STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2009
v	No. 279068 St. Clair Circuit Court
NICHOLAS THOMAS KELLY, Defendant-Appellant.	LC No. 07-000187-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to 30 to 60 years' imprisonment. He appeals as of right. We conclude that the admission of the victim's statements to law enforcement officers violated defendant's right of confrontation. However, because we also conclude that the evidentiary error was harmless, that the evidence did not support an instruction for involuntary manslaughter, that the trial court did not err in scoring offense variable 7, and because we find no merit to any of the issues raised by defendant in his standard 4 brief, we affirm.

I. Basic Facts

Holli Sharrow, defendant's girlfriend, died on December 12, 2006. Sharrow died from blunt force trauma to her head, which had created a subdural hematoma. According to Dr. Kanu Virani, the medical examiner, the hematoma had been present in Sharrow's brain for two to three weeks prior to her death.

Two weeks before her death, on November 30, 2006, Sharrow was interviewed by Detective Colleen Titus. Sharrow told Titus that, on November 25, 2006, defendant had thrown her against a wall, causing her head to hit the wall. Sharrow also told numerous medical providers that defendant had assaulted her, with her head striking a wall.

II. Right of Confrontation

Defendant argues that, pursuant to his right of confrontation, the trial court erred in admitting Sharrow's statements to law enforcement officers regarding prior assaults by defendant. Defendant also claims that the admission of Sharrow's statement to Detective Titus violated his right of confrontation. "Constitutional questions, such as those concerning the right

to confront witnesses at trial, are reviewed de novo." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A

The trial court admitted Sharrow's statements to law enforcement officers regarding prior assaults by defendant pursuant to MCL 768.27c. We agree with defendant that the admission of hearsay statements under MCL 768.27c must yield to his right of confrontation. "It is axiomatic that a statutory provision . . . cannot authorize action in violation of the federal . . . constitution[]." *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Accordingly, even if Sharrow's hearsay statements to law enforcement officers were admissible under MCL 768.27c, the statements were not admissible at trial if admission of the statements would violate defendant's right of confrontation.

B

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The Sixth Amendment bars testimonial statements by a witness who does not testify at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). The United States Supreme Court has articulated the following standard regarding statements given during police interrogation:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006.]

We agree with defendant that Sharrow's statement to Detective Titus on November 30, 2006, was a testimonial statement. Titus interviewed Sharrow after she was "assigned the case." Titus recorded the interview, and she planned on having Sharrow make a written statement but elected not to do so because she did not want to make Sharrow sit up. Under these circumstances, Sharrow's statement to Titus about the November 25, 2006 incident was testimonial, as was Sharrow's statement to Titus about the November 14, 2006 incident. Titus did not elicit Sharrow's statements to resolve a present emergency, but to learn about what had happened in the past. See *Id*. at 822, 827; *People v Walker (On Remand)*, 273 Mich App 56, 63-65; 728 NW2d 902 (2006).

Likewise, Sharrow's statements to Officer Mike Kasprzyk, Sergeant Dewayne Gilley, and Deputy James Leen about incidents with defendant that occurred in October 2003, July 2004, and July 2006, were testimonial. Sharrow's statements described past events. In the statements, Sharrow was not speaking of ongoing emergencies. In addition, she made the statements in places of relative safety. She was protected by law enforcement, and defendant was not present. Viewed objectively, the statements were testimonial, as they were made to

prove or establish past events. See *Davis*, *supra*; *Walker*, *supra*. We will assume, for purposes of this appeal, that Sharrow's statement to Lieutenant James Wagester in November 2005 was testimonial. Although Sharrow was in a volatile situation with defendant when Wagester arrived, the record is unclear as to whether Sharrow's statement, as was testified to by Wagester, was given to enable Wagester to respond to the volatile situation or whether it was given to establish past events.[1] However, Sharrow's statement to Wagester on December 9, 2006, was nontestimonial. Her statement that the pain in her head was a result of an assault by defendant was given to enable Wagester to render emergency medical assistance.

C

Plaintiff contends that, even if Sharrow's statements were testimonial, the statements were admissible because defendant, by making Sharrow unavailable to testify at trial, forfeited his right of confrontation. We disagree. The forfeiture by wrongdoing doctrine only applies when the defendant engaged in conduct designed to prevent the witness from testifying. *Giles v California*, __ US __; 128 S Ct 2678, 2683; 171 L Ed 2d 488 (2008). There is no evidence in the record to suggest that defendant assaulted Sharrow on November 25, 2006, in order to prevent her from testifying. Accordingly, the forfeiture by wrongdoing doctrine does not apply to the present case, and the trial court erred in holding that defendant had forfeited his right of confrontation.

Because Sharrow's statement to Titus about the November 25, 2006 assault was testimonial, as were Sharrow's statements to Kasprzyk, Gilley, Leen, and Wagester, with the exception of the December 9, 2006 statement, and because defendant did not have a prior opportunity to cross-examine Sharrow, the admission of Sharrow's statements violated defendant's constitutional right of confrontation. *Crawford*, *supra*.

D

The admission of evidence in violation of a defendant's right of confrontation is subject to a harmless error test. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005). A constitutional error is harmless if it is clear beyond a reasonable doubt that a jury would have convicted the defendant absent the erroneously admitted evidence. *Id.* at 347; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Although the prosecutor heavily emphasized the erroneously admitted evidence in closing arguments, the erroneous admission of Sharrow's statements was harmless. In the course of receiving medical treatment, Sharrow provided statements to five medical providers about the cause of her brain injury. She told Dr. David Michael and Dr. Robert Brandt that her boyfriend had assaulted her. She informed Dr. Meena Hierholzer and Dr. Mark Adams that her boyfriend had thrown her against a wall, causing her head to strike the wall. She told Dr. David Charles that her boyfriend had taken her by her head or hair and beat her head against a wall multiple times. In addition, Dr. Virani testified that the hematoma in Sharrow's brain was consistent with

[1] The written statement that Sharrow provided to Wagester, and also the written statement that Sharrow provided to Gilley, were clearly testimonial.

Sharrow's head being slammed into a wall two or three weeks before her death. Dr. Virani further testified that a "directly large amount of force" was necessary to cause the hematoma. Based on Sharrow's statements to her medical providers and the testimony of Dr. Virani, it is clear beyond a reasonable doubt that, even if Sharrow's statements to Titus and the other law enforcement officers had been excluded, the jury would have convicted defendant of second-degree murder. *Shepherd, supra*. Accordingly, the error in admitting Sharrow's statements was harmless.

III. Manslaughter Instruction

Defendant claims that the trial court erred in refusing to instruct the jury on involuntary manslaughter. We disagree. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

Manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id.* The element of malice distinguishes murder from involuntary manslaughter. *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004).

> If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was committed with a lesser mens rea of gross negligence or an intent to injury, and not malice, it is not murder, but only involuntary manslaughter. [*Id.* at 21-22.]

Thus, defendant was entitled to an instruction on involuntary manslaughter only if a rational view of the evidence would have supported a finding that Sharrow's death was caused by an act of gross negligence or an intent to injure, and not malice. *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006). Malice is "an intent to kill, an intent to create great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Mendoza, supra* at 540.

Sharrow's statements to her medical providers indicate that she suffered the hematoma after defendant pushed her head, either directly or indirectly, into a wall. Dr. Virani testified that the "cue and contra cue injuries," which included the hematoma, suffered by Sharrow required a force sufficient to cause the brain to move inside the skull. He described this force as a "good force" or a "directly large amount of force." Titus testified that when she interviewed Sharrow she observed "hair . . . like broken off and bare spots" near Sharrow's temples. Sharrow was also observed by Titus and her supervisor, John Greer, with having a black left eye and bruise behind her ear. Further, defendant had engaged in violent behavior in the early morning hours of November 25, 2006. For example, he kicked a hole in a wall and broke a doorframe. A rational view of this evidence—the severity of Sharrow's injuries and defendant's violent behavior—does not support a finding that defendant acted with gross negligence or an intent to injure without malice. *Gillis, supra* at 139. Accordingly, the trial court did not err in refusing to instruct the jury on involuntary manslaughter.

IV. OV 7

Defendant next argues that the trial court erred in scoring 50 points for offense variable (OV) 7, MCL 777.37. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We will uphold a scoring decision for which there is any evidence in support. *Id.*

A trial court may score 50 points for OV 7 if a "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). Here, the evidence established that, in the early morning hours of November 25, 2006, defendant cursed and yelled at Sharrow, called her vulgar names, spat at her, slapped her, and threw her into a wall. Sharrow suffered bruises on her head and face and had bald spots on each side of her scalp. Defendant also engaged in other violent acts while in Sharrow's apartment during those early morning hours. He punched and kicked a wall, kicked at a screen door and at the kitchen island, broke a doorframe, and threw a lamp. This evidence adequately supports the trial court's scoring of OV 7. Consequently, we affirm the trial court's scoring of OV 7. *Endres, supra*.

V. Defendant's Standard 4 Brief

Defendant raises numerous issues in his standard 4 brief, none of which have any merit.

A

Defendant asserts that he was denied a fair trial by the prosecutor's misconduct. Defendant claims that the prosecutor appealed to the jury's sympathy, injected issues broader than guilt or innocence, vouched for the credibility of witnesses, appealed to the jury's civic duty, and shifted the burden of proof. Because defendant did not object to any of the challenged statements or actions, review is for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Having reviewed, in their context, the challenged statements and actions by the prosecutor, we conclude that the prosecutor did not engage in any misconduct.[2] In addition, defendant has not established that, even if the prosecutor engaged in misconduct, any resulting prejudice could not have been cured by a timely objection and a curative instruction. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

[2] Although the trial court erroneously admitted Sharrow's statements to law enforcement officers, the prosecutor did not engage in misconduct by referring to them in opening and closing arguments. The trial court had ruled that the statements were admissible. We also note that, because the affidavits defendant submitted on appeal are not a part of the lower court record, we decline to consider the affidavits in analyzing defendant's argument. See *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), reversed in part on other grounds 462 Mich 415 (2000).

Defendant also claims that counsel was ineffective for failing to object to the prosecutor's alleged misconduct. However, because the prosecutor engaged in no misconduct, any objection by counsel would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

B

Defendant claims that the trial court erred in admitting three autopsy photographs of Sharrow. Defendant argues that the photographs had no probative value and were unduly prejudicial. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). Here, the autopsy photographs illustrated and augmented Dr. Virani's testimony, and the photographs need not be excluded based on gruesomeness alone. *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008). Accordingly, we conclude that the photographs were relevant, MRE 401, and were not unduly prejudicial, MRE 403. The trial court did not abuse its discretion in admitting the photographs.[3]

C

Defendant argues that his conviction for second-degree murder is not supported by sufficient evidence. Specifically, defendant claims that, because Sharrow told Dr. Hierholzer that the left side of her head hit the wall when defendant assaulted her, the assault could not have been the cause of Sharrow's death because Dr. Virani testified that Sharrow's brain injury was caused by an impact to the right side of Sharrow's head. Defendant further claims that, because Sharrow passed out at work on November 27, 2006, and probably fell when doing so, the injury that caused her death most likely occurred when she passed out and fell. We review a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that all elements of the crime were proven beyond a reasonable doubt. *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Although there was some inconsistent testimony about which side of Sharrow's head hit a wall, it was for the jury to determine whether this inconsistency was material. Likewise, it was for the jury to determine whether this inconsistent testimony, along with the fact that Sharrow passed out on November 27, 2006, provided an inference that Sharrow's brain injury was the result of a fall after she passed out. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We will not interfere with the jury's role in determining the weight of the evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Viewing Sharrow's statements to her

[3] Even if the trial court abused its discretion in admitting the photographs, defendant has not demonstrated that, if the photographs had been excluded from evidence, it is more probable than not that the outcome of his trial would have been different. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

medical providers and the testimony of Dr. Virani in the light most favorable to the prosecution, there was sufficient evidence from which the jury could have concluded that the elements of second-degree murder were proven beyond a reasonable doubt. *James, supra*.

D

Next, defendant argues that the trial court erred in denying the jury's request for transcripts of the witnesses' statements. However, defendant agreed to the trial court's decision to deny the request and to instruct the jury to rely on its collective memory. Accordingly, defendant has waived the issue. *People v Carter*, 462 Mich 206; 219; 612 NW2d 144 (2000). Defendant's waiver extinguished any error. *Id.*

In the alternative, defendant argues that counsel was ineffective for agreeing to the trial court's decision and instruction. However, the trial court's decision to deny the jury's request was reasonable, as the request was not limited to testimony of any specific witnesses and was made 30 minutes after the jury began deliberations. See *Id*. at 213 n 10. Further, the trial court, by instructing the jury that it "was not going to say sometimes that there can't be a specific question asked," did not foreclose the possibility of the jury reviewing the testimony at a later time. MCR 6.414(J); *Carter, supra* at 213 n 10. Under these circumstances, any objection to the trial court's decision and instruction would have been futile. Counsel is not ineffective for failing to make a futile motion. *Fike, supra*.[4]

E

Defendant argues that the trial court erred in scoring 25 points for OV 13, MCL 777.43, because his conviction for second-degree murder was his first felony conviction. Twenty-five points are to be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction*." MCL 777.43(2)(a) (emphasis added). The presentence report indicates that defendant was charged with assault with a dangerous weapon in October 2003 and July 2006 and with assault with intent to commit great bodily harm in November 2006. Although these charges did not result in felony convictions, that fact, pursuant to the plain language of MCL 777.43(2)(a), is irrelevant. The trial court's scoring of OV 13 is sufficiently supported by the evidence. *Endres, supra*.[5]

F

[4] In addition, defendant cannot establish the prejudice prong of a claim for ineffective assistance. The jury returned a verdict approximately 20 minutes after the trial court responded to its request for transcripts, without asking any specific questions about the testimony of any witness.

[5] A defendant's right of confrontation does not apply at his sentencing hearing. *People v Uphaus (On Remand)*, 278 Mich App 174, 184; 748 NW2d 899 (2008). Thus, Sharrow's statements to law enforcements officers that were erroneously admitted at trial can be used to support the trial court's scoring of OV 13.

Defendant claims that counsel was ineffective for failing to call Shawna Mumby as a witness, because Mumby would have presented testimony that Sharrow was physically violent toward defendant. Although defendant has presented us with an affidavit from Mumby, which establishes Mumby's proposed testimony, this affidavit was not part of the lower court record. Therefore, we will not consider the affidavit. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001). The failure to call a witness only constitutes ineffective assistance of counsel if the failure deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Because the record does not contain a summary of Mumby's testimony, defendant has not shown that counsel's failure to call Mumby deprived him of a substantial defense.

Defendant also claims that counsel was ineffective for failing to move for a *Daubert*[6] hearing after the preliminary examination because the testimony of Dr. Virani was inconsistent with statements Sharrow had provided to her medical providers. A *Daubert* hearing is held to determine whether expert testimony is admissible under MRE 702, such that the testimony is "'based on sufficient facts or data,' that it 'is the product of reliable principles and methods,' and that the proposed expert witness 'has applied the principles and methods reliably to the facts of the case.'" *Unger, supra* at 217, quoting MRE 702. Thus, in the present case, a *Daubert* hearing would only need to be held if it was necessary to determine if the testimony of the medical examiner was admissible. Defendant makes no argument that the testimony of the medical examiner was not admissible under MRE 702. Accordingly, defendant's argument that counsel was ineffective for failing to move for a *Daubert* hearing is without merit.

G

Finally, defendant claims that the cumulative effect of errors requires reversal of his conviction. The cumulative effect of several errors may constitute error requiring reversal. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). However, "only actual errors are aggregated to determine their cumulative effect, *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995), and there must be at least two errors, *Alvarez v Boyd*, 225 F3d 820, 824 (CA 7, 2000). In this case, because there was only one error, the erroneous admission of Sharrow's statements to law enforcement officers, we reject defendant's claim that reversal is required based on the cumulative effect of errors.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[6] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).