

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON TORAY WILLIAMS II,

Defendant-Appellant.

UNPUBLISHED
November 29, 2005

No. 256123
Wayne Circuit Court
LC No. 03-013127-01

Before: Cavanagh P.J., and Smolenski and Zahra, JJ

PER CURIAM.

Defendant appeals as of right his bench trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to 13½ to 25 years in prison. We affirm.

I. Basic Facts and Procedure

On November 7, 2003, Andrea Semeniuk asked her cousin, Raquel Kopsolias,¹ and Raquel's boyfriend, defendant, to babysit her two children, four-month old Ashton, the decedent in this case, and two-year old Lydia. Raquel and defendant lived together in an apartment located in Brownstown. Andrea brought the children to Raquel and defendant at approximately 8:00 p.m. on November 7, 2003. The children were to stay overnight, and Andrea was to pick them up the next morning before 9:30 a.m. On November 8, 2003, at approximately 8:00 a.m., Raquel went to a local grocery store to call Andrea from a pay phone. Raquel implored Andrea to come pick up the children because Ashton would not stop crying. Defendant remained at home with Ashton and Lydia.

Andrea called her mother, Lisa Semeniuk, to pick up Ashton and Lydia from Raquel's apartment. Lisa and her daughter Katie traveled to Raquel's apartment to pick up Ashton and Lydia. When Lisa and Katie arrived, Katie observed Ashton to be in an abnormally deep sleep. Ashton's head was "flung back like he wasn't alive" and his eyes were closed. Defendant took Ashton outside and placed Ashton in a car seat in Lisa's vehicle. After Ashton was placed in the

¹ "Raquel" is often referenced as "Raquez" in the transcripts.

car seat, Lisa picked him up and placed him on her shoulder. Ashton made an “odd cry,” his whole body stiffened, and he went limp. Lisa attempted to give Ashton a pacifier, but he would not take it. Ashton’s eyes also rolled in his head when he opened them.

Ashton was taken to Oakwood Heritage Hospital, where he was given a CAT scan. Physicians at Oakwood determined that Ashton was suffering from a severe brain injury. Ashton was placed on a respirator and flown to Motts Children’s Hospital (“Motts”) in Ann Arbor. When Ashton arrived at Motts, he was in critical condition. Dr. Edward Walton, a pediatric emergency physician, was Ashton’s attending physician. Dr. Watson also determined that Ashton suffered a skull fracture. Dr. Watson concluded that, given Ashton’s age and lack of motor skills, the head injury was caused by an adult. Dr. Watson opined that Ashton’s injury was consistent with Shaken Baby’s Syndrome. Ashton also suffered a fractured left leg and a fracture in his right arm. The arm and leg injuries were caused by traction force on the arm and leg, i.e., someone pulling on the arm and leg.

Over the next two days Ashton’s condition continually deteriorated. Ashton died on November 10, 2003. An autopsy revealed that the cause of death was loss of consciousness caused by brain swelling. The Medical Examiner determined that Ashton had been violently shaken, causing his head to snap back and forth. The Medical Examiner concluded that the manner of death was homicide.

After Ashton’s death defendant volunteered to be interviewed by the Michigan State Police regarding Ashton’s death. Defendant wrote a statement indicating that on the morning of November 8, 2003, Raquel went to call Andrea from a pay phone. Defendant indicated that Lydia was on a couch playing near Ashton. Defendant recounted that Lydia fell off the couch and landed on Ashton. Defendant’s written statement indicated that defendant snatched Ashton up, causing Ashton to hit his head on the base of the couch. Defendant indicated that he made sure that Ashton was okay and placed him in his playpen. He informed Raquel of the incident when she returned home after calling Andrea.

Defendant was later interviewed by the Brownstown Police Department. On this occasion, defendant stated that he picked up Ashton violently after Lydia fell on Ashton and pulled Ashton toward defendant’s chest. Defendant indicated that Ashton “shot out” of his arms into the air and fell, hitting his head on the carpet. As defendant attempted to pick Ashton up by his feet, Ashton’s head struck a wooden portion of the couch. After Ashton’s head struck the wooden portion of the couch, Ashton appeared to be unconscious. Defendant began to shake Ashton back and forth to attempt to determine Ashton’s consciousness. Ashton woke up after defendant shook him a few times “did a high pitched squeal,” bucked his head back, and went limp. Defendant picked Ashton up, caressed his head until he heard a faint whimper, placed Ashton in the playpen, and changed Ashton’s diaper.

Raquel was also interviewed after Ashton’s death on November 10, 2003. She indicated that on November 8, 2003, in the early morning hours, she woke up to attempt to feed Ashton. She stated that as she held Ashton and prepared his bottle, she dropped him and his head hit a corner on the kitchen sink. As Ashton fell, Raquel attempted to grab his leg and arm, attempting to catch him before he hit the floor. She put Ashton back in his crib roughly and patted his back until he went to sleep.

The trial court found that defendant shook Ashton and that defendant's actions were "some level of child abuse." The trial court found that defendant "knowingly created a very high risk of death or great bodily harm knowing that death would be the likely result of his action." The trial court also found that defendant acted with wanton and willful disregard for the likelihood that death or serious injury would result from defendant's conduct. The trial court indicated that it believed that defendant unlawfully injured Ashton and started a series of events that resulted in Ashton's death. The trial court stated that it was convinced beyond a reasonable doubt that defendant was guilty of second-degree murder. This appeal followed.

II. Impeachment by Use of Defendant's Prior Statements

Defendant first argues that the trial court erred in allowing the prosecution to impeach his testimony with evidence of his prior convictions. Defendant has waived this issue for appellate review. A defendant may waive a broad array of constitutional and statutory rights. Although some rights cannot be waived without a defendant's full and publicly acknowledged consent, other rights may be waived by counsel. Absent a showing of ineffective assistance of counsel, counsel's decisions regarding what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence are binding on the defendant. *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000). Because defense counsel acquiesced to the trial court's decision regarding the admission of impeachment evidence and stated that his objection and subsequent motion for reconsideration were moot, defendant has waived appellate review of this issue. *Carter, supra*, pp 218-219. "Because any objections were waived, there are no errors [for this Court] to review." *People v Ortiz*, 249 Mich App 297, 310-311; 642 NW2d 417 (2001).

III. Effective Assistance of Counsel

Defendant also argues that defense counsel's failure to object to the admission of his prior convictions as impeachment evidence denied him the effective assistance of counsel. We disagree.

A. Standard of Review

Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Questions of constitutional law are reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness, (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight. Moreover, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defense counsel's failure to object to the admission of defendant's prior convictions as impeachment evidence did not deny defendant the effective assistance of counsel. The testimony regarding defendant's prior convictions was not elicited during the prosecution's case-in-chief, but rather, to rebut defendant's claim that he was a "fair tempered" person and that "[police] don't care who pays for [a crime], as long as somebody pays for it." Evidence of other crimes that is not admissible under MRE 404(b) or MRE 609 is nonetheless admissible where it is offered to rebut specific testimony offered by the defendant at trial. *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985). Therefore, any objection to the admission of the impeachment evidence would have been futile. Because a defense counsel need not make a meritless motion or a futile objection, defense counsel's failure to object on these grounds did not constitute ineffective assistance. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).²

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

² Even if defense counsel had erred, however, defendant cannot demonstrate that, but for defense counsel's error, the result of the proceeding would have been different because the evidence against defendant was overwhelming.