

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD HINE,

Defendant-Appellant.

UNPUBLISHED

January 3, 2003

No. 207358

Calhoun Circuit Court

LC No. 97-000307-FC

ON SECOND REMAND

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

A jury convicted Robert Edward Hine of first-degree felony-murder¹ and first-degree child abuse,² but acquitted him of open murder.³ The trial court sentenced him to life in prison without the possibility of parole for the felony-murder conviction and ten to fifteen years for the first-degree child abuse conviction. The first two times we considered this case, we held that the trial court committed error requiring reversal when it permitted the prosecutor to use prior bad acts evidence over defendant Robert Edward Hine's objection.⁴ In our view, the prosecutor used this evidence for a classic – but highly improper – propensity theory in order to overcome the shortfalls in the other evidence, and that admitting this evidence was not harmless error. The Supreme Court, after first remanding⁵ the case for us to reconsider our holding in light of *People v Sabin (After Remand)*,⁶ ultimately disagreed, deciding that the evidence was admissible.⁷ The Supreme Court has now remanded the case to us so that we may decide the remaining issues.⁸

¹ MCL 750.316(1)(b).

² MCL 750.136b.

³ MCL 750.316.

⁴ See *People v Hine*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2000 (Docket No. 207358) (*Unpublished Hine*); *People v Hine (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2001 (Docket No. 207358).

⁵ See *People v Hine*, 463 Mich 926; 620 NW2d 308 (2000).

⁶ *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

⁷ *People v Hine*, 467 Mich 242, 244; 650 NW2d 659 (2002).

⁸ *Id.* at 253.

Having twice recounted the facts of this case, we move directly to the issues we must decide, elaborating on the record only as necessary. We affirm in part, vacate in part, and remand.

I. Mistrial

A. Standard Of Review

Hine claims that the trial court erred when it denied his motion for a mistrial. This Court reviews a trial court's decision to deny a motion for a mistrial to determine whether the trial court abused its discretion.⁹

B. Testimony of Hine's Former Girlfriend

At trial, one of Hine's former girlfriends testified that he had raped her while she was nine months pregnant, a fact she had not revealed at an earlier evidentiary hearing. Hine did not object to the testimony contemporaneously, but waited until the witness finished testifying and the jury was excused for lunch to argue that he was entitled to a mistrial. Even though the trial court was troubled by defense counsel's failure to make a contemporaneous objection, it took the matter into consideration and, after the lunch break, denied the motion, explaining:

A mere error of law or procedure does not constitute legal necessity and a mistrial should not be declared in consequence of mere irregularities which are not prejudicial to the rights of the persons prosecuted.

Now, obviously it's a matter of perspective of how one may see whether or not a Defendant's rights are prejudiced to the extent that an alternative such as instructing the jury or something of that nature is adequate to avoid injustice.

The Court has considered the matter in regard to the aspect of whether or not this was some kind of intentional misconduct on the prosecution's part. I don't believe it was, I believe the prosecutor was as surprised as everybody else when [the witness] made her response during the course of the questioning, which presumably was not expected.

* * *

The other has to do with the nature of what it is that [the witness] testified to. She testified obviously that she had been forced into sexual relations by the Defendant on a particular occasion. There was no – that is certainly different than the conduct to which the Defendant is on trial. He's not on trial for anything to do with sexual conduct or criminal sexual conduct of any kind.

* * *

⁹ See *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1988).

The other thing – the third thing to look at is whether there is some alternative that might cure the problem. And that usually has to do with whether you can properly instruct the jury in some way.

* * *

Given all of that, the Court's decision then is to deny the motion for a mistrial on the basis that the Court finds no manifest necessity requiring a mistrial. The Court does find that there is an alternative that can be engaged in, that being the giving of an instruction, and that's what the Court intends to do.

As soon as the jury reentered the courtroom, the trial court and issued a cautionary instruction:

Ladies and gentlemen of the jury, this morning you heard testimony from a witness . . . [that] during a time when she and the Defendant, Mr. Hine, lived together. That there was one occasion when he [sic] sexual relations with her at a time when she did not wish to engage in sexual relations, and that the Defendant forced himself upon her without his consent.

This evidence of alleged other improper conduct for which the Defendant, Mr. Hine, is not on trial was improper, and it should not have been presented to you as part of the evidence in this trial.

The great danger in such evidence is that you as jurors will believe such evidence, and believing it, will use such evidence to conclude that if Mr. Hine did something wrong on another occasion at another time under circumstances having nothing to do with the crimes for which the Defendant is on trial in this case, then it is more likely that he committed the crimes for which he is standing trial now.

Such a conclusion would be improper, unfair, wrong, and unjust. Therefore, again, such evidence is not admissible and clearly should not have come before you during the course of this trial.

Now, under these circumstances, I'm going to give you the following instruction: While it may be thought hard to accomplish, I believe that each of you can live up to your oath and follow the instruction of the Court that you are to completely disregard this portion of [the witness's] testimony. You are to put it out of your mind and treat it as if it never existed. It is not to be treated by you as evidence in this case, it is not to be in any way a part of your deliberations, and it is to play absolutely no role in your reaching a verdict as to the charges here made against the Defendant, Mr. Hine.

In *People v Heywood*,¹⁰ this Court explained that a

mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988), and impairs his ability to get a fair trial, *People v Barker*, 161 Mich App 296, 305; 409 NW2d 813 (1987). Nevertheless, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.

The record in this case indicates that the witness volunteered the testimony concerning the alleged sexual assault; the prosecutor did not elicit this testimony. Further, the trial court took action to cure prejudice from this remark by issuing the limiting instruction as soon as the jury returned to the courtroom, which was as promptly as it could act given the timing of Hine's motion. Accordingly, the trial court did not abuse its discretion in denying the motion for a mistrial.

II. Jury Instructions

A. Standard Of Review

Hine argues that the trial court erred when it failed to instruct the jury that first-degree child abuse requires evidence of a specific intent, thereby allowing him to be convicted both of the felony murder and the predicate felony without the requisite intent. Because Hine did not object to the trial court's instructions, he did not preserve this issue for appeal. Accordingly, our review is limited to determining whether there was plain error affecting Hine's substantial rights.¹¹

B. Analysis

At trial, the trial court instructed the jury with respect to the elements of felony murder, including the elements of the predicate felony, stating in part:

Now, in Count II, the Defendant is charged with what is called first degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant caused the death of Caitlan McLaughlin. Again, that Caitlan McLaughlin died as a result of being assaulted by the Defendant. Second, that the Defendant had one of these three states of mind: That he intended to kill or that he intended to do great bodily harm to Caitlan McLaughlin, or that he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.

¹⁰ *People v Heywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

¹¹ See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

And third, that when he did the act that caused the death of Caitlan McLaughlin, the Defendant was committing the crime of child abuse in the first degree.

For the crime of child abuse in the first degree, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant had the care or custody or authority over Caitlan McLaughlin when the abuse allegedly happened.

Second, that the Defendant either *knowingly or intentionally* caused serious physical harm to Caitlan McLaughlin. By serious physical harm I mean an injury that causes substantial physical disfigurement or seriously impairs the function of a body organ or limb. This harm does not have to be permanent.

Third, that the victim Caitlan McLaughlin was at the time of the offense under the age of 18. . . .^[12]

The trial court repeated the instructions concerning the elements of first-degree child abuse, saying:

Now, in the third count, ladies and gentlemen, the Defendant is charged with child abuse in the first degree. And again, in order to prove that charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: first, that the Defendant had the care, custody or authority over Caitlan McLaughlin when the abuse allegedly happened.

And second, that the Defendant either *knowingly or intentionally caused serious physical harm to Caitlan McLaughlin*. And again, by serious physical harm I mean an injury that caused substantial physical disfigurement or seriously impairs the function of a body organ or limb. This harm does not have to be permanent. And third, that Caitlan McLaughlin was at the time under the age of 18.^[13]

According to *People v Gould*,¹⁴ first-degree child abuse is a specific intent crime. As a result, “in order to convict a defendant of first-degree child abuse, it must be shown that the defendant intended to harm the child, not merely that the defendant engaged in conduct that caused harm.”¹⁵

In this case, the trial court did not explicitly instruct the jury that it had to find that Hine acted with a specific intent in the context of first-degree child abuse or felony murder with the

¹² Emphasis added.

¹³ Emphasis added.

¹⁴ *People v Gould*, 225 Mich App 79, 84; 570 NW2d 140 (1997).

¹⁵ *Id.* at 85.

underlying felony being first-degree child abuse. The trial court did, however, clearly instruct the jury that in order to convict, it had to find that defendant “knowingly or intentionally” caused serious physical harm. This adequately conveyed the substance of a specific intent to the jury, protecting Hine from the possibility that the jury would convict him of causing serious physical harm to the little girl without specifically intending that harm to befall her.¹⁶ Consequently, Hine has not proved that the trial court’s instructions constituted plain error affecting his substantial rights.

III. Double Jeopardy

Finally, Hine argues that the trial court erred when it entered the judgment of sentence convicting him of felony murder and first-degree child abuse, which was the predicate felony for the felony murder conviction. Hine is correct. As we noted in the first opinion we issued in this case, “convicting and sentencing a defendant for both felony-murder and the predicate felony violates the prohibition against double jeopardy.”¹⁷

Conviction of felony murder affirmed, first-degree child abuse conviction vacated, and case remanded to the trial court for administrative correction of the judgment of sentence to reflect this change. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

¹⁶ See *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000).

¹⁷ *Unpublished Hine*, slip op *supra* at 9, citing US Const, Am V, Const 1963, art 1, § 15, and *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).