STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MICHAEL STRATTEN,

Defendant-Appellant.

UNPUBLISHED
June 30, 2000

No. 212452
Macomb Circuit Court
LC No. 97-002853-FC

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b), predicated on a murder committed during the perpetration of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). He was sentenced to life imprisonment without the possibility of parole. We affirm.

Defendant first argues that the trial court erred in admitting evidence of two other bad acts, contrary to MRE 404(b). We disagree. We review the trial court's decision to admit the evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

The crib-flipping incident witnessed by defendant's friend was probative of defendant's intent in that it showed that defendant set out to punish the child because the child had annoyed him and that defendant acted, at a minimum, with reckless disregard as to whether an injury would result. *People v VanderVliet*, 444 Mich 52, 64-65, 74-75; 508 NW2d 114 (1993); see also *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). The conversation about the spanking was likewise probative of defendant's intent, in that it too demonstrated his lack of regard as to whether he would harm the child. *VanderVliet, supra* at 64-65; see also *Crawford, supra* at 385. Both incidents were also probative of a lack of accident or mistake because they tended to rebut defendant's claim that the child accidentally fell down the stairs, and that he would never intentionally hurt the child. Further, the probative value of these incidents was not substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting this evidence.

Next, defendant argues that the trial court erred in refusing to instruct the jury on intervening proximate cause in accordance with CJI2d 16.15. We disagree. To justify the instruction requested, it was necessary that there be evidence that the child received grossly negligent medical treatment, amounting to an intervening cause of the child's death sufficient to cut off defendant's criminal responsibility. See *People v Bailey*, 451 Mich 657, 677-679; 549 NW2d 325 (1996). Our review of the record reveals that no such evidence was presented. Therefore, the trial court properly refused to give the requested instruction. See *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995).

Lastly, defendant argues that reversal is required because the trial court failed to specify that first-degree child abuse requires an intent to inflict "serious" physical or mental injury. We disagree. Although the court initially stated that first-degree child abuse requires that defendant must have "intentionally caused harm," rather than stating that defendant must have intentionally caused *serious* harm, it subsequently instructed the jury that, "[b]y *serious* physical harm, I mean an injury that causes substantial physical disfigurement or seriously impairs the function of a body organ -- body organ or limb." Viewed as a whole, we conclude that the court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Further, the principal issue at trial was whether defendant was the cause of the child's injuries, not whether the injuries that the child sustained resulted from a substantial force, which, if inflicted by a person, were inflicted with an intent to cause serious physical harm. In this context, we cannot conclude that it is more probable than not that, but for the alleged error, a different outcome would have resulted. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999).

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder