STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 2013
v	No. 310809 Wayne Circuit Court
ANTHONY LAWRENCE SEWEJKIS, Defendant-Appellant.	LC No. 12-000222-FH

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree child abuse, MCL 750.136b(2). Defendant was sentenced to 10 to 15 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

At the time of the incident, defendant was the caretaker for his four month old son. Leanne Garlick, the mother of the infant, was at work when she received a message from defendant that their son had fallen off the futon and hit his head, but that he was fine. However, when Garlick arrived home later that day, she observed that the baby's face was slanted and that he was making repetitive monotone crying sounds.

After arriving at Oakwood Annapolis Hospital, the baby was taken into custody and quickly airlifted to the University of Michigan Hospital. Doctors at Oakwood found that the baby had sustained life threatening injuries, as his brain had such significant swelling that if the pressure was not relieved, there was a possibility that his brain would herniate down into his cervical spinal track and kill him. At U of M, the baby underwent a neurological procedure in which doctors evacuated the blood that was on the surface of his brain and removed a portion of his skull to relieve the pressure.

Lisa Markman, M.D., an expert in pediatrics and child abuse at U of M Hospital, examined defendant's infant son after the operation and found that the baby had two skull fractures that were not consistent with defendant's story of the baby falling a foot and a half off the futon. While Markman testified that it was possible that the baby had been a victim of shaken baby syndrome, she indicated that the force necessary to cause the baby's injuries would be that of either slamming his head against something hard or something hard being slammed against his head.

During defendant's initial interview with the police, he said he changed the baby's diaper, sat him on the futon while he went to the bathroom, and returned to find that the baby had fallen off the futon with a bump on his head. Later in the interview, however, defendant became upset and told the detective that if he told the truth, he would lose his family. The detective testified that defendant then changed his story and confessed that "he freaked, he f***** up[,] and he hurt the child." Defendant confessed that he immediately knew his son was injured "when his legs became stiff right after he pushed the child's head to the floor," and that he thought of taking him to the hospital but did not.

At trial, defendant presented yet another version of events. He testified that the baby was crying so defendant went to lay him on the floor, but the baby wriggled out of his hands and hit the floor. Defendant admitted that his initial story about his son rolling off the futon was untrue. Defendant testified that he loved his son, he did not intend to hurt him, but that he did hurt him. He acknowledged that he could have called several people when his son was crying and that he waited several hours to take the baby to the hospital even though he knew his son needed medical help. In addition, defendant's mother offered testimony in support of defendant's latest version of the events.

After both parties rested, the prosecution and defendant stipulated to the standard jury instruction for first-degree child abuse. When the trial court gave the jury instruction, defense counsel objected, contending that the instruction did not comply with the Michigan Supreme Court's opinion in *People v Maynor*, 470 Mich 289; 683 NW2d 565 (2004). The trial court overruled the objection and stated that defense counsel should have submitted a special jury instruction to the court beforehand. The jury found defendant guilty of first-degree child abuse. Defendant was sentenced to 10 to 15 years' imprisonment. Defendant now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Preservation & Standard of Review

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's findings of fact are reviewed for clear error." *Id.* "Questions of constitutional law are reviewed de novo[.]" *Id.* "In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2004). Because defendant did not move for a new trial or for an evidentiary hearing, our review is limited to the mistakes apparent on the record. *Id.* at 659.

B. Analysis

On appeal, defendant argues that he was denied his Sixth Amendment right to effective assistance of counsel. We disagree.

In order to prevail on a claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

Thus, the issue in this case is whether counsel's decision not to request a special jury instruction (1) "fell below an objective standard of reasonableness," and (2) whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 688, 694; *People v Pickens*, 446 Mich 298, 303-304; 521 NW2d 797 (1994).

At trial, the prosecution and defense counsel stipulated to the standard jury instruction for first-degree child abuse.[1] After the trial court read this instruction to the jury, defense counsel objected and argued that it did not comply with the Michigan Supreme Court's opinion in *Maynor*, *supra*. Overruling the objection, the trial court stated that because the wording in *Maynor* would deviate from the standard jury instruction, defense counsel should have submitted a special jury instruction to the court beforehand. Now on appeal, defendant argues that defense counsel was ineffective for failing to ascertain the requested instruction. Defendant's argument is meritless.

In *Maynor*, the defendant left her two young children in her car for three and a half hours on a hot summer day while she visited a beauty salon. 470 Mich at 291-292. When she returned to her car, she found her children dead. *Id.* at 292. "Defendant was charged with two counts of felony[-]murder, with first-degree child abuse as the underlying felony." *Id.* at 293. The Michigan Supreme Court addressed the intent element of first-degree child abuse, finding that "the jury [is] to be instructed that to convict it must find, not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act." *Id.* at 291. The Court concluded that "[t]he recommended standard jury instruction for first-degree child abuse, CJI2d 17.18, correctly focuses the jury by directing it to this method of analysis." *Id.* at 295-296. The Court further

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[1] The jury instruction read was as follows:

> The defendant is charged with the crime of First Degree Child Abuse. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that Anthony Sewejkis is the parent of [the child]. Second, that the defendant either knowingly or intentionally caused serious physical harm to [the child]. By serious physical harm, I mean any injury to a child that seriously impairs the child's health or physical well-being. Including but not limited to brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burned or scolded, or sever cut. And third, that [the child] was, at the time, under the age of 18.

explicated that it is "unnecessary for the jury to be given further instruction on 'specific intent,' such as that found in CJI2d 3.9" and that "as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm," the jury is adequately instructed. *Id.* at 296.

Thus, *Maynor* makes it clear that the standard jury instruction for first-degree child abuse is perfectly adequate and that "it is unnecessary for the jury to be given further instruction on 'specific intent' . . . . " 470 Mich at 295-296. In the instant case, the jury received the standard jury instruction for first-degree child abuse and was specifically instructed that it had to find "that the defendant either knowingly or intentionally caused serious physical harm to [the child]." Because the jury received the instruction that the Michigan Supreme Court has explicitly approved, defense counsel did not err. Therefore, defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness.

Furthermore, counsel's delayed request that the jury be instructed with the so-called "*Maynor* language" would not have affected the outcome of the trial. Because the standard jury instruction given was consistent with *Maynor*, the jury instruction would have remained unchanged because it "correctly focuse[d] the jury" on defendant's intent. *Id.* at 296. Therefore, the outcome would not have been different. Defendant has failed to satisfy either prong of the *Strickland* test.

III. CONCLUSION

Defendant was not denied the effective assistance of counsel and a new trial is not warranted. We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan