Order

Michigan Supreme Court
Lansing, Michigan

December 9, 2015

150663

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 150663
COA: 313075
Kent CC: 11-010829-FH

ANDREW PEDRO VALDEZ,
Defendant-Appellant,

_____/

On order of the Court, the application for leave to appeal the October 23, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, and we REMAND this case to the Kent Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

s1202

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 9, 2015

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 313075 Kent Circuit Court
ANDREW PEDRO VALDEZ, Defendant-Appellant.	LC No. 11-010829-FH

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree child abuse, MCL 750.136b(2), and the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to a prison term of 175 to 270 months. Defendant appeals as of right. We affirm.

During an argument with his girlfriend, defendant picked up his girlfriend's infant son and yanked him out of a car seat. Later that day, defendant's girlfriend took the child to the hospital, where doctors discovered multiple rib fractures, other broken bones, and bruises. At a police interview regarding the child's injuries, defendant explained that the safety strap covering the child's chest and legs was still on the child when defendant yanked him out of the car seat. Defendant first grabbed the child's arm, and then grabbed and squeezed his body. When defendant pulled on the child, the child's legs got caught in the straps and the child cried out. After the interview, defendant called his mother and told her, "I'm the one that did it, ok?"

Defendant first argues that insufficient evidence existed to support his conviction. "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). First-degree child abuse is a specific intent crime, and the prosecution must establish that defendant intended to commit the act, and that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by his act. *People v Maynor*, 470 Mich 289, 297; 683 NW2d 565 (2004). Defendant admitted to performing the act that caused the child's injuries. See *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). The child suffered multiple rib fractures, other broken bones, and bruises. A medical expert, Sarah Brown, testified at trial that defendant's actions could have caused the rib fractures and injuries. "Serious physical harm" includes "a skull or bone fracture." MCL 750.136b(1)(f). Thus, a rational trier of fact could conclude beyond a reasonable doubt, *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009), that

defendant caused serious physical harm to the child.

Defendant argues that there was insufficient evidence to show that he caused the arm and leg injuries. Defendant points out that Brown expressed doubt that defendant caused these injuries. However, for defendant to be convicted of first-degree child abuse, the evidence needed to establish at a minimum the causing of "a skull or bone fracture." MCL 750.136b(1)(f). Thus, the evidence that defendant caused the child's rib fractures by itself was sufficient to support his conviction. *Id*. Moreover, Brown indicated that there was a "very small possibility" that these arm and leg injuries were caused by defendant's acts. "[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented," *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and "[a]ll conflicts in the evidence must be resolved in favor of the prosecution." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The evidence was also sufficient to allow a rational trier of fact to conclude that defendant possessed sufficient intent to commit first-degree child abuse. Defendant admitted to performing the act that caused the child's injuries. The child suffered multiple broken bones, fractures, and bruises that required hospitalization. Despite the child's injuries, defendant did not call for help or take the child to the hospital. Brown testified that the child's injuries were caused by "excessive force." Although defendant said that he did not mean to hurt the child, circumstantial evidence, such as defendant's statement admitting his actions, the severity of the injuries, the fact that the injuries were caused by "excessive force," and the fact that defendant did not seek aid and even informed his girlfriend that the child did not need to be hospitalized, suffice to establish defendant's intent. See *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997).

Defendant next argues that the trial court violated MRE 404(b) by admitting evidence pertaining to his past abuse directed at his girlfriend and her daughter, as well as evidence pertaining to his poisoning of his girlfriend's cats. Defendant failed to preserve this argument by objecting to admission of the evidence. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error affecting substantial rights exists. *Id*. Even assuming that the evidence was improperly admitted, any error in admitting the evidence was harmless in light of the overwhelming evidence that defendant committed the acts that injured the child, that defendant's description of what occurred was consistent with causing the rib fractures, and that defendant had the requisite intent.

Defendant also argues that the trial court erred in scoring offense variables (OVs) 3 and 7. A trial court should score OV 3 at 25 points when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The child suffered multiple rib fractures, broken bones, and had bruises on his body. He required medical attention and hospitalization for multiple days. According to a letter that the child's mother submitted at sentencing, a hospital staff member informed her that if she had brought the child to the hospital any later, "he may not have made it through the night due to the severity of the pain he was going through." In addition, the letter noted that the child was being treated for a bowel

obstruction injury resulting from the injuries caused by defendant.[1] We thus find that a preponderance of the evidence, *People v Hardy*, 494 Mich 430; 438; 835 NW2d 340 (2013), supports a finding that the child suffered "[l]ife threatening or permanent incapacitating injury," and the trial court did not err scoring OV 3. Next, a trial court should score OV 7 at 50 points if a victim was treated with "excessive brutality." MCL 777.31(1)(a). "[E]xcessive brutality means 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 *Hardy*, 494 Mich 430. For defendant to be convicted of first-degree child abuse, the evidence needed at a minimum to establish the causing of "a skull or bone fracture." MCL 750.136b(1)(f). Here, the evidence established that defendant's conduct resulted in multiple rib fractures, other broken bones, and bruises. Thus, we find that a preponderance of the evidence, *Hardy*, 494 Mich at 438, supports a finding that defendant's conduct constituted excessive brutality. *Glenn*, 295 Mich App at 533. The trial court did not err in scoring OV 7. MCL 777.31(1)(a).

Lastly, defendant argues that the trial court engaged in judicial fact-finding during sentencing in violation of the Sixth and the Fourteenth Amendments. This argument has been addressed and rejected in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer

[1] Contrary to defendant's contention, MCL 777.33(1)(c) "does not require the prosecution to specifically present medical testimony." *People v McCuller*, 479 Mich 672, 697; 739 NW2d 563 (2007).

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Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I agree with the majority that there was sufficient evidence from which the jury could convict defendant of second-degree child abuse, MCL 750.136b(3)(a), on the basis of reckless behavior resulting in serious harm. However, I do not agree with the majority that there was sufficient evidence that defendant acted with the *intent* to *seriously* injure the child as is required for a first-degree child abuse conviction, MCL 750.136b(2). Accordingly, I would vacate defendant's conviction for first-degree child abuse and enter a judgment of conviction of second-degree child abuse.

There were several individuals who were alone with the child during the relevant days and who, therefore, could have inflicted some or even all of the child's injuries. No witnesses testified that they saw defendant mishandling or hurting the child. During the course of a several-hour police interrogation, defendant was repeatedly asked if he did anything that could have caused any of the child's injuries. He eventually stated that on the day before the child was taken to the hospital, he yanked on the child's arm and leg while trying to remove him from a car seat and ultimately grabbed him around the torso to get him out. He stated that, at that time, he did not think he had injured the child, but agreed he had been rough during this incident and that, at the time, he was feeling frustrated with the child's mother. The officers indicated their satisfaction that the actions defendant described were the likely cause of the child's injuries. It was at that point that defendant said that he was the "one that did it." Defendant never stated that he intended to harm the child, and certainly not that he intended to cause serious harm.

There was no evidence that defendant ever expressed a wish to harm the child or that he had ever been seen harming the child on some other occasion. The prosecution introduced evidence that defendant had an argument with the child's mother on the same date and that he had ripped her glasses from her face during the argument. The prosecution also introduced the

testimony of a hospital pediatrician who specializes in child abuse and examined the child. She testified that it was unlikely that merely trying to pull a child from a car seat when a strap was still on the child's arm or leg would cause this degree of injury, but agreed that it was possible. She did not testify that the injuries had to have been intentionally caused. Accordingly, the prosecution presented insufficient evidence to allow a reasonable jury to conclude beyond a reasonable doubt that defendant committed first-degree child abuse.

The defendant also raises an issue based on MRE 404(b). I believe that allowing evidence of defendant's altercation with the child's mother in the time frame at issue was not error because it went to defendant's state of mind. However, it is very troubling that the prosecution's closing argument suggested that there was evidence that defendant poisoned his girlfriend's cat and that he had disciplined his girlfriend's older child by twisting her fingers. A review of the record reveals that there was never any such testimony. Rather, a police officer accused defendant of these actions during the videotaped interrogation and defendant denied them. Those accusations should not have been played for the jury nor described in the prosecutor's closing argument. However, for purposes of a second-degree child abuse conviction, I would find this error harmless. See MCL 769.26.

I also disagree with the majority as to the scoring of offense variable (OV) 3, MCL 777.33. There was neither testimony nor medical records that described the child's injuries as life-threatening and the child was never placed in an intensive care unit. The sole "evidence" that the injuries were life-threatening was contained in a sentencing letter written by the child's mother in which she stated that a "hospital staffer" told her this. I do not agree that a hearsay report of a statement by an unidentified person at the hospital, who may not even have been a medical professional, is sufficient to amount to the preponderance of evidence necessary to support the scoring of OV 3. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

I would vacate defendant's first-degree child abuse conviction and remand for entry of a judgment of conviction for second-degree child abuse and sentencing on that conviction.

Accordingly, I respectfully dissent.

/s/ Douglas B. Shapiro