STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORONDE MAKONNEN GRAHAM,

Defendant-Appellant.

UNPUBLISHED
December 22, 2009

No. 286464
Wayne Circuit Court
LC No. 07-014316

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, and second-degree child abuse, MCL 750.136b(3). He was sentenced to concurrent prison terms of 3 to 15 years for the manslaughter conviction and one to four years for the child abuse conviction. He appeals as of right. We affirm.

Defendant's convictions arose from the death of 15-month-old Diamond Reynolds in July 2007. At the time, defendant was living with the victim's mother, Ashley Crump.[1] Crump left the house, leaving defendant to care for the victim and two other children, who were two and four years old. While in defendant's care, the victim sustained severe head injuries that resulted in her death. On the day the victim was injured, defendant telephoned Crump to report that the victim was not breathing and that the four-year-old child had said that the victim was choking on ice. Defendant also called 911 and reported that the victim had swallowed ice, but he was able to remove it and she was breathing. The victim was transported by ambulance to a hospital, where she later died.

Defendant first argues on appeal that the evidence was insufficient to support either of his convictions. We disagree. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

[1] Although Crump identified defendant as her children's father, defense counsel asserted in his opening statement that defendant was not the victim's biological father.

Involuntary manslaughter under a gross-negligence theory requires proof that the defendant (1) knew of "a situation requiring the use of ordinary care and diligence to avert injury to another," (2) had the ability to "avoid the resulting harm by ordinary care and diligence in the use of the means at hand," and (3) failed to "use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003). Stated otherwise, "a defendant who does not seek to cause harm, but is simply reckless or wantonly indifferent to the results, is grossly negligent." *People v Lanzo Constr Co*, 272 Mich App 470, 477; 726 NW2d 746 (2006). A conviction of second-degree child abuse requires, in pertinent part, proof that the defendant's reckless act caused serious harm to a child. MCL 750.136b(3)(a).

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a reasonable juror to find beyond a reasonable doubt that defendant committed the charged offenses by violently shaking the victim, or by shaking the victim and causing her head to impact a surface. While there was no direct evidence that defendant shook the victim, circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of an offense, *Nowack*, *supra* at 400; *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and defendant was supervising the victim at the time of the injuries, with the only other persons present being two young children. Further, although the prosecution's expert witnesses were unable to rule out completely the possibility that some trauma other than shaking caused the injuries within the child's skull, the prosecution was not required to disprove every reasonable theory consistent with innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). It is sufficient that the prosecution prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id*. at 424; *Nowack*, *supra* at 400; *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009).

The prosecution's expert witnesses, aside from testifying about the consistency between the injuries sustained by the victim and those caused from shaking a child, also testified about the type of circumstances that could cause blunt trauma injuries, without shaking or any external injury, and the force needed to cause the victim's injuries. Each expert testified that the injuries would not result from a typical household fall, but rather would require something severe. Dr. Earl Hartwig, an expert in pediatric medicine, testified that the type of household mechanism that might cause these injuries would be a large television falling on a child. Dr. Carl Schmidt, the Wayne County Medical Examiner, testified that he could not completely rule out a blunt trauma injury to the head, but opined that it was a remote possibility. He testified that the injury would require impact with a soft surface and, if the impact occurred against a soft surface such as a pillow, several impacts would be required to cause the severity of the injuries sustained by the victim. Dr. Schmidt also testified that a four-year-old child could not exert the energy required to cause the victim's injuries.

Even Dr. Daniel Spitz, the defense expert in forensic pathology, testified that something more than a typical household fall would be required to cause a blunt impact injury, without any external injury. He hypothesized that a child standing on the back of a couch at a height of at least five feet from a wooden floor, who then fell and sustained a direct impact of the head with the floor, could have a blunt impact injury, without showing any external injury. He opined that the surface impacted would have to be a "somewhat yielding surface," but need not be soft, to cause an injury to a child without leaving a bruise or laceration.

Examining the expert testimony in light of the other evidence in the case, including the statements made by defendant to explain the victim's condition, which were inconsistent with the medical evidence, the circumstantial evidence was sufficient to establish the prosecution's theory beyond a reasonable doubt. Although defendant correctly observes that doubts about the credibility of a witness may not completely substitute for evidence of guilt, *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), defendant's out-of-court statements did not implicate this principle. Exculpatory statements that tend to lead suspicion and investigation in a false direction are probative of a consciousness of guilt. See *People v Arnold*, 43 Mich 303; 305-306; 5 NW 385 (1880); *People v Wolford*, 189 Mich App 478, 481-482; 473 NW2d 767 (1991); *People v Dandron*, 70 Mich App 439, 442-445; 245 NW2d 782 (1976). Defendant's statements supplemented the other evidence of guilt in this case.

For these reasons, we reject defendant's argument that the evidence was insufficient to support his convictions.

Defendant alternatively argues that the trial court abused its discretion in denying his motion for a new trial based on the great weight of the evidence. We disagree. A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). The record reflects no extraordinary circumstances that would preclude the trial court's deference to the jury's role in determining the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 645-647; 576 NW2d 129 (1998); *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). Further, it cannot be said that the "evidence preponderates so heavily against the verdict that it would be a miscarriage of justice for the verdict to stand." *Id.*

The trial court also did not abuse its discretion in denying defendant's motion for a new trial based on prosecutorial misconduct. Because defendant did not object to the alleged misconduct at trial, his claims of misconduct are subject to review under the plain-error doctrine. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Thus, to obtain appellate relief, defendant must demonstrate a plain error that affected his substantial rights. *Schutte*, *supra* at 720. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

We reject defendant's argument that he is entitled to a new trial because the trial prosecutor called another assistant prosecutor as a witness to testify regarding her efforts to interview the two other children who were present in the home with defendant when the victim was injured.

> [P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant. [*People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) (citation omitted).]

The limited purpose of the assistant prosecutor's testimony was to explain that investigative efforts were made to interview the two younger children to determine whether they could provide any information. The assistant prosecutor testified that neither child was capable of providing reliable information. Defendant has not shown that the assistant prosecutor's testimony was offered in bad faith, or was prejudicial. Without some information regarding the efforts made to determine if the children had any knowledge of the circumstances surrounding the victim's injuries, the jury would have been left to ponder whether there had been a "rush to judgment," as asserted by defense counsel in both his opening statement and closing argument. A prosecutor may respond to a defendant's attack on the adequacy of an investigation. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, defendant was not prejudiced in connection with this issue, because the jury did not hear any statements made by the children. We disagree with defendant's argument that he was prejudiced by the assistant prosecutor's explanation for why she concluded that the children were not competent to provide reliable information. In sum, defendant has failed to show the requisite outcome-determinative plain error to warrant relief. *Schutte*, *supra* at 720; see also *People v Unger*, 278 Mich App 210; 234; 749 NW2d 272 (2008).

Further, the prosecutor did not improperly vouch for the credibility of his witnesses by using the phrase "I believe it" during rebuttal argument. Although a prosecutor may not vouch for the credibility of witnesses to the effect that he or she has special knowledge concerning the witnesses' truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), "prosecutorial comments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief." *Unger*, *supra* at 240. Examined in context, the prosecutor's statement was made in reference to the evidence at trial and was an attempt to explain how the jurors might go about their deliberations. The prosecutor essentially was saying, "If you believe the doctors, then accept their testimony. Say, 'I believe it.'" Therefore, the statement was not improper.

Further, any misstatement by the trial prosecutor during rebuttal argument with respect to the testimony regarding shaking was sufficiently cured by the trial court's later instructions that the "lawyers' statements and arguments are not evidence" and "[y]ou should only accept things the lawyers say that are supported by evidence and your own common sense and general knowledge" See *Schutte*, *supra* at 721-722. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *Abraham*, *supra* at 279; see also *Unger*, *supra* at 237. No plain error requiring reversal is apparent.

Finally, we are not persuaded that the prosecutor made an improper appeal for sympathy by stating in closing argument that the victim quickly went from a healthy child to one who was comatose and eventually died in the hospital. A prosecutor need not state his arguments in the blandest possible terms. *Schutte*, *supra* at 722. Further, to the extent that it was improper for the prosecutor to refer to the victim as a "poor little injured child," this isolated remark was not so egregious that it denied defendant a fair trial, particularly in light of the trial court's instruction that the jury "must not let sympathy or prejudice influence your decision." *Abraham*, *supra* at 279; see also *Unger*, *supra* at 237; *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001). Again, no plain error requiring reversal is apparent.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro