STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2013
v	No. 307488 Macomb Circuit Court
MELISSA ANNE MEMMER, Defendant-Appellant.	LC No. 2010-003256-FC

Before: SHAPIRO, P.J., and MURRAY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right her jury-trial conviction of first-degree murder. MCL 750.316. Defendant was sentenced to life in prison without parole.[1] We affirm.

Defendant was previously convicted in 2004 of first-degree child abuse, MCL 750.136b(2), and assault with intent to commit murder, MCL 750.83, stemming from an incident that occurred on May 7, 2003, between her and the victim, who was two years of age at the time. After the victim died on December 26, 2009,[2] defendant was charged with first-degree premeditated murder and felony murder, resulting in the instant conviction and appeal.

Defendant's sole claim of error on appeal is that the trial court erred in not instructing the jury on CJI2d 16.16(4), which relates to improper medical treatment as an intervening,

[1] Defendant was convicted of first-degree premeditated murder and felony murder, MCL 750.316(b), but the trial court merged the two convictions into one count of first-degree murder and entered one sentence based on that count.

[2] The trial evidence indicated that defendant suffocated the victim. As a result, the victim suffered severe brain damage and was unable to swallow, eat, or walk, and required 24-hour care. He was fed through a feeding tube surgically implanted into his stomach and required medications to control seizures and his muscle tone. He also had additional surgeries to control saliva secretions and took medication in order to prevent saliva from aspirating into his lungs.

superseding cause of death.[3] The prosecution contends that defendant waived this issue on appeal by agreeing to the instructions as given.[4] After reviewing the record, we agree.

Generally, in order to preserve an issue for appellate review, a party must make a timely objection on the record. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). In contrast, when a party expresses satisfaction with the jury instructions, he waives a challenge to them on appeal. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). "Waiver" is defined as "the intentional relinquishment or abandonment of a known right." *Id.*, quoting *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). When a party waives his rights, he "may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.*, citing *Carter*, 462 Mich at 215 (quotation marks and citations omitted).

The record shows that defendant waived appellate review of this issue. Before closing arguments, the parties and the trial court discussed the jury instructions. The parties agreed that CJI2d 16.16(3), relating to an already weak or ill victim, was not applicable to the case and

---

[3] CJI2d 16.16 provides:

> (1) If the defendant unlawfully injured *[name deceased]* and started a series of events that naturally or necessarily resulted in *[name deceased]* 's death, it is no defense that:
>
> *[Choose one or more of (2), (3), or (4):]*
>
> (2) the injury was not the only cause of death.
>
> (3) *[name deceased]* was already weak or ill and this contributed to [his / her] death.
>
> (4) the immediate cause of death was medical treatment. It is a defense, however, if the medical treatment was grossly erroneous or grossly unskillful and the injury might not have caused death if *[name deceased]* had not received such treatment.

[4] In oral argument before this Court, the prosecutor conceded that the issue *had* been preserved, contrary to the People's argument in their well-written brief and contrary to the record. Arguments of counsel are neither evidence nor stipulations of fact. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993). Additionally, "[t]hough entitled to deference, courts are not required to blindly follow confessions of error, as they must independently exercise their judicial function to determine the validity of the suggested error." *Young v United States*, 315 US 257, 258-259; 62 S Ct 510; 86 L Ed 832 (1942). Furthermore, while we might possibly be limited by a stipulation of fact made in the trial court, we are bound to the record on appeal as it is, rather than as a party on appeal asserts it is. In any event, whether an issue was preserved for appeal is a question of law, not an error that could warrant reversal, so we review the question de novo even if counsel has expressed an opinion on the matter. An appellee's abandonment of an issue does not generally relieve the appellant of the burden of proving entitlement to relief on the law and on the record.

should not be read to the jury. The prosecutor objected to giving CJI2d 16.16(4), which related to grossly erroneous or grossly unskillful medical treatment. Defense counsel stated that he wanted subsection (4) because of the language regarding grossly erroneous or grossly unskillful medical treatment. The prosecutor argued that there had been no testimony regarding grossly erroneous or unskillful medical treatment.

Defense counsel conceded that he did not have "any evidence or testimony of gross[ly] erroneous medical treatment[.]" But he argued that "because of the lack of medical care that [the victim's] demise was brought upon substantially earlier than the predictions of any of the doctors that we do have the evidence in front of the jury about." He believed the instruction in subsection (4) was appropriate because "the death would not have occurred had [the victim] received the treatment that was otherwise necessary."

The trial court held that it would instruct on subsections (1) and (2), but not (3) or (4), because there was no "medical testimony whatsoever regarding medical treatment that was grossly erroneous or grossly unskilled. In fact, just the opposite." Defense counsel then withdrew his request for CJI2d 16.16 as a whole, stating "I think what I'll do then is withdraw the request in its entirety." The trial court granted the request to withdraw the entire instruction.

After discussing a different instruction, the prosecutor later returned to CJI2d 16.16 and asked the trial court to give subsections (1) and (2), arguing that the instruction clarified that if defendant "unlawfully injured [the victim] and started a series of events that naturally or necessarily resulted in [the victim's] death[,]" then it would be "no defense that the injury was not the only cause of death. And if there is any inference that perhaps something was, exasperated [sic], exasperated [sic] his death or sped it up, I mean, I think still it is no defense, and that that [sic] instruction should be employed." Defense counsel interjected, "no disrespect, your Honor, but I am going to have a problem with that."

> *DEFENSE COUNSEL:* I think that leaving out the part on Number 4 only paints half the picture of what the instruction is supposed to be, and I think that the concern about the multiple cause of death is really alleviated in the intervening cause language on 16.15 which starts out with the language that it says there may be more than one cause of death.
>
> *PROSECUTOR:* Right. 16.15 makes sense. There could be more than one cause of death, and then this clarifies how that might be the case. Yet [defendant] still would be guilty if they find that she did the conduct. And in 16.16 it gives the Court discretion, it says choose one or more of those different sentences.
>
> *TRIAL COURT:* Well, then following [defense counsel's] statement then if I am going to give 16.16, I got to give 16.15.
>
> *PROSECUTOR:* Right. I don't have any objection to 16.15.
>
> *DEFENSE COUNSEL: Sounds like we have an agreement then*. Except you could really eliminate Number 3, the third paragraph, because there was no evidence that [the victim] was already weak or ill.

TRIAL COURT: I'm eliminating 3 and 4.

DEFENSE COUNSEL: Very good. [Emphasis added.]

After a recess, the trial court began arranging the order of the instructions to be read to the jury:

TRIAL COURT: And then 16.15, didn't we decide on 16.16?

DEFENSE COUNSEL: Yes, sir. We were going to put in Paragraphs 1 and 2. [Emphasis added.]

We conclude that defendant ultimately expressed satisfaction with the instructions and thereby waived appellate review. *Kowalski*, 489 Mich at 503; *Carter*, 462 Mich at 215. Defense counsel's statements signaled his satisfaction with the instructions that the trial court ultimately decided to give to the jury. His responses, "Sounds like we have an agreement then[,]" and "Very good[,]" after the parties discussed the issue and he proposed adding CJI2d 16.15, indicated his satisfaction and agreement with the trial court's decision to give CJI2d 16.16(1) and (2) in conjunction with CJI2d 16.15, and not give CJI2d 16.16(4). As a result of expressing satisfaction with the instructions, defendant has waived this issue on appeal.[5]

Nevertheless, had the issue not been waived, we would find that the trial court did not abuse its discretion in omitting CJI2d 16.16(4). *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Consequently, whether the issue was preserved is of no practical significance to the outcome of this appeal. Medical treatment can only be an "intervening cause" for purposes of CJI2d 16.16(4) if there is evidence that it was "grossly erroneous or grossly unskillful." See *People v Cook*, 39 Mich 236, 238 (1878); see also *People v Bailey*, 451 Mich 657, 678; 549 NW2d 325 (1996); *People v Townsend*, 214 Mich 267, 279; 183 NW 177 (1921); *People v Herndon*, 246 Mich App 371, 400; 633 NW2d 376 (2001). Furthermore, the medical treatment must have been "so grossly erroneous or unskillful as to have been the cause of the death[.]" *Townsend*, 214 Mich at 270, 279. It is therefore "no defense to show that other or different medical treatment might or would have prevented the natural consequences flowing from the

---

[5] Had defense counsel merely given up trying to persuade the trial court to include CJI2d 16.16(4) and ultimately acquiesced to the instructions as given, it might be arguable that defendant had some kind of inferred ongoing objection, even if defense counsel failed to ask for one or did not explicitly acquiesce subject to a prior objection. This would be a particularly persuasive argument if it was clear that it would have been futile for defense counsel to attempt to place such an objection on the record; e.g., the trial court was antagonistic. However, as discussed, defense counsel affirmatively withdrew the request for CJI2d 16.16 in its entirety. When the prosecution then requested CJI2d 16.16(1) and (2), defense counsel did not ask for the complete instruction to be given or place any objection on the record; instead, defense counsel requested CJI2d 16.15. The trial court provided defense counsel ample leeway with which to object had defense counsel ultimately concluded that doing so was proper.

wounds." *Id.* "If a wound or other injury cause[s] a disease, such as gangrene, empyema, pneumonia, or the like, from which [the] deceased dies, he who inflicted the wound or other injury is responsible for the death." *Id.* at 278 (internal citation and quotation omitted).

Here, defendant presented no evidence that inadequate medical treatment occurred or caused the victim's death. Rather, defense counsel focused on abuse or neglect in having "unfit" living conditions or poor parenting skills on the part of the victim's post-injury care provider, which are unrelated to medical treatment. In any event, an intervening cause defense only "applies to nonfatal wounds that the defendant could not anticipate would cause death," not to "an injury that is fatal." *People v Herndon*, 246 Mich App 371, 400-401; 633 NW2d 376 (2001). "If thoroughly and extraordinarily incompetent medical care killed the victim, it would break the chain of causation, absolving the defendant of criminal liability." *Id*. at 400. Without medical intervention to resuscitate the victim, he would have died in 2003 after the initial injury because his heart had stopped. The immediate cause of the victim's death was pneumonia, to which he was extremely susceptible because of the brain damage caused by the injuries that defendant inflicted. Indeed, the testimony indicated that the victim lived as long as he did only because of the medical treatment and intervention that he received; his death was simply the culmination of the natural consequences flowing from the injury defendant inflicted in 2003.[6]

Finally, when evaluating a claim of jury instruction error, this Court reviews the trial court's instructions as a whole to determine whether they, even if imperfect, sufficiently protected the defendant's rights and fairly presented the issues to the jury. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007) (citations omitted). "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007) (citation omitted). An instruction on a defense or theory should be given if it is supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

The instructions as given sufficiently protected defendant's rights and fairly presented the issues to the jury. Defendant argued to the jury that an intervening cause was responsible for the victim's death because of the care he received after the injury. The instruction in CJI2d 16.15 directed the jury, consistent with defendant's theory of the case, that "[i]t is not enough that the

---

[6] Withdrawal of medical life support does not constitute a superseding, intervening cause of death that absolves a defendant of liability. *People v Bowles*, 461 Mich 555, 559-560; 607 NW2d 715 (2000).

defendant's act made it possible for the death to occur. In order to find that the death of [the victim] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of the defendant's act." The jury could not have found defendant guilty unless it concluded that the victim's death was "the natural or necessary result" of her actions, and not merely that defendant's actions made it possible for death to occur.

Affirmed.

/s/ Christopher M. Murray
/s/ Amy Ronayne Krause

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2013
v	No. 307488 Macomb Circuit Court
MELISSA ANNE MEMMER, Defendant-Appellant.	LC No. 2010-003256-FC

Before: SHAPIRO, P.J., and MURRAY and RONAYNE KRAUSE, JJ.

SHAPIRO, P.J. (*concurring*).

I agree that the trial court's refusal to give CJI2d 16.16(4) was not error and that the trial court did not prevent the jury from considering defendant's assertion that poor care by the child's post-injury caregiver was an intervening, superseding cause of the victim's death. Defendant was liberally permitted to question the caregiver based on non-testimonial statements that the caregiver had not provided adequate care to other children in her home. Moreover, the trial court permitted defense counsel to argue causation in closing, asserting that the child's post-injury caregiver had provided substandard care despite the fact that there was no medical testimony to support that claim and that to the contrary, all the medical testimony supported the prosecution's theory. Finally, the trial court did instruct the jury that they were to acquit the defendant if they did not conclude that the victim's death was the "natural or necessary result" of the defendant's acts.

I write separately, however, to note my disagreement with the majority's unnecessary and, I believe, incorrect analysis of the preservation issue. It is unnecessary because the majority opinion goes on to consider whether refusing to give the requested instruction constituted error, and I agree with the majority's conclusion that it was not error. Despite our unanimity on the substantive issue, however, the majority concludes it must address the preservation issue and so I am unfortunately obligated to do so as well.

I would, first, conclude that we should not address the question whether defendant preserved the objection below, because on appeal, the prosecutor has abandoned the issue. Though the prosecutor's brief on appeal asserted that defendant failed to preserve the objection, at oral argument the prosecution changed its position. The prosecutor appearing before this Court explicitly conceded the issue and expressly stated that defendant had preserved the claim of instructional error. I see no reason to reject that explicit concession which was made

knowingly, intelligently and voluntarily by the prosecutor when she argued her case to this Court and I know of no case that would allow, let alone require, that we ignore that concession. [1]

Second, I believe the majority is applying a double standard by excusing the prosecutor's clear and unequivocal waiver of an issue at oral argument while holding defendant to a duty to preserve that goes well beyond what is actually required. In this case, defense counsel repeatedly asked the court to give the instruction in question and consistent with the reasons for which we require preservation, the trial court heard argument, considered the issue and made a ruling on the record. However, once the trial court declined to give the requested instruction, defense counsel was obligated to attempt to obtain the best alternative for his client. Neither the prosecution nor the trial court stated that by eventually acquiescing in a different instruction, after having been explicitly denied the instruction it wanted, that the defense retroactively waived its initial request or that its agreement to the less desirable alternative was conditioned on its abandonment of the instruction it really wanted.

Because I believe the majority has employed a double standard I cannot join the portion of the opinion addressing whether defendant adequately preserved his instructional objection at the trial court, or its ready dismissal of the prosecutor's concession at oral argument. In all other respects I concur.

/s/ Douglas B. Shapiro

---

[1] The majority's sole authority for doing so is a citation to *Zantop Airlines v Eastern Airlines*, 200 Mich App 344 (1993) which does not remotely bear on the issue of an explicit concession of an issue on the record. It merely says that "counsel's arguments are not evidence." I have not suggested that the prosecutor's statement was "evidence." Indeed, no "evidence" is admitted at an appellate oral argument. What the prosecutor did was orally concede an issue it had briefed.