STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2012
v	No. 301526 Eaton Circuit Court
MONIQUE DENICE JAMES, Defendant-Appellant.	LC No. 10-020222-FH

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree child abuse, MCL 750.136b(2), and third-degree child abuse, MCL 750.136b(4). The trial court sentenced defendant to concurrent prison terms of 6 to 15 years for first-degree child abuse and 365 days for third-degree child-abuse. Defendant appeals as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The four-year-old victim in this case was adopted by defendant. Shortly after the adoption, the victim began urinating and defecating in the house. On May 3, 2010, the victim suffered a severe brain injury that required immediate surgery to prevent death. She had other markings on her body indicative of abuse including grip marks on her upper arm, marks indicative of defensive bruising, and several hyper pigmented marks on her legs and buttocks that appeared to have been made with a looped belt or cord. Hair had also been pulled from three different locations on her head.

Defendant told responding officers that she had sent the victim upstairs to wash her hands and shortly thereafter heard a noise. She reported that she found the unresponsive victim lying on the floor near the sink. The faucet was running and a stool was turned over. Defendant later told a detective that she had pushed the victim while in the garage earlier that day and that the victim might have hit her head on a step. Defendant also claimed that the victim had fallen down the stairs and hit her head a few days earlier.

The victim's adopted sister and defendant's biological son recounted other instances of defendant's inappropriate conduct and abuse. The sister testified that all the children received "whoopings" with a belt and that the victim was punished "every day". The sister testified that the victim had to stand and eat at the dinner table and that she slept on the floor because she wet

the bed. She also said that the children had to do the "motorcycle" and the "cockroach, "which she described as painful positions that they were required to hold. The sister recounted that she once heard, but did not see, defendant push the victim down. In a videotaped interview of defendant's son, he described spankings he received from defendant while using a belt and a spatula and stated that the victim "got spankings all the time." He stated that defendant yelled at the victim, that she received "spankings" on her face, and that she was required to stand at the table because she urinated on the chairs. Further, he described the "motorcycle" and "cockroach" and stated that all the children had received this punishment. He claimed that the victim was thrown to the floor by defendant "lots of times."

Defendant acknowledged that she had spanked the victim on three occasions with a belt when other forms of discipline failed. She stated that the victim had fallen down the stairs a few days earlier. She admitted to having pushed the victim in the garage on the morning in question because she had dropped some clothes. Defendant stated that she did not mean to hurt the victim and that the victim seemed unaffected after the push. She said she was not sure if the victim hit her head. Defendant denied ever beating her children, and denied that the victim was not allowed to sit at the table or sleep in a bed, saying that on a few occasions she may have had to stand until her diaper could be changed or sleep on a pallet made of blankets while her bedding was being washed. Defendant testified that the victim ran constantly in the house and had fallen several times.

II. DEFENDANT'S CLAIMS OF EVIDENTIARY ERROR

Defendant first claims that the trial court abused its discretion in admitting the video recording of her son, and also in admitting expert testimony by Dr. Guertin without first conducting an evidentiary hearing to determine the reliability of the data on which he based his opinions. We find no error in the trial court's admission of this evidence; additionally, we conclude that any possible error resulting from the admission of this evidence was harmless.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion exists if the results are outside the range of principled outcomes. *Id*. A preliminary issue of law regarding admissibility based upon construction of the Michigan Rules of Evidence is reviewed de novo. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An error in the admission of evidence is not grounds for reversal unless, "after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009).

MRE 803(5) governs the admission of hearsay testimony under the "past recollection recorded" exception to the general hearsay rule. MRE 803(5) allows admission of

> (5) *Recorded recollection*. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into

> evidence but may not itself be received as an exhibit unless offered by an adverse party.

If the foundational requirements of this rule are met, a memorandum or writing may be admitted into evidence regardless of the availability of the declarant. *People v Daniels*, 192 Mich App 658, 667; 482 NW2d 176 (1991). The foundational requirements of MRE 803(5) are:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant, or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*Id.* at 667-668.]

Defendant argues that the foundational requirements for admission of the video recording were not met because defendant's son did not demonstrate a lack of recollection concerning all of the subjects he spoke about. We disagree. MRE 803(5) does not require proof that a witness is totally unable to recall a document's contents, but only that he "now has insufficient recollection to enable him to testify fully and accurately." *People v Missias*, 106 Mich App 549, 55l; 308 NW2d 278 (1981); see also *People v Clark*, 106 Mich App 610, 612-613; 308 NW2d 180 (1981).

Here, the foundational requirements of MRE 803(5) were satisfied. The statements concerned events that defendant's son had personally witnessed. He recalled talking to the detective but claimed he did not recall the substance of the testimony. The statement was not prepared by someone else but was his own video recorded statement. His testimony that he did not remember the "motorcycle" and "cockroach" rendered him unable to testify fully and accurately as to punishments suffered in his home. The trial court's statement to the effect that it believed defendant's son was simply unwilling to testify does not nullify this finding as the foundational requirements were met. The court did not abuse its discretion. Even if the trial court did err, defendant has not demonstrated that admission of the video recording was outcome determinative.

MRE 702 governs the admission of expert testimony and states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 imposes a "gatekeeper role" on the trial court. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004), citing *Daubert v Merrel Dow Pharms*, 509 US 579, 590 n 8; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The trial court must ensure that any expert testimony admitted at trial is reliable. *Id*. Although exercise of this gatekeeper role is within a

court's discretion, a trial court may neither abandon this obligation nor perform it inadequately. *Id*. The trial court's determination of reliability is a precondition to admissibility. *Id*. at n 46. The proponent of expert opinion evidence bears the burden of establishing admissibility under this standard. *Id*. The proponent must show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise, and that the opinion expresses conclusions reached through reliable principles and methodology. *Id*.

At trial, Dr. Guertin testified that it was extremely rare for a household fall to cause a head injury comparable to the victim's injury. In addition to referring to studies that concluded that the chance of such an injury from a fall was one in several thousand, he stated that he had never seen a household fall result in the death of a child. He noted multiple planes of injury and impact sites on the child's head, as well as her other injuries. He concluded that she had been abused.

Defendant argues that Dr. Guertin's testimony concerning the results of studies of children in household and playground falls was improperly admitted by the trial court without undergoing the vetting process demanded by *Gilbert*. We disagree. The trial court satisfied itself that "the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached." *Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 579; 633 NW2d 461 (2001). Guertin did not base his ultimate conclusion solely on the studies he referenced; he also relied on his years of experience, training, and specialized knowledge.

Contrary to defendant's assertion, the trial court did not abuse its discretion in admitting Dr. Guertin's testimony. The court was satisfied with regard to the reliability of Dr. Guertin's testimony. The court required Dr. Guertin to provide a foundation for his probability claims, which he did by referencing published studies. Whether expert testimony is based on published, peer-reviewed literature is an important factor in determining its admissibility. *Edry v Adelman*, 486 Mich 634, 640; 786 NWd2d 567 (2010).

We note that the study provided by defendant with her motion for a new trial does not substantively contradict the studies referenced by Dr. Guertin. The gist of Dr. Guertin's opinion was that life-threatening injuries from a fall are rare. Although the new article suggested there was a higher incidence of significant injury from a fall, it did not speak to life-threatening injuries per se and similarly concluded that significant injuries were unlikely. Although the article states that serious head injuries from stairway falls are perhaps more common than previously reported, it provides numerous reasons why the results of this study may have differed from previous studies and concludes that the most severe injuries are caused by adults dropping infants on stairs. The subject of medical testimony need not be known to a certainty. *Spect Imaging, Inc*, 246 Mich App at 579. The trial court did not abuse its discretion in failing to find Dr. Guertin's testimony unreliable. Dr. Guertin's opinion on the ultimate issue of abuse was based on sound methodology and principles. *Id*.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant alleges that defense counsel was ineffective in four instances: (1) counsel's failure to properly investigate the case and call exculpatory witnesses at trial; (2) counsel's failure to present an expert witness who would refute the prosecution's case; (3) counsel's failure to object to inadmissible evidence; and (4) counsel's failure to object to the jury instructions as given and failure to request a jury instruction on the lesser-included offense of second-degree child abuse.

To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id*. at 486.

A. Failure to Investigate and Call Witnesses

The failure to reasonably investigate can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation; however, the failure to interview witnesses does not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant claims that counsel's failure to call Dr. Batool Mir, her family physician, rendered the performance ineffective. Dr. Mir allegedly would have testified that she had not observed any signs of abuse on the children. Importantly, however, Dr. Mir last saw the children in March of 2010, before the behavioral problems with the victim had begun in earnest. There was no indication of how thoroughly they were examined. No testimony was elicited that established the victim's injuries took place before April 2010. Dr. Mir was not an eyewitness and could not provide exculpatory evidence to bolster defendant's case. Defense counsel could easily have concluded that there was no strategic benefit to be gained from calling Mir at trial. Even if trial counsel's failure to call Mir was not sound trial strategy, defendant has not demonstrated that a reasonable probability exists that, but for the failure to call Mir, the outcome of defendant's trial would have been different.

B. Failure to Retain an Expert Witness to Rebut the Prosecution's Expert Testimony

Defendant asserts that defense counsel erred in failing to consult and retain an expert witness to rebut the prosecution's expert witness. Evidence presented in response to defendant's motion for a new trial shows that counsel consulted an expert witness who, after a review of the records, indicated that he could not assist with expert testimony. Nonetheless, he assisted in preparing defendant's counsel for cross-examination of Dr. Guertin.

Defendant has not demonstrated that counsel's failure to locate an expert witness to testify in support of her theory of the case was based on lack of diligence or negligence. An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Failure to call a

witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id*. Mere speculation by a defendant that an independent expert could have provided favorable testimony is insufficient to show that retention of an expert would have altered the outcome of the trial. *Id*.

C. Failure to Object to the Introduction of Irrelevant and Prejudicial Evidence

Defendant contends that her trial counsel failed to object to the admission of Lutheran Social Services' Child Management Policy as irrelevant and prejudicial. Counsel is not required to raise meritless or futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). The evidence offered was relevant to show that defendant knew she was contractually prohibited from using any corporal punishment on the victim, which tended to show that the force she admitted using on the victim was not something she regarded as reasonable parental discipline. Additionally, it bore on her credibility, as it tended to make her claims that she did not habitually use physical force as a disciplinary measure or that she only used it as a last resort less credible, especially since the Child Management Policy provides that any problem with child management should be discussed with the social worker assigned to the case, which defendant admits she did not do.

The prosecution was required to prove that defendant's actions were not reasonable discipline. *People v Sherman-Huffman*, 466 Mich 39, 42; 642 NW2d 339 (2002). The evidence was thus logically related to a potential defense and defendant's credibility. The evidence was not of the type that would inflame a jury and divert them from an objective appraisal of defendant's guilt or innocence of the crimes charged. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Additionally, nothing in the record indicates that the introduction of the Child Management Policy was in any way outcome determinative.

D. Failure to Request a Jury Instruction on Second-Degree Child Abuse or to Object to the Jury Instructions as Given

Finally, defendant argues that counsel was ineffective in failing to object to the jury instructions as given or to request an instruction on second-degree child abuse. MCL 768.32(1), which she maintains is a necessarily included lesser offense of first-degree child abuse.

MCL 750.136b provides the elements of first and second degree child abuse:

> (2) 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 not more than 15 years.
>
> (3) A person is guilty of child abuse in the second degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.

(b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.

(c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

First-degree child abuse is a specific intent crime, requiring a criminal intent beyond the intent to commit the act such as the consequences of the act; second-degree child abuse is a general intent crime requiring merely the intent to do a physical act. *People v Maynor*, 256 Mich App 238, 241-242; 662 NW2d 468 (2003).

Assuming, without deciding, that second-degree child abuse is a lesser included offense of first-degree child abuse, defendant has failed to demonstrate a reasonable probability that the outcome would have been different if his attorney had requested the instruction. *Grant*, 470 Mich at 486. In finding that defendant knowingly or intentionally caused serious physical harm to the victim to support the first-degree child abuse conviction, the jury clearly did not find credible defendant's defense that the injury to the victim was an accident caused by pushing the victim out of frustration. Therefore, defendant was not prejudiced by her attorney's failure to request an instruction that defendant acted without the intent to cause serious injury.

E. Trial Court's Denial of Defendant's Motion for an Evidentiary Hearing

Defendant argues that her claims of ineffective assistance of counsel, at a minimum, require a *Ginther* hearing to allow her to develop a record concerning whether the actions of her counsel were sound trial strategy. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). However, the appellate record before this Court is sufficient to determine defendant's claim of ineffective assistance of counsel. See *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

IV. SCORING OF OFFENSE VARIABLE SEVEN

Defendant argues that the trial court abused its discretion by scoring offense variable (OV) 7 at 50 points for excessive brutality. We disagree.

A trial court's decision on the scoring of offense variables is reviewed by this court to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). A trial court's scoring decision will be upheld if there is any record evidence to support a particular score. *Id*.

OV 7 addresses aggravated physical abuse. It is to be scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The sentencing guidelines act and MCL 777.37 do not define the term "excessive brutality." In *People v Wilson*, 265 Mich App 386, 398; 695 NW2d 351 (2005), this Court upheld the scoring of 50 points for OV 7 when the victim was severely beaten over several hours by the defendant, requiring the victim to be treated at a hospital, confining the victim to a wheelchair for three weeks, and requiring her to walk with a cane for three additional weeks. The victim reported

pain for two months after the attack. *Id*. In the instant case, the victim suffered severe injuries requiring immediate skilled medical care to save her life. She was hospitalized for a long period of time and suffered injuries that will endure beyond her hospitalization. She was placed in life-threatening peril and potentially will be permanently disabled as a result of defendant's abuse. The severity of her injuries was such that, were it not for the promptness with which emergency medical personnel responded, she likely would have died. It is difficult to see how a child could suffer a more serious injury without dying as a result. Accordingly, the evidence adequately supports a finding that defendant acted with excessive brutality. Thus, the trial court properly exercised its discretion to score OV 7 at 50 points.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter