STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v	No. 286270 Macomb Circuit Court
CRYSTAL TAMARA CONKLIN, Defendant-Appellant.	LC No. 2007-004032-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), arising from the death of her 32-month-old son, who died of blunt head injuries. She was sentenced to life imprisonment for the murder conviction and 9 to 15 years' imprisonment for the child abuse conviction. She appeals as of right. We affirm.

I. TRIAL COURT'S EX PARTE COMMUNICATION WITH JUROR

Defendant first argues that she was denied a fair trial when the trial court engaged in ex parte communications with a juror. Because defendant did not preserve this issue by raising it below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

"[T]he right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v Spain*, 464 US 114, 117; 104 S Ct 453; 78 L Ed 2d 267 (1983). In *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984), our Supreme Court acknowledged that "[a] defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." Further, the United States Supreme Court has held that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice[.]" *Roe v Flores-Ortega*, 528 US

470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000). A "critical stage" of a proceeding is any stage in which counsel's absence may harm a defendant's right to a fair trial. *People v Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), overruled on other grounds *People v Anstey*, 476 Mich 436; 719 NW2d 579 (2006).

MCR 6.414(B) provides, in pertinent part:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

In *People v France*, 436 Mich 138, 142, 161; 461 NW2d 621 (1990), our Supreme Court examined MCR 6.414(A), the predecessor to MCR 6.414(B), in the context of a court's communications with a deliberating jury. The Court held that reversal in such circumstances is not automatically required and depends on the prejudicial effect of the ex parte communication. *Id.* at 142, 163. Although *France* involved deliberating juries, the language of MCR 6.414(B), which is identical to former MCR 6.414(A), is not limited to deliberating juries. Thus, the rationale of *France* equally applies to a trial court's communications with jurors who have not yet begun their deliberations.

In *France*, the Supreme Court held that a defendant is entitled to reversal of a conviction if a reviewing court determines that the defendant was prejudiced by a trial court's ex parte communication with the jury. *France*, 436 Mich at 163. The Court explained that "before a reviewing court can make a determination regarding the prejudicial effect of an ex parte communication, it must first categorize the communication into one of three categories: substantive, administrative, or housekeeping." A substantive communication involves a supplemental instruction on the law given to a jury and carries a presumption of prejudice. *Id.* An administrative communication includes instructions regarding the availability of evidence and instructions encouraging a jury to continue its deliberations. Administrative communications carry no presumption of prejudice. *Id.* Finally, housekeeping communications involve general "housekeeping" matters, such as meal orders and restroom facilities, unrelated to the case being decided. It is presumed that a defendant is not prejudiced by a housekeeping communication, and a defendant must make a definite and firm showing to rebut the presumption of no prejudice. *Id.* at 164.

The communication in this case was an administrative communication. It did not involve an instruction regarding the law, which is characteristic of a substantive communication. *France*, 436 Mich at 143. Moreover, the communication did not involve mere housekeeping matters, but rather was akin to an instruction encouraging a jury to continue its deliberations. Thus, the communication was administrative in nature. *Id.* Further, defendant has not established that she was prejudiced by the communication. Contrary to defendant's argument, the trial court did not comment on the weight of the evidence and it merely encouraged the juror to carry out her oath despite that the juror found the evidence to be emotionally disturbing. Even considering the nature of the evidence, the juror indicated that she was unsure whether she would be able to render a guilty verdict. In addition, the juror was able to effectively communicate with the trial court, dispelling defendant's assertion of a language barrier. Accordingly, defendant has

failed to establish prejudice resulting from the trial court's ex parte communication with the juror.

Defendant also argues that the ex parte communication involved a "critical stage" of the proceedings and that the absence of counsel requires reversal. Defendant likens the communication to a trial court's reinstruction of the jury. As previously discussed, however, the communication did not involve an instruction regarding the law, which is indicative of a substantive communication. *France*, 436 Mich at 143. Defendant also contends that the communication was a "critical stage" of the proceedings because counsel's absence *might* have hindered her right to fair trial. But because defendant has failed to show that she was prejudiced by the communication, counsel's absence did not infringe on defendant's right to a fair trial. Defendant has failed to establish that the communication constituted a "critical stage" of the proceedings.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor engaged in misconduct by failing to disclose a promise made to Michael Sowards in exchange for his testimony and by failing to correct Sowards's false testimony that no agreements had been made in exchange for his testimony. Because defendant did not object or raise this issue in the trial court, it is not preserved and our review is limited to ascertaining whether there existed plain error that affected her substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

"Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony." *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009). The focus of requiring disclosure in such situations is to reveal factors that the jury may consider in weighing a witness's testimony and which may motivate the witness to give certain testimony. *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976). Similarly, *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), requires a prosecutor to "disclose any information that would materially affect the credibility of his witnesses." *McMullan*, 284 Mich App at 157.

To establish a *Brady* violation, a defendant must prove

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.*, quoting *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Here, the record of Sowards's sentencing hearing indicates that neither the prosecutor, Sowards's attorney, nor the trial court considered the agreement between the prosecutor and Sowards to be a typical plea or sentencing agreement. Sowards's attorney stated that Sowards "agree[d] to testify and aid the Prosecutor's Office, knowing that there was no plea agreement other than just the recommendation from the Prosecutor to stay within the guidelines." In addition, the prosecutor indicated that she could not promise Sowards anything other than to ask the trial court to sentence him within the guidelines. Further, the trial court stated, "you deserve

credit for the fact that you came into the courtroom and testified, knowing under those circumstances that no agreement had been reached and you could, that testimony could be used against you at trial." The prosecutor's promise to recommend a sentence within the guidelines, however, was an "agreement for testimony" that the prosecutor was required to disclose under MCR 6.201(B)(5). It was also information that might materially affect Sowards's credibility and favor defendant. Thus, the prosecutor was required to disclose the agreement pursuant to *Brady*, 373 US at 87, and *McMullan*, 284 Mich App at 157.

Notwithstanding the prosecutor's failure to disclose the agreement, reversal is not required because defendant has not satisfied the fourth prong of the *Brady* test. See *McMullan*, 284 Mich App at 157-158. Defendant has not demonstrated a reasonable probability of a different result had the agreement been disclosed. *Id.* at 157. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Lester*, 232 Mich App at 282 (internal quotations and citation omitted). As discussed in section III, *infra*, the evidence against defendant was overwhelming and established that only she, rather than Sowards, could have committed the acts that caused her son's death. Police officers independently confirmed that Sowards was not present at the home at any time during the day on June 11, 2007, and thus could not have caused the child's head injuries. The evidence also established that the child's severe head injuries could not have been caused by a typical household accident or fall. Thus, it is not reasonably probable that the result would have been different if the jury had been aware that there was an agreement to recommend that Sowards be sentenced within the sentencing guidelines range.

Defendant also argues that the prosecutor committed misconduct by failing to correct Sowards's false testimony. A conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). Such a conviction requires reversal and a new trial if "the '"false testimony could . . . in any reasonable likelihood have affected the judgment of the jury[.]"'" *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986), quoting *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972), quoting *Napue*, 360 US at 271.

As previously recognized, there is no reasonable likelihood that Sowards's denial of any promises of leniency could have affected the jury's verdict.[1] The evidence overwhelmingly established that the child received massive nonaccidental head injuries during a time when only defendant and the child's three-year-old sister were with him. Thus, although defendant attempted to deflect all responsibility from herself and show that Sowards caused the child's head injuries, the evidence showed otherwise. Because there exists no reasonable likelihood that Sowards's denial of leniency could have affected the jury's verdict, reversal is not warranted. *Wiese*, 425 Mich at 454.

[1] Although Sowards also testified that there was not an agreement with the prosecutor regarding a reduced sentence "or anything else relative to this," this testimony was not made in jury's presence and thus could not have affected its verdict.

Defendant further argues that the prosecutor committed misconduct by admitting evidence of her post-arrest silence for impeachment purposes. We disagree. Defendant relies on *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976), in which the Court held that the use of a defendant's "silence, at the time of arrest and after receiving Miranda[2] warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." Defendant challenges the prosecutor's elicitation of Officer Marlene Niedermeier's testimony that defendant did not inquire regarding her son's welfare, the testimony of Child Protective Services (CPS) worker Krystal Magnan that defendant did not give a sufficient explanation regarding the cause of the child's injuries, and Dr. Marcus DeGraw's testimony that defendant did not provide a sufficient explanation for the cause of the child's injuries. Because defendant's conversations with these witnesses occurred before her arrest, their testimony did not implicate *Doyle*. See *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009), amended 485 Mich 868 (2009).

Similarly, Detective Kenneth Marsee's testimony did not implicate *Doyle* because defendant waived her *Miranda* protections and answered Detective Marsee's and Detective Chad Richardson's questions. A "defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). Because defendant did not invoke her right to silence under the Fifth Amendment or *Miranda*, Marsee's testimony did not implicate her right to due process. As such, the prosecutor was free to cross-examine defendant regarding her statement to the police.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence was insufficient to establish the intent elements of first-degree child abuse and felony murder. We disagree. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational fact-finder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury's verdict. *Nowack*, 462 Mich at 400. Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id*. "'Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.'" *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

To establish first-degree felony murder, the prosecution was required to prove an intent to kill, to cause great bodily harm, or to create a high risk of death or bodily harm knowing that death or bodily harm will most likely result. MCL 750.316(1)(b); *Carines*, 460 Mich at 758-759.

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Similarly, to establish first-degree child abuse, the prosecution was required to show that defendant knowingly or intentionally caused serious physical or mental harm. MCL 750.136b(2); *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). The evidence overwhelmingly established the intent elements.

Defendant had a history of mistreating her son and giving his sister preferential treatment. Caring for her son appeared to be an annoyance to defendant, who had left the child in a playpen in a dark basement, in the garage, or in his car seat covered with a blanket when he was younger. Defendant admitted that she did not seek medical treatment for her son's various maladies, including his vision impairment. She also admitted that, at the time of her son's death, he could barely see. When her son was admitted to the hospital, he had numerous nonlife-threatening injuries, including bruising all over his body, a gash on his forehead that was healing, a deformed and possibly broken left index finger, and missing toenails. He had also suffered a traumatic and life-threatening brain injury that was caused by nonaccidental blunt force trauma. Dr. DeGraw testified that the child's head injuries could not have been caused by a household accident or fall and that they were more characteristic of being thrown from a car during an automobile accident, being struck with a baseball bat, or falling from a high-story window. Dr. DeGraw opined that any reasonable person would have realized immediately after the trauma that the child was seriously injured.

The evidence showed that on the day the child received his massive head injuries, Sowards left the home before 7:00 a.m. and went to work. When he left work at approximately 4:30 p.m., he went to his uncle's home to repair his truck before returning home. Police officers confirmed Sowards's whereabouts that day by talking to his employer, obtaining a copy of his time card, verifying the existence of a pay phone that Sowards used, talking to Sowards's uncle, and obtaining a copy of a receipt from an auto parts store. When Sowards arrived home, he discovered the child lying facedown on his bed, unresponsive, and barely breathing. Although defendant went with Sowards to the hospital, she did not go inside and left in the truck. She went to her uncle Matthew Conklin's home and told him that her son had fallen and that she thought that he was having seizures. Defendant then admitted that if she went to the hospital, she would be arrested and her daughter would be removed from her care.

When the police arrived at defendant's home that night, they discovered a blood-splattered pile of laundry in the utility room that included children's bedding and items in the washing machine that smelled of vomit and contained blood spots. They also found dried blood on the carpet in the child's bedroom, on two of the bedroom walls, on the interior walls of the closet and closet door, and on the underside of his mattress. Moreover, police officers found an 8- to 12-inch metal pipe with a rubberized handle on the kitchen windowsill.

Further, defendant provided various explanations for her son's injuries and failed to sufficiently explain how his head injuries occurred. For example, defendant told Sowards that the injury to one of the child's toenails occurred when a Tonka truck fell on the toenail. In her statement to the police, however, defendant claimed that the missing toenails were caused by a fungus. Defendant also told her uncle at the hospital that her son's eye problems were caused because he was allergic to the medication that he was being administered. This explanation conflicted with evidence that the child had suffered chronic eye problems and, according to defendant, he could "barely see" at the time that he was admitted to the hospital.

Finally, defendant told Dr. DeGraw, Magnan, Detective Brian Kijewski, Detective Richardson, and Detective Marsee that after Sowards left for work on the morning on June 11, 2007, he did not return home until 7:00 or 8:00 p.m. This conflicted with defendant's trial testimony that Sowards returned home after work at approximately 4:30 p.m., screamed at the child, and left the child lying in his bed. Viewing the evidence in the light most favorable to the prosecution, a rational fact-finder could conclude that the prosecution proved the intent elements of the offenses beyond a reasonable doubt. *Sherman-Huffman*, 466 Mich at 40-41; *Nowack*, 462 Mich at 399-400.

IV. JURY INSTRUCTIONS

Defendant next argues that the trial court's felony-murder jury instruction was erroneous because it did not require the jury to find that the victim died as a result of blunt head injuries caused by defendant. We disagree. We review claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004).

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

The trial court instructed the jury as follows regarding first-degree felony murder:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that Crystal Conklin caused the death of [the child] and it --- and that that is that [the child] died as the result of blunt head injuries. Second, that Crystal Conklin had one of these three states of mind: She intended to kill or she intended to do great bodily harm to [the child] or she knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of her actions. Third, that when she did the act that caused the death of [the child], Crystal Conklin was committing the crime of first-degree child abuse.

Viewed as a whole, the court's instructions included all elements of felony murder and protected defendant's rights. The instructions required the jury to find that defendant caused the child's death and also required that it find that she either intended to kill him or knowingly created a very high risk of death or great bodily harm, knowing that death would likely result. The instructions also required the jury to conclude that defendant was committing first-degree child abuse at the time she caused the child's death. Read as a whole, the instructions fairly presented that the jury was required to find that defendant caused the child's blunt head injuries in order to convict defendant of felony murder. *Aldrich*, 246 Mich App at 124. Accordingly, reversal is not required. *Huffman*, 266 Mich App at 371-372.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that she was denied the effective assistance of counsel for several reasons. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, 262 Mich App at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, 462 Mich at 302.

Defendant first argues that counsel was ineffective for failing to move for a change of venue because of extensive pretrial publicity. A change of venue may be granted where justice demands or where statutory law provides. *People v Jendrzejewski*, 455 Mich 495, 499-500; 566 NW2d 530 (1997). Community prejudice based on extensive, highly inflammatory pretrial publicity can constitute a circumstance warranting a change of venue where such prejudice amounts to actual bias and the inflammatory pretrial publicity saturates the community to such an extent that the entire jury pool is tainted. *Id.* at 500-501.

Here, the record shows that the jury pool was not tainted by extensive pretrial publicity. Defense counsel testified at the *Ginther*[3] hearing that there was very little publicity in this case other than during the two or three days following the child's death. The trial court also determined that the pretrial publicity was limited and restricted to defendant's preliminary examination, which occurred approximately eight months before trial. In addition, both the trial court and defense counsel indicated that none of the prospective jurors had heard about this case. Thus, the record fails to show that inflammatory pretrial publicity tainted the jury pool. As such, defense counsel was not ineffective for failing to move for a change of venue. Defense counsel does not render ineffective assistance by failing to assert futile arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that counsel was ineffective for failing to call certain lay witnesses, including a witness who could corroborate Sowards's acts of violence against defendant and the child at the Sunnybrook Hotel. "Decisions regarding what evidence to present and whether to call or question certain witnesses are presumed to be matters or trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defense counsel testified that he hired Michael Burn, a private investigator, who spoke with John Johnston at the Sunnybrook Motel. Johnston indicated that he called the police regarding a commotion in the hotel room, but he did not know what occurred and did not observe any assault. Because Johnston could not have corroborated defendant's claim that Sowards was violent toward her, counsel's failure to call Johnston was not objectively unreasonable. *Davis*, 250 Mich App at 369. Further, the record does not support defendant's assertion that she informed counsel of other potential witnesses from the Sunnybrook Hotel, including "Randy," "Jerry," "Steve," and "Sarah."

Defendant also argues that counsel was ineffective for failing to call a neighbor who lived next door to defendant's home at 2215 Jarvis who could testify that Sowards came home after work on June 11, 2007. Defense counsel testified that Burn attempted to go to 2217 Jarvis, but discovered that the address did not exist. Burn went to 2207 Jarvis, but nobody was at that residence. He then searched a database and discovered that Molly Thompson owned the residence at 2207 Jarvis. He called the home and spoke to Shane Vanostrand, Thompson's husband, who recalled defendant but did not have any specific recollection of the events that occurred on June 11, 2007. Because defense counsel's investigation revealed that Vanostrand could not have testified that Sowards came home after work on June 11, 2007, defendant again has failed to establish that counsel's failure to call him was objectively unreasonable. *Davis*, 250 Mich App at 369.

Defendant also complains that counsel failed to subpoena her brother, Craig Conklin. At the *Ginther* hearing, defense counsel did not recall defendant asking him to subpoena Craig and testified that he represented Craig a few times in court and that Craig still owed him money. Counsel emphatically denied that he refused to call Craig to testify because Craig owed him money. Defendant contends that Craig's testimony would have corroborated her testimony and contradicted Sowards's testimony. In particular, defendant references a Sterling Heights Police Department dispatch log that appears to reflect that Craig called the police on one occasion after defendant had called him and told him that Sowards had kicked in the bedroom door and assaulted her previously. Even if counsel had refused to subpoena Craig contrary to defendant's request, as she claims, defendant has not overcome the presumption that counsel's decision not to call Craig was reasonable sound trial strategy. *Davis*, 250 Mich App at 369. The record does not indicate in what capacity counsel represented Craig previously, and Craig may have been subject to impeachment had he testified. Moreover, the dispatch log refers to an incident that occurred on June 19, 2005, at an address in Sterling Heights. Thus, Craig's testimony would not have assisted the jury in determining the events that occurred on June 11, 2007, or defendant's treatment of the child during the two years previous to that date. Accordingly, defendant has not shown that she was prejudiced by counsel's failure to subpoena Craig. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Defendant also argues that counsel was ineffective for failing to call her uncle Ronald Conklin to testify. Counsel testified that he spoke to Ronald, but Ronald declined to testify. Counsel claimed that he sought to question Ronald about an altercation that he had with Sowards, but Ronald refused to testify about the incident. At the *Ginther* hearing, Ronald initially denied that he refused to testify and claimed that he would have done so had he been called to testify at trial. On cross-examination, however, he admitted that his name was on

defense counsel's witness list and that counsel sought to present his testimony. Ronald also admitting declining to testify:

> *Q*. And, at some point in time, you indicated you would rather not testify, is that correct?
>
> *A*. Yes, ma'am.
>
> *Q*. So, you did have an opportunity to speak at the trial and chose not to, is that correct?
>
> *A*. Yes, ma'am.

In light of this record, defendant has failed to rebut the presumption that counsel's failure to call Ronald as a witness was sound trial strategy. *Davis*, 250 Mich App at 369.

Defendant further argues that counsel was ineffective for failing to subpoena various other lay witnesses, including Tammy Stockum, William Malinzack, Bryan Swan, Jeremy Schiefka, and police officers who were called to specific residences. At the *Ginther* hearing, counsel denied that defendant asked him to call these witnesses. More importantly, defendant did not establish the substance of the witnesses' purported testimony or explain how their testimony would have assisted her defense. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for [her] claims . . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation and quotations omitted). Thus, once again, defendant has not overcome the presumption that counsel's failure to call the witnesses was sound trial strategy. *Davis*, 250 Mich App at 369.

Defendant next argues that counsel was ineffective for failing to call Dr. Bader J. Cassin to testify. Counsel admitted that he hired Dr. Cassin, who had given counsel a letter stating that Dr. DeGraw had exaggerated the description and character of the child's injuries and that defendant's explanation of the cause of the injuries was at least credible. The letter further stated that the characterization of the injuries as resulting from nonaccidental trauma may be incorrect. Counsel admitted that Dr. Cassin's testimony could have "possibly" impeached Dr. DeGraw's testimony and supported defendant's theory that she did not intentionally harm her son. Counsel listed Dr. Cassin's name on his witness list, but when he spoke to Dr. Cassin before trial, Dr. Cassin stated that he would not be able to assist in the matter. As a result of that conversation, counsel elected not to call Dr. Cassin to testify. Thus, the record indicates that counsel decided not to call Dr. Cassis as a matter of strategy, and defendant has not rebutted the presumption of sound strategy. *Davis*, 250 Mich App at 369.

Defendant next argues that counsel failed to effectively cross-examine Sowards regarding his physical abuse of the child. Counsel denied that defendant informed him of any physical abuse that Sowards inflicted on the child at the Sunnybrook Hotel. Rather, counsel testified that defendant informed him only that Sowards had physically abused her at the hotel. Counsel also denied that defendant informed him that Sowards had flipped the child upside side when he was buckled into his car seat or flipped him onto the floor. Counsel admitted that defendant had indicated that Sowards inflicted physical violence on the child on one or two occasions. As counsel explained, however, he did cross-examine Sowards regarding his physical abuse of the

child during trial, but Sowards denied that he abused the child. Although defendant complains that counsel failed to effectively cross-examine Sowards so as to elicit an admission regarding his physical abuse of the child, this did not render counsel's performance below an objective standard of reasonableness. *Pickens*, 446 Mich at 302-303; *Moorer,* 262 Mich App at 75-76.

Defendant next argues that counsel failed to effectively cross-examine Sowards regarding his motivation to testify. Counsel testified that he cross-examined Sowards regarding his second-degree child abuse charge, but he was not privy to any agreement between Sowards and the prosecution. In addition, defendant contends that counsel failed to discover and investigate Sowards's criminal record involving theft or dishonesty. Defendant references a 2001 conviction for retail fraud. But even if counsel had further cross-examined Sowards regarding his motivation to testify or presented evidence regarding Sowards's 2001 retail fraud conviction, it is not reasonably probable that the result of trial would have been different. *Toma*, 462 Mich at 302-303; *Moorer,* 262 Mich App at 75-76. Thus, defendant has not established the requisite prejudice to establish a claim of ineffective assistance of counsel.

Defendant next argues that counsel was ineffective for failing to present medical evidence regarding acute dermatitis, Apraxia, and the fact that defendant took the child to the Plumbrook medical facility for treatment of his dermatitis in February 2006. Counsel testified that he received a copy of the Plumbrook medical records but was unaware of a condition known as acute dermatitis until after trial. Counsel also testified that he was not familiar with a condition known as Apraxia. Thus, counsel could not have presented evidence regarding acute dermatitis or Apraxia at the time of defendant's trial. Moreover, considering that the child died of blunt head injuries, defendant has not demonstrated that she was prejudiced by counsel's failure to present evidence that defendant took the child for treatment regarding his dermatitis. *Toma*, 462 Mich at 302-303; *Moorer,* 262 Mich App at 75-76.

Defendant next argues that counsel was ineffective for failing to cross-examine Sowards's mother, Elizabeth Herd, regarding her failure to seek medical treatment for the child while he was in her care for several days. Defendant has not demonstrated that Herd's failure to seek medical treatment could have assisted her defense. Further, counsel testified that defendant never informed him that Herd had physical custody of the child on occasion and an opportunity to seek medical treatment for him. Accordingly, this claim cannot succeed.

Defendant next contends that counsel was ineffective for allowing the prosecutor to call Dr. Daniel Spitz to testify out of turn, at the conclusion of the case. As defense counsel explained, and the trial court recognized, calling witnesses out of order is a common trial practice that does not impact the trial. The jury was instructed to treat all evidence fairly. Thus, defendant has failed to establish either deficient performance or resulting prejudice with respect to this claim. *Toma*, 462 Mich at 302-303; *Moorer,* 262 Mich App at 75-76.

Defendant next argues that counsel was ineffective for failing to move to suppress defendant's statements to the police. Counsel testified that he did not seek suppression of defendant's police statements because she made no admissions in the statements and showed extreme emotion when she was informed that the child had died. Counsel believed that defendant's recorded statement would assist her defense. Defendant has not overcome the presumption that counsel's decision was sound strategy. *Toma,* 462 Mich at 302. Moreover, as

discussed in section VIII, *infra*, any motion to suppress would have been futile. Counsel is not ineffective for failing to make a futile motion. *Snider*, 239 Mich App at 425.

Defendant next argues that counsel was ineffective for failing to assert a battered woman syndrome defense. We again disagree. In *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995), the Court explained:

> Generally, battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse.

Thus, battered woman syndrome testimony arguably may have been helpful to explain why defendant did not initially disclose her contention that Sowards returned home from work at approximately 4:30 p.m. on June 11, 2007, and screamed at the child. But such testimony would not have otherwise supported her defense that she did not intentionally injure the child or show that Sowards, rather than defendant, caused the child's head injuries. Furthermore, during trial, defendant testified about Sowards's physical abuse directed toward her. She asserted that she was afraid to tell the police that Sowards came home after work because she was scared of what he would do to her and her unborn child. Thus, because defendant presented evidence of Sowards's physical abuse at trial, including her reasons for not immediately implicating Sowards, she has not demonstrated that she was prejudiced as a result of counsel's failure to assert a battered woman syndrome defense. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Defendant next argues that counsel was ineffective for allowing certain witnesses to offer testimony based on hearsay and speculation. Defendant specifically challenges Dr. Edward O'Malley's testimony that the child's eye problems could have been caused by malnourishment, Detective Marsee's testimony that defendant did not ask other police officers about the child's condition because she was not in the presence of other officers while she was detained, and Magnan's testimony that defendant beat the child, did not like him, did not want him, and was mean to him. Defendant's argument lacks merit because the witnesses did not testify based on hearsay and speculation. Dr. O'Malley offered a medical opinion that chronic malnourishment could cause the type of eye problem that the child experienced. Marsee's testimony was not speculative because it was based on his knowledge that defendant was being detained in a secluded area. Magnan's testimony simply described the allegations contained in a CPS complaint made in 2005. Thus, defendant has not established that counsel was ineffective for failing to object to the testimony, given that any objection would have been futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next argues that counsel was ineffective for failing to introduce the child's birth certificate as evidence. Defendant contends that the space indicating the father's name on the birth certificate was left blank because Sowards claimed that he was not the child's father and would not accept responsibility for him. Considering the overwhelming evidence against defendant, evidence that Sowards was not listed as the child's father on his birth certificate would not have affected the outcome of the proceeding. Thus, defendant was not prejudiced. *Toma*, 462 Mich at 302-303; *Moorer*, 262 Mich App at 75-76.

Finally, defendant argues that counsel was ineffective for failing to object at sentencing to information in the presentence investigation report (PSIR) that the child was blind. The PSIR stated that the child "had an eye infection in both eyes which caused him to become blind[.]" The PSIR also reflected a medical opinion that the child suffered "severe malnourishment which caused the infection to both eyes resulting in blindness." These statements were consistent with the trial testimony. Dr. O'Malley testified that the child's vision was severely compromised and that he might be able to count fingers in front of him only at a very close range. Dr. O'Malley opined that chronic malnourishment could cause the cornea problem that the child experienced. Further, defendant admitted at trial that the child could "barely see" and that she told the police officers that he was unable to see. Accordingly, because the testimony supported the indication of the child's blindness in the PSIR, counsel was not ineffective for failing to object. *Milstead*, 250 Mich App at 401.

VI. DOUBLE JEOPARDY

Defendant argues that her convictions of both felony murder and the underlying felony violate her double jeopardy protections. We disagree. "A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15." *Nutt*, 469 Mich at 574. The Double Jeopardy Clause protects against (1) a second prosecution for the same offense following either acquittal or conviction, and (2) multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). In *Smith*, our Supreme Court held that the term "same offense" in the context of the "multiple punishments" strand of double jeopardy jurisprudence has the same meaning as that term connotes in the "successive prosecutions" strand of our jurisprudence. *Id.* at 315-316. Thus, in the absence of clear legislative intent to impose multiple punishments, courts must apply the *Blockburger*[4] "same elements" test to determine whether multiple punishments are constitutionally permitted. *Id.* at 316. Under the "same elements" test, multiple punishments are permissible as long as each of the crimes of which a defendant is convicted contains an element that the other does not. *Id.* at 296, 316-319.

In *People v Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008), our Supreme Court held that the "same elements" test applies when a defendant is convicted of both first-degree felony murder and the underlying predicate felony. The Court stated that "convicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the 'multiple punishments' strand of the Double Jeopardy Clause if each offense has an element that the other does not." *Id.*

To prove first-degree felony murder, the prosecution must prove: (1) the killing of a human being, (2) with the intent to kill, to cause great bodily harm, or to create a high risk of

[4] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

death or bodily harm knowing that death or bodily harm will most likely result, (3) during the commission, attempted commission, or assisted commission of any one of several enumerated felonies, including first-degree child abuse. MCL 750.316(1)(b); *Carines*, 460 Mich at 758-759. To establish first-degree child abuse, the prosecution must show that the defendant knowingly or intentionally caused serious physical or mental harm to a child. MCL 750.136b(2); *Maynor*, 470 Mich at 295. Because each offense contains an element that the other does not, the offenses are not the "same offense" within the meaning of the Double Jeopardy Clause. See *Ream*, 481 Mich at 241. Thus, defendant's convictions of both offenses do not violate her double jeopardy protections.

VII. MRE 404(b) EVIDENCE

Defendant next challenges the trial court's admission of other evidence of the child's numerous injuries, medical opinions that the child suffered from neglect and abuse, and defendant's alleged long-term mistreatment of the child. We review for an abuse of discretion the admission of other acts evidence at trial. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

MRE 404(b)(1) governs the admission of prior bad acts evidence. Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than to show the defendant's character or propensity to commit the charged crime. *Knox*, 469 Mich at 509. Second, the evidence must be relevant under MRE 402. *Id*. Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id*. Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id*.

Defendant contends that the evidence of the child's numerous injuries, medical opinions that the child suffered from neglect and abuse, and defendant's alleged long-term mistreatment of the child was not admissible for a proper purpose under MRE 404(b), but rather was introduced only to show her bad character. She argues that because her defense was that she never injured the child, the evidence was not relevant to show her "intent, preparation, scheme, plan, or system," as permitted under MRE 404(b)(1).

Contrary to defendant's argument, the evidence was relevant to establish her motive, intent, scheme, plan, and absence of accident, which are all proper purposes under MRE 404(b). "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence of defendant's long-term mistreatment of the child and his numerous nonlife-threatening injuries tended to establish defendant's motivation, intent, scheme, and plan in causing the head injuries that led to the child's death. This evidence also tended to show that the child's head injuries did not occur as a result of an accident, such as a fall from a sink when defendant was cleaning the child's eyes.

Regarding defendant's intent in particular, to convict defendant of first-degree felony murder, the prosecution was required to prove that defendant killed the child with the intent to kill, to cause great bodily harm, or to create a high risk of death or bodily harm knowing that

death or bodily harm will most likely result. *Carines*, 460 Mich at 758-759. Similarly, to convict defendant of first-degree child abuse, the prosecution was required to show that defendant knowingly or intentionally caused the child serious physical or mental harm. *Maynor*, 470 Mich at 295. Defendant's general denial of guilt placed all elements of the offenses, including the intent element, at issue. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Thus, the evidence was relevant and admissible for a proper purpose under MRE 404(b).

Defendant also argues that the prejudicial effect of the evidence substantially outweighed its probative value. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The probative value of the other acts evidence was relevant to rebut defendant's theory that she did not harm the child and that either Sowards caused the child's head injuries or his injuries occurred by accident. Thus, the evidence was not merely marginally probative, but was probative of the ultimate issue, i.e., whether defendant committed the offenses charged. See *Sabin*, 463 Mich at 71. The trial court did not abuse its discretion in determining that the prejudicial effect of the evidence did not substantially outweigh its probative value.

VIII. DEFENDANT'S STATEMENTS TO THE POLICE

Defendant contends that her statements to the police should have been suppressed because they were involuntary and elicited in violation of her state and federal constitutional rights to representation by counsel. We disagree. Because defendant failed to preserve this issue for our review by raising it below, our review is limited to plain error affecting her substantial rights. *Carines*, 460 Mich at 763, 774; *Knapp*, 244 Mich App at 375.

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived [her] Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

We first address whether defendant was denied her constitutional rights to representation by counsel. Initially, we note that defendant references her federal Sixth Amendment right to counsel as well as her corresponding state right to counsel under Const 1963, art I, § 20. Because these rights to counsel attach only after the initiation of adversarial judicial proceedings, they are not implicated in this case where defendant's statements to the police were given before the initiation of judicial proceedings. See *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004); see also *People v Richert (After Remand)*, 216 Mich App 186, 194; 548 NW2d 924 (1996) (recognizing that Const 1963, art I, § 20 is construed identical to its federal counterpart, US Const, Am VI).

Defendant also contends that her statements to the police were elicited in violation of her Fifth Amendment right to counsel and corresponding state constitutional right to counsel

guaranteed under Const 1963, art I, § 17. The procedural safeguards adopted in *Miranda* apply only during custodial interrogation. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). Moreover, the right to counsel under Const 1963, art I, § 17 is construed identical to the federal Fifth Amendment right to counsel. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). Thus, the rights to counsel guaranteed under the Fifth Amendment and Const 1963, art I, § 17 attach only during custodial interrogation.

Defendant was not in custody when she gave her first statement to the police on June 12, 2007. As such, her rights to counsel under the Fifth Amendment and Const 1963, art I, § 17 were not implicated.

Because defendant was in custody when she gave her second statement to the police on June 13, 2007, this statement did implicate her constitutional rights to counsel. However, the record shows that defendant validly waived her rights to counsel and that her waiver was knowingly and intelligently made. "To establish that a defendant's waiver of his Fifth Amendment right was knowingly and intelligently made, 'the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him.'" *Tierney*, 266 Mich App at 709, quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). Before defendant gave her second statement to the police, Detective Marsee advised her of her *Miranda* rights. He informed her that she had the right to remain silent and not answer any questions, that anything she said could be used against her, and that she had the right to have an attorney present. Defendant initialed the constitutional rights form next to each of the five rights and signed the form, which also indicated that she had not been threatened or promised anything and that she wished to make a statement. Defendant also indicated that she understood the English language. Moreover, she appeared calm and relaxed at the time that she waived her rights to counsel, and there is no indication that she ever requested an attorney. Thus, the record shows that defendant validly waived her constitutional rights to counsel.

Defendant also contends that her statements to the police were involuntary.[5] In determining whether a statement to the police was freely and voluntarily made, this Court reviews the totality of the circumstances surrounding the making of the statement. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004). The test of voluntariness is whether, based on the totality of the circumstances, "the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired[.]'" *Cipriano*, 431 Mich at 333-334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). Factors to consider when making this determination include:

[5] Although defendant was not in custody when she gave her first statement to the police, even noncustodial interrogation may, in some situations, give rise to an involuntary statement. *Beckwith v United States*, 425 US 341, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976).

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

Defendant argues that her statements to the police were involuntary because she was young, emotionally devastated, had no prior experience with the criminal justice system, was detained for a lengthy period of time, was not advised of her *Miranda* rights, and was denied counsel. The record fails to support defendant's argument.

As previously indicated, defendant was not in custody when she gave her first statement to the police. Accordingly, she was not required to be advised of her *Miranda* rights. *Marsack*, 231 Mich App at 374. Because she was not in custody, she was not detained and the record fails to show that she requested an attorney. In sum, the record does not support defendant's argument that her first statement to the police was involuntary.

The record also fails to show that defendant's second statement to the police was involuntary. As previously discussed, defendant was in custody at the time she made the statement and she validly waived her *Miranda* protections. Defendant admitted that the detectives gave her a coat because she was cold, and asked if she was hungry or thirsty. They then gave her pizza and something to drink. The detectives interviewed defendant for approximately three hours. She appeared calm and relaxed at the beginning of the interview and did not appear upset until she was informed that the child had died. Thus, the record fails to support defendant's argument that her second statement to the police was involuntary.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis