STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2010
v	No. 293182 Oakland Circuit Court
GORDON GRAHAMLATTA WELLS, Defendant-Appellant.	LC No. 2008-220867-FH

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of third-degree child abuse, MCL 750.136b(5). The trial court sentenced him to two years' probation and 90 days in jail. We affirm.

Defendant claims that the prosecutor presented insufficient evidence to support the conviction. We review insufficiency claims de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2006). We review the evidence in the light most favorable to the prosecutor "to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *Id*. Questions concerning witness credibility are to be resolved by the trier of fact. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

At the time of the offense, MCL 750.136b(5) stated, in relevant part, that "[a] person is guilty of child abuse in the third degree if the person knowingly or intentionally causes physical harm to a child."[1] Defendant contends that the prosecutor presented insufficient evidence

[1] MCL 750.136b(5) has since been amended and now reads:

> (5) A person is guilty of child abuse in the third degree if any of the following apply:
>
> (a) The person knowingly or intentionally causes physical harm to a child.

regarding the issue of intent. He contends that the prosecutor merely showed that defendant spanked the child "on the bottom over his clothes." He cites MCL 750.136b(9), which states that "[t]his section does not prohibit a parent or guardian . . . from taking steps to reasonably discipline a child, including the use of reasonable force." Defendant claims that "[b]ruising exclusively on the buttocks as a result of one act of discipline does not constitute sufficient evidence from which a rational jury could reasonably conclude beyond a reasonable doubt that [defendant] intended to harm [the child]."

In *People v Sherman-Huffman*, 241 Mich App 264, 266; 615 NW2d 776 (2000), the Court stated that a third-degree child-abuse conviction under the pre-amendment statute required proof "that [the] defendant subjectively desired *or knew* that the prohibited result would occur" (emphasis added). The Court stated:

> [D]efendant testified that the spankings were hard enough to cause a blood clot that was in her daughter's nose from an earlier nosebleed to dislodge, and that her nose bled for a short time. Moreover, the bruising to her daughter was sufficient to raise the suspicion of her daughter's teacher, a child protective services investigator, a police officer, and an emergency room physician. Defendant contends that her daughter bruises easily because of her asthma medication; however, defendant certainly was aware of this before spanking her. At the very least, defendant's decision to spank her daughter with enough force to actually cause substantial bruising and dislodge a blood clot from her nose, when viewed in a light most favorable to the prosecution, supports the trial court's conclusion that defendant possessed the requisite specific intent to harm her child. [*Id*. at 266-267.]

Here, the child testified that defendant spanked him more than ten times during the incident. He testified that his buttocks were so sore that he had to sit on his knees for the rest of the day. There was evidence that defendant told the child to sit on his knees because of the pain in the child's buttocks. The child's mother testified that she "wanted to throw up" when she saw the child's buttocks after the spanking. The nurse who examined the child testified that she had to work to control the outward expression of her feelings when she saw the child's buttocks because she had "never seen anything like it" in 19 years of nursing. She stated: "The bruising that I saw was a week old and it was consistent with what week old bruising would be as far as color, it was brownish, purple, yellow, green but the depth of this bruising I had never seen before on soft tissue." The prosecutor introduced photographs of the bruising and this Court has reviewed them; the photographs depict extensive bruising over the child's buttocks.

> (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

The victim's sister testified that the victim was screaming and crying during the incident and that this lasted about five to ten minutes. The victim testified that defendant apologized to him after the hitting, and he indicated that he believed that defendant told him not to talk about the incident. There was evidence that defendant admitted to taking out his anger on his son and evidence that he told his son "he would never do it again."

As in *Sherman-Huffman*, 241 Mich App at 267, the extent of the bruising in this case, along with the pain experienced by the child and the evidence of defendant's consciousness of guilt, adequately supported the jury's finding regarding the element of intent or knowledge. We note that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Moreover, "[a]n actor's intent may be inferred from all of the facts and circumstances . . . and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). We find no basis for reversal.

Defendant next contends that an error requiring reversal occurred when the victim's sister testified about an "improper other act" committed by defendant. This issue is unpreserved and is therefore reviewed under the plain-error doctrine. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009), amended on reh 485 Mich 686 (2009). To warrant reversal, there must have been a clear or obvious error that affected the outcome of the proceedings. *Id*. Moreover, the error must have resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity or reputation of judicial proceedings. *Id*. at 197.

The victim's sister testified that, several days after the spanking, she and defendant and the victim were in the checkout line at a grocery store when she said "move it" to the victim. She stated that, after they left the store, defendant reprimanded her and said, "I'm going to smack you so hard . . . ." She also testified that he said, "I want you the [f--k] out of my house . . . ."

We find that the sister's testimony does not require reversal, for two separate reasons. First, defense counsel raised the issue of the grocery-store incident as a matter of trial strategy. He argued in his opening statement that after the grocery-store incident, the children's mother decided to file a complaint against defendant for his alleged abuse of the sister, and only after this was unsuccessful did she come to the conclusion that the brother had been abused. Defense counsel was trying to impugn the mother's credibility and suggest that she was "out to get" defendant in any way she could. After the prosecutor elicited testimony about the grocery-store incident on direct examination, defense counsel delved into it and its aftermath in greater detail and further expounded on his theory in his closing statement.

Because defendant himself raised the issue, we decline to find a clear or obvious error in this case. See *People v Knapp*, 244 Mich App 377-378; 624 NW2d 227 (2001).

Secondly, given the evidence of extensive bruising, pain, and consciousness of guilt on the part of defendant, we cannot conclude that the testimony regarding the grocery-store incident affected the outcome of the proceedings. *Borgne*, 483 Mich 196.

Defendant also contends that defense counsel provided ineffective assistance of counsel by failing to object to the testimony regarding the grocery-store incident.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted; emphasis removed).]

Defense counsel's conduct did not fall below an objective standard of reasonableness because he used the grocery-store incident to try to impugn the mother's credibility regarding the hitting incident. Moreover, defendant has failed to demonstrate that the failure to object affected the outcome of the proceedings.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter