STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2009
v	No. 283711 Mackinac Circuit Court
KEVIN MARTIN SAMPHERE, Defendant-Appellant.	LC No. 06-002994-FH

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of first-degree child abuse, MCL 750.136b(2), and the trial court sentenced him to 5 to 15 years in prison. Defendant appeals as of right. We affirm defendant's conviction and sentence, but reverse the trial court's calculation of the sentencing guidelines and remand for correction of defendant's guidelines score.

I. Sufficiency of the Evidence

We initially address defendant's contention that insufficient evidence of intent supported his first-degree child abuse conviction. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Questions of credibility and intent are for the trier of fact to resolve. *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court generally will not second guess the trier of fact's determinations concerning what inferences fairly arise from the evidence or its determination regarding "the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A first-degree child abuse conviction requires proof that an individual "knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). Here, defendant does not challenge that the then four-year-old victim endured serious physical

harm, specifically second- and third-degree burns over approximately 90 percent of his body.[1] Defendant contends that the trial evidence comported with his theory that he did not knowingly or intentionally cause the victim's injuries, which occurred accidentally when he left very hot bath water running unattended and the victim climbed into the tub. According to defendant, from down a hallway in his residence he heard a shriek and a thump that prompted him to investigate the source of the noise, and on reaching the bathroom observed the victim lying submerged and face-up in the tub.

Dr. Stephen Guertin, director of the Lansing Sparrow Regional Children's Health Center's pediatric intensive care unit, offered expert testimony in the areas of "pediatrics and child abuse." Dr. Guertin testified that the victim's body was spared from significant burns in several areas, including portions of his groin, his armpits, his anus, the backs of his knees, his elbow creases, the top of his head, and under his chin, which signified that the victim had entered the water in a crouched position and remained in that position for the duration of his presence in the tub. Dr. Guertin noted that the most severe burns on the victim's body appeared on "the very bottom of the back, the buttock, [and] backs of [his] legs," signifying that these areas entered the tub water first and exited last. In Dr. Guertin's estimation, the burning the young victim suffered would have occurred within two to five seconds, presuming that the tub water was around 135 to 140 degrees. Dr. Guertin offered the following relevant conclusions with respect to the victim's arrival in the tub:

> *Prosecutor*: Now based upon your medical training and experience if the boy were floating in the tub, fully extended, could he have had the sparing in those regions?
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> *Dr. Guertin*: No. No the sparing tells you the position he was in, and he had to have maintained that position through the burn event, and so no, you wouldn't have found him like this and then seen areas of sparing behind his knees, the sparing in the groin, and even sparing here in the elbow creases, no.
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> Based on all of those things I believe that the child was—that very hot water was put into the tub, that it . . . was unreasonably hot, although a person may not necessarily have tested it first, *that the child was picked up and put in the tub with his—in the crouched—in that position*, that his butt and back of his legs, and lower back went in first and then he was tipped or angled this way. I believe that then he had to of [sic] either been released or he slid[] or fell somehow so that he was partially submerged—literally up to here. I believe that given the time frame I've described to you he would have had to have been plucked out then.

[1] Pursuant to MCL 750.136b(1)(f), "'serious physical harm' means 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." (Emphasis added).

> Either first an attempt was made to pluck him out and it failed and that's when he slid or submerged, but then certainly within two to five seconds he is successfully plucked out of the tub. I believe that that is the most consistent with the position he was in, the distribution of third- and second-degree burn, the time frame that we're talking about, the account given by the child, and portions of the account given by . . . Defendant. [Emphasis added.]

Dr. Guertin characterized as "considerably less likely" defendant's account that the victim climbed into the bath tub himself and eventually was rescued by defendant:

> Any four-year old can climb into the bath tub, no question. Any four-year old can get down into a crouched position, any four-year old can cry out for help and if he's rescued soon enough could be lost in that attempt, slide down get some second-degree burn and get plucked out. All of that is true, it is possible. He would have had to have maintained that position throughout. It implies that he would have once in the tub gotten into a crouch—in a hot tub—and it implies that he would have not been aware, or as aware as you would expect, or would suspect a kid ought to be able to know, that this was extremely hot. So for him to put himself in it sort of says . . . he cannot have appreciated how hot it was, and then instead of clambering out he had to go into a crouch, then he had to maintain the crouch, lose it, get that second-degree burn and be rescued. *I find that to be—while I cannot say it's impossible—I find that to be incredibly less likely then [sic] the scenario that I just told you earlier*. [Emphasis added.]

Although Dr. Guertin declined to opine concerning defendant's intent when placing the victim in the tub, he did offer that defendant may have intentionally placed the child in the tub hoping to burn him, or may have simply put the victim in the water neglectfully.

The prosecution also presented testimony by Dr. Richard Wilcox, director of the Spectrum Health Regional Burn Center in Grand Rapids, who treated the victim between March 31, 2006 and April 5, 2006. The trial court certified Dr. Wilcox as an expert "in burns, burn causation and child abuse." Dr. Wilcox described the presence of a burn pattern on the victim similar to that detailed by Dr. Guertin. When questioned whether defendant's account of the victim's burns would have caused the injuries detected by Dr. Wilcox, the doctor replied,

> My opinion, no.
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> They—you have to go back to the pattern of the burns and specifically the pattern of what's not burned. The areas that we've talked about that were spared the burns, that were tucked up, to put yourself into that position you have to then ask yourself could I get into a bath tub in that position; and I don't know how one gets into a tub flexed up as given the position that [the victim] had to be to get the kinds of burns that he—that the pattern, the distribution of burns, that he got. In addition, at 140 degrees it doesn't take long to . . . give you some tissue destruction to greater or lesser extent . . . matter of seconds. And it would seem to be that if the length of time it would have taken to go from one—and I don't

> know how far that was, obviously—but it sounds like you describing many seconds that would have past [sic], and it seems to me, therefore, that even though I know he sustained some burns and needed skin grafting that maybe more of his body would have sustained similar kinds of burns that were deeper given more time exposure to that very hot water.
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> I think the important part is . . . the position that the child had to be in to be in that water. Again, because of the areas that were not burned.

When asked whether it would have "been possible for [the victim] to have been floating in the tub of hot water head back, arms and legs extended[,]" Dr. Wilcox replied, "No, sir," then elaborated,

> If . . . [the victim's] arms and legs were extended then the areas in front of his elbows, and behind his knees, would have been burned . . . and would have looked just like the tissue that . . . was burned that was right adjacent to those areas. If he'd been face up his face may or may not have gone in the water, and may not have been burned at all, but the surface of—the area on the undersurface of his chin, and the front of his neck that was not burned, would have been burned had he been floating horizontally with his face up, because that would have been exposed to the . . . hot water.
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> . . . [I]f . . . [the victim] slipped into the tub, it's not likely he's going to be in that—if it's an accidental thing—it's not likely he's going to be in that flexed position because he's not anticipating the need to protect himself; that's a protective position. He's going to fall in and the burn is going to be a little bit more random. There's going to be parts of his body burned that are not burned before he can get into that [crouched] position to protect himself.
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> . . . I think . . . again we're talking about position and . . . I think that's . . . the key here, and I think that a four-year old trying to escape from a bad situation—such as getting a foot in 140 degree water and then perhaps falling in—is much more likely to try to scramble and get away from that situation, get out of the hot situation, and not curl up in a ball; then to curl up in a ball and assume that position and stay in the hot water. . . . [T]his is true of adults and kids—I think when we assume that position it's more often to try to avoid a threat, something that's going to injury [sic] you rather then [sic] try to escape from it.

Dr. Wilcox viewed as a "very hard indicator" of child abuse that "the story of the circumstance doesn't fit the appearance of the injury." Dr. Wilcox concluded, "I think it was not accidental in that the child didn't accidentally get himself in the position to be burned."

David Owsley, who shared a jail cell with defendant for about a week and a half, recounted that defendant had acknowledged putting the victim in the hot bath water. The victim similarly testified at trial that defendant had "put me in the very hot tub." The evidence also revealed that defendant told several witnesses that he had been drawing a bath for himself and had turned on only the hot water, which was his practice; according to several witnesses, defendant liked his bath water very hot. Defendant's ex-wife recalled that the extremely hot temperature of defendant's baths had been an issue in their marital home because they had small children, and she therefore instructed defendant to keep the bathroom door closed so that the children did not touch the water and hurt themselves.

Viewed in the light most favorable to the prosecution, the evidence detailed above, and the reasonable inferences arising from the evidence, constituted an ample basis for a rational jury to find beyond a reasonable doubt that defendant intentionally placed the victim into the bathtub, either intending that the victim would suffer serious physical harm or with knowledge that the hot water in the tub would cause the victim serious physical harm.

II. Great Weight of the Evidence

Defendant also insists that the trial court should have granted his motion for a new trial on the basis that the verdict contravened the great weight of the evidence. "We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

Defendant suggests that the trial evidence substantiating his rapid response in rescuing the victim, his expert's conclusion that the bathtub incident occurred accidentally, his appropriate postevent affect and reactions, and the good relationship, devoid of abuse, that he shared with the victim all demonstrate that he did not intend to harm the victim. However, "[c]onflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232, citing *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The jury also possesses the prerogative concerning what weight to assign to expert testimony. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). In this case, as set forth above, abundant evidence supported a rational inference that defendant intentionally inflicted serious physical injury on the victim or knowingly caused the victim serious physical harm. The trial court properly left for the jury to assess the conflicting expert opinions, and the other circumstantial evidence both supportive of, and inconsistent with, defendant's intentional or knowing injury of the victim. After reviewing the entire record, we reject that the jury's resolution of the evidence preponderated so heavily against the record as a whole that it would be a miscarriage of justice to allow the verdict to stand. Consequently, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. Expert Qualifications

Defendant additionally maintains that the trial court erred in qualifying Dr. Wilcox as an expert in pediatric burn causation. We review for an abuse of discretion a trial court's decision

regarding the qualification of a witness as an expert. *Unger*, 278 Mich App at 216. An abuse of discretion exists if the court's decision fell beyond the range of reasonable and principled outcomes. *Id*. at 217.

A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *People v Yost*, 278 Mich App 341, 393; 749 NW2d 753 (2008). A proposed expert witness need not satisfy an overly narrow test of his qualifications. *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986). Whether a witness's expertise is as great as that of others in the field has relevance to the weight rather than the admissibility of the expert's testimony and is a question for the jury. *Id*.

At the time of trial, Dr. Wilcox, director of the Spectrum Health Regional Burn Center, had practiced in the specialized area of burn surgery for almost 30 years. He was the victim's treating physician for a week and thereafter followed the victim's case. Dr. Wilcox conceded that he did not have certification as a pediatrician, but testified that his burn center admitted about 30 children a year. He explained that in all burn cases, whether adult or child victims, understanding the cause of the burn was important for proper diagnosis and treatment. Although Dr. Wilcox did not belong to a child abuse assessment team, he had supplied his expertise to Child Protective Services when requested. Dr. Wilcox described that he also regularly attended seminars that included the topic of pediatric burns and had reviewed literature on the subject. In light of Dr. Wilcox's training and his extensive burn surgery experience, which included the treatment of many children and a determination of burn causation in these children, the trial court did not abuse its discretion in qualifying Dr. Wilcox as an expert in the area of pediatric burn causation.

IV. Demonstrative Evidence

Defendant further complains that the trial court erred by permitting the prosecution to introduce at trial a video animation that depicted a child going into a bathtub. The prosecution employed the animation as a three-dimensional illustration of Dr. Guertin's and Dr. Wilcox's testimony with regard to the specific positioning of the victim's body when he entered the tub and throughout the incident. We review for an abuse of discretion the trial court's decision to allow the evidence. *Unger*, 278 Mich App at 216.

The trial court permitted the prosecution to present the video animation as demonstrative evidence.

> In Michigan, "(d)emonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). "(W)hen evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *Id*. "Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court's decision to admit demonstrative evidence." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). However, "(a)s with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative

> value in light of policy considerations for advancing the administration of justice." *Id.*; see also MRE 401-403. [*Unger*, 278 Mich App at 247.]

In this case, the brief animation clip had relevance because it visually demonstrated the prosecution's theory of the case as supported by its experts' opinions. MRE 401. Defendant's argument regarding this issue fails to either elaborate on any specific factual discrepancies contained in the animation or identify any specific manner in which the animation injected unfair prejudice into the proceeding. Assuming that defendant's appellate complaint centers on the tub's dimensions and the level of water therein, as reflected in the testimony of the prosecution experts the accuracy of these aspects simply was not material to the purpose for which the evidence was offered, specifically to show the position of the victim's body on entering the tub. Thus, we detect no danger of unfair prejudice that substantially outweighed the animation's probative value. MRE 403. Moreover, the trial court instructed jury concerning the parties' stipulations that "the tub in the animation is not an exact replica of the tub at 405 West Spring Street, and secondly, . . . that the water level is not an exact replica in the animation of the water level from March 30, 2006." Because the animation was not misleading or unfairly prejudicial, the trial court did not abuse its discretion in admitting it.

V. Sentencing

Defendant lastly asserts that the trial court erred in scoring several sentencing guideline offense variables (OVs). We review a trial court's scoring decisions to determine whether the sentencing court properly exercised its discretion and whether evidence of record adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, the interpretation and application of the statutory guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Defendant first disputes the trial court's assignment of one point for OV 2, which authorizes the scoring of one point when "[t]he offender possessed or used any other potentially lethal weapon." MCL 777.32(1)(e). The trial court treated the hot tub water as a potentially lethal weapon. Defendant submits that the trial court's scoring of OV 2 is inconsistent with its earlier decision that the hot water did not qualify as a weapon for purposes of OV 1. MCL 777.31 (aggravated use of a weapon). We need not specifically consider whether a court's scoring of OV 1, which focuses on the manner in which the defendant used various weapons, must match its scoring of OV 2, which focuses on the lethal potential of the weapon itself; here, defendant does not contest the trial court's assignment of zero points under OV 1, but instead contests the adequacy of the evidence supporting the trial court's finding that he "possessed or used any other potentially lethal weapon." MCL 777.32(1)(e). Although the scalding water into which defendant placed the victim had the potential to inflict lethal injury, the hot water does not fit the definition of a "weapon" adopted by this Court in *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002) (applying the dictionary definition of "weapon" as an instrument or device used for attack or defense). Because we do not view the hot water as falling within the plain and ordinary meaning of a "device" or an "instrument," we conclude that the trial court incorrectly scored one point for OV 2. See *Random House Webster's College Dictionary* (2d ed, 1997) (defining a "device" as "a thing made for a particular purpose, esp. a mechanical, electric, or electronic invention or contrivance," and "instrument" as "a mechanical tool or implement, esp. one used for delicate or precision work").

Defendant next challenges the trial court's 25-point scoring of OV 3 on the basis that "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Defendant points to MCL 777.33(2)(d) in support of his position that the court should not have scored OV 3 for his first-degree child abuse conviction, which required proof of bodily injury as an element of the offense. However, the limitation in subsection 33(2)(d) plainly only precludes a five-point score under subsection 33(1)(e), which applies where the victim sustains an injury that does not require medical treatment. Here, testimony established that the victim required extensive and prolonged medical treatment and that his injures threatened his life. In summary, the trial court correctly assigned 25 points under subsection 33(1)(c), and the limitation in subsection 33(2)(d) does not apply.

Defendant further avers that the trial court erred in scoring 50 points under OV 7, MCL 777.37. The trial court scored 50 points on the ground that the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). "Sadism" means "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). The trial evidence revealed that defendant deliberately placed the victim into a bathtub containing scalding hot water, causing burns over 91 percent of his body, about 30 percent of which constituted third-degree burns that required skin grafts. This evidence reasonably establishes that defendant engaged in conduct that subjected the victim to extreme pain and did so to make the victim suffer. Consequently, the trial court properly assigned 50 points under OV 7.

Lastly, defendant disputes the propriety of his 10-point score for OV 10, which assesses a defendant's "exploitation of a vulnerable victim." MCL 777.40(1). Pursuant to MCL 777.40(1)(b), a court may score 10 points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). Defendant does not argue that the trial court's scoring lacked evidentiary support, but rather suggests that the court should have scored no points because a child victim's vulnerability is inherent in child abuse offenses. However, had the Legislature intended to limit the variable's applicability with respect to child abuse offenses, it could have done so, as it has done in the context of other offense variables. See MCL 777.31(2)(e); MCL 777.33(2)(b)-(d); MCL 777.38(2)(b); MCL 777.41(2)(c); MCL 777.42(2)(b); MCL 777.43(2)(c)-(e); and MCL 777.47(2). Because we must presume that the Legislature intentionally omitted a provision in one statute that it included in another, we conclude that the trial court correctly scored 10 points for OV 10 in this child abuse case. *People v Monaco*, 474 Mich 48, 57-58; 710 NW2d 46 (2006).

In summary, our conclusion that the trial court incorrectly scored OV 2 does not change the sentencing guidelines that the court employed in fashioning defendant's sentence. The one-point reduction attributable to OV 2 lowers the OV total in this case to 95 points, which still places defendant firmly in the A-VI scoring grid contained in MCL 777.63 (envisioning a 36-60 month minimum term). Accordingly, we affirm defendant's sentence, but remand for administrative correction of defendant's guidelines score to reflect zero points under OV 2. *People v Melton*, 271 Mich App 590, 593, 596; 722 NW2d 698 (2006) (opinion by Davis, J.).

VI. Presentence Report

The record does not support defendant's final contention that he objected before the trial court to a personal protection order reference in the presentence information report's marriage section. The transcript of the sentencing hearing reflects that defense counsel requested that the court strike other language, which the court did, but that defense counsel stipulated that the personal protection order reference could remain. Defense counsel's affirmative agreement to the reference's inclusion in the presentence report waived, and thus extinguished, any claim of error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

We affirm defendant's conviction and sentence, reverse the trial court's guidelines calculation, and remand for correction of his guidelines score consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher