STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2013
v	No. 307488 Macomb Circuit Court
MELISSA ANNE MEMMER, Defendant-Appellant.	LC No. 2010-003256-FC

Before: SHAPIRO, P.J., and MURRAY and RONAYNE KRAUSE, JJ.

SHAPIRO, P.J. (*concurring*).

I agree that the trial court's refusal to give CJI2d 16.16(4) was not error and that the trial court did not prevent the jury from considering defendant's assertion that poor care by the child's post-injury caregiver was an intervening, superseding cause of the victim's death. Defendant was liberally permitted to question the caregiver based on non-testimonial statements that the caregiver had not provided adequate care to other children in her home. Moreover, the trial court permitted defense counsel to argue causation in closing, asserting that the child's post-injury caregiver had provided substandard care despite the fact that there was no medical testimony to support that claim and that to the contrary, all the medical testimony supported the prosecution's theory. Finally, the trial court did instruct the jury that they were to acquit the defendant if they did not conclude that the victim's death was the "natural or necessary result" of the defendant's acts.

I write separately, however, to note my disagreement with the majority's unnecessary and, I believe, incorrect analysis of the preservation issue. It is unnecessary because the majority opinion goes on to consider whether refusing to give the requested instruction constituted error, and I agree with the majority's conclusion that it was not error. Despite our unanimity on the substantive issue, however, the majority concludes it must address the preservation issue and so I am unfortunately obligated to do so as well.

I would, first, conclude that we should not address the question whether defendant preserved the objection below, because on appeal, the prosecutor has abandoned the issue. Though the prosecutor's brief on appeal asserted that defendant failed to preserve the objection, at oral argument the prosecution changed its position. The prosecutor appearing before this Court explicitly conceded the issue and expressly stated that defendant had preserved the claim of instructional error. I see no reason to reject that explicit concession which was made

knowingly, intelligently and voluntarily by the prosecutor when she argued her case to this Court and I know of no case that would allow, let alone require, that we ignore that concession. [1]

Second, I believe the majority is applying a double standard by excusing the prosecutor's clear and unequivocal waiver of an issue at oral argument while holding defendant to a duty to preserve that goes well beyond what is actually required. In this case, defense counsel repeatedly asked the court to give the instruction in question and consistent with the reasons for which we require preservation, the trial court heard argument, considered the issue and made a ruling on the record. However, once the trial court declined to give the requested instruction, defense counsel was obligated to attempt to obtain the best alternative for his client. Neither the prosecution nor the trial court stated that by eventually acquiescing in a different instruction, after having been explicitly denied the instruction it wanted, that the defense retroactively waived its initial request or that its agreement to the less desirable alternative was conditioned on its abandonment of the instruction it really wanted.

Because I believe the majority has employed a double standard I cannot join the portion of the opinion addressing whether defendant adequately preserved his instructional objection at the trial court, or its ready dismissal of the prosecutor's concession at oral argument. In all other respects I concur.

/s/ Douglas B. Shapiro

---

[1] The majority's sole authority for doing so is a citation to *Zantop Airlines v Eastern Airlines*, 200 Mich App 344 (1993) which does not remotely bear on the issue of an explicit concession of an issue on the record. It merely says that "counsel's arguments are not evidence." I have not suggested that the prosecutor's statement was "evidence." Indeed, no "evidence" is admitted at an appellate oral argument. What the prosecutor did was orally concede an issue it had briefed.