STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ARTHUR ORMSBY,

Defendant-Appellant.

UNPUBLISHED
May 19, 2000

No. 214357
Ogemaw Circuit Court
LC No. 97-001292-FH

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and one count of domestic violence, MCL 750.81(2); MSA 28.276(2). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to two concurrent prison terms of fifteen to twenty-two years for the two child abuse convictions and a concurrent prison term of ninety-three days for the domestic violence conviction. Defendant appeals by right. We affirm.

Defendant argues that the trial court abused its discretion by admitting photographs of the victims' injuries into evidence because their prejudicial impact substantially outweighed their probative value. Defendant further argues that the photographs were improperly admitted because they were cumulative to the testimony offered by numerous witnesses. We disagree. Generally, the decision whether to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, because defendant alleges a nonconstitutional error that was not preserved for review, he can avoid forfeiture of the issue only by showing that a plain error occurred that affected his substantial rights, i.e., that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Photographic evidence is admissible if relevant, pertinent, competent, and material to any issue in the case. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Photographs are not inadmissible merely because they are gruesome or shocking, but the trial court should exclude those photographs that could lead the jury to abdicate its truth-finding function and convict on the basis

of passion. *Id.* The proper inquiry is whether the probative value of the photographs is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds, 450 Mich 1212 (1995).

To prove first-degree child abuse, the prosecutor was required to show that defendant "knowingly or intentionally cause[d] serious physical or serious mental harm to a child." MCL 750.156b(2); MSA 28.331(2)(2). The photographs clearly had probative value as to whether the children were seriously injured. The photographs were also instructive in determining whether defendant intended to cause serious injuries. Defendant has not shown that the probative value of the photographs at issue was substantially outweighed by the danger of unfair prejudice. The mere fact that evidence is damaging does not mean it is unfairly prejudicial. *Mills, supra* at 75. Although photographs of injured children are never pleasant, the photographs at issue were not so inflammatory that their probative value was substantially outweighed by the danger of unfair prejudice.

Moreover, contrary to defendant's argument that the photographs were inadmissible because they were cumulative to testimony given by numerous witnesses, photographs are not inadmissible simply because a witness can orally testify about the information contained in the photographs, and photographs may be used to corroborate or further explain witness testimony. *Mills, supra* at 76. Therefore, defendant has not shown that the trial court erred in admitting the photographs into evidence.

Next, defendant argues that the trial court committed reversible error by refusing to instruct the jury on the lesser included offenses of third- and fourth-degree child abuse. Again, we disagree. The decision whether to give a requested jury instruction is reviewed for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Third- and fourth-degree child abuse are both misdemeanors. See MCL 750.136b(4), (5); MSA 28.331(2)(4), (5). A five-part test is used to determine whether an instruction for a lesser included misdemeanor should be given. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). First, a proper request must be made. *Id.*; *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). Second, there must be an appropriate relationship between the charged offense and the requested misdemeanor. *Stephens, supra* at 262; *Steele, supra* at 19. An appropriate relationship exists if 1) the greater and lesser offenses relate to the protection of the same interests, and 2) the offenses are related in an evidentiary manner so that, generally, proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense. *Steele, supra* at 19; *People v Corbiere,* 220 Mich App 260, 263; 559 NW2d 666 (1996). Third, the requested misdemeanor must be supported by a rational view of the evidence at trial. *Steele, supra* at 19. This element requires not only evidence to justify a conviction of the misdemeanor, but requires that proof of the elements be in dispute, so the jury could possibly find the defendant innocent of the greater offense but guilty of the lesser offense. *Id.* at 20. "The differentiating elements must be factually disputed, and the dispute must be great enough for the jury to rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense." *Steele, supra* at 21. Fourth, if the prosecution requests an instruction, the defendant must have adequate notice of it as a charge against which he may have to defend. *Id.* at 21. The fifth condition for receiving a misdemeanor instruction requires that the

instruction not result in undue confusion or injustice. *Id*. Thus, even when the requirements of *Stephens* are met, a trial court retains substantial discretion to accept or deny a request. *Steele, supra* at 22.

Here, the third condition, that the instruction must be supported by a rational view of the evidence, was not met. First-degree child abuse requires serious physical harm or serious mental harm to the child. MCL 750.136b(2); MSA 28.331(2)(2). Third- and fourth-degree child abuse require physical harm to the child, but do not require that the physical harm be serious. MCL 750.136b(4); MSA 28.331(2)(4); MCL 750.136b(5); MSA 28.331(2)(5). Third- and fourth-degree child abuse cannot be based on mental harm. *Id.*

"Serious physical harm" is defined as "an injury of a child's physical condition or welfare that is not necessarily permanent but constitutes substantial bodily disfigurement, or seriously impairs the function of a body organ or limb." MCL 750.136b(1)(e); MSA 28.331(2)(1)(e). "Serious mental harm" is defined as "an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(f); MSA 28.331(2)(1)(f).

Here, the evidence indicated that defendant caused serious physical and mental harm to Karen and Kevin. Dr. Bryant Beesley, who treated the children on the day of the incident, testified that Karen's physical injuries were "extensive and severe" and that she suffered "a significant amount of soft tissue injury." With respect to Kevin, Dr. Beesley testified that Kevin suffered numerous blows to the head, which were potentially dangerous due to their nature and location. Furthermore, there was substantial evidence that the children suffered serious mental harm. Dr. Lynn Butterfield testified that Karen suffered from an anxiety disorder, confusion, sleeping difficulties, and fearfulness. Dr. Butterfield further testified that, as the result of the abuse, both Karen's and Kevin's perception of reality was impaired in that they viewed the abuse as normal. Dr. Butterfield testified that Kevin also suffered from an anxiety disorder, fearfulness, and very low self-esteem. Dr. Butterfield concluded that the mental harm caused to the children was severe.

Because the evidence demonstrated that the harm to the children was serious, an instruction on the lesser included misdemeanors of third- and fourth-degree child abuse was not supported by a rational view of the evidence. Therefore, the trial court did not abuse its discretion in refusing to instruct the jury with respect to the misdemeanor offenses.

Defendant next argues that he was deprived of the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show 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 App 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.* at 687. Because

defendant did not move for a new trial or a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant contends that his attorney's failure to object to the admission of the photographs of the victims' injuries constituted ineffective assistance of counsel. However, because we have concluded that the photographs were properly admitted, defendant cannot show any error in defense counsel's failure to object. The failure to make a meritless objection does not constitute ineffective assistance of counsel. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Thus, defendant has not demonstrated that he was denied the effective assistance of counsel.

Finally, defendant contends that the trial court abused its discretion by denying his challenge for cause during jury voir dire. We disagree.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art1, § 20; *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). A defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury. *Daoust*, *supra* at 8-9. A four-part test is used to determine whether the refusal to excuse a juror for cause requires reversal. It must be clearly shown on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

Here, defendant challenged juror Ambrose for cause on the ground that Ambrose had been a neighbor of the prosecutor for many years and, therefore, he may have been biased in favor of the prosecutor. See MCR 2.511(D)(3). However, the trial court properly denied the challenge for cause. Ambrose stated that he could be impartial and that he had not discussed the case with the prosecutor. The record indicates that the juror was merely a social acquaintance of the prosecutor and no information was elicited at voir dire indicating that the juror could not be impartial. *Cf. People v Walker*, 162 Mich App 60, 62-66; 412 NW2d 244 (1987) (holding that the trial court erred where it failed to dismiss for cause a potential juror who was a police officer, was acquainted with the prosecutor, and had worked "quite closely" with several police witnesses). Moreover, defendant failed to show that a subsequently summoned juror that defendant wished to dismiss was objectionable. *Lee*, *supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).