

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 1, 2014

v

RENEE MARIE KING,

No. 309974
Macomb Circuit Court
LC No. 2011-001495-FC

Defendant-Appellant.

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), first degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and first-degree child abuse, MCL 750.136b(2). The trial court sentenced defendant to mandatory life imprisonment for the murder conviction and to concurrent prison terms of 30 to 50 years for the first-degree CSC conviction and 86 to 180 months for the first-degree child abuse conviction. Defendant appeals her sentence and claims: (1) that the trial court violated her due process rights; (2) that the trial court erred when it failed to suppress a statement she gave to a police officer; and (3) ineffective assistance of counsel. For the reasons stated below, we affirm.

I. FACTS

The jury found that defendant killed her two-year-old stepdaughter, LFW. Defendant was home alone with LFW. A few hours later, after a 911 call, emergency personnel arrived at defendant's house and discovered that the child was dead. Medical evidence indicated that the child had multiple contusions about her body, including at least 20 different areas of bruising to the head. She also had a serious injury to her vagina and perineum. The medical examiner determined that the child died from cardiorespiratory arrest as a result of the head injuries and classified the death as a homicide. Defendant claimed that the child's injuries were inflicted accidentally when defendant was holding her and dropped her, or when defendant fell while holding her, or both.

II. ANALYSIS

A. MRE 404(B)

Defendant argues that the trial court violated her due process rights by admitting other acts evidence under MRE 404(b)(1). A defendant has a constitutional right to a fair trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). While this right can be violated by the admission of unfairly prejudicial evidence, *People v Starr*, 217 Mich App 646, 648; 553 NW2d 25 (1996), rev'd on other grounds 457 Mich 490 (1998), evidentiary errors are generally considered nonconstitutional. *People v Blackmon*, 280 Mich App 253, 260; 761 NW2d 172 (2008). A preserved issue regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion occurs when the trial court selects an outcome that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Under MRE 404(b)(1), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person to show action in conformity therewith. Thus, if the sole purpose in offering the evidence is to show the defendant's propensity for particular conduct based on his or her character as inferred from other wrongful conduct, it is not admissible. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). It is admissible, however, for another purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident" if that purpose is material. MRE 404(b)(1).

To be admissible pursuant to MRE 404(b)(1), other-acts evidence must meet three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The fact that evidence is damaging does not mean it is unfairly prejudicial because "[a]ny relevant testimony will be damaging to some extent." *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury, *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), when it would lead the jury to decide the case on an improper basis such as emotion, *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989), or when it would be inequitable to allow the use of the evidence, *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). If the evidence is admissible, the trial court may provide a limiting instruction upon request. *Knox*, 469 Mich at 509. "Such a limiting instruction protects a defendant's right to a fair trial." *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007).

LFW died from blunt force trauma to the head. A principal issue at trial was whether that trauma was inflicted deliberately or whether the victim's injuries were accidentally caused. Defendant gave conflicting accounts of the falls and said both that she accidentally dropped the child and that she had accidentally fallen while holding the child. The prosecutor was allowed to introduce evidence that defendant had previously struck the child in the face deliberately. Evidence that defendant previously injured the child by deliberately striking her in the head made it somewhat less likely that she accidentally injured the child in the head by dropping her. Therefore, the evidence was relevant for a proper purpose other than propensity. Given the horrific nature of the injuries the child sustained while in defendant's custody, it is highly unlikely that the jury would have been distracted by, or given undue weight to, evidence that defendant once bloodied the child's nose by slapping her. Therefore, the probative value of the

evidence was not substantially outweighed by the danger of unfair prejudice. Consequently, the trial court did not abuse its discretion in admitting the evidence.

B. MOTION TO SUPPRESS

Defendant also says that the trial court erred in failing to suppress the statement she gave to Officer Yax while she was in the hospital. In reviewing a trial court's determination on a motion to suppress a confession, this Court reviews the record de novo but will defer to the trial court's factual findings unless they are clearly erroneous. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). However, if resolution of a disputed fact depends on the credibility of the witnesses or the weight of the evidence, this Court will defer to the trial court's determination. *Id.*; *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

"Both the state and federal constitutions guarantee that no person shall be compelled to be a witness against himself or herself." *People v Cortez (On Remand)*, 299 Mich App 679, 691; 832 NW2d 1 (2013). "*Miranda*¹ warnings are not required unless an individual is subjected to custodial interrogation." *People v Roberts*, 292 Mich App 492, 504; 808 NW2d 290 (2011). "Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody," which the police should know is reasonably likely to elicit an incriminating response from the defendant. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). A person is in custody where the "person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). Whether the defendant was in custody depends on the totality of the circumstances. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* The key question is whether the defendant "reasonably could have believed that he was not free to leave." *Id.*

"The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations." *Michigan v Jackson*, 475 US 625, 629; 106 S Ct 1404; 89 L Ed 2d 631 (1986), overruled in part on other grounds by *Montejo v Louisiana*, 556 US 778, 796; 129 S Ct 2079; 173 L Ed 2d 955 (2009). A defendant who is in custody and who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the [defendant] himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Defendant was interviewed at the hospital by Officer Reed and then by Officer Yax. Reed did not advise defendant of her rights before questioning her. Nevertheless, defendant

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

claims that she asked for counsel while speaking with Officer Reed. Defendant must be in custody in order to invoke her right to counsel, see, e.g., *Burket v Angelone*, 208 F3d 172, 197 (CA 4, 2000); *United States v Wyatt*, 179 F3d 532, 537 (CA 7, 1999), and defendant claims that she was in custody at the time that she spoke to Officer Reed. A defendant who is questioned at a hospital generally is not in custody if she is not under arrest and is not otherwise restrained or prevented from leaving by the police. See, e.g., *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000), *Peerenboom*, 224 Mich App at 197-198, and *People v Gilbert*, 8 Mich App 393, 397-398; 154 NW2d 800 (1967).

At the suppression hearing, the evidence showed that defendant was at the hospital emergency room, and not interviewed at the police station. This finding is supported by the testimony of Officer Reed and defendant, who both stated that they spoke while defendant was in the hospital. The trial court found that defendant was at the hospital for medical treatment. This finding is supported by defendant's mother's testimony that she had to leave defendant's bedside because defendant "was going through tests and different things." The trial court found that defendant "was free to leave and in fact did leave the hospital," and this finding is supported by Officer Reed's testimony that he did not place defendant under arrest and that she was free to leave and by defendant's testimony that she left after Officer Reed told her she was not under arrest. While defendant initially testified that Officer Reed threatened to harm her if she tried to leave, the trial court rejected that testimony, finding that defendant's credibility on that point was "suspect," in part because that testimony was contradicted by defendant's later testimony that she left after Officer Reed told her she was not under arrest. The trial court found that "[a]ny security that was present was due primarily to the family altercations in the hospital, not to restrain the defendant and there was no evidence that the police were in any way acting as security." This finding is supported by Officer Reed's testimony that he did not know why hospital security personnel were involved and by defendant's mother's testimony that hospital security personnel had locked the doors to the emergency treatment area, apparently as part of the response to a family altercation in which some people had threatened to kill defendant. No one testified that hospital security personnel were acting at the behest of police. Given these findings, the trial court did not clearly err in finding that defendant was not in custody when Officer Reed interviewed her at the hospital.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that her trial counsel was ineffective for failing to call Dr. Julie Lata, whose testimony defendant contends would have mandated a contrary result regarding her motion to suppress. Because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request for an evidentiary hearing in the trial court, our review of this issue is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, the defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48

(1996). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant’s claim is premised on an excerpt from a report prepared by Dr. Lata during defendant’s hospitalization. Dr. Lata’s report states in part:

While the patient was in the emergency department, she had multiple question and answer periods which occurred with the medical examiner as well as the police department regarding her stepdaughter. The patient was becoming somewhat agitated as she was awaiting being medically cleared and receiving these interviews; however, per the police department, the patient could not get [sic] leave the emergency department until she was medically clear, and they needed to be notified prior to her official discharge. While the patient was waiting, she did become agitated, and she attempted to leave and remove her IV. The police were in the emergency department and told her that she needed to be detained.

Dr. Lata’s report does indicate that the police told defendant that she was being detained. However, it is not clear that was all the police said—they might have explained that she was being detained because she had not been medically cleared. Accordingly, the report does not establish that defendant was being held by the police rather than by hospital authorities. Further, Dr. Lata’s report indicates that the police told defendant that she was being detained when defendant was removing her IVs. Evidence at the suppression hearing indicated that this incident occurred after defendant had spoken to both officers and just before defendant was released from the hospital—not when defendant was talking to Officer Reed and before she spoke to Officer Yax. Moreover, despite Dr. Lata’s indication that the police told defendant that she was being detained, the trial court found that defendant “told Police Officer Reed she was going to leave because she was not under arrest” and defendant did in fact leave. This finding is supported by defendant’s own testimony and thus is not clearly erroneous. Therefore, it is not reasonably probable that had Dr. Lata testified at the suppression hearing, the trial court would have found that defendant was in custody. Accordingly, we reject defendant’s ineffective assistance of counsel claim.²

² Defendant says that the trial court erred in failing to score the sentencing guidelines for the CSC and child abuse convictions. It is unclear if defendant also challenges the sentence imposed for the CSC conviction as being a departure from the appropriate guidelines range. Regardless, both issues are moot because defendant is serving a mandatory life sentence for her first-degree

Affirmed.

/s/ Henry William Saad

/s/ Karen M. Fort Hood

murder conviction and any lesser sentence, within the guidelines range or not, is necessarily subsumed within the life sentence, which “effectively nullifies the significance of any sentences” imposed on the lesser offenses. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Therefore, defendant is not entitled to any relief. *People v Poole*, 218 Mich App 702, 719; 555 NW2d 485 (1996).

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GLEICHER, J., (*concurring in part and dissenting in part.*)

I concur with the majority's resolution of defendant's challenges to her convictions. I write separately to express my belief that the trial court erred by failing to score defendant's convictions for first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and first-degree child abuse, MCL 750.136b(2). See *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005) (Sawyer, J.), and *People v Getscher*, 478 Mich 887; 731 NW2d 768 (2007) (Markman, J., dissenting).

Additionally, because the sentence imposed for the CSC conviction qualified as an upward departure, the trial court was obligated to articulate substantial and compelling reason for the departure sufficient to permit appellate review. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). I would remand for the accomplishment of that task.

/s/ Elizabeth L. Gleicher