

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES TILLMAN,

Defendant-Appellant.

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UNPUBLISHED

July 21, 2000

No. 208832

Wayne Circuit Court

LC No. 96-006952

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of second-degree murder. MCL 750.317; MSA 28.549. Defendant was sentenced to twelve to twenty years' imprisonment. We affirm.

This case arises from the death of defendant's five-month-old son, Darian. On March 30, 1996, the child was left in defendant's care while Darian's mother, Melissa Moore, went to work. At approximately 2:25 a.m. the next day, emergency service personnel responded to a report of an "unresponsive baby" at defendant's residence. The child was first transferred to Oakwood Hospital, and then, via airlift, to the University of Michigan Hospital in Ann Arbor. Darian died later that day of injuries sustained as the result of several blows to the head. Defendant was arrested on April 1, 1996, on an outstanding traffic warrant and he was questioned regarding the death of his son. At first, defendant gave various accounts about what caused Darian's injuries. However, defendant later admitted he hit Darian in the head three times to stop him from crying.

Defendant's first argument on appeal is unclear. He contends that without defendant's admissions, there was insufficient evidence adduced at trial to support the conviction. However, defendant does not state why his confession should be excluded from our sufficiency analysis. If defendant's argument is that the testimony of the medical examiner who performed the autopsy on the child was unduly influenced by his admissions, we conclude that he has failed to establish this assertion. The medical examiner specifically testified that he concluded Darian's wounds were caused by "inflicted injuries" prior to learning of defendant's admissions. If defendant's argument is that reversal is required because testimony about the admissions violated the corpus delicti rule, we disagree.

As defendant observes, proof of the corpus delicti of the charged offense is required before the prosecutor may introduce a defendant's inculpatory statements. *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996). "The underlying purposes of the corpus delicti requirement are (1) 'to guard against, indeed to preclude, conviction for a criminal homicide when none was committed,' and (2) 'to minimize the weight of a confession and require collateral evidence to support a conviction.'" *Id.* at 548-549, quoting *People v Williams*, 422 Mich 381, 398; 373 NW2d 567 (1985), and Hall, General Principles of Criminal Law (2d ed), ch VII, p 226. The corpus delicti rule provides that a defendant's confession may not be admitted until "there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995).

In the case at hand, the order of proofs required under the corpus delicti rule was violated. Specifically, although the occurrence of the specific injury was established prior to the admission of defendant's inculpatory statements, proof that some criminal agency was the source of that injury did not come until after those admissions were entered into the record. However, we find this error to be harmless.

Because defendant did not raise an objection to the order of proofs at trial, we review the effect of this error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Evidence of criminal agency was clearly established through the medical examiner's testimony. He testified that Darian's injuries were caused by a forceful blow to the head. He indicated that the force needed to inflict those injuries could not have come about by a fall from a bed. As previously noted, the medical examiner also indicated that before learning of defendant's admissions, the examiner had concluded that the injuries that caused Darian's death were "inflicted," i.e., the result of foul play, not accidental or natural causes. Thus, although the order of proofs was violated, the elements of the corpus delicti rule were nonetheless established. Accordingly, because defendant has failed to establish that the error was prejudicial, reversal is not warranted.

Defendant next raises a two prong challenge to the effectiveness of his trial counsel. First, defendant argues that he was denied the effective assistance of counsel when defense counsel failed to object to the introduction of his inculpatory statements before the corpus delicti was established. Second, defendant argues that he was denied the effective assistance of counsel when counsel failed to

move to suppress the medical examiner's testimony concerning criminal agency. We reject both of these arguments.

"To prove 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 deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*<sup>1</sup> hearing, our review his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Regarding defendant's first challenge, we conclude that he has failed to establish either that counsel's action was deficient, or that he was prejudiced by the failure raise an objection to the order of proofs. Defendant has not demonstrated that defense counsel's failure to object was anything more than trial strategy. Because the medical examiner's testimony would render defendant's confession admissible, counsel could have reasonably concluded that raising an objection to the order of proofs would have been meaningless given that it would not have changed the substance of the prosecution's case. Further, because sufficient evidence was adduced at trial to satisfy the corpus delecti rule, defendant fails to show that he was prejudiced by counsel's behavior.

We also conclude that defendant's second challenge to the effectiveness of his counsel is without merit. As we have twice previously noted, the medical examiner specifically testified that his conclusion about criminal agency was arrived at before he learned of defendant's admissions.

Finally, defendant contends that the sentence imposed by the trial court was disproportionate. We disagree. We review a defendant's sentence for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A court abuses its discretion if the sentence imposed is disproportionate to both the offense committed and to the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence falling within the proposed sentencing guidelines range is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-55; 408 NW2d 789 (1987). We conclude that defendant fails to overcome this presumption. Defendant's twelve-year minimum sentence was within the guidelines range of eight to twenty-five years' imprisonment. Defendant fails to articulate any unusual circumstances that would render this sentence disproportionate.

Affirmed.

/s/ Michael J. Kelly  
/s/ Donald E. Holbrook, Jr.  
/s/ Richard Allen Griffin

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

