STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2018
v	No. 335796 Kalamazoo Circuit Court
DAVEETA LEE WALKER, Defendant-Appellant.	LC No. 2016-000850-FC

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions of two counts[1] of felony murder, MCL 750.316(1)(b); one count of first-degree child abuse, MCL 750.136b(2); and one count of torture, MCL 750.85. The trial court sentenced defendant to life imprisonment for the two counts of felony murder, 50 to 70 years' imprisonment for the child-abuse conviction, and 50 to 70 years' imprisonment for the torture conviction. The sentences are concurrent. We affirm defendant's convictions but remand this case for a modification of the judgment of sentence.

The convictions arose from the death of defendant's four-year-old child. She was found deceased on a makeshift mattress on March 26, 2016, after defendant inflicted injuries upon her the prior day. Testimony indicated that the victim died from a blood infection that was a complication of blunt-force trauma and being burned.[2]

Defendant argues that there was insufficient evidence adduced at trial to support the conviction for torture because the torture statute is inapplicable to custodial parents in regard to their minor children. Defendant further argues that there was insufficient evidence adduced at trial regarding defendant's *mens rea* for each of her convictions.

The de novo standard of review applies to challenges regarding the sufficiency of evidence; we view "the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Bennett*, 290 Mich App 465, 471; 802 NW2d 627 (2010).

[1] This case involved one victim, as discussed *infra*.

[2] The pathologist stated that the burning, the blunt-force trauma, or both led to the infection.

Questions of statutory interpretation are also subject to de novo review. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003).

Defendant argues that the torture statute is inapplicable to custodial parents concerning their minor children; she contends that the element of unlawful forcible restriction or unlawful forcible confinement is incapable of being met here. MCL 750.85(1) states:

> 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.

MCL 750.85(2)(b) defines "custody or physical control" as "the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority."

There was no dispute that defendant was the victim's lawful custodial parent. While it is true that "[p]arents have a right to autonomy in the control and upbringing of their children[,] . . . this right is not absolute." *People v Hicks*, 149 Mich App 737, 743; 386 NW2d 657 (1986) (citation omitted). In *People v Green*, 155 Mich 524, 533; 119 NW 1087 (1909), the Michigan Supreme Court stated:

> [I]t is the unquestionable right of parents and those in loco parentis to administer such reasonable and timely punishment as may be necessary to correct growing faults in young children; but this right can never be used as a cloak for the exercise of malevolence or the exhibition of unbridled passion on the part of a parent.

"Therefore, a criminal statute may not, constitutionally, interfere with the right of parents to administer normal (reasonable and timely) discipline to their children but such statute may prohibit discipline that is not reasonable and timely." *Hicks*, 149 Mich App at 743-744. Defendant's argument that the "without lawful authority" prong of the torture statute can never be met by the prosecution in cases involving a custodial parent and minor child is simply incorrect.

Moreover, the prosecution presented sufficient evidence to satisfy the prong. Defendant's alleged "discipline" of the very young victim was not reasonable and timely such that the torture statute was inapplicable. By way of background, we note that one witness testified that defendant limited the victim's water intake and would punish the victim for getting water by "giv[ing] her a whipping." The witness had observed defendant punish the victim before and had seen defendant use a belt on the victim four or five times. During these punishments with the belt, the victim would often "squirm around" because she did not want to be "whooped." This squirming caused the victim to be hit in various parts of her body with the belt, including her face.

Regarding the "discipline" that led to the child's death, defendant burned the victim with scalding water; her feet ended up blistering. In addition, shortly before the victim's death, defendant told a witness the victim had just received an "*ss whipping,"[3] and the pathologist found that the victim's pancreas was damaged and hemorrhaging as a result of "significant force." We note that, at death, the victim's body was covered with 40 to 50 scars, over 150 abrasions, over 10 contusions or bruises, over 25 individual burns, and four or five areas of internal hemorrhage. The evidence was sufficient to prove that defendant acted without lawful authority.

Defendant contends that there was insufficient evidence of the required *mens rea* for each conviction. Torture requires proof that a defendant had the intent to cause cruel or extreme physical or mental pain and suffering. MCL 750.85(1). "Cruel" is defined in the torture statute as "brutal, inhuman, sadistic, or that which torments." MCL 750.85(2)(a). Additionally, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient" to establish the defendant's state of mind, which can be inferred from all the evidence presented. *People v Ericksen*, 288 Mich App 192, 197; 793 NW2d 120 (2010).

Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found that defendant intended to cause cruel or extreme physical or mental pain and suffering because of the nature of the wounds on the victim and the brutality employed. A defendant's intent to cause serious physical harm to a victim can be inferred by the severity of the victim's injuries. See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (concluding that "the severity and the vastness of the victim's injuries were of consequence to the determination whether the defendants' acts were intentional"). The victim in *Mills*, 450 Mich at 71, "was burned over sixty percent of her body . . . ." Likewise, in this case, the victim's body had signs of serious injury. The victim had been burned, and her pancreas was damaged and hemorrhaging as a result of "significant force . . . ." In addition, defendant told the investigating detective that she liked to take very hot baths,[4] turned on only the hot water when giving the victim a bath, and purposefully let the scalding hot water hit the victim's feet and legs for two to three minutes because defendant was frustrated that the victim complained that the water was initially too cold. The evidence as a whole was sufficient to support the requisite *mens rea* for torture. See *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011) (concluding that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime") (quotation marks and citations omitted).[5]

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[3] Defendant told a police officer that she had "whooped" the victim on the morning of March 25, 2016, and "the whoopings continued."

[4] The officer stated that this led him to realize that defendant was aware of the extremely hot temperature of the water that emanated from the faucet.

[5] We note, too, that the victim was found to have been dehydrated, with sunken eyes and chapped lips. A witness testified that the victim had been drinking out of the toilet and stealing food out of the refrigerator and trash can.

Similarly, a reasonable jury could deduce from the evidence that defendant had the requisite intent for first-degree child abuse. MCL 750.136b(2) states: "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for life or any term of years." "Serious physical harm" is statutorily defined as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f). "The phrase 'knowingly or intentionally' modifies the phrase 'causes serious physical or serious mental harm to a child.' Thus, this language requires more from defendant than an intent to commit an act." *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). In *Maynor*, *id*., the Court held that "[t]he prosecution must prove that by leaving her children in the car, the defendant intended to cause serious physical or mental harm to the children or that she knew that serious mental or physical harm would be caused by leaving them in the car."

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant knowingly or intentionally caused serious physical or serious mental harm to the victim. Defendant told a detective that she was giving the victim a bath on March 25, 2016, and purposefully let the scalding hot water hit the victim's feet and legs for two to three minutes because defendant was frustrated that the victim complained that the water was initially too cold. Although defendant, at trial, issued a denial, the credibility of witnesses is for the jury to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). In addition, a family friend testified that shortly before the victim died, defendant texted her to come over before she hurt the child. Also, as noted above, the jury could infer from the nature of the victim's injuries, included the damaged pancreas, that defendant intended to cause the injuries that she inflicted upon her daughter. See *Mills*, 450 Mich at 71. Only minimal circumstantial evidence is required to establish intent and intent may be inferred from all the facts, including the nature of the injuries. *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997) (stating that the nature and extent of injuries is probative of intent); *Ericksen*, 288 Mich App at 197.

To possess the requisite intent for felony murder, defendant must have acted with malice. See, generally, *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006). "Malice is defined as an act done with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Id*. (quotation marks and citation omitted). Malice is also described as "an intent to create a risk of great bodily harm with knowledge that such is the probable result." *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). The facts and circumstances of a killing may lead to an inference of malice, and "[i]t is for the jury to determine whether the element of malice can be inferred from all the evidence." *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991).

From the evidence, a reasonable jury could infer that defendant acted with malice. Shortly before the victim's death, defendant told a witness that the victim, who was only four years old, had just gotten an "*ss whipping." The pathologist later found that the victim had a damaged pancreas as a result of "significant force . . . ." Defendant failed to seek medical attention for the victim even though she was in pain. In fact, defendant told her cousin that the victim's feet were burned during a bath and that the water was so hot it "melted her skin

instantly." This cousin told defendant that the victim needed to go to the hospital because people could die from third-degree burns. Defendant declined, saying that the police would "look at her funny." Defendant admitted to a detective that she let scalding water hit the victim's feet for two or three minutes on March 25, 2016. Another one of defendant's cousins described the victim as crawling to the toilet and using the wall to stand up on March 25. Yet another cousin testified that the victim had "bubbles on her feet" and was breathing abnormally that day. Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that malice existed during the events leading to the victim's death.

Defendant argues that if this Court vacates the felony-murder convictions on the basis of insufficient evidence but the torture or child-abuse convictions remain, this Court should remand for resentencing. However, there was sufficient evidence to convict defendant of torture, first-degree child abuse, and felony murder. Therefore, defendant is not entitled to resentencing.

Next, defendant argues that she was denied a fair trial by the trial court's denial of her request for a jury instruction on the lesser offense of involuntary manslaughter.

This Court reviews de novo issues of law arising from jury instructions. *Gillis*, 474 Mich at 113. A trial court's determination regarding whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *Id*. "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

Defendant claims that a rational view of the evidence supported a guilty verdict on the lesser offense. Common-law involuntary manslaughter is a necessarily-included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Therefore, when a criminal defendant is charged with murder, the trial court should provide an instruction on involuntary manslaughter if it is supported by a rational view of the evidence. *People v McMullan*, 488 Mich 922, 922; 789 NW2d 857 (2010). Reversal of a trial court's decision to omit a lesser-offense instruction is proper only if the offense was clearly supported by the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002) (opinion by TAYLOR, J.); *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002), rev'd in part on other grounds by *Mendoza*, 468 Mich 527. An offense is clearly supported when substantial evidence to support it exists. *Id.*; *Silver*, 466 Mich at 388 n 2 (opinion by TAYLOR, J.). The reviewing court must consider all of the evidence regardless of who produced it "to determine whether it provides a rational view to support an instruction on the lesser charge." *McMullan*, 488 Mich at 922.

"Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza*, 468 Mich at 536. In this case, the distinguishing element between murder and manslaughter is malice. *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004). "If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter." *Id*. at 21-22. A defendant is entitled to an involuntary manslaughter instruction only if a rational view of the evidence would have supported a finding that the victim's death was "caused by an act of 'gross negligence or an

intent to injure, and not malice . . . .' " *Gillis*, 474 Mich at 138, quoting *Holtschlag*, 471 Mich at 21-22. This is not the case here because the facts of this case do not rationally support an instruction on involuntary manslaughter. The evidence, as discussed throughout this opinion, demonstrates an egregious case involving malice, not a case of merely gross negligence or merely an intent to injure. *Id*.

The only evidence that defendant cites in support of her argument is her own testimony and the testimony of two of her cousins indicating that they did not believe the victim's injuries from March 25, 2016, needed immediate medical attention. Defendant also argues that she had no medical training to determine the extent of the victim's infection. However, the testimony of one of the cousins showed that the victim was acting very erratically on March 25, 2016. In fact, the victim had crawled to the toilet and used the wall to get up. The other cousin testified that the victim had "bubbles on her feet" and was breathing abnormally. And defendant admitted to another witness, after that witness told her that the victim needed medical attention, that she was not going to take the victim to a hospital because "the police would look at her funny."

At any rate, even if it was error for the trial court to not give the instruction, it was harmless.

> Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. [*People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).]

In *Zak*, *id*., this Court concluded that the jury's rejection of second-degree murder "reflect[ed] an unwillingness by the jury to convict on manslaughter and, therefore, the failure to so instruct constitutes harmless error." Here, the jury here was provided with an instruction on second-degree murder and ultimately convicted defendant of first-degree felony murder. The jury's rejection of second-degree murder in favor of convicting defendant of first-degree murder reflected an unwillingness to convict of a lesser-included offense such as manslaughter. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998); *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997).

Finally, defendant argues that her two felony-murder convictions constitute a double-jeopardy violation. We agree.

The prosecution concedes that multiple murder convictions arising from the death of one single victim violates the protections against double jeopardy. "Multiple convictions and sentences for a single crime violate the constitutional guarantees against double jeopardy." *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Thus, a plain error has occurred. The normal remedy for conviction of multiple offenses in violation of double-jeopardy protections is to vacate the lower charge. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001); *People v Franklin*, 298 Mich App 539, 546; 828 NW2d 61 (2012). However, upon conviction of first-degree premeditated murder and first-degree felony murder, the proper

remedy is to modify the conviction to specify that it is a single count of first-degree murder supported by two theories. *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011), remanded on other grounds 493 Mich 916 (2012). Because defendant's convictions are for first-degree felony murder, we conclude that defendant is entitled to the entry of a corrected judgment of sentence showing a conviction for one count of first-degree felony murder supported by two theories: torture and first-degree child abuse. See, generally, *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Additionally, a single sentence of life imprisonment without parole is affirmed. *Zeitler*, 183 Mich App at 71.

Defendant's convictions are affirmed but we remand this case for a modification of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra