STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v	No. 275406 Branch Circuit Court
CHRISTOPHER ALLEN SOURS, SR., Defendant-Appellant.	LC No. 05-128428-FH

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of second-degree child abuse, MCL 750.136b(2), and the trial court sentenced defendant to a prison term of 30 to 48 months. Defendant appeals as of right. We affirm.

I

Defendant's argument that he was denied a fair trial by prosecutorial misconduct is not preserved because he did not raise timely objections or request curative instructions. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Consequently, appellate review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763, 774. No error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003); *Watson*, *supra* at 586.

Defendant first asserts that the prosecutor improperly mischaracterized the evidence by referring to defendant as an abuser, and by describing the victim's mother as a victim herself. Defendant argues that the prosecutor's statements constituted improper attempts to introduce evidence of prior bad acts and to appeal to the sympathy of the jury. We disagree. The prosecutor did not introduce facts that were not in evidence and did not refer to evidence of defendant's prior bad acts. Instead, the prosecutor merely summarized the evidence against defendant, and argued that the jury should infer from that evidence that the victim's mother's odd behavior, such as refraining from telephoning the police for approximately 1-1/2 hours after she realized the victim was dead, was prompted by fear of defendant. A prosecutor is allowed to

argue the evidence and all reasonable inferences arising from it as they pertain to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, the prosecutor was not trying to play on the jury's sympathy. He was trying to convince the jury, based on the evidence and reasonable inferences, that the conduct of the victim's mother's behavior was explainable and should not mitigate defendant's guilt. Additionally, the trial court instructed the jury to only "consider the evidence that has been properly admitted in this case," and that "[t]he attorneys' statements and arguments are not evidence." Jurors are presumed to follow a court's instructions. Any prejudicial effect of the prosecutor's statements was cured by the trial court's jury instructions. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant also asserts that the prosecutor impermissibly commented on defendant's decision not to testify when he stated that the victim's mother's testimony was uncontroverted. We disagree. The prosecutor did not comment on defendant's failure to testify or to present evidence but, rather, argued that the testimony was undisputed. A prosecutor's argument that inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

Because we have determined that the prosecutor's comments were not improper, an objection would have been futile. Defendant's trial counsel will not be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Thus, defendant's claim that his counsel was ineffective is without merit.

II

Defendant argues that he was denied his right to present a defense by the trial court's denial of his attempt to introduce extrinsic evidence of the victim's mother's initial statement to the police, which was inconsistent with her trial testimony. A defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). This includes the right to call witnesses to establish that defense. *Id*. at 278-279. Generally, a trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Because defendant's evidentiary claim implicates his right to present a defense, we review it de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The trial court did not abuse its discretion by prohibiting a police officer from testifying about the substance of the prior inconsistent statement of the victim's mother. The victim's mother's never had the opportunity at address or explain the inconsistency. MRE 613(b); *People v Parker*, 230 Mich App 677, 682-683; 584 NW2d 753 (1998). More importantly, the decision not to admit the substance of the statement did not deprive defendant of a substantial defense. The fact that the victim's mother initially gave an inaccurate statement was introduced through both her testimony and the testimony of a police officer. Thus, defendant was not deprived the ability to present the defense that the victim's mother lacked credibility.

Defendant further asserts that the trial court's decision to prohibit him from recalling the victim's mother as a witness at trial deprived him of his right to confront the witnesses against him. Generally, a defendant's claim that he was denied the right to confront the witnesses against him is reviewed de novo on appeal. *People v Geno*, 261 Mich App 624, 627; 683 NW2d

687 (2004). A defendant's constitutional right to confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause of the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Michigan Constitution also guarantees the same right. Const 1963, art 1, § 20. However, the Confrontation Clause only guarantees the defendant a reasonable opportunity to test the truth of a witness' testimony. *People v Slovinski*, 166 Mich App 158, 169-170; 420 NW2d 145 (1987). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Defendant was not denied the right to confront the witnesses against him. Defendant vigorously cross-examined the victim's mother. During this cross-examination, defendant elicited the fact that the victim's mother made a statement to the police that was inconsistent with her trial testimony. Defendant had the opportunity to further explore the specifics of the prior inconsistent statement and chose not to do so. The attempt to recall her was properly thwarted by the trial court because defendant had an opportunity to elicit the information during the initial cross-examination.

III

Defendant argues that the trial court erred by failing to instruct the jury on the offenses of third-degree child abuse and fourth-degree child abuse. We review de novo the trial court's decision whether to instruct a jury on a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). The trial court's determination whether a requested jury instruction is applicable to the facts of a case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Even if there is error, reversal is only warranted if defendant can establish that the error caused a miscarriage of justice, which means that it is more likely than not that the error was outcome determinative, and the error undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006).

A person is guilty of child abuse in the first degree if "the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). A person is guilty of third-degree child abuse if "the person knowingly or intentionally causes physical harm to a child." MCL 750.136b(5). A person is guilty of fourth-degree child abuse if "the person's omission or reckless act causes physical harm to a child." MCL 750.136b(6).

Because all elements of third-degree child abuse are found within first-degree child abuse and first-degree child abuse requires the jury to find a disputed factual element, i.e., that the physical harm is serious, third-degree child abuse is a necessarily included lesser offense of first-degree child abuse. Consequently, the instruction is proper if it is supported by a rational view of the evidence. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

MCL 750.136b(1)(e) defines "physical harm" as "any injury to a child's physical condition." In contrast, MCL 750.136b(1)(f) defines "serious physical harm" as "any physical

injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury...." The prosecutor presented evidence that the victim suffered injuries that included hemorrhaging in the back of his throat, as well as asphyxiation that resulted in his death. Defendant did not dispute the severity of the injuries at trial, and instead disputed whether he caused the injuries. There was no dispute that the victim died after suffering a serious physical injury. Therefore, an instruction on third-degree child abuse was not supported by a rational view of the evidence.

Similarly, assuming, without deciding, that fourth-degree child abuse is a necessarily included lesser offense of first-degree child abuse, no rational view of the evidence would support a charge of fourth-degree child abuse. The trial court properly denied defendant's request for instructions on the offenses of third- and fourth-degree child abuse. *Cornell, supra* at 354.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering