STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2004
V	No. 243615 Oakland Circuit Court
HENRY DEQUAN MAY, Defendant-Appellant.	LC No. 02-183038-FC

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316. Defendant was sentenced to life in prison without parole. We affirm.

Defendant's first issue on appeal is that the prosecution failed to present sufficient evidence to support his felony murder conviction. We disagree. In criminal cases, we review, de novo, the evidence in the light most favorable to the prosecution, and conclude whether there was sufficient evidence to justify a finder of fact in determining guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999) (citing *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992)); see also *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Defendant was charged with felony murder predicated upon first-degree child abuse in the death of the two-year-old victim on December 22, 2001. To convict defendant of this charge the prosecution was required to prove beyond a reasonable doubt (1) that defendant killed the child, (2) "with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result," (3) while committing first-degree child abuse. *People v Maynor*, 256 Mich App 238, 243-244; 662 NW2d 468 (2003); see also MCL 750.316(1)(b). The elements of first-degree child abuse require proof that defendant (1) knowingly or intentionally (2) causes serious mental or serious physical harm to a child. *Maynor*, *supra* at 240; see also MCL 750.136b(2). First-degree child abuse is a specific-intent crime. *Maynor*, *supra* at 241. "Generally, a specific-intent crime requires criminal intent beyond the act done, whereas a general-intent crime require only the intent to perform the proscribed physical act." *Maynor*, *supra* at 240 (citing *People v Whitney*, 228 Mich App 230, 254; 578 NW2d 329 (1998)).

An autopsy of the child revealed several contusions on his head and on his back, several fractured ribs, and damage and hemorrhaging of the kidney, adrenal gland, and liver. Testimony from the medical examiner and a prosecution medical expert in the field of child abuse and pediatric medicine shows that the child died as the result of homicide from injuries constituting child abuse. At issue is whether the evidence supported a finding by the jury that defendant was guilty of committing the abuse and causing the death of the child beyond a reasonable doubt.

Defendant argues that the primary evidence linking him to the child's death is the testimony of Poupee Baines, the child's mother, and that inconsistencies between Baines' testimony and her prior police statements and between her testimony and the medical testimony substantially undermined her credibility to the point that no reasonable jury could have found defendant guilty beyond a reasonable doubt. The prosecution counters by arguing that this Court may not overturn a conviction on the basis of the credibility of a witness. Indeed, it is the case that this Court generally may not interfere with a jury's credibility determination. *People v Hughes*, 217 Mich App 242, 248-249; 550 NW2d 871 (1996); *People v Crump*, 216 Mich App 210, 215-216; 549 NW2d 36 (1996) (citing *Wolfe, supra*); *People v DeLisle*, 202 Mich App 658, 600; 509 NW2d 885 (1993). Defendant argues that our Supreme Court has defined narrow exceptions to this rule, where (1) "testimony contradicts indisputable physical facts or laws," (2) "where testimony is patently incredible or defies physical realities," (3) "where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror," or (4) "where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *People v Lemmon*, 456 Mich 625, 643-645; 576 NW2d 129 (1998) (internal quotations and citations omitted). However, the Court articulated these exceptions in the context of reviewing a trial court's decision regarding a motion for a new trial alleging that the verdict was against the great weight of evidence; accordingly, we do not agree with defendant that *Lemmon* applies here. Regardless, we conclude that the medical evidence, the testimony that defendant was alone with the victim for a significant period of time the day he died, and that he spanked or "whipped" the victim for wetting his pants on the day of death as he had before under the same or similar circumstances was sufficient for a reasonable trier of fact to find that defendant had caused the victim's fatal injuries. Viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to allow a rational jury to find defendant guilty beyond a reasonable doubt. Accordingly, we affirm defendant's conviction and sentence for felony murder.

Defendant's next issue on appeal is that the trial court erred in admitting evidence that defendant had, one month prior to the victim's death, grabbed the victim around his chest, roughly placed him over his knee, pulled down his pants, and spanked him so hard that a handprint was left on his buttocks. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, the decision often involves a question of law, specifically, whether the admission of the evidence is permitted by statute or court rule; we review questions of law de novo. *Id.* It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

Evidence of scheme, plan, or system in doing an act may be properly admitted under MRE 404(b). There are four requirements: that (1) the evidence is offered for a proper purpose other than a character to conduct or propensity theory under MRE 404(b), (2) it is relevant under MRE 402, and (3) its probative value is not substantially outweighed by any unfair prejudice

pursuant to MRE 403, (4) the trial court consider a requested limiting instruction under MRE 105. *People v Sabin (After Remand), 463 Mich 43, 55-56; 614 NW3d 888 (2000)* (citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994)). MRE 404(b) states, in relevant part:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . motive, . . . intent, . . .scheme, plan, or system in doing an act, . . . or absence of mistake or accident when the same is material. [MRE 404(b)(1).]

Here, the prosecution sought to introduce the evidence that defendant had, one month prior to the victim's death, grabbed him by the chest, and spanked him so hard that he left marks on the victim's buttocks because the victim had wet himself, in order to prove defendant's intent, to prove defendant's motive for hitting the victim, and to establish a common plan, scheme, or system of abusing the victim when he wet himself. The trial court delayed the admission of the prior acts evidence until such time as the identity of the disciplinarian was in dispute or for purposes of impeachment. On defendant's cross examination of the victim's mother, counsel asserted not only that the mother was the only one who disciplined the child, but that the mother had in fact killed her child.

It was the theory of defense as elucidated during the cross-examination of the mother of the child that served as a trigger for the prior acts evidence. The evidentiary door had been opened. After stating the general prohibition against the use of propensity or conformity evidence, our Supreme Court instructs in *Sabin, supra* at 56, "The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. The list is not, however, exhaustive." To rebut an advanced defense theory is a proper other purpose within the meaning of MRE 404(b)(1). Once defendant asserted that he did not discipline the child, the issue of the nature and extent of his involvement in disciplining the child was germane.

Prior abuse of sufficient similarity is admissible to support that the defendant employed a common plan in committing the charged offense, that the death was non-accidental, and that the child's death was a homicide. *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002). This Court has also ruled that evidence of similar past conduct was admissible to show a common scheme on the part of a defendant to assault his girlfriend's children. *People v Maygar*, 250 Mich App 408, 417; 648 NW2d 215 (2002).

Here, evidence that defendant had previously beaten or spanked the victim for wetting himself would be probative in establishing not only that he disciplined the child, but a common plan, system, or methodology in spanking or beating the victim as punishment for wetting himself. Further, the similarities of the behavior of the defendant and the methods he employed between the charged acts, the uncharged acts, and the pattern of injury that resulted are probative of the fact that the child's death was neither non-accidental nor unintended. We conclude that the evidence is for a proper purpose under MRE 404(b).

"'"Relevant evidence" means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence.'" *Hawkins*, *supra* at 449 (quoting MRE 401, emphasis added by this Court in *Hawkins*). Here, the evidence does have a tendency to make it more probable that defendant committed the instant crime, and is thus, relevant.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (quoting *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998))). As this Court noted, all relevant evidence "is somewhat prejudicial to a defendant. . . ." *Maygar*, *supra* at 416. Here, the trial court did consider the prejudicial effect of the evidence, and accordingly restricted the use of the evidence for impeachment purposes, or where defendant put the victim's discipline at issue. Furthermore, the trial court's instructions to the jury specifically prohibited the jury from inferring bad character on the part of defendant. The fact that the trial court issues a limiting instruction "that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character" contributes to a finding that evidence was not unfairly prejudicial. *Id.* Juries are presumed to follow the court's instructions, and "instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003). Based upon the foregoing, we conclude that there was no unfair prejudicial effect that substantially outweighed the probative value of the evidence. Accordingly, we conclude that the trial court properly admitted the evidence, and did not commit an abuse of discretion in doing so.

Defendant's final issue on appeal is that the trial court committed a plain error requiring reversal in admitting evidence that defendant attempted to arrange a deal to purchase marijuana, and that defendant and his cousin were using a scale to weigh marijuana. Further, that defense counsel's failure to object constituted ineffective assistance of counsel. We disagree.

This issue has not been preserved for appeal. To preserve an issue for appeal, the party appealing must make a timely objection at trial. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Defendant concedes on appeal that no objection was made at trial. This Court may, nonetheless, review the trial court's admission of the evidence for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). This doctrine comprises three requirements: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights . . . [which] requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, *supra* at 763 (citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993)). This Court must reverse "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.'" *Carines*, *supra* at 763 (quoting *Olano*, *supra* at 736-737).

In order to review the trial court's decision to admit evidence of defendant's prior bad act for plain error, it is first necessary to determine whether the decision was error at all. *Carines*, *supra* at 763. "'"Relevant evidence" means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Hawkins*, *supra* at 449 (quoting MRE 401, emphasis added by this Court in *Hawkins*). Defendant was not charged with possessing or distributing marijuana. The possession of marijuana or distribution of marijuana is not an

element to the crime of felony murder predicated on first-degree child abuse. Defendant's alleged attempts to purchase marijuana, and his alleged weighing of marijuana outside his house, do not make it any more (or less) likely that he committed the instant crime. Any evidence that is not relevant is inadmissible. MRE 402.

While the marijuana evidence should not have been admitted into evidence as irrelevant, we conclude that in light of the significant amount of evidence tending to show defendant's guilt, this plain error did not result in prejudice to defendant, nor did it result in the conviction of an innocent defendant, nor did it seriously affect the fairness or integrity of the proceedings. As a result, the admission of the marijuana evidence by the trial court is plain error, but not one requiring reversal.

Defendant next argues that defense counsel's failure to object on this ground at trial constituted ineffective assistance of counsel. We disagree. Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Where defendant did not move for a new trial or a *Ginther*[1] hearing below, the issue is waived if the record does not support defendant's assertions. *Sabin (On Remand)*, *supra* at 659.

> A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). [*Sabin (On Remand)*, *supra* at 659.]

Here, as defendant concedes in his brief, defense counsel, at trial, failed to object to defendant's introduction of the evidence, choosing instead to impeach Baines' testimony as it related to the alleged marijuana dealings. We find that this choice suggests that defense counsel understood the damaging effects of the testimony, and that she preferred to attack it head on rather than object to it. It is not unreasonable to infer that defense counsel hoped to use the testimony to defendant's advantage by attempting to catch Baines in a lie. In any event, we find that defendant has not made a showing sufficient to overcome the "strong presumption" that counsel's decision was "sound trial strategy," and as such, we conclude that defendant was not

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

denied the effective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio