STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2014
v	No. 316044 Ottawa Circuit Court
RYAN VICTOR KUPRES, Defendant-Appellant.	LC No. 12-037100-FH

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree child abuse, MCL 750.136b(2). Because defendant has not established error requiring relief, we affirm.

The five-month-old victim was admitted to the hospital on the night of March 30, 2012 after she went limp and became unresponsive while in defendant's care. Medical tests revealed that the victim had two serious brain injuries involving subdural hemorrhages, a spinal injury, retinal hemorrhaging, and fractures to each of her arms and legs. Neither defendant nor anyone else provided the doctors with a plausible explanation for how the victim sustained her injuries.

Defendant first argues that there was insufficient evidence to support his conviction.[1]

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, "when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

[1] We review de novo a claim of insufficient evidence to support a conviction. *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). The child abuse statute defines "[s]erious physical harm" as "any physical 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, burn or scald or severe cut." MCL 750.136b(1)(f). Further, "it is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

While defendant appears to only challenge his identity as to the perpetrator of the victim's injuries, we find the evidence was sufficient to support the existence of all the elements of the crime beyond a reasonable doubt. Dr. Sarah J. Brown testified as an expert in pediatric child abuse that the victim's injuries "were definitely abusive trauma" and that they indicated "severe" whiplash injuries likely caused by someone shaking the victim "very violently." Further, the victim's head and spinal injuries occurred within 48 hours of the victim's March 31, 2012 MRI, and her bone fractures "were definitely more than seven days old" at the time of the victim's March 31, 2012 x-rays. At trial, defendant testified that he did not dispute any of Dr. Brown's medical findings. Thus, the prosecution presented sufficient evidence to support a conclusion that someone caused the victim to suffer "serious physical harm." MCL 750.136b(1)(f); MCL 750.136b(2).

Defendant's identity was established beyond a reasonable doubt as well. The victim's mother testified that she observed a fresh bruise on the victim's face when defendant transferred the victim to her on March 17, 2012. Defendant told mother that the victim bruised her own face by pinching herself. The record also indicates that the victim had a notable bruise on her neck after mother picked the victim up from defendant's residence on March 19, 2012. When confronted about the new bruise, defendant told mother that he witnessed the victim pinch herself and cause the bruise. At trial, Dr. Brown reviewed a March 19, 2012 photograph of the victim's neck bruise and testified that a child of the victim's age could not pinch herself hard enough to cause the bruise. The victim's aunt testified that while she babysat the victim on March 21, 2012, the victim became upset and recoiled from defendant when he attempted to hold her. The record established that mother left the victim in defendant's care for approximately 1-1/2 hours on the evening of March 30, 2012. While in defendant's care, the victim vomited on herself, went limp, and became non-responsive. Dr. Brown testified that the victim most likely went limp soon after suffering a head trauma. At the hospital, defendant told Dr. Brown that the victim's injuries may have occurred during a March 25, 2012 bath when she purportedly hit her head against defendant's knee and later hit her leg against the bathtub. However, the victim's paternal grandmother testified that she was present for all but possibly 15 to 30 seconds of the March 25, 2012 bath and did not witness the victim hit her head or her leg. Significantly, Dr. Brown testified that defendant's account of the March 25, 2012 bath could not have caused any of the victim's injuries.

Mother and the paternal grandmother testified that they did not cause the victim's injuries and defendant testified that he did not observe mother, the grandmother, or anyone else injure the victim. According to defendant, he did not abuse the victim and he did not know how the victim sustained her injuries. The prosecution presented evidence, however, that in 2008, defendant's infant son, while in defendant's care, suffered multiple brain injuries involving subdural

hemorrhaging, five bone fractures to his legs, and retinal hemorrhaging. Dr. Debra N. Simms and Detective Thomas Knapp testified that defendant had initially offered a non-abusive explanation for his son's injuries, but when defendant was informed that his explanation was inconsistent with medical tests, he admitted that he had shaken his son in frustration and that this shaking was the likely cause of his son's brain injuries.

The jury's verdict in this case demonstrates that the jury did not find defendant's testimony credible. "Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Wolfe*, 440 Mich at 515 (quotation omitted). Further, although the prosecution did not present any direct evidence establishing defendant's identity at the victim's abuser, "[c]ircumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *Schultz*, 246 Mich App at 702. The evidence established defendant's identity as the perpetrator where the victim previously was injured in defendant's care, defendant provided information about the cause of those injuries that was refuted by medical testimony, defendant previously injured a child and gave false information as to the cause of that child's injuries, the injuries of both children were substantially similar, the victim suffered some sort of head trauma while in defendant's care and went limp in his arms, and defendant's own mother refuted defendant's testimony as to how the victim may have been injured – thus, fortifying defendant's lack of credibility.

Moreover, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Thus, viewing "the evidence in a light most favorable to the prosecution," the prosecution presented sufficient evidence from which a rational jury could determine beyond a reasonable doubt that defendant intentionally or knowingly caused the victim to suffer serious physical harm. *Wolfe*, 440 Mich at 515. Accordingly, the prosecution presented sufficient evidence to allow the jury to find defendant guilty of first-degree child abuse.

Defendant next argues that the trial court improperly admitted testimony regarding his 2008 abuse of his son in violation of MRE 404(b).[2]

MRE 404(b)(1) "is a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b), the prosecution must prove that: (1) it is offering the evidence for a proper purpose, i.e., to prove something other than defendant's bad character or criminal propensity; (2) the evidence is relevant under MRE 402; and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d

[2] We review the trial court's decision to admit evidence for an abuse of discretion but review the underlying questions of law de novo. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "Finally, the trial court, upon request, may provide a limiting instruction[.]" *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009).

Under the first prong, the trial court only needs to find one of the prosecution's theories to be a proper purpose. *Starr*, 457 Mich at 501. Proper purposes include defendant's intent, knowledge, identity, or his common plan, scheme, or system. MRE 404(b)(1); *VanderVliet*, 444 Mich at 78. Here, defendant's intent or knowledge was an element of first-degree child abuse, MCL 750.136b(2), and he placed his intent and knowledge at issue by his general denial of guilt. *Starr*, 457 Mich at 501. Therefore, proving that defendant intentionally or knowingly caused the victim serious harm was a proper purpose under 404(b) for which prosecution offered the evidence of defendant's 2008 incident of child abuse. *Id*.; *VanderVliet*, 444 Mich at 80-81. "When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts are of the same general category." *Id*. at 79-80 (citation omitted). The record indicates that the 2008 child abuse against defendant's son was "of the same general category" as the 2012 child abuse against the victim and was relevant to show that defendant did not accidentally or mistakenly cause serious physical harm to the victim, but rather intentionally or knowingly caused serious harm to the victim. *Id*.; MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

The prosecution may also offer evidence of defendant's other bad acts to show defendant's plan, scheme, or system. MRE 404(b)(1); *Starr*, 457 Mich at 500-502. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot," *id*. at 64, and "distinctive and unusual features are not required to establish the existence of a common plan or scheme," *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007). In this case, the particulars of defendant's 2008 child abuse against his son were strikingly similar to the particular acts of child abuse against the victim, which supported an inference that the two acts "are manifestations of a common plan, scheme, or system" regarding how defendant treats his infant children. *Sabin (After Remand)*, 463 Mich at 63.

Under MRE 404(b), the trial court may also admit evidence of defendant's prior bad acts to prove defendant's identity where identity is an element at issue. MRE 404(b)(1). In *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982), our Supreme Court set forth the test "to show logical relevance where similar-acts evidence is offered to show identification through modus operandi." *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). *Golochowicz*, 413 Mich at 325, provides that "the trial court, when similar-acts evidence is offered to prove *identity*, should insist upon a showing of a high degree of similarity in the manner in which the crime in issue and the other crimes were committed." Under the *Golochowicz* test, MRE 404(b) evidence is admissible to prove a defendant's identification through modus operandi where

> (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. [*Ho*, 231 Mich App at 186, citing *Golochowicz*, 413 Mich at 307-309.]

Here, one of the purposes for which the prosecution offered evidence of defendant's 2008 child abuse against his son was to prove his identity as the victim's abuser. Defendant plea of no contest to first-degree child abuse against his son established the first prong of the *Golochowicz* test. *Golochowicz*, 413 Mich at 309; *Ho*, 231 Mich App at 186. With regard to the second prong of the *Golochowicz* test, defendant's act of child abuse against his son — like his alleged abuse of the victim — involved his infant child suffering multiple brain injuries involving subdural hemorrhaging, retinal hemorrhaging, and multiple bone fractures to his limbs. In both cases, defendant's infant child was injured on multiple separate occasions, the injuries were indicative of abusive shaking and trauma, and defendant provided medical personnel with a non-abusive explanation for the injuries that was inconsistent with the injuries. Regarding his 2008 abuse of his son, defendant told Knapp that he shook his son out of frustration and Dr. Brown testified that the victim's injuries in the instant case were consistent with the victim being shaken or jerked out of frustration. Thus, the record supports that there was "a high degree of similarity in the manner in which the" the abuse against the victim and the abuse against defendant's son "were committed," *Golochowicz*, 413 Mich at 325, and that there was "some special quality of the" 2008 child abuse "that tends to prove the defendant's identity" at the victim's abuser. *Ho*, 231 Mich App at 186. Regarding the third prong, "identity is an element of every offense," *Yost*, 278 Mich App at 356, and was "material to the defendant's guilt" in this case, *Ho*, 231 Mich App at 186.

Moreover, the probative value of the evidence of defendant's 2008 child abuse was not substantially outweighed by the danger of unfair prejudice. Here, the *Golochowicz* test resembles the general test for admissibility under MRE 404(b) enumerated by *VanderVliet* and its progeny. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. "All evidence offered by the parties is 'prejudicial' to some extent, but . . . [i]t is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

For the reasons discussed above, evidence of defendant's 2008 abuse against his son was highly probative of his intent, knowledge, and identity. The trial court minimized the danger of unfair prejudice by giving multiple limiting instructions to the jury regarding the proper purpose for which the jury could consider the evidence. "Jurors are presumed to follow the instructions of the court." *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). "[A] limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose[.]" *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998). In light of the highly probative value of the evidence and the trial court's limiting instruction, on

the record before us, the trial court did not abuse its discretion by determining that the risk of unfair prejudice did not substantially outweigh the probative value of the challenged other acts evidence. *Mills*, 450 Mich at 75; *McGhee*, 268 Mich App at 614 (emphasis added) ("Unfair prejudice exists when there is a tendency that evidence with *little probative value* will be given too much weight by the jury.").

Accordingly, the trial court did not abuse its discretion by admitting testimony regarding defendant's 2008 abuse of his son.

Defendant next raises multiple claims of error relating to his sentence. He argues that the trial court erred by considering facts not found beyond a reasonable doubt by the jury when scoring his offense variables (OVs) and when departing from the statutory sentencing guidelines recommended minimum sentence range.

Defendant argues that *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and its progeny require that the prosecution prove any facts necessary to support the scoring of OVs beyond a reasonable doubt. However, our Supreme Court has held that, "[u]nder the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnote omitted). Defendant also argues that *Blakely* and its progeny require that any judicially found facts used to increase defendant's minimum sentence, i.e., those facts found by the trial court in scoring defendant's OVs, must be found by a jury beyond a reasonable doubt. However, we are bound by the previous published decisions of this Court, MCR 7.215(J)(1), which rejected defendant's argument in *People v Herron*, 303 Mich App 392, 400-405; 845 NW2d 533 (2013).[3] Accordingly, our review is limited to determining whether the trial court clearly erred by finding that defendant's OV scores were supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

Defendant argues that the preponderance of the evidence did not support the trial court's scoring of OV 7. The trial court scored OV 7 at 50 points, finding that defendant treated the victim with sadism and excessive brutality. MCL 777.37(1)(a). MCL 777.37(3) defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." The statute does not define "excessive brutality," but we "presume that the Legislature intended for the words to have their ordinary meaning." *Hardy*, 494 Mich at 440. We have previously interpreted "excessive brutality" as meaning "savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev'd on other grounds by *Hardy*, 494 Mich 430.

[3] Our Supreme Court, 846 NW2d 924, has held the *Herron* defendant's application for leave to appeal in abeyance pending the resolution of *People v Lockridge*, 304 Mich App 278; 849 NW2d 388, lv gtd 496 Mich 852 (2014), a case that addressed the same argument advanced by the instant defendant and contained concurrences from Judges Beckering and Shapiro that disagreed with the outcome and analysis in *Herron*.

A conviction of first-degree child abuse requires a finding beyond a reasonable doubt that defendant caused "any physical injury to a child that seriously impairs the child's health or physical well-being, including, . . . brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald or severe cut." MCL 750.136b(1)(f). Here, the victim did not suffer *a single* qualifying physical injury under MCL 750.136b, but rather suffered multiple qualifying injuries on at least two separate occasions during March 2012. The victim's injuries hospitalized her for "several weeks," during which time she suffered seizures and had to be sedated and placed on a ventilator for seven or eight days. Dr. Brown testified that there was an area of the victim's brain where her brain cells were dying and she was "critically ill" in April 2012. The record supported the trial court's reasonable inference that defendant abused the victim as a self-gratifying reaction to his frustration with the victim. Given the number and severity of the victim's injuries, the trial court properly found that defendant committed "savagery or cruelty beyond even the 'usual' brutality of" first-degree child abuse, *Glenn*, 295 Mich App at 533, and engaged in conduct that subjected the victim "to extreme or prolonged pain" for the purpose of producing suffering or for defendant's gratification. MCL 777.37(3). Accordingly, the trial court did not err by scoring OV 7 at 50 points.[4]

Defendant also contends that the trial court should have scored OV 13 at zero points instead of 25 points. OV 13 directs the trial court to score 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "In scoring OV 13, 'all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.' " *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013), quoting MCL 777.43(2)(a). MCL 777.43(1)(c) does not limit the "trial court's ability to score more than one instance arising out of the same criminal episode." *People v Gibbs*, 299 Mich App 473, 488; 830 NW2d 821 (2013). Thus, "multiple concurrent offenses arising from the same incident are properly used in scoring OV 13[.]" *Id*. at 487-488. Here, the trial court scored OV 13 at 25 points on the basis that defendant abused his son on two separate occasions in 2008 and that he abused the victim on two separate occasions in March 2012. Dr. Brown's testimony established that the victim suffered bone fractures approximately one or more weeks before she suffered her head and spinal injuries. Dr. Simms testified that the brain injury suffered by defendant's son indicated that he suffered head trauma on two separate occasions. Thus, the preponderance of the evidence supported that the sentencing offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Accordingly, the trial court did not err by scoring OV 13 at 25 points.

Finally, defendant argues that the trial court abused its discretion by departing upward from the recommended minimum sentence range. Defendant's recommended minimum sentence under the legislative guidelines, as a second-offense habitual offender, was 84 to 175

[4] The record indicates that the trial court also found that defendant's conduct was designed to increase the victim's fear or anxiety. MCL 777.37(1)(a). We need not address this finding in light of our holding regarding the trial court's finding of sadism and excessive brutality.

months' imprisonment. MCL 777.21(3)(a); MCL 777.63. The trial court sentenced defendant to a minimum of 180 months' imprisonment, which was an upward departure of five months. "A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). In order to be substantial and compelling, the reasons on which the trial court relied "must be objective and verifiable." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008) (citations omitted). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). The reasons for departure must also "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *Smith*, 482 Mich at 299. However, "[t]he trial court may not base a departure 'on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate or disproportionate weight.' " *Id*. at 300, quoting MCL 769.34(3)(b). Moreover, "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Smith*, 482 Mich at 303. Thus, "the trial court . . . must justify *on the record* both the departure and the extent of the departure." *Id*. at 313.

Here, the trial court articulated multiple reasons for departure and stated that it would impose the same sentence on the basis of any one of its stated reasons.[5] The trial court found that the sentencing guidelines did not give adequate weight to defendant's OVs because his total OV score was 35 points higher than the highest OV level. This reason was objective and verifiable, and the trial court did not abuse its discretion by finding that this was a substantially compelling reason justifying an upward departure of five months' imprisonment. See *Smith*, 482 Mich at 308-309; *People v Stewart*, 442 Mich 937; 505 NW2d 576 (1993). The trial court also stated that it was departing because defendant's prior record variables (PRVs) did not adequately account for the serious nature of defendant's previous conviction of first-degree child abuse against his son. A defendant's criminal history is objective and verifiable. *People v Gonzalez*, 256 Mich App 212, 228-229; 663 NW2d 499 (2003). And, a "defendant's prior criminal history and recidivist history" are factors that are "included in the scoring of the prior record variables and offense variables and, thus, [are] insufficient to support an upward departure absent a finding by the trial court that the factors were given inadequate weight when scored." *People v Hendrick*, 472 Mich 555, 564 n 10; 697 NW2d 511 (2005). Here, defendant was scored 25 points for PRV 1, which applies to an offender who "has 1 prior high severity felony

[5] On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Smith*, 482 Mich at 300.]

conviction." MCL 777.51(1)(c). A trial court may score PRV 1 for crimes listed in offense classes A, B, C, D, or M2, which include crimes against property and against public trust. MCL 77.51(1)(c)(a). As the trial court correctly noted, defendant was "not previously convicted of a property crime but a serious assault against one of" his children. The record supported that defendant abused his infant son on multiple occasions, causing multiple brain injuries, retinal hemorrhaging, and five fractured bones. The trial court did not abuse its discretion by finding that defendant's PRV score did not give adequate weight to the nature of his previous conviction.

In sum, the trial court articulated objective and verifiable reasons that were of considerable worth in determining defendant's sentence and they keenly grasp the Court's attention. *Smith*, 482 Mich at 299. Moreover, the trial court justified the extent of its departure by referencing defendant's statutory sentencing range grid, *Smith*, 482 Mich at 303-304, 306, 309, and we affirm the extent of the departure.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens