

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2012

v

ERROL LOUIS MARTIN,

Defendant-Appellant.

No. 293703
Wayne Circuit Court
LC No. 08-014328-FC

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). He was sentenced to concurrent prison terms of life without parole for the murder conviction, and 10 to 15 years for the child abuse conviction. We affirm.

I. BACKGROUND

Defendant's convictions arise from the July 10, 2008, death of 22-month-old Jaeshawn Profit, who was the son of defendant's intermittent girlfriend, Marquisha Profit. Jaeshawn was found dead inside of defendant's house with second-degree burns and both internal and external bodily injuries. Wayne County Assistant Medical Examiner Dr. Leigh Hlavaty found that there were three injuries to Jaeshawn that either individually or collectively caused his death: (1) blunt force trauma to the head; (2) blunt force trauma to the abdomen; and (3) scalding burns and swelling of the airway caused by steam inhalation. Dr. Hlavaty testified at trial that Jaeshawn died within minutes of sustaining any of the three injuries.

It was the prosecution's theory that defendant inflicted Jaeshawn's fatal injuries because defendant was the only person who had custody of Jaeshawn during the relevant period. Defendant admitted to washing Jaeshawn with hot water, and hitting him twice on the backside. The defense argued, however, that Marquisha had previously inflicted the fatal injuries, and that Jaeshawn was already dying when Marquisha left him in defendant's care. It was revealed during the preliminary examination that Marquisha had struck Jaeshawn on various occasions in the past. At trial, however, the trial court limited evidence of Marquisha's abuse of Jaeshawn to abuse during the 24-hour period preceding Jaeshawn's death based on Dr. Hlavaty's opinion that Jaeshawn died shortly after the fatal injuries were inflicted, and Marquisha was not with

Jaeshawn at that time. At trial, the defense did not offer expert testimony related to Jaeshawn's cause of death.

After defendant was convicted, he filed a motion for a new trial in which he argued that trial counsel was ineffective for failing to present expert testimony regarding the cause and timing of Jaeshawn's death. Defendant argued that trial counsel should have presented a forensic pathology expert to dispute Dr. Hlavaty's findings, and should have challenged the admissibility of Dr. Hlavaty's testimony under MRE 702 on the ground that she failed to follow protocol when conducting the autopsy. Defendant further argued that the absence of an independent expert affected the trial court's evidentiary ruling limiting evidence of Marquisha's history of abusing Jaeshawn. Defendant submitted the affidavit of Oakland County Chief Medical Examiner Dr. L. J. Dragovic, who averred that Dr. Hlavaty's opinion that Jaeshawn died within minutes of sustaining any of the injuries either was not supported by the evidence, or was not based on proper testing protocols. At an evidentiary hearing, Dr. Dragovic testified that Jaeshawn likely sustained his abdominal injuries several hours before his death, and suffered his head injuries one or two days before his death.

Also testifying at the evidentiary hearing was defendant's trial counsel, who testified about his decisions and trial strategy, and three forensic pathologists—Dr. Hlavaty, Dr. Dragovic, and an independent pathologist retained by the prosecution, Dr. Michael Caplan. All three experts concurred that Jaeshawn's abdominal injuries alone would have been fatal. However, the three experts disagreed on the post-injury survival interval. While Dr. Hlavaty's survival interval of a few minutes was discredited to some extent, Dr. Caplan testified that Jaeshawn likely would have died within an interval of minutes to hours, but more likely a matter of minutes. Defendant's expert, Dr. Dragovic, opined that Jaeshawn died within several hours of receiving the fatal abdominal injuries. Following the evidentiary hearing, the trial court denied defendant's motion for a new trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant first argues that he is entitled to a new trial because trial counsel's performance was objectively deficient where he failed to present an expert witness regarding the cause of death and the post-injury survival interval. We disagree.

Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law, and the trial court must first determine the facts and then decide whether those facts demonstrate a violation of the defendant's constitutional right to the assistance of counsel. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (internal quotation marks omitted).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results

of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that trial counsel's asserted reasons for failing to present or even confer with an independent forensic expert were misguided and implausible. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

At the evidentiary hearing, trial counsel explained that his decision not to consult with an independent forensic pathologist was a tactical choice, primarily based on admissions that defendant had made to him at the outset. According to trial counsel, defendant reported that he was upset because he loaned Marquisha his car, she was not answering his telephone calls, and he later learned that she was actually with another man while he had custody of her son, Jaeshawn. After smoking some marijuana, defendant took his feelings out on Jaeshawn. Defendant told counsel that as Jaeshawn was on the floor, he stomped on him with his foot and beat him with his fists. Counsel was aware that defendant had sole custody of the child for a "considerable period of time." Given the information about defendant's actions and custody of Jaeshawn, counsel decided to forego consulting with an independent expert because of his concern that the witness might actually support the prosecution's theory that defendant positively caused the fatal injuries. Instead, counsel crafted a strategy of demonstrating reasonable doubt by showing that Marquisha had hit Jaeshawn earlier that day as he sat in his car seat, thereby showing that Marquisha might have caused the child's fatal injuries. Counsel did, in fact, make those arguments at trial.

The trial court found trial counsel's testimony regarding defendant's admissions and his reasons for proceeding as he did to be credible. Considering the trial court's superior ability to judge the credibility of witnesses who appear before it, we defer to the trial court's conclusion that trial counsel's version of events was believable and that defendant made the unfavorable admissions to counsel. See MCR 2.613(C); *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000). Indeed, there is nothing to contradict trial counsel's testimony. Accepting trial counsel's testimony as true, defendant admitted to gravely harming Jaeshawn, and an independent forensic expert could have very well been detrimental to the defense. It is clear from trial counsel's questions, remarks, and arguments throughout trial that he consistently and vigorously sought to inject reasonable doubt by arguing that Marquisha might have caused the child's fatal injuries.

To the extent that defendant claims that trial counsel's approach was misguided and not successful, nothing in the record suggests that trial counsel's strategy was unreasonable or prejudicial under the circumstances. Counsel's decisions about what witnesses to call and what evidence to present were matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.

People v Rice (On Remand), 235 Mich App 429, 445; 597 NW2d 843 (1999). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not overcome the strong presumption that counsel’s decision was based on objectively reasonable trial strategy.

We note defendant’s argument that counsel’s alleged defective performance was significantly prejudicial. But we agree with the trial court that defendant has failed to demonstrate that, had trial counsel presented an independent expert at trial, there is a reasonable probability that the outcome would have been different. As previously indicated, all three expert witnesses testified that the injuries to Jaeshawn’s abdomen alone would have been fatal, with the most significant injury being to the liver, which was nearly transected. While Dr. Caplan testified that Jaeshawn likely would have died within a period of minutes to hours, more likely minutes, defendant’s expert set the interval as several hours. Dr. Dragovic also testified that the child would have had suffered pain if he was conscious, and vomiting and defecation as a result of the abdominal trauma.

As aptly noted by plaintiff, there was evidence that supported that defendant had custody of Jaeshawn for hours before the child’s death. Defendant’s mother testified that when she arrived home, Marquisha, defendant, Errol III (defendant and Marquisha’s son), and Jaeshawn were in the basement. Marquisha then left, although defendant’s mother was unsure of the exact time. At a later point, defendant came upstairs, stated that Jaeshawn was throwing up and had defecated on himself, and returned to the basement. Defendant returned again, asked someone to watch Errol III while he cleaned Jaeshawn, and returned to the basement. At trial, there was evidence that at an investigative subpoena proceeding, defendant’s mother stated that by the time defendant came upstairs the second time, an hour or longer had passed since Marquisha left. Defendant’s stepfather, who was also upstairs, acknowledged that at the investigative subpoena proceeding, he stated that Marquisha had left “like two hours” earlier. Defendant’s stepfather subsequently observed defendant carry Jaeshawn to an upstairs bedroom, and described the child as having his head on defendant’s shoulder and appearing to be asleep. In his statement, defendant indicated that after placing Jaeshawn in the bedroom, he heard his sister screaming about Jaeshawn almost two hours later. This evidence would support a finding that Jaeshawn showed symptoms of abdominal trauma while in defendant’s sole custody, and that he was in defendant’s custody for at least three to four hours, which would not be inconsistent with his proposed expert’s opinion regarding the post-injury survival interval.

For these reasons, defendant has not shown that trial counsel’s performance was deficient. Even if counsel’s failure to present an expert witness could be considered objectively unreasonable, defendant has not shown prejudice. Accordingly, defendant has failed to establish an ineffective assistance of counsel claim and is not entitled to a new trial.

III. MRE 702

Defendant further argues that trial counsel was ineffective for failing to move to suppress Dr. Hlavaty’s testimony under MRE 702. Again, we disagree.

The determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). But failure to move for suppression of inadmissible evidence can be ineffective assistance of counsel warranting relief. *People v Brown*, 119 Mich App 656, 664, 666; 326 NW2d 834 (1982). MRE 702 establishes three broad preconditions to the admission of expert testimony: (1) the expert must be qualified, (2) the proposed testimony must assist the trier of fact; that is, it must be relevant, and (3) the scientific or technical evidence must be based on sufficient facts, reliable, and reliably applied to the facts of the case. *Craig v Oakwood Hosp*, 471 Mich 67, 78-79; 684 NW2d 296 (2004).

In this case, there was no dispute that Dr. Hlavaty was a qualified expert. Rather, the focus of defendant's claim is that Dr. Hlavaty's scientific findings regarding the post-injury survival interval were not based on sufficient and reliable facts, chiefly because she failed to perform microscopic (histological) examinations on the central nervous systems as well as other various parts of Jaeshawn's body. At the evidentiary hearing, Dr. Dragovic and Dr. Caplan both testified that they would have performed microscopic examinations in this case, and agreed that such an examination provides a more accurate estimate of the post-injury survival interval. But contrary to what defendant argues, a microscopic examination was not mandatory. In specific, Standard G-27 of the standard autopsy protocol set forth in the National Association of Medical Examiners ("NAME") states:

Histological examination may reveal pathologic changes related to the cause of death. The forensic pathologist shall perform histological examination in cases with *no* gross anatomic cause of death unless the remains are skeletonized."
[Emphasis added.]

All three experts agreed that this case involved a gross anatomic cause of death. As a result, both Dr. Hlavaty and Dr. Caplan testified that a microscopic examination was not required here. Dr. Caplan further specifically disagreed with Dr. Dragovic's opinion that Dr. Hlavaty's failure to conduct a microscopic examination fell below the NAME standards. The failure to perform a microscopic examination would not have supported suppression of Dr. Hlavaty's testimony under MRE 702, and accordingly, defendant cannot establish a claim of ineffective assistance of counsel on this basis.

IV. EXCLUSION OF EVIDENCE

Defendant also argues that the trial court improperly limited cross-examination and denied him his constitutional rights of confrontation and to present a defense by prohibiting evidence of Marquisha's history of abusing Jaeshawn beyond the 24-hour period before his death. We disagree.

Defendant objected to the prosecution's motion in limine, and argued that evidence that Marquisha had abused Jaeshawn beyond the 24-hour window before his death was relevant. Therefore, that evidentiary issue is preserved for review. However, defendant did not raise the argument that precluding evidence of Marquisha's complete history of abusing Jaeshawn violated his constitutional rights of confrontation or to present a defense, so those arguments are not preserved for review. An objection on one ground is insufficient to preserve an appellate

challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

This Court reviews defendant's preserved evidentiary issue to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Defendant's unpreserved constitutional claim is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

At the preliminary examination, Marquisha testified that she "pop[s]" Jaeshawn, and had whipped him with a belt in the past. Defendant's stepfather testified that he observed Marquisha strike Jaeshawn at various times on several occasions in the past. In addition, in defendant's statement, he made references to abuse inflicted by Marquisha during the several days before Jaeshawn's death.

Although a defendant has a constitutional right to present a defense and to confront his accusers, US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). In this case, the trial court did not preclude defendant from presenting all evidence that Marquisha had abused Jaeshawn, but rather precluded admission of past acts that were not relevant to the charges against defendant. The only medical evidence before the court at the time of the motion and trial established that Jaeshawn's bruises were inflicted within 24 hours before his death, that he died from blunt force trauma to the head, blunt force trauma to the abdomen, and steam inhalation, and that the post-injury survival interval was a period of minutes. Given the ages of the bruising, the cause of death, and the post-injury survival interval, defendant did not establish that Marquisha's various past acts of striking Jaeshawn had any tendency to make his culpability in inflicting the fatal injuries more probable or less probable than it would be without the evidence. MRE 401; *Yost*, 278 Mich App at 355. Because defendant was unable to establish the relevancy of the proposed evidence, the trial court did not abuse its discretion by excluding it. The trial court did not preclude defendant from otherwise presenting a defense and challenging Marquisha's credibility, and permitted defendant to present evidence that Marquisha beat Jaeshawn within the 24 hours preceding his death and cross-examine her at length about that abuse. Accordingly, the trial court's decision to exclude unrelated abuse did not fall outside the range of reasonable and principled outcomes, and that decision did not deprive defendant of his rights of confrontation or to present a defense.

V. FLIGHT INSTRUCTION

Lastly, defendant argues that the trial court erred in instructing the jury on flight because there was no evidence to support that instruction. We disagree.

"It is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). "Such evidence is probative because it

may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction.” *Id.* The term “flight” has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Id.*

There was evidence that as emergency personnel was tending to Jaeshawn, defendant got in his car, drove away, and did not return home for a couple of days. After defendant’s mother arranged to meet him at a gas station and encouraged defendant to turn himself in, defendant voluntarily went to the Schaefer police station and was placed in custody. Defendant was then sitting near Detroit Police Officer Moises Jiminez’s cubicle. Officer Jiminez testified that as he talked to defendant, defendant “tried to dart out and go outside.” Officer Jiminez explained that defendant initially made eye contact with him as they were communicating, but subsequently began to shift his body while glancing at the door. Officer Jiminez further explained that defendant noticed that people were going in and out of the station through the side door. Defendant “kept glancing at the door.” Eventually, defendant moved his body away from the cubicle and toward the doorway, and got up “real quick.” Believing that defendant was going to run, the officer got up, tackled defendant, forced him to the floor, handcuffed him, and took him to the lockup area.

Contrary to what defendant now argues, his actions of repeatedly looking toward the doorway as people were traveling in and out of the police station, shifting his body away from an officer’s desk and toward the doorway during their conversation, and standing up rapidly without any apparent cause other than to flee could properly be considered evidence of “flight.” These facts supported an inference that defendant was attempting to escape police custody. Further, although not relied on by the trial court, defendant’s actions of leaving the scene of the crime (his house), not returning home, and meeting his mother days later at a gas station where she encouraged him to turn himself in could also properly be considered evidence of “flight,” because they supported an inference that he was attempting to avoid detection by staying away from his own home. That defendant ultimately surrendered voluntarily does not negate these inferences. In addition, this was not a situation where the evidence of flight was the sole evidence of defendant’s guilt. Accordingly, the trial court did not err in instructing the jury on flight.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto