STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2002
v	No. 231405 Saginaw Circuit Court
GAYLE ANNE ROBERSON, Defendant-Appellant.	LC No. 99-017686

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b).[1] The trial court sentenced defendant to life imprisonment on both counts. Defendant appeals as of right. We affirm defendant's conviction of first-degree murder, but remand for modification of the judgment of sentence.

Defendant challenges the sufficiency of the evidence to support her convictions of first-degree premeditated murder and felony-murder. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In deciding whether there was sufficient evidence to sustain a conviction, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

With respect to defendant's conviction of first-degree premeditated murder, defendant argues that there was insufficient evidence of premeditation to sustain her conviction. We disagree.

"To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2001); MCL

[1] The predicate felony for first-degree felony murder was first-degree child abuse, MCL 750.136b(2).

750.316(1)(a). Premeditation requires sufficient time to permit the defendant to take a second look and may be inferred from the circumstances surrounding the killing. *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000); see also *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, the prosecution charged defendant with first-degree premeditated murder on the theory that defendant caused her four-month-old infant's death from asphyxiation by "deliberately, with the intent to kill, and with premeditation" placing a wad of paper in the infant's throat, thereby blocking his airflow. At trial, competent medical testimony established that the infant victim was incapable of manipulating the wad of paper into the back of the throat. That fact alone supports the conclusion that the act that caused the victim's death was performed intentionally. Also, testimony from the expert that the victim's natural reflex would be to regurgitate the wad of paper or otherwise expel it, and that the victim had abrasions in his mouth, further support this conclusion. Moreover, the fact that the wad of paper that was found lodged in the victim's throat was similar to several wads of toilet tissue found on defendant's kitchen counter, her bathroom floor, and in her trash, would allow the reasonable inference that defendant had taken time to prepare before deliberately placing the paper in the infant's throat. Additionally, testimony at trial indicated that death would take about five or six minutes to occur, during which time the victim would have been struggling, thus providing ample time for reflection and remedial action. See *Herndon, supra* at 415 (extended period of inflicting blows gave the defendant time to consider what was occurring). Viewing this evidence in a light most favorable to the prosecution, we are persuaded that a rational trier of fact could find beyond a reasonable doubt that defendant intentionally killed the victim and that the killing was done with premeditation and deliberation. *Wolfe, supra*; *Herndon, supra*. Defendant's arguments to the contrary merely attack the weight and credibility of the evidence, which are matters for the jury, not this Court, to decide. *Wolfe, supra* 514-515.

With regard to defendant's felony-murder conviction, defendant argues that the proofs at trial established, at most, second-degree child abuse, and it is only first-degree child abuse that can be the predicate child abuse offense for felony murder. In support of this argument, defendant maintains that the act of forcing wadded paper into a child's throat "does <u>not</u> prove an intent to cause <u>permanent</u> physical injury."

The elements of first-degree felony murder include (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b), which includes first-degree child abuse. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999); MCL 750.316(1)(b). Malice includes the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Id*. at 758. "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id*. at 759. However, a defendant's malicious intent cannot be inferred solely from the commission of the underlying offense unless "the facts and circumstances of the intent to commit the underlying crime warrant the inference." *People v Dumas*, 454 Mich 390, 408; 563 NW2d 31 (1997).

A conviction of first-degree child abuse requires proof that a "person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). Under that statute, the term "knowingly" means the same as "intentionally" and requires a

showing of a specific intent to harm the child, not merely that the defendant's actions caused harm. *People v Gould*, 225 Mich App 79, 84-85; 570 NW2d 140 (1997). The requisite specific intent may be inferred from the surrounding facts, especially from one's actions. *Id.* at 87; *People v Harris*, 110 Mich App 636, 641; 313 NW2d 354 (1981). Contrary to defendant's apparent assertion in her brief, serious physical harm and serious mental harm as defined by the statute at the time of the incident did not require injury that was permanent. MCL 750.136b(1)(f).

In the present case, trial evidence demonstrated that the child's death resulted from asphyxia due to a large wad of paper being forced into his throat, that the wad of paper prevented him from breathing, that the throat obstruction was not self-inflicted, and that defendant understood that pushing a piece of tissue down the victim's throat would be physical abuse. Defendant's actions caused the victim to be asphyxiated and to ultimately die. Contrary to defendant's assertion, forcing paper into an infant's throat is not merely an act of cruelty, but may also result in serious physical and mental impairment, including brain damage due to oxygen deprivation and, as in this case, death. Further, defendant's intent to kill was sufficiently distinct from her intent to knowingly or intentionally cause serious physical harm and may be inferred from the circumstances of the crime. Evidence that death was not instantaneous, but rather took five or six minutes to occur, during which the child would have been fighting and struggling to breathe before he died allows the inference of malice. From the evidence presented, a jury could infer that defendant intentionally set in motion a force likely to cause death or great bodily harm. *Carines, supra*. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find, beyond a reasonable doubt, that defendant caused the child's death due to the commission of first- degree child abuse and with malice.

To the extent that defendant argues that the trial court erred in allowing the prosecution to introduce evidence of defendant's emergency room visit with the child in May 1999, we need not review that challenge because it was not properly preserved and presented. Although defendant listed that argument in her table of contents and addressed it in her brief, defendant failed to identify the issue in the statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Regardless, even if we were to conclude that the introduction of that evidence was error, defendant has not shown that it is more probable than not that a different outcome would have resulted without the alleged error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

Finally, defendant argues that her conviction and sentence on both first-degree premeditated murder and felony murder violate her constitutionally protected right to be free from double jeopardy. Defendant is correct. "Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy." *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001); accord *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001); *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998). "The proper remedy is to modify the judgment of conviction and sentence to specify a single conviction of first-degree

murder supported by two theories: premeditated murder and felony murder." *Long*, *supra* at 588; accord *Bigelow*, *supra* at 222.

Defendant's first-degree murder conviction is affirmed, but the case is remanded for modification of the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell