STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2015
v	No. 320247 Ingham Circuit Court
JOHN HAROLD SANDERS, Defendant-Appellant.	LC No. 13-000224-FC

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment without parole for the first-degree felony murder conviction and 50 to 100 years' imprisonment for the first-degree child abuse conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was convicted of killing his infant daughter. On January 4, 2013, the victim's mother left the victim in defendant's care while she went to an appointment. Shortly after the mother left the victim, defendant contacted her to tell her that the victim was not breathing and that he had taken the victim to the hospital. Dr. Stephen Guertin, who testified at trial as a qualified expert in child abuse, treated the victim at the hospital. Despite Dr. Geurtin's efforts, the victim died later that evening. Dr. Guertin, as well as the forensic pathologist who performed the autopsy, testified at trial that the victim's injuries and death were caused by child abuse. Defendant was charged and eventually convicted after a jury trial. Defendant filed a motion for a new trial, which was denied. Defendant now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the trial court erred in denying his motion for a new trial and for an evidentiary hearing on the issue of ineffective assistance of counsel. Defendant preserved the issues by filing a motion for a new trial with the trial court, which the court denied. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). However, the trial court did not hold an evidentiary hearing, so our review is limited to the facts on the record.

People v Chapo, 283 Mich App 360, 369; 770 NW2d 68 (2009), citing *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant asserts that trial counsel failed to provide an alternative theory to explain the injuries the victim sustained, which would have shown shaken baby syndrome was not the cause of death. The record clearly shows that defense counsel did present alternative theories on how the victim could have been injured. During the cross-examination of the victim's mother, counsel explored the possibility that the injury could have been from a fall that occurred when the victim's sister was holding the victim. While cross-examining the pathologist, counsel also presented alternative theories, including that the injuries were the result of an accidental fall, resuscitation efforts, second impact syndrome, aneurism rupture, or genetic abnormality. Moreover, during his closing argument, counsel put forth several alternate theories, including accidental trauma and that defendant might have been covering up for the victim's mother.

Defendant also claims that counsel failed to meet his investigative duty when he called no witness and offered no expert testimony to rebut the prosecution's theory of shaken baby syndrome. A defendant is entitled to have defense counsel prepare, investigate, and present all substantial defenses. *Chapo*, 283 Mich App at 371. "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. (citation omitted). Specifically, the decision "to call or question witnesses is presumed to be [a] matter[] of trial strategy" and will only constitute ineffective assistance when it deprives defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Here, trial counsel did consult an expert, Dr. Laurence Simson, prior to trial. The record is not clear why defense counsel did not call this witness to testify, but, consistent with the standard of review, we presume that defense counsel made a strategic decision not to do so because it was in defendant's best interests. Defendant offers nothing to undermine this presumption.

Moreover, defendant failed to show "the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. The prosecution's expert witnesses both testified that the injuries likely resulted from something other than just shaken baby syndrome. Dr. Guertin stated that the victim had at least five or six deep bruises to the scalp and these were impact sites, showing that she must have been hit against something. Dr. Guertin explained that just shaking the baby alone could not have caused the type of injuries the child sustained. The pathologist also testified that she believed there was an impact that caused traumatic brain injury. She explained that the victim's retinal hemorrhages

were characteristic of inflicted head injuries that were very rarely seen in accidental trauma. Thus, defendant also has failed to show the existence of a reasonable probability that the outcome of his trial might have differed had defense counsel called an expert witness or presented further evidence related to shaken baby syndrome.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his conviction. We disagree. We review a challenge to the sufficiency of the evidence de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). "When reviewing challenges to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt." *People v Johnson-El*, 299 Mich App 648, 651; 831 NW2d 478 (2013). This Court "must draw all reasonable inferences and examine credibility issues in support of the jury verdict" and "must not interfere with the jury's role as the sole judge of the facts." *Malone*, 287 Mich App at 654.

"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). To be convicted of first-degree child abuse, the defendant must have both an intent to commit the act and an intent to cause serious physical or mental harm to the child or know that the act would cause serious mental or physical harm. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). "A fact-finder may infer a defendant's intent from all of the facts and circumstances." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). "Serious physical harm" is defined 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). In addition, MCL 750.316(1)(b) provides that a person is guilty of first-degree murder when they commit murder in the perpetration of first-degree child abuse.

Defendant asserts that the prosecution presented insufficient evidence that defendant "knowingly and intentionally" caused serious injury to the victim. Although there was no direct evidence that shows defendant "knowingly and intentionally" caused the victim to sustain serious injuries, the circumstantial evidence of the element was strong. "Minimal circumstantial evidence suffices to prove a defendant's intent." *Johnson-El*, 299 Mich App at 653. Defendant was alone with the three-and-a-half-month-old when the victim stopped breathing. The record showed that the victim was fine when she was left in defendant's sole care. The infant suffered a severe head injury with a subdural hemorrhage and her brain was dead or dying a few hours after she was brought to the hospital. The evidence showed that considerable force or impact was required to cause such traumatic brain injury. The evidence also showed that even a fall from a height onto a hard surface would not cause this type of injury. There was also evidence that the retinal hemorrhages that the victim sustained typically can only be found in rollover type motor vehicle accidents, child abuse cases, or where a child's head is crushed. Therefore, the evidence, viewed in a light most favorable to the prosecution, indicated that defendant had an intent to commit the act and an intent to cause serious physical harm to the victim.

Defendant also contends that the prosecution failed to present sufficient evidence that defendant's act caused serious injuries to the victim. The evidence demonstrated that the victim suffered an injury when she was alone with defendant, and she had several deep bruises to her scalp, showing that she must have been hit against something. Defendant admitted that he shook the victim (ostensibly to revive her), but the evidence establishes that shaking the child alone could not have caused the type of traumatic head injuries inflicted. Again, the retinal hemorrhages were rarely seen in accidental trauma. Resolving all conflicts in the evidence in favor of the prosecution, "a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt." *Id.* at 651.

Affirmed.

/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood
/s/ Michael F. Gadola