

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IAN ALBERT ANDERSON,

Defendant-Appellant.

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UNPUBLISHED

November 18, 2008

No. 277370

Jackson Circuit Court

LC No. 06-003887-FC

Before: Fitzgerald, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of torture, MCL 750.85, and first-degree child abuse, MCL 750.136b(2), and the trial court sentenced defendant to concurrent prison terms of 18 to 30 years for the torture conviction and 43 months to 15 years for the first-degree child abuse conviction. He appeals as of right. We affirm.

I

Defendant's convictions arise from the abuse of the six-year-old son of defendant's girlfriend, Jeannine Nyies, during the summer of 2006. The victim lived with defendant and Nyies, and also attended parenting time with his biological father, Walter Harmon. In July 2006, the victim started missing scheduled visits with Harmon. On August 9, 2006, a police officer conducted a welfare check of the victim in his home and then took the victim to a medical facility for treatment. The victim had a lot of pain in his left arm and could not sit down. A large area on each buttock was completely raw, scabbed over, and oozing. The victim also had a cut on his head, bruises, and abrasions. The victim was admitted to a hospital the next day for extensive wound care. While hospitalized, the victim told a treating physician that defendant and Nyies were responsible for his injuries. The victim attributed an arm injury to having his hands tied behind his back. After defendant was arrested, he told Jackson Police Detective Judy Tomlin that he and Nyies had argued and "took it out" on the victim.

Defendant testified that he lied to Detective Tomlin. He testified that the victim was tied up and spanked while being disciplined by Nyies on August 6, 2006.<sup>1</sup> Defendant testified that he became involved after the victim screamed and kicked Nyies. They both grabbed the victim by the hair. Defendant used a spatula provided by Nyies to spank the victim 30 or 40 times.

## II

Defendant argues that the evidence was insufficient to establish the elements of torture. We review de novo issues involving the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant was convicted under an aiding and abetting theory of violating MCL 750.85(1), which provides:

A person who, with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years.

(2) As used in this section:

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(b) “Custody or physical control” means the forcible restriction of a person’s movements or forcible confinement of the person so as to interfere with that person’s liberty, without the person’s consent or without lawful authority.

(c) “Great bodily injury” means either of the following:

(i) Serious impairment of a body function as that term is defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(ii) One or more of the following conditions: internal injury, poisoning, serious burns or scalding, severe cuts, or multiple puncture wounds.” MCL 750.85(c)(ii).

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<sup>1</sup> A jury convicted Nyies of torture, MCL 750.85, and first-degree child abuse, MCL 750.136(b)(2). This Court affirmed Nyies’ convictions. See *People v Nyies*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 278245).

### A. Custody or Physical Control

Defendant argues that the prosecutor failed to establish that defendant had custody or physical control of the victim. He maintains that the statute's requirement that the victim be forcibly restrained in his movements without his "consent or lawful authority" means that both consent *and* lawful authority had to be absent. We disagree.

Under the plain language of the statute, custody or physical control means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without the person's consent *or* without the person's lawful authority.<sup>2</sup> Thus, the statute allows (1) a conviction of a defendant with lawful authority to act if the victim does not consent to the restriction or confinement, or (2) a conviction, even in the face of a victim's consent, where a defendant acts without lawful authority to restrict or confine a person. Here, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that the victim was within defendant's custody or physical control under both prongs. Because of the victim's young age, it can be presumed that he lacked the capacity to consent to the forcible restriction of his movements or the forcible confinement of his person. And, while it is true that a parent or guardian, or other person permitted by law or authorized by the parent or guardian may take steps to reasonably discipline a child, including the use of reasonable force, MCL 750.135b(7), the evidence in this case reveals that defendant used excessive force when he used a spatula to spank the victim 30 to 40 times. Further, considering that defendant's statement to Detective Tomlinson indicated that the victim was not being disciplined, but rather that defendant and Nyies were "going crazy," arguing, and "took it out" on the victim, the evidence was sufficient to prove that defendant acted without lawful authority.

Because the evidence was sufficient to establish the requisite "custody or physical control" for torture, we reject defendant's claim that trial counsel was deficient by failing to move for a directed verdict with respect to this element. Trial counsel was not required to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, examined in the proper statutory context, we are not persuaded that trial counsel was ineffective by not making certain arguments to the jury regarding the element of "custody or physical control," or by not requesting additional jury instructions to explain this element to the jury. It is apparent from trial counsel's closing argument that the defense strategy was to concede that defendant committed only a third-degree child abuse offense, and to place responsibility for the victim's condition at the time he was taken for medical treatment on Nyies. Limiting our review to the record,<sup>3</sup> we conclude that defendant has not overcome the strong

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<sup>2</sup> Contrary to defendant's suggestions, the definition of "custody or physical control" does not mean the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without the person's consent *and* lawful authority.

<sup>3</sup> The trial court did not conduct a *Ginther* hearing, and therefore our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

presumption that trial counsel's performance was sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

#### B. Great Bodily Injury or Severe Mental Pain or Suffering

Defendant argues that the evidence was insufficient to support the element of "great bodily injury or severe mental pain or suffering." We disagree. The injuries inflicted on the victim constituted "severe cuts" within the meaning of MCL 750.85(c)(ii). A "cut" is commonly understood to mean "the result of cutting, as an incision, wound, passage, or channel." *Random House Webster College's Dictionary* (1997). Viewed in a light most favorable to the prosecution, the evidence showed that the victim sustained multiple cuts to the buttocks from being struck with a spatula, as well as a cutting injury to his head. The victim was not taken for medical treatment immediately, but when he was initially examined, the raw, scabbed condition on the buttocks caused the examining physician to believe that it was a burn. Another physician found that the buttock wounds were very deep and required extensive wound care.

There was also evidence that the victim sustained a head injury described by physicians as a "cut" and "laceration." The victim testified that he was hit on the head with a spatula and a wooden spoon. Other testimony indicated that two surgeries were required to drain infection from the scalp lesions. Had the victim not received treatment, he could have lost the top layer of his scalp or died from the infection. Reasonable jurors could find beyond a reasonable doubt that the victim suffered severe cuts. Therefore, the evidence of severe cuts was sufficient to sustain the torture conviction.

Although the severe cuts alone were sufficient to sustain the conviction, evidence of the victim's temporary loss of use of his left arm was sufficient to allow the jury to find "great bodily injury" as defined in MCL 750.85(c)(i) and, specifically, a "serious impairment of a body function" as defined in MCL 257.58c. The nonexclusive list of serious impairments in this statute includes "the loss of use of a limb." MCL 257.58c(a). The loss need not be long-lasting or permanent. *People v Thomas*, 263 Mich App 70, 77; 687 NW2d 598 (2004). In *Thomas*, this Court considered other listed impairments in MCL 257.58c and, specifically, an impairment defined as a "comatose state that lasts for more than 3 days," MCL 257.58c(f), for purposes of evaluating whether a police officer's temporary lost use of a leg could constitute a "serious impairment of a body function." The Court concluded:

The officer lost the use of that limb almost completely for several weeks while he was on crutches and, to a more limited extent, during the several months that he was unable to return to work. This impairment was certainly less extreme than what would have been the case had the officer been rendered comatose. But it was far more long-lasting than the three days that would have been sufficient had a comatose state resulted. We conclude that this lesser impairment, itself within the statutory list, suffered for a much greater time than required for a more serious injury within the list, is properly considered as falling within the "serious impairment" category. [*Thomas, supra* at 77.]

Here, viewed in a light most favorable to the prosecution, the evidence indicated that the victim was unable to use his left arm because of excruciating pain. When first taken to a medical facility for treatment, a cast or splint was placed on the arm to protect it from the pain. He had

multiple bruises on the arm, but x-rays were normal. He would not allow his arm to be touched while he was in the hospital. At the end of his six-day stay at the hospital, his pain for various injuries was slightly subdued. Although the victim was able to move his arms when he testified at trial, the evidence was sufficient for the jury to find beyond a reasonable doubt that the victim's temporary loss of use of his arm constituted a serious impairment of a body function.

Finally, the evidence was sufficient to allow the jury to find that the victim suffered the "serious visible disfigurement" form of a "serious impairment of a body function" in MCL 257.58c(e). Although testimony was presented that the victim no longer had any physical injuries, except for scars, the condition of the victim's buttocks at the time of his medical treatment was sufficient to enable a reasonable jury to find serious visible disfigurement. As with the loss of use of the arm, it was not necessary that the disfigurement be permanent. *Thomas, supra* at 77. Indeed, a "serious bone fracture" qualifies as a serious impairment of a body function, without regard to the time for the fracture to heal. MCL 257.58c(h). The disfigurement here was visible and serious, as indicated by its physical characteristics and the extensive wound care that it required to heal.

In sum, having considered defendant's challenges to the sufficiency of the evidence for the torture conviction, as well as his related ineffective assistance of counsel claim as it relates to the "custody or physical control" element, we conclude that defendant has not established any basis for reversal.

### III

Defendant seeks correction of the judgment of sentence to reflect the sentences announced at sentencing. After defendant filed his brief, however, the trial court issued an amended judgment of sentence reflecting the proper sentences. Accordingly, this issue is moot.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Peter D. O'Connell