing an expert witness to offer an opinion based on facts not in evidence, including facts not admissible, or admissible only after considerable time and expense, although the trial court may, consistent at least in part with pre-MRE law, 'require that underlying facts or data essential to an opinion or inference be in evidence.' . . . . MRE 703 leaves the nature of the underlying facts to the trial court's discretion (although we believe it is self-evident that the facts relied on should be such as would reasonably be relied on by an expert in the field).
>
> The discretion permitted Michigan judges has, predictably resulted in some inconsistency in the application of Rule 703 to expert opinions based on particular underlying facts. In Thomas v McPherson Community Health Center, [155 Mich App 700; 400 NW2d 629 (1986)], the court permitted a physician to offer an expert opinion based on hearsay pathological reports. However, in Doan v Highland Beach Inn, [158 Mich App 144; 404 NW2d 640 (1986),] the court held that the trial court did not abuse its discretion when it refused to allow the plaintiff's expert witness to offer an opinion that the defendant was drunk, based on his review of an inadmissible blood test. Under the current Rule, we believe that the better procedure is for the court to require, as permitted by Rule 703, that at least the essential underlying facts or data be in evidence, and that such facts be of the type reasonably relied on by experts in the field in forming opinions.

By its plain language, MRE 703 does not require the test results to have been admitted before Dr. Cohle based his opinion on them. *People v Lucas*, 188 Mich App 554, 580; 470 NW2d 460 (1991). Here, Dr. Cohle testified that vitreous humor tests are routinely done on autopsy and that three of the seven tests performed on vitreous humor are looked to if dehydration may be involved. He testified that the methodology used is standard and had been done for many years at the Blodgett lab, and that the lab's procedure was to test the machine at least once daily. This was an adequate foundation under MRE 703.

The reliability of the vitreous humor tests in the instant case was sufficiently established. Implicit in Dr. Cohle's testimony that the three Astra-7 tests he primarily relied on showed consistent results was that the tests were reliable [5] Moreover, neither defense attorney accepted the prosecution's offer to subpoena the performer of the tests. Under these circumstances, we find no abuse of discretion.

IV

No. 204067 - Brenda McCoy

Brenda next argues that she was denied a fair trial and the effective assistance of counsel where trial counsel elicited testimony that Sequoia said her "mommy" had burned her, the court precluded further testimony that Sequoia stated that that was her birth mother, and trial counsel failed to take additional steps to prevent the jury from being misled.

On direct examination by Brenda's counsel, Rosemary Jackson testified that she discussed the scar on Sequoia's back with Sequoia and that she felt that Sequoia knew how she got the burn. She testified that Sequoia told her that "her mommy did it," immediately after which the prosecutor objected on hearsay grounds. The prosecutor then indicated that he would withdraw the objection if it was not being offered to prove the truth of the matter. Defense counsel indicated that the evidence was being introduced to show that the child was able to verbalize the cause of her injuries and indicated she would rephrase her questioning "so that we just get the particulars about the circumstances around the bathing." When Brenda's counsel subsequently asked Jackson "Did she [Sequoia] describe it as something that occurred in the care of her adoptive parents?" the prosecutor objected on hearsay grounds, and the trial court sustained the objection.

At the post-trial evidentiary hearing on Brenda's motion for new trial, Jackson testified that, had she been allowed to complete her testimony, she would have explained that she continued to question Sequoia and elicited from her that it was her birth mother, and not Brenda, who had injured her. Brenda's trial counsel testified at the hearing that she was thrown off balance by the trial court's ruling, and had been at a loss as to how to correct the damage that had been done. She testified that she was a fairly inexperienced attorney at the time and that in retrospect she believed that there were things she could have done to better protect her client.

Brenda argues that because Jackson was not allowed to finish her testimony and clarify Sequoia's statement, the jury was left with the false impression that Sequoia had named Brenda as her abuser, and that this was the only evidence at trial that Sequoia had ever indicated Brenda had physically abused her. Brenda argues that the trial court's evidentiary ruling was erroneous.

Brenda's trial counsel at no time explained to the trial court that her follow-up question, whether Sequoia described the mark on her back as something that occurred in the care of her adoptive parents, was offered for a reason other than the truth of the matter asserted. Under these circumstances, the trial court did not err in sustaining the prosecution's objection on hearsay grounds. The trial court could have taken steps to correct any misimpression had it been so apprised, but it was not. A defendant cannot harbor error and use it as an appellate parachute. *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996).

Brenda also argues that her trial counsel was ineffective to the extent that she caused this error. We disagree. In light of the fact that this matter involves only one mark on Sequoia, and given the severity of the injuries Sequoia suffered while in defendants' care and the numerous marks and bruises

observed on her body when she was admitted to the hospital for her head injury in July 1993 and on autopsy in June 1994, we conclude that Brenda has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

V

No. 204070 - Herbert McCoy

Herbert next argues that the trial court erred in failing to grant his motion for directed verdict of acquittal because the prosecution failed to present any evidence that he was grossly negligent. We disagree.

In order to establish involuntary manslaughter for failure to perform a duty, the prosecution was required to prove beyond a reasonable doubt: 1) the existence of a legal duty; 2) defendant's knowledge of the duty; 3) that defendant willfully neglected or refused to perform the duty; and 4) that the death was directly caused by defendant's failure to perform this duty. CJI2d 16.13; see also *People v Giddings*, 169 Mich App 631, 634-635; 426 NW2d 732 (1988). Herbert does not dispute that the prosecution established the first two elements. However, he argues that even if the evidence is viewed in a light most favorable to the prosecution, a rational jury could not have found that he was grossly negligent. He argues that the prosecution failed to present evidence that he knew that his daughter was not receiving adequate food, water, or medical care or that a reasonable person who did not bathe or dress Sequoia would have noticed her weight loss.

Willful neglect, or gross negligence, is defined as

> 1) knowledge that a situation existed requiring the use of ordinary care to prevent injury; 2) having the capacity, means, and ability to avoid the harm by the use of ordinary care; and 3) failing to use ordinary care where it would have been apparent to an ordinary mind that harm would result from such failure. [*People v Moye*, 194 Mich App 373, 376; 487 NW2d 777, rev'd on other grounds 441 Mich 864 (1992).]

We conclude that the prosecution presented evidence that defendant knew that the circumstances required the use of ordinary care to prevent injury to Sequoia. Herbert visited Sequoia while she spent nine months in the hospital following her head injury, during most of which time she was being fed through a gastrostomy tube, and could not speak or walk well. There was testimony that both defendants were told that Sequoia needed follow-up medical care after her discharge and that both were trained in how to feed and care for her. Although others testified that they did not notice Sequoia's weight loss, several medical experts testified that Sequoia's drastic weight loss would have been apparent and, more important, that by the night before her death, the effects of dehydration would have been obvious. There was testimony that Herbert checked on Sequoia the night before she died. It is undisputed that Herbert did not ask for help in caring for Sequoia, provide Sequoia with food or water at this time, or ensure that Sequoia received medical care.

We thus conclude that there was evidence from which a jury could have found beyond a reasonable doubt that Herbert was grossly negligent. See *Giddings, supra* at 634-635 (finding that there was sufficient evidence to support a bindover on charges of involuntary manslaughter in connection with the starvation over a one-month period of the defendants' child where the defendants admitted to being the child's parents and living together in the same residence, there was expert testimony that the defendants' failure to provide sufficient nourishment caused the child's death, there was testimony describing the child's emaciated appearance and medical testimony that anyone seeing the child should have realized the child's condition was not normal.)

VI

Herbert last argues that the trial court failed to individualize his sentence and that his sentence is disproportionate. We disagree.

At sentencing, in the context of arguing guidelines' scoring, the trial court heard considerable argument from Herbert's counsel regarding several of the same points advanced on appeal: that Herbert was less culpable than Brenda because Brenda was the primary caretaker and he worked two jobs, and Herbert assumed Sequoia was receiving proper care. On appeal, Herbert additionally argues that it was Brenda who received instructions from Tri-State Hospital regarding Sequoia's care after discharge and that he was at work when the head injury occurred. However, there was testimony that the discharge instructions and training by Tri-State Hospital were given to both Herbert and Brenda. And, there was testimony that Herbert checked on Sequoia the night before her death, and that her grave condition would have been apparent at that time.

The trial court stated at sentencing that there was no question that Herbert was a hardworking individual, one who provided for his family, and that he and Brenda kept an orderly, disciplined home. The trial court stated that Herbert's lack of prior encounters with the law was to his credit. The trial court further noted that both Herbert and Brenda were the persons who had the last opportunity to come forward and say that Sequoia's needs were more than they could handle, but that they failed to do so. The trial court noted that the fact that Herbert worked two jobs and was not giving day-to-day care to Sequoia did not diminish his responsibility as a parent.

Under these circumstances we find no abuse of discretion and reject Herbert's argument that the trial court did not individualize his sentence.

We also disagree that Herbert's sentence was disproportionate. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). While we by no means over simplify the circumstances that lead to this tragic situation, Sequoia died of dehydration while under the care of Herbert and Brenda. She lost approximately seventeen pounds in the forty or so days between her discharge from Tri-State Hospital and her death. Under these circumstances we cannot conclude that Herbert's sentence of five to fifteen years, which was within the minimum guideline range of two to seven years, was disproportionate to the seriousness of the circumstances surrounding the offense and offender.

We affirm in both cases.

/s/ Barbara B. MacKenzie
/s/ Helene N. White
/s/ Michael R. Smolenski

[1] William Gross, a Berrien County protective services worker who investigated Sequoia's case, testified that Sequoia was neglected "by the biological parent and placed with various individuals." He testified that Sequoia and Antonio were removed from the biological parents in Muskegon County, and that there was no charting of the physical injuries Sequoia had from the abuse in Muskegon County, although there was documentation that Sequoia was "physically disciplined with a fly-swatter."

[2] Brenda's defense as presented in opening statement was that Sequoia had an underlying medical factor, undetected by all her healthcare providers, that caused infection, bed wetting, dizziness, dehydration, and starvation and, when undetected, death. In closing argument, Brenda's trial counsel argued that she could not have been negligent because none of the professionals or others that saw Sequoia during the forty-two days between her discharge from Tri-State Hospital and her death noticed Sequoia's weight loss, and the jury should not believe that the life-threatening signs seen post-mortem were visible to Brenda. Counsel argued that defendant took Sequoia to therapy three times a week during that time, complying with her obligations, that it was the doctors who had the realm of knowledge regarding Sequoia's eating and drinking abilities, and that Brenda was thus not negligent for failing to be on "a heightened sense of alert for weight loss" and not negligent given that Sequoia had been released to go home without a helmet, walker, or wheelchair.

[3] Although *Biggs* was decided post-*VanderVliet*, the *Biggs* Court applied the test of *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982), that was overruled in *VanderVliet*, *supra*. That error notwithstanding, we conclude the result would have been the same had *Vander Vliet* been applied.

[4] Vitreous humor is defined in Schmidt, Attorney's Dictionary of Medicine, vol 6, p V-97, as

> The transparent semifluid material which fills the interior of the eyeball behind the lens, i.e., the vitreous chamber. The lens, its ligaments, and its muscles form a partition which divides the interior of the eyeball into a front compartment and a back compartment. The back compartment is the larger one and is filled with the vitreous (glass-like) humor. Also called simply *vitreous*.

[5] In *Lucas*, this Court rejected the defendant's argument that the prosecutor failed to elicit a sufficient foundation from the chemical analysis expert regarding the reliability of tests used to justify the admission of cocaine into evidence:

. . . . We recognize that the accuracy of the methods used is a requisite element of establishing a sufficient foundation. However, the trial court is afforded considerable discretion in deciding whether a proper foundation has been laid. We have reviewed the testimony of the laboratory expert and conclude that the trial court did not abuse its discretion. Although the witness did not detail the various tests conducted, he did state that two crystal tests and two instrumental tests all generated consistent results that the substance was cocaine. Implicit in such testimony is the conclusion that these tests were reliable, having all reached consistent results. Accordingly, we find no abuse of discretion. [188 Mich App at 580-581. Citations omitted.]