STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2004
v FRANK LEWIS ADAMS, JR., Defendant-Appellant.	No. 244314 Oakland Circuit Court LC No. 02-183679-FC

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of felony murder, MCL 750.316(b), armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for felony murder, twenty-three to fifty years for armed robbery, six to ten years for assault with intent to do great bodily harm less than murder, and two years, with 209 days credit for time served, for each felony-firearm count. We affirm.

The charges arise out of the robbery and shooting of Tracey Kinsey, who was 25 ½ weeks pregnant at the time. Kinsey was shot in the stomach. An emergency Caesarean section was performed and the baby lived for a little over an hour. Defendant gave police a statement asserting that the shooting was accidental. At trial, he offered an alibi defense, maintaining that he gave the earlier inculpatory statement because the true perpetrator, who used the gun in a subsequent robbery, threatened defendant's family.

Defendant first contends that the prosecution presented insufficient evidence to convict him of felony-murder. In assessing a sufficiency claim, this Court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

The elements of felony murder are:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery].

> [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (brackets in original).]

Defendant challenges only the first element, claiming that he did not kill a human being because the baby was not born alive and thus was not a "person."

This Court addressed a similar issue in *People v Selwa*, 214 Mich App 451; 543 NW2d 321 (1995), and determined that a child is born alive and thus, is a human being, if

> following expulsion or extraction from the mother, there is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions. [*Id*. at 464 (emphasis original)].

The *Selwa* Court also stated:

> The necessity of medical intervention to revive or bring one to life does not preclude a finding that a person is alive. Otherwise, the use of the word "irreversible" becomes meaningless. [*Id*. at 469.]

Under the *Selwa* irreversible cessation of respiratory and circulatory function or brain function standard, there was sufficient evidence to support a finding that the baby was born alive. In *Selwa*, this Court stated that the fact that the baby had a heart rate and spontaneously breathed negated a finding of death and thus was evidence of life. *Selwa*, *supra*, at 469. Here, the evidence presented at trial showed that the baby had a heartbeat, and that although she was on a respirator, she took at least one independent breath. These signs of life, including a slightly improved skin color, resulted in a positive Apgar score.[1] In fact, the baby had a higher Apgar score, three, than the baby in *Selwa*, who scored a two. The baby's improved heartbeat and color, and the evidence that there was some independent breathing was adequate to support a finding that the initial cessation of respiratory and circulatory functions at birth was not irreversible.

Defendant next claims that the jury instructions were insufficient. Upon a review of the instructions in their entirety, together with the arguments of counsel, we are satisfied that the jury understood that in order to convict defendant, it had to find that the baby was born alive, and that it was thus aware of all the essential elements of the offense. Further, defendant did not request that the jury be instructed more extensively on this issue.

Defendant also claims that his trial counsel provided ineffective assistance. We disagree. Because there has been no *Ginther*[2] hearing, our review is limited to mistakes apparent in the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). Claims of

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[1] An Apgar score is a system for assessing a newborn's status immediate after birth. The system includes five measures: 1) the heart rate; 2) the baby's muscle tone; 3) the breathing effort; 4) reflex/response to stimuli; and 5) the baby's color. Each element is judged on a zero to two scale (two being the best score). The best possible Apgar score is ten.

[2] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). The Supreme Court articulated the test for ineffective assistance claims in *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994):

> In order to succeed on such a claim, the defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

Based on the existing record, defendant did not meet this heavy burden.

Defendant first claims that counsel was ineffective for failing to call a "false confession expert." A counsel's decision whether to call a witness is presumed to be a matter of trial strategy. This Court will not substitute its judgment for counsel's on such matters. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, without an offer of proof, this Court has no way of knowing what the potential witness would testify to. It is possible that the potential expert's testimony would have been contrary to defendant's case and claims. Defendant has not established the factual predicate for his claim, and has not demonstrated that the results of the case would have been different had counsel called an expert. *Ackerman*, *supra*, at 455-456.

Defendant next claims that counsel was ineffective for failing to object to the felony murder instructions because they did not specifically instruct the jury that they had to find the baby was born alive, and that counsel was ineffective for waiving any objections to the jury instructions. Because we conclude that the instructions given by the court, together with counsel's argument, fairly informed the jury that it had to find that the baby was born alive in order to convict, and thus sufficiently protected defendant's rights, defendant cannot show the requisite prejudice to support a finding of ineffective assistance. Further, the decision not to request an instruction specifically setting forth the *Selwa* test - - that there is lacking an *irreversible* cessation of respiratory and circulatory functions or brain functions - - appears to have been a matter of trial strategy where counsel focused on the phrase "born alive" and the evidence that the baby was not born alive and did not breath on her own. We will not second guess matters of trial strategy. *Ackerman*, *supra*, at 455.

Defendant's next claim is that counsel was ineffective for failing to request the entire witness identification jury instruction. It seems from counsel's statement that he did not wish to focus the jury's attention on the identification issue as a matter of trial strategy. This Court will not disturb counsel's strategic decisions. *Id.* Even assuming that counsel failed to consider the instruction at all, defendant has not shown the necessary prejudice needed to prove ineffective assistance. Substantial evidence existed against defendant. This evidence included defendant's confession to the police and confessions to other individuals. Defendant has not shown that, but for the failure to request this instruction, the outcome of this case would have been different. Therefore, he has not established that counsel provided ineffective assistance. *Ackerman*, *supra*, at 455-456; *Stanaway*, *supra* at 687-688.

Finally, defendant claims that counsel was ineffective due to his cumulative errors. As outlined, *supra*, there are no trial errors concerning ineffective assistance to aggregate and deny defendant a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002); *Ackerman*, *supra*, 257 Mich App 454. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski