STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 22, 2008
v	No. 282211 Calhoun Circuit Court
ADAM DAVID MARKOS, Defendant-Appellee.	LC No. 2007-003362-FC

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant is charged with "open murder" under MCL 750.316 and with first-degree child abuse, MCL 750.136b(2), in connection with the death, in August 2007, of his girlfriend's four-year-old son. The trial court denied the prosecutor's motion in limine to admit evidence of prior acts of child abuse. After this Court denied the prosecutor's interlocutory application for leave to appeal the trial court's order, *People v Markos*, unpublished order of the Court of Appeals, entered December 4, 2007 (Docket No. 282211), the Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Markos*, 480 Mich 963; 741 NW2d 517 (2007). We conclude that the trial court abused its discretion in disallowing evidence of the prior injuries to the child. We reverse the trial court's order and direct that evidence of prior injuries as discussed in this opinion be allowed at trial.

In June 2007, defendant telephoned the child's mother and told her that the child was not behaving normally. Defendant stated that the child had fallen out of his bed and struck his head and had also thrashed around and hit the bed's guardrails while in defendant's care. Around the same time, the child sustained severe burns to his legs, and defendant stated that the child's legs had been sunburned. The doctor who performed the autopsy on the child in August 2007 stated that the scars on the child's legs did not appear to be consistent with sunburn. The doctor also stated that the child had incurred a previous, severe head injury (apart from the August 2007 head injury that caused the child's death) that was more recent than a documented July 2006 injury and that was inconsistent with the child's having fallen from a bed or having thrashed around and hit the bed's guardrails.

The trial court indicated that it was excluding the evidence of the June 2007 injuries because the medical doctors could not positively determine what caused them. We do not agree with this decision. The evidence was sufficient to demonstrate that the injuries were the result of

child abuse, and evidence of these injuries tended to show the absence of mistake or accident in connection with the August 2007 injury. See MRE 404(b)(1).

Moreover, unlike Judge Murray, we would not somehow restrict the prosecutor from arguing that it was defendant who caused the prior injuries, as long as the prosecutor refrains from making a "character" argument forbidden by MRE 404(b)(1). In *People v Knox*, 469 Mich 502, 513; 674 NW2d 366 (2004), the Court held that the prosecutor erred in introducing evidence of prior injuries to a child because the evidence was introduced "not only to show that the earlier events were abusive, but also to convince the jury that defendant had caused those prior injuries, despite the absence of *any* evidence that defendant had committed the past abuse" (emphasis added). Here, in contrast, there *was* evidence that defendant committed the past abuse. As noted, in June 2007, defendant claimed that the child fell from a bed and thrashed around and hit the bed's guardrails while in his care, and the child was later found to have incurred a severe head injury that was inconsistent with his having fallen from a bed or his having thrashed around and hit the bed's guardrails. Although the doctor who performed the autopsy could not say with certainty that the prior severe head injury was incurred at the time of the June 2007 incident, she saw no other reported injury in the child's medical records that could account for the severe injury. Moreover, defendant claimed that the child's legs had been sunburned while in his care, but the doctor opined that the scars were inconsistent with sunburn.

The above evidence was admissible in its entirety and was relevant in that it tended to prove the absence of mistake or accident in connection with the fatal injuries to the child. See MRE 401 and 404(b)(1). Moreover, the evidence was not more prejudicial than probative, MRE 403, and the trial court was free to provide a limiting instruction to the jury regarding the proper use of the evidence. *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). We conclude that the prosecutor could properly argue, given the above evidence, that defendant likely abused the child in the past and that this made the possibility of mistake or accident in connection with the fatal injuries unlikely.[1]

Considering all the circumstances, we conclude that the trial court abused its discretion in excluding the evidence in question.[2]

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter

[1] It will be up to the trial court to determine whether the absence of mistake or accident is or becomes a salient issue in the trial. Additionally, we note that the evidence would also be admissible to prove intent, should the prosecutor decide that he would like to offer the evidence for that purpose.

[2] As noted in *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006), we review a decision to admit or exclude evidence for an abuse of discretion.