

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

LEON EDWARD BRITTON,

Defendant-Appellant.

No. 307738
Wayne Circuit Court
LC No. 11-002906-FH

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree child abuse, MCL 750.136b(3). Defendant was sentenced to five years' probation, with 100 days in jail, for his conviction. For the reasons set forth in this opinion, we affirm.

I. FACTS.

This case arises from allegations that defendant abused several of his children. On April 7, 2011, the prosecution provided notice to the trial court that it intended to use other acts evidence of defendant's uncharged misconduct during trial. The prosecution sought to introduce testimony from defendant's other children regarding defendant's allegations of past misconduct. The prosecution sought to introduce the following acts of misconduct: 1) that defendant punished his daughter by requiring her to remove all of her clothing and stand in the cold garage while defendant poured cold water on her naked body; 2) defendant held his son's hand over a light bulb as punishment; 3) defendant has required the children to take cold showers and baths as punishment; 4) defendant required his daughter to run outside in the cold without a jacket as punishment; 5) defendant smacked his daughter's hands with a belt as punishment; and 6) defendant withheld food from his son as punishment. The prosecution sought to admit the other acts evidence to prove defendant's absence of mistake or accident. In addition, the prosecution sought to show that defendant intended to commit the act charged, and that he followed a common scheme, plan or system involving abuse when he purports to discipline his children.

Defendant submitted an answer to the prosecution's motion to admit other acts evidence. Defendant objected to the introduction of testimony by the children that included alleged acts of misconduct and contested the admissibility of each allegation offered by the prosecutor in its motion. Defendant argued that the allegations were not relevant, failed to establish any common scheme or plan, failed to prove that there was an absence of mistake or accident, and were highly

prejudicial with no probative value. The trial court granted the prosecution's motion to admit testimony of defendant's uncharged acts of misconduct, pursuant to MRE 404(b)(1).

At trial, complainant testified that defendant disciplined her on several occasions. Specifically, on January 11, 2011, defendant woke her up in the middle of the night and walked her to the foyer of the house. Complainant, who was eight years old at the time of the incident, was wearing a robe, long john shirt, long john pants, and slippers. Defendant told her to take off her slippers and to put on his sneakers, he then took her outside and pushed her into the snow. He then ordered complainant to take off all clothes and shoes, and he took the items into the house. Defendant forced complainant to wait outside in her socks for about 10 to 20 minutes, after which he took a pot of cold water and threw it on her while she was standing outside naked.

On January 12, 2011, defendant dropped the complainant off at the house of her grandmother, Annette Harper. The complainant told Harper that her feet were hurting so Harper proceeded to take off the child's socks, whereupon she observed the child's feet were "terribly, terribly, terribly red." Harper and the complainant's mother, Selina Gadsden, took complainant to the emergency room for treatment and doctors diagnosed her with first-degree frost bite. After leaving the hospital, they went to the Romulus Police Station and made a police report.

Complainant also testified to several other instances where defendant disciplined her and her two brothers. She testified that defendant previously punished her by pouring cold water on her in January 2010. Defendant also allegedly punished his children by making them take cold showers and baths. In addition, testimony revealed that defendant disciplined complainant by making her run outside in the cold without a jacket and spanking her hand with a belt until her finger bled.

Several other people testified to defendant's misconduct. Gadsden testified to being aware of prior incidents where defendant punished her daughter. In addition, she testified to knowing about defendant's misconduct that resulted in the complainant's first-degree frost bite diagnosis. Kimberly Hoskins, a Michigan Department of Human Services Protective Services Investigator, testified at trial as well. Hoskins testified that she spoke with the complainant about the alleged incident where defendant poured water on her. In addition, Hoskins testified to speaking with defendant about his other alleged incidents of misconduct. She testified that defendant was previously under investigation for child neglect and that he received some rehabilitative services through Professional Outreach Counseling Services.

Defendant was convicted and sentenced as stated above. This appeal then ensued. On appeal, defendant argues that the trial court abused its discretion by admitting evidence concerning defendant's other acts of uncharged misconduct.

II. ARGUMENT AND ANALYSIS.

Where a decision involves a preliminary question of law, such as whether a rule of evidence precludes admission, this Court reviews the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A trial court's decision to exclude bad acts evidence is reviewed for an abuse of discretion. A trial court abuses its discretion when it chooses an

outcome falling outside the range of principled outcomes. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

“To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is not simply evidence of the defendant’s character or relevant to his propensity to act in conformance with his character.” *Mardlin*, 487 Mich at 615. “Evidence relevant to a noncharacter purpose is admissible under MRE 404(b) even if it also reflects on a defendant’s character.” *Id.* “Any undue prejudice that arises because the evidence also unavoidably reflects the defendant’s character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its ‘probative value is substantially outweighed by the danger of unfair prejudice.’” *Id.* at 616. “Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes.” *Id.*

As previously stated, the prosecution sought to admit defendant’s other acts evidence to prove that he followed a common scheme, plan, or system involving the abuse of his children. To establish the relevance of bad acts evidence through a showing of a plan, scheme, or system, the bad acts must be “sufficiently similar” to the acts at issue to support an inference that they are manifestations of a common plan, scheme, or system. To meet this criterion of similarity between the other acts and the fact to be proved, there must be a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. *People v King*, 297 Mich App 465, 477; 824 NW2d 258 (2012), quoting *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Defendant argues that the trial court abused its discretion by allowing complainant, Kimberly Hoskins, and Selina Gadsden to testify concerning additional acts of misconduct. However, the testimony was consistent with the prosecution’s motion concerning the prosecution’s intent to introduce other acts that establish a common plan, scheme, or system. At trial, complainant testified that defendant allegedly punished her and her brothers by making them take cold showers and baths. Defendant allegedly punished complainant by pouring cold water on her while she stood outside in extremely cold weather, made her run outside in the cold without a jacket, and spanked her hand with a belt until her finger bled. Finally, complainant testified to defendant hitting her older brother, Leon Britton, Jr., who is currently an adult, with a belt. The testimony concerning defendant’s other acts of misconduct demonstrate that he would regularly discipline his children by exposing them to extreme winter temperatures and physically harming them. In addition, the testimony proves that defendant would regularly pour cold water

on complainant as punishment for her behavior. Therefore, the testimony concerning defendant's prior misconduct is "sufficiently similar" to the acts at issue and establishes that defendant follows a common scheme, plan, or system in abusing his children. Thus, the trial court did not abuse its discretion in allowing complainant's testimony concerning defendant's additional acts of misconduct.

The trial court similarity did not abuse its discretion in allowing the witnesses, Hoskins and Gadsden, to testify to other instances of defendant's misconduct toward his children. The trial court, by motion, permitted the prosecution to introduce additional acts of uncharged misconduct. Defendant argues that the trial court erred in allowing Hoskins to testify that defendant was previously under investigation for child neglect and that defendant received some rehabilitative services. However, the testimony provided context on why Hoskins conducted the investigation and the procedure that the government takes when there is an allegation of child abuse. In addition, Hoskins and Gadsden corroborated complainant's testimony with their own account of defendant's misconduct toward his children. Therefore, the trial court did not abuse its discretion because Hoskins's and Gadsden's testimony demonstrated a common scheme, plan or system, an absence of mistake, and that defendant abused his children in the past.

Defendant also argues that defense counsel's failure to object to the additional witness testimony deprived him of the effective assistance of counsel.

This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error. *Id.*; MCR 2.613(C). Questions of constitutional law are reviewed by this Court de novo. *Id.*

Defense counsel's failure to object to the additional witness testimony did not deprive defendant of the effective assistance of counsel. There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Johnson*, 293 Mich App at 90; *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

First, defendant must show that defense counsel's performance was below an objective standard of reasonableness under prevailing norms. *Leonard*, 224 Mich App at 592. Defendant alleges that defense counsel's performance was below an objective standard of reasonableness because he failed to object to testimony that was not listed in the Prosecution's Notice of Intent to Use Other Acts of Uncharged Misconduct. Defendant argues that defense counsel failed to object when complainant testified that defendant whipped her older brother, Leon, Jr., who is now an adult, with a belt. In addition, defendant argues that defense counsel failed to object to Gadsden's testimony that she was aware of prior incidents of punishment involving defendant

and complainant. Finally, defendant argues that defense counsel failed to object to Hoskins's testimony concerning previous incidents of alleged child abuse and that defendant was substantiated for child neglect.

Even assuming that trial counsel's failure to object fell below an objective standard of reasonableness, defendant cannot demonstrate that but for counsel's errors the result of the proceedings would have been different.¹ *Leonard*, 224 Mich App at 592. Defendant has failed to prove that the result of the proceedings would have been different if the alleged acts of misconduct were excluded. Defendant has not explained how the trial proceedings would have been altered, but for the alleged error. Additionally, as more thoroughly stated below, our review of the record leads us to conclude that even if we expunge the evidence that defendant cites as his basis for a finding of ineffective assistance of counsel, there was sufficient legal evidence presented for a rational trier of fact to find defendant guilty of child abuse. Therefore, defendant has failed to show how the alleged error would have altered the outcome of the proceedings.

Finally, defendant argues that the prosecution failed to prove that defendant knowingly or intentionally performed an act likely to cause serious physical or mental harm to complainant.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo on appeal. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). The Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* In addition, the Court must not interfere with the jury's role as the sole judge of the facts. *Id.*

"[S]econd-degree child abuse occurs if a person "knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results." MCL 750.136b(3)(b); *People v Maynor*, 256 Mich App 238; 662 NW2d 468 (2003). Thus, second-degree child abuse is an example of a general intent crime." *Id.*

There was sufficient evidence for a rational trier of fact to conclude that defendant "knowingly or intentionally" committed an act likely to cause serious physical or mental harm to complainant. On January 11, 2011, while it was snowing outside, defendant took complainant outside and pushed her into the snow. Complainant was told to take off her clothes and shoes, and defendant took the items into the house, leaving her outside naked. Then, defendant forced complainant to wait outside for about 10 to 20 minutes. Defendant came back outside with a pot

¹ For purposes of deciding this appeal, we presume counsel's conduct fell below an objective standard of reasonableness; however, we also find that complainant's testimony reaffirmed many of the alleged instances of misconduct listed in the prosecution's motion. Additionally, Gadsden's and Hoskins's testimony was proper because their testimony corroborated complainant's account of defendant's misconduct. Thus we could hold that defense counsel's failure to object to Hoskins's testimony was not unreasonable because Hoskins provided context to the government procedures when there is an allegation of parental neglect or misconduct.

of cold water and threw it on complainant while she was naked and standing outside. Complainant testified to crying after defendant threw her into the snow and after defendant threw cold water on her naked body. As a direct result of defendant's actions, complainant suffered severe frost bite. Considering complainant's testimony, it was reasonable for a jury to conclude that defendant knew that forcing her to stand in the cold without clothes could cause serious physical or mental harm. In addition, defendant prevented complainant from coming in the house after he threw cold water on her. It was reasonable for the jury to conclude that throwing cold water on a person in the middle of winter would cause injuries such as frost bite. In addition, defendant intentionally attempted to punish complainant by exposing her to extreme temperatures. Therefore, viewing the evidence in the light most favorable to the prosecutor, there was sufficient evidence for a rational trier of fact to conclude that defendant knowingly and intentionally committed acts likely to cause serious physical or mental harm to complainant.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray