STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 213137 Grand Traverse Circuit Court
KENNETH NEIL KUIPERS, Defendant-Appellant.	LC No. 98-007511-FH

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). He was sentenced to nine to fifteen years' imprisonment and appeals as of right. We affirm.

Nicole Shelby lived with defendant and her two children, the victim, a sixteen month old baby, and the victim's five-year old sister. Shelby had met defendant through the Internet in March 1997, and he moved in with her and the children at the end of March 1997. Shelby had to work on January 2, 1998, and was unable to take the children to daycare because it was closed due to a holiday. Defendant was seasonally employed and was available to watch the children. Shelby was to meet defendant with the children at Sam's Club after work. She called home in the afternoon, and defendant reported that he was having a good day with the children. They arranged to meet at 5:15 p.m. at Sam's Club. When defendant did not arrive with the children, Shelby called home. Defendant was upset, crying, and reported that the victim was hurt and a blow dryer was involved. Shelby quickly arrived home to find the victim crying while sitting on the couch with her coat on. Defendant did not provide an explanation for any injury to the victim and kept repeating things over and over. A friend, Jude Cornett, was trying to calm the victim down and apply a wet towel to the victim's face. The victim's skin was red, and she appeared to have a sunburn. Shelby and Cornett took the victim to the emergency room of the hospital, while defendant remained home to watch Shelby's five-year old daughter and Cornett's children. When they arrived at the hospital, doctors needed information regarding the cause of the burn to the victim's face in order to properly treat it. Shelby telephoned defendant and told him to come to the hospital as soon as friend Tracy Washkevich arrived to relieve him of caring for the children.

Dr. Timothy Archer, board certified in emergency medicine, received training in the treatment of burns during his residency and completed a two-month rotation in a burn unit. During that period, Dr. Archer treated thirty to forty burn patients and continued to treat burn patients as an emergency physician, but the number of patients varied with the season. When treating a burn patient, it was imperative to know the type of burn and the history of how the burn happened to predict the extent of the burn and treat the burn appropriately. Shelby and Cornett reported that the burn occurred accidentally when defendant was blowing his hair and the victim grabbed the hair dryer. However, the burn was suspicious in nature because it was quite symmetrical, an unusual occurrence in a burn reported as accidental. It was unusual that both earlobes suffered small burns. It was also suspicious that the burn was allegedly sustained as a result of hair dryer use. Hair dryers have a low heat coefficient and retain heat inadequately. The burn would not have occurred instantaneously. While Dr. Archer could not estimate the time frame for the burn to occur, it would have been "longer than a child would have put up with." He opined that the victim would not have been comfortable or laughing and giggling while the burn occurred, but would have expressed her discomfort and tried to get away from the heat exposure. The victim received a second-degree burn covering eight percent of her body, mostly on the face. The top layer of the victim's skin started to slide off, and there was blistering and peeling of the cheeks and forehead. Dr. Archer administered narcotics to alleviate the victim's pain and discomfort. The victim's treatment was taken over by her pediatrician, Dr. David Olson.

Dr. Olson testified that he was not a burn specialist; his specialty was in pediatrics. However, he did treat six to eight children per year with second-degree burns. It was important to determine the cause or etiology of a burn to determine the course of treatment. Dr. Olson examined the victim and observed that she had second-degree burns to the majority of her face. Only a few areas were spared. Defendant told Dr. Olson that he washed the victim's hair and was blow drying it for ten to fifteen minutes. During the course of the drying, defendant would occasionally direct the air stream on the victim's face, and she would blow at the air. The victim, defendant reported, did not appear uncomfortable, and it was a playful game. The victim even took the hair dryer and directed it at herself. After the blow drying stopped, defendant noticed the victim's face was getting red, and the skin was coming off. Defendant did not mention applying hydrocortisone creme or hair spray to the victim's face. His explanation did not seem plausible because the victim would not have inflicted such pain on herself. If the defendant's version of events had occurred, the burn would have occurred in the area where hair drying occurs, such as on the forehead or where the hair ends. Dr. Olson told defendant that his version of events was not plausible and called police.

Dr. Thomas Doerr, a plastic and reconstructive surgeon, had treated burn patients during his rotation through a burn center, and his practice involved the treatment of all different types of burns. Based on his experience, Dr. Doerr had expertise in determining the source of a burn, the treatment of the burn, and the circumstances of the burn from a patient's history. In his experience, the source of the burn was detectable from the scar that occurred. For example, a splash, hot liquid or chemical burn left a drop mark. A contact burn would leave a pattern. A hot water or immersion burn left a demarcation line. The scar that remained often assisted in determining whether the cause of the burn was consistent with the history provided for the basis of the burn. Dr. Doerr concluded that the cause of the burn was a hair dryer, but determined that

it was not accidental, but rather, intentional. Dr. Doerr explained that there were areas of the skin, specifically, skin folds, where there was no evidence of burn. The pattern revealed that the victim was in a defensive pose while the burn occurred. Additionally, Dr. Doerr examine the ingredients of hair spray found at the home and concluded that the contents were innocuous. Thus, if defendant had applied hair spray while drying the hair, that application would not have caused the second-degree burn. Dr. Doerr also researched both accidental and intentional burns involving hair dryers. Accidental cases matched the history or basis for the burn that was given. The pattern of burns in intentional cases did not match the history given.

Defendant gave various versions of how the burn occurred to police and doctors. Initially, defendant told a police officer that the burn occurred while he was trying to style the victim's hair with a hair dryer. He also told the officer that the victim picked up the hair dryer and directed it at herself while he was out of the room. However, the victim did not indicate that she was harmed as a result. Later, he told police that he used hair spray while attempting to style the hair. He also admitted that he lied to police and family members when he denied touching the victim with the hair dryer. Rather, he admitted to accidentally touching the victim's face with the hair dryer on two occasions.

Defendant's family physician, Dr. Erwin Grasman, basically had the same qualifications as Dr. Olson. He did not examine the victim, but did see the photographs of the victim after the burn occurred. He opined that defendant's version of events, that the burn occurred while styling the hair with a blow dryer and hair spray, was plausible because a baby's skin was more sensitive. He opined that the victim would not have reacted immediately to the burn because it was similar to a sunburn where pain was not felt until after the burn occurs. However, a prosecution expert testified that there was a difference between a thermal burn and a radiation burn. Dr. Grasman's testified that only one earlobe was burned, although the medical records and photographs indicated the contrary.

Defendant first argues that there was insufficient evidence of intent to sustain the conviction because the testimony offered to support the intent requirement was based on incorrect assumptions. We disagree. When reviewing a challenge to the sufficiency of the evidence, we examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Rodriquez*, 236 Mich App 568, 570; 601 NW2d 134 (1999). The elements of first-degree child abuse, MCL 750.136b(2); MSA 28.331()(2), are (1) the person, (2) knowingly or intentionally, (3) causes serious physical or mental harm to a child. *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997). The question of intent is properly resolved by the trier of fact. *In re Forfeiture of $25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996). The intent of an actor may be inferred from all the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id*. at 518. Defendant contends that the evidence of intent was received from the inaccurate opinions of Drs. Olson and Doerr. Defendant gave various versions of events to doctors and police. Evaluation of the different versions of events is left for the jury as a question of credibility. *People v Lewis*, 26 Mich App 290, 294; 182 NW2d 86 (1970). Dr. Doerr testified that he had been told that it was a hair drying event. However, he also acknowledged defendant's most recent version of

events that the burn occurred during a hair styling event involving hair spray. Furthermore, the prosecutor's experts opined that the burn had to be caused intentionally due to the amount of time that would have been required to inflict the second-degree burn and the sparing of skin folds that indicated the victim was in a protective stance at the time of the burning. Dr. Grasman testified that defendant's version of events was plausible, despite the testimony offered by the prosecutor's experts to the contrary. The assessment of the credibility of intent, when posed by two diametrically opposed versions of events, is for the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Accordingly, this issue was properly resolved by the jury.

Defendant next argues that Dr. Olson's lay opinion, that defendant intentionally caused the burn, was inadmissible under MRE 701 and was improper because it assessed defendant's credibility. We disagree. This issue is not preserved for appellate review because defendant failed to object at trial to this testimony. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992); MRE 103(a)(1). When an issue involves unpreserved, nonconstitutional error, defendant must demonstrate plain error to avoid forfeiture. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has failed to meet this burden. Dr. Olson treated burn patients in the course of his education and practice. His opinion was based on his perceptions and assisted the jurors in determining whether it was plausible for the burn to have occurred during the circumstances described by defendant. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). See also *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996), citing *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983) ("[a]ny witness is qualified to testify as to his or her physical observations and opinions formed as a result of them."). Dr. Olson's opinion, that defendant's version of events was not plausible, does not constitute plain error where it was not objected to and was limited in scope. *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988).

Defendant next argues that he was denied a fair trial when the trial court qualified Drs. Doerr and Archer as experts in the areas of causation and intent when neither doctor had any training in this field. We disagree. To preserve an evidentiary issue, a party must timely object at trial and specify the same ground for objection on appeal. *Considine, supra*. Defendant has failed to meet this requirement. Defendant objected to the testimony below based on the doctors' titles. Defendant never alleged that there was a difference in burn expertise based on causation or intent. In any event, the determination of a witness' expert qualifications lies within the discretion of the trial court. *People v Gambrell*, 429 Mich 401, 407; 415 NW2d 202 (1987). Admissibility of expert testimony is governed by a three-part test. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). That is, the expert must be qualified, the evidence gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue for resolution by the trier of fact, and the evidence must be from a recognized discipline. *Id*. at 239-240. Drs. Archer and Doerr satisfied the requirements for expert testimony. Both doctors had the educational background and practical experience to treat burn patients. The testimony helped the trier of fact determine a matter at issue, that is, whether a severe second-degree burn could result from inadvertent facial exposure to a hair dryer when hair spray is applied. Finally, the

practice of medicine is a recognized discipline. *Parcha, supra*. Accordingly, the trial court did not abuse its discretion in qualifying the doctors as experts. *Gambrell, supra*.[1]

Defendant next argues that the trial court erred in failing to respond to the jury's question regarding whether the prosecutor could have presented rebuttal character evidence. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Even somewhat imperfect instructions do not require reversal as long as they fairly presented the issues and the defendant's rights were sufficiently protected. *Id*. Prior to beginning deliberations, the trial court read to the jury CJI2d 3.5 that advises jurors to consider only the evidence presented at trial during deliberations. Defendant did not object to this instruction. During deliberations, the jury inquired whether the prosecution was allowed to submit either negative character traits or specific instances of negative conduct involved in defendant's background. The trial court responded with a note that the question involved the rules of evidence and procedure and the jury was only to concern itself with the evidence presented at trial. The trial court's instruction was merely a restatement of a portion of CJI2d 3.5 to which defense counsel had no objection. Furthermore, the trial court is the sole determiner of the admission of evidence. *People v Vega*, 413 Mich 773, 776; 321 NW2d 675 (1982). Accordingly, the trial court properly instructed the jury, and the jury was not entitled to have a tutorial regarding rules of evidence.

Lastly, defendant argues that his sentence was disproportionate. We disagree. The trial court did not abuse its discretion in sentencing defendant; the sentence was proportionate to the circumstances surrounding the offense and the offender. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The medical testimony established that the victim had to be held down for five to fifteen minutes in order for this burn to occur.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski

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[1] Additionally, we note that Dr. Doerr testified that determining causation was encompassed within the treatment of a burn. There was no evidence presented at trial to indicate that causation and treatment were two separate areas of expertise. Indeed, even plaintiff's expert, Dr. Grasman, did not testify to a distinction. Also, because we conclude that the admission of the testimony of the prosecutor's experts was proper, defendant's contention that it rose to the level of cumulative error requiring a new trial is without merit.