

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLE LASHAWN JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

November 28, 2006

No. 262306

Oakland Circuit Court

LC No. 04-194712-FH

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for second-degree child abuse, MCL 750.136b(3)(c). Defendant was sentenced to 18 months' probation for her conviction. We affirm.

Defendant first argues on appeal that she was denied the effective assistance of counsel because defense counsel failed to object to improper hearsay testimony. Defendant also argues that she was denied the effective assistance of counsel because defense counsel misstated the elements of the charged offense during closing argument. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to mistakes apparent on the record. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).

To establish a claim of ineffective assistance of counsel a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Walker, supra*, p 545. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). The defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra*, p 545.

Defendant was convicted of abusing her infant son, from February 2002 to February 2003, by falsifying his medical information, which subjected him to multiple unnecessary medical tests. During this time, defendant's son was subjected to two sweat chloride tests to test

for cystic fibrosis. Dr. Debbie Toder testified regarding the nature of the testing and the results. Defendant argues that Dr. Toder made hearsay statements while testifying about the testing apparatus and test results, and because of such, defendant was denied her right to confrontation. We disagree.

Although defendant maintains that Dr. Toder's statements about the testing apparatus and test results were hearsay statements, we conclude otherwise. Defendant fails to cite to specific statements for her claim; however, a review of the record shows that Dr. Toder did not make any hearsay statements when testifying about the sweat chloride testing apparatus or the test results. By definition, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. *McLaughlin*, *supra*, p 651.

Dr. Toder's statements regarding the testing apparatus and test results were based on her personal experiences, knowledge and medical conclusions. According to Dr. Toder, because the first sweat chloride test results were abnormal she checked to see if the testing controls were fine and whether the other sweat chloride test results conducted on that day were normal. Dr. Toder testified that she concluded that there was tampering because the test results were extremely abnormal and she confirmed that the testing apparatus worked fine for the other sweat chloride tests conducted on that day. Dr. Toder rendered her expert opinion based on what she personally studied, experienced and believed to be true, rather than what someone conveyed to her to be true. The statements were Dr. Toder's own statements in response to the prosecution's questioning, and thus were not out of court statements. Defendant's claim is without merit. Because the statements were not hearsay statements, defendant's claim that she was denied her right to confrontation is also without merit.

The statements at issue were not hearsay statements, and therefore, counsel was not ineffective for failing to object to them on hearsay grounds. Counsel is not obligated to make futile objections, and for that reason, defense counsel was not ineffective for failing to object to the alleged hearsay statements. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also argues that she was denied the effective assistance of counsel because during closing argument defense counsel twice stated that one of the elements of the charged offense required a showing of serious physical harm to the child. We disagree. To prove second-degree child abuse under MCL 750.136b(3)(a) there must be a showing of serious physical harm to the child. However, defendant was not charged with second-degree child abuse under MCL 750.136b(3)(a), but, rather, she was charged pursuant to MCL 750.136b(3)(c), which does not require that the child be harmed by the defendant's conduct. Although defense counsel's misstatement of the elements of the charged offense may have fallen below an objective standard of reasonableness, we conclude that the misstatement was not so prejudicial that defendant was denied a fair trial. *Walker*, *supra*, p 545.

The record shows that defense counsel did argue that defendant's actions were not cruel, an essential element of the charged offense. When examining Dr. Toder, defense counsel asked

Dr. Toder twice if she would describe the sweat chloride test as cruel. During closing argument, defense counsel also argued that defendant's actions were not cruel and that defendant acted as a concerned mother would. Further, the trial court properly instructed the jury that to convict defendant of the crime charged the prosecution must show that: (1) defendant is her son's parent or guardian, (2) defendant knowingly or intentionally did an act that was cruel to her son, and (3) that her son was under the age of 18. Therefore, the jury was properly informed of the elements of the charged offense. MCL 750.136b(3)(c).

In light of the evidence presented, it is unlikely that the outcome of the case would have been different had defense counsel not erred in her closing argument. Although testimony was presented showing that defendant's son was subjected to numerous instances of medical testing, no testimony was presented establishing that her son was harmed because of such. Because there was no evidence presented showing that defendant's actions caused serious physical harm to her son, the misstatement was not outcome determinative. Moreover, defense counsel's argument that there was no serious physical harm done to defendant's son most likely gave weight to defense counsel's argument that defendant's actions were not cruel. Because defendant has failed to show the outcome of the case would have been different absent defense counsel's error, defendant has failed to show that she was denied the effective assistance of counsel.

Defendant also argues that counsel was ineffective because she failed to define "cruel" as defined by MCL 750.136b(1)(b). Although defense counsel did not define "cruel" for the jury, counsel's failure to do so was likely trial strategy and defendant offers no evidence to overcome this presumption. "Regardless, this Court will not second guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, the trial court properly defined "cruel" for the jury during its instructions.

Defendant's last argument on appeal is that the prosecution presented insufficient evidence to support her conviction and that the trial court erred when it denied her motion for a directed verdict of acquittal. We disagree. When reviewing a claim of insufficiency of the evidence, this Court does so de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The Court reviews the evidence "in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove second-degree child abuse, under MCL 750.136b(3)(c), the prosecution must show that defendant knowingly or intentionally committed an act that was cruel to her son regardless of whether harm resulted. MCL 750.136b(3)(c). Cruel is defined as "brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b).

The evidence showed that between February 2002 and February 2003 defendant's son was taken to Beaumont Hospital 40 to 50 times. According to Dr. Mary Smyth, this was a high number of visits. The evidence showed that defendant provided her son's medical history to the medical staff during this time. Within that year, a needle was put into defendant's son's arm about 50 or 60 times to draw blood. Because of the information provided by defendant, her son was tested for several medical conditions including cystic fibrosis. Defendant told the doctors that her son's half-sibling had this condition; however, the evidence presented showed that defendant falsified this information.

The evidence also showed that Dr. Mark Thomas ordered a celiac panel test, a metabolic analysis, a thyroid analysis, a parasite screening, an HIV/AIDS test, and electrolytes test on defendant's son because of the information provided by defendant. The test results were all normal. Defendant's son was subjected to other testing and procedures, including a colonoscopy and biopsy. Both of these procedures required that a black tube with a camera at the end be placed down her son's esophagus. The procedures also required sedation. Dr. Smyth opined that defendant subjected her son to unnecessary invasive medical procedures because defendant falsified her son's medical condition.

The evidence presented was sufficient for a jury to infer that defendant's actions, of falsifying her son's medical illnesses, thereby subjecting him to various unnecessary medical testing, were cruel. Although evidence was presented showing that defendant's son did have fevers, was diagnosed with viral meningitis and had trouble with his weight, the jury determined that the evidence was sufficient to satisfy the elements of the charged offense. Despite Dr. Michael Katz's testimony, that he believed that defendant did not exhibit any signs of psychosis or irrational thinking and that he did not think that defendant could neglect or endanger her child, the jury found defendant guilty as charged. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). The evidence was sufficient to show that defendant committed second-degree child abuse, and therefore, the prosecution presented sufficient evidence to support defendant's conviction.

Defendant's claim that the trial court erred when it denied her motion for a directed verdict of acquittal is also without merit. When reviewing the evidence presented by the prosecution, in the light most favorable to the prosecution, a rational trier of fact could be persuaded that the essential elements of the crime charged were proved beyond a reasonable doubt. *Aldrich, supra*, p 122.

When defendant moved in the trial court for a directed verdict of acquittal, evidence had been presented showing that between February 2002 and February 2003 defendant took her son to Beaumont Hospital 40 to 50 times. The evidence showed that defendant provided her son's medical history to the medical staff during this time. Within that year, a needle was put into her son's arm about 50 or 60 times to draw blood. Defendant's son was also tested for several medical conditions including two tests for cystic fibrosis. Although defendant told the doctors that her son's half-sibling had cystic fibrosis, the evidence showed that defendant falsified this information. Dr. Smyth testified that in her expert opinion, defendant's son was subjected to unnecessary invasive medical procedures because of defendant's actions. Evidence was also

presented that showed that defendant was suspected of tampering with her son's sweat chloride test. For the reasons stated, the trial court did not err when it denied defendant's motion for a directed verdict of acquittal.

Affirmed.

/s/ William C. Whitbeck  
/s/ David H. Sawyer  
/s/ Kathleen Jansen