

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLISE ROGERS,

Defendant-Appellant.

UNPUBLISHED

November 13, 2008

No. 279521

Wayne Circuit Court

LC No. 07-004866-01

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

A jury convicted defendant of involuntary manslaughter, MCL 750.321, and second-degree child abuse, MCL 750.136b(3). The trial court sentenced defendant to 5-1/2 to 15 years' imprisonment for the manslaughter conviction and time served (15 days) for the child abuse conviction. She appeals as of right. We affirm.

I. Basic Overview

Defendant's convictions arise from the tragic death of a two-year-old foster child while in defendant's care. The evidence indicated that the child died from multiple blunt force injuries to his head and body. The child also had several second-degree burns on his stomach and chest, which were consistent with burns caused by a household iron. There was no evidence that defendant personally caused the injuries. The prosecutor's theory of the case was that defendant failed to perform a legal duty, in particular by failing to protect the victim from harm, failing to provide him with a safe living environment, and failing to monitor his safety, health, and welfare, which led to his death.

II. Evidentiary Challenges

Defendant first argues that the trial court abused its discretion by admitting the police statement of defendant's adopted daughter, who stated that she was playing with the victim by throwing him into the air and onto the bed, and that the victim missed the bed on the last throw and struck his head on the floor, after which she covered him up and went downstairs to watch television. Defendant contends that because her daughter did not testify at trial, the admission of her statement violated defendant's right of confrontation. However, the record discloses that defense counsel stipulated to the admission of the statement at trial. By stipulating to its

admission, defendant has waived any claim of error and, accordingly, this issue is not subject to review on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that the trial court abused its discretion by allowing evidence that her parental rights to two of her children were terminated. Although defendant argues that this evidence was both irrelevant and unduly prejudicial, she objected only on the basis of relevancy at trial. An objection on one ground is insufficient to preserve an appellate attack on another ground. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Therefore, only the relevancy challenge is preserved.

We review for an abuse of discretion the trial court's determination of relevancy. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review defendant's unpreserved argument that the evidence was unduly prejudicial for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774, 597 NW2d 130 (1999).

Defendant asserts that evidence her parental rights were terminated in regard to other children was irrelevant. Generally, only relevant evidence is admissible. MRE 401; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. *Id.* Defendant testified on direct examination that during her many years as a foster care parent, no complaint filed against her had ever been substantiated. The prosecutor explored this subject on cross-examination, eliciting that a complaint associated with the death of the victim in this case was substantiated and led to the termination of her parental rights to two other children. The credibility of a witness is always a material issue. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). In light of defendant's direct examination testimony suggesting that her conduct as a foster parent had been investigated and never determined to be inappropriate, it was not improper for the prosecutor to explore this issue on cross-examination and elicit that defendant's parental rights to two of her children were terminated. The evidence was responsive to defendant's direct examination testimony and was relevant to her credibility. Accordingly, the trial court did not abuse its discretion in finding that the evidence was relevant.

Defendant further asserts that even if the evidence was relevant, it was unfairly prejudicial. She contends that because the termination of parental rights proceeding relied on the same evidence that was presented at defendant's criminal trial, the admission of this evidence may have caused the jury to abdicate its duty to independently find her guilty. We disagree. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 462.

In this case, the jury was informed only that defendant's parental rights to two of her children were terminated as a result of an investigation into a complaint that arose from the victim's death. It was not informed of the basis for the complaint or the decision to terminate her parental rights, or whether the termination proceedings relied on the same evidence as was

presented at defendant's criminal trial. Considering the limited context in which the evidence was elicited, defendant has failed to show a plain error affecting her substantial rights.

III. Sentencing

Defendant next argues that the trial court improperly scored offense variable (OV) 1 and OV 7 at sentencing. This Court reviews a trial court's scoring decision to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, the interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

The trial court scored ten points for OV 1 ([t]he victim was touched by any other type of weapon"), MCL 777.31(1)(d), and 50 points for OV 7 ("[a] victim was treated with terrorism, sadism, torture, or excessive brutality"). MCL 777.37(1)(a). Defendant does not contend that there was insufficient evidence to show that the victim was touched by a weapon, or that he was treated with torture or excessive brutality. Instead, she argues that it was improper to score these variables because there was no evidence that she personally committed the acts that supported the scoring of these offense variables. We disagree.

In interpreting a statute, the fundamental task of a court is to discern and give effect to the Legislature's intent as provided in the plain language of the statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). We find nothing in the language of the statutes to suggest that the conduct contemplated in OV 1 and OV 7 must be inflicted by the particular offender being sentenced in order for points to be scored. The focus of the variables is on the victim and the offense, not the offender.

Although defendant observes that OV 1 refers to "an offender" in the context of multiple offender situations, see MCL 777.31(c) and (d), this observation does not aid defendant's argument. "A" refers to an indefinite object, while "the" designates a definite object. *Hagerman v Gencorp Automotive*, 457 Mich 720, 728-729; 579 NW2d 347 (1998), overruled in part on other grounds in *Paige v City of Sterling Hts*, 476 Mich 495, 499; 720 NW2d 219 (2006). In other situations where the Legislature intended for an offense variable to be scored only for a particular offender's conduct, it has stated so. For example, OV 6 refers to "*the offender's* intent to kill or injure another individual." MCL 777.36 (emphasis added); see also MCL 777.40 (nature of offender's conduct). Thus, we conclude that points properly may be scored for OV 1 and OV 7 where, as here, there is evidence that the victim was touched with a weapon, and that the victim was treated with torture or excessive brutality, regardless of whether the defendant personally committed these acts.

We also disagree with defendant's argument that it was improper to score 50 points for OV 7 because she was convicted of involuntary manslaughter under a theory of failure to act, rather than a theory involving her commission of an overt act. Again, the focus of OV 7 is on the victim, not the offender. It was not necessary that defendant personally commit the acts that establish the factual basis for the scoring of this variable. This conclusion is supported by *People v Albers*, 258 Mich App 578; 672 NW2d 336 (2003), in which this Court held that points were properly scored for OV 3 (life-threatening injury occurred to a victim) where a defendant

was convicted of involuntary manslaughter based on her failure to act. Accordingly, the trial court did not err in its scoring of OV 1 or OV 7.

Lastly, defendant argues that the trial court erroneously scored ten points for OV 10, exploitation of a vulnerable victim. MCL 777.40(1)(b). Defendant argues that there was no evidence that she exploited the victim's youth or abused her authority status. Even if the trial court erred in scoring this variable, the scoring decision does not affect the appropriate guidelines range. If this variable had not been scored, defendant's guidelines range would remain at 43 to 86 months. Therefore, any error is harmless and does not require resentencing.¹ *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

¹ Defendant also argues that defense counsel was ineffective for not objecting to the scoring of OV 10. Because any scoring error does not affect the appropriate guidelines range, defendant was not prejudiced by counsel's failure to object and, therefore, defendant cannot establish a claim of ineffective assistance of counsel. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).