STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 268804 Calhoun Circuit Court
NICHOLE TASHA JACOBY, Defendant-Appellant.	LC No. 2004-004501-FH

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree child abuse, MCL 750.136b. The trial court sentenced defendant, as an habitual offender, second offense, MCL 769.10, to 72 to 270 months' imprisonment. Defendant appeals her conviction and sentence as of right. We affirm.

I Sufficiency of the Evidence

Defendant first contends that the prosecution failed to present sufficient evidence to support her conviction of first-degree child abuse.

A. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). The standard of review is deferential and, therefore, we must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

B. Analysis

To sustain defendant's conviction for first-degree child abuse, the prosecutor was required to prove, beyond a reasonable doubt, that defendant "knowingly or intentionally cause[d] serious physical or serious mental harm to a child." MCL 750.136b(2).

Defendant first argues that there was insufficient evidence to prove that the victim, her tender-aged stepson, suffered serious physical harm or serious mental harm. "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." MCL 750.136b(1)(f). "Serious mental harm" means "an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(g).

Defendant's friend, Hope Hart, testified at trial that every time she saw the victim, he had bruises on his arms, legs, and head. On January 21, 2004, she saw bruises "all over" the victim, including on his ears, face, and the side of his head. That night, Hart called the police to report that defendant and her husband were fighting. When the police officer arrived at defendant's home, he observed "suspicious bruising" around the victim's ears, and on his forehead. He also noticed a few bruises on the victim's legs. Dr. Collette Gushurst, a pediatrician, examined the victim on January 29, 2004. She testified at trial that she observed a linear scar on the victim's forehead, a moon-shaped marking at his hairline, and bruises on his head, face, shins, legs, and back. The victim's eyes were red from broken veins, and he had scabs on his left thumb and right forearm.

The victim's sister testified that she saw bruises "[a]ll the time" on the victim's ears, face, back, and stomach. The victim's kindergarten teachers observed bruises on the victim and, on one occasion, observed that the victim had a "fat lip" and a "knot" on the top of his head. The victim's first-grade teacher documented six occasions between September 10, 2003, and January 22, 2004, when the victim had bruises that she considered to be "suspicious." She testified that she did not believe the victim sustained the bruises at school.

The prosecutor presented sufficient evidence to prove beyond a reasonable doubt that the victim suffered serious mental harm. The victim's therapist, Carol Burch, who treated the victim between February 2004 and September 2005, diagnosed the victim with posttraumatic stress disorder ("PTSD"). According to Burch, the victim's PTSD resulted from an "ongoing series of events where he felt powerless and hopeless that things would get better." She testified that the physical or verbal abuse of a child by a parent could cause PTSD. She testified that the victim was "extremely anxious, very hyper vigilant." He had severe nightmares about being severely injured or killed. She further testified that he would need counseling to address the long-term effects of the PTSD.

Dr. Randall Haugen, a psychologist, examined the victim on March 4, 2004. He testified at trial that the victim was nervous, depressed, worried, and anxious. He was distractible and impulsive, he oversimplified his world excessively, he viewed the world as a dangerous place, and he exhibited a lot of anger. He had difficulties in relationships, and had a tendency to be

detached. Dr. Haugen recommended that the victim and his family seek counseling to address his psychological problems.

Given this evidence, we need not determine whether the victim's physical injuries rose to the level of serious physical harm. The evidence clearly establishes that the victim suffered serious mental harm. The trial testimony also established that the victim urinated in inappropriate places, including on his sister's and stepsister's toys and blankets, and that he was taking medication to correct his behavioral problems. This evidence, too, reflects that the victim suffered from serious mental harm in that his judgment and behavior were significantly impaired.

Defendant also argues that there was insufficient evidence to prove that she had the requisite intent to commit first-degree child abuse. In order to prove first-degree child abuse, the prosecution must prove not only that defendant intended to commit the acts that caused serious physical harm or serious mental harm, but also that she intended to cause serious physical harm or serious mental harm, or knew that serious physical harm or serious mental harm would be caused by her act. See *People v Maynor*, 470 Mich 289, 291, 295-297; 683 NW2d 565 (2004). "Intent, like any other fact, may be proven directly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Further, "because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (Citation omitted).

The victim's sister testified that she saw defendant hit the victim almost every day. She hit him with her hand, spatulas, spoons, belts, shoes, and hairbrushes. She hit him on his head, face, buttocks, and arms. "She would pick him up by his ears and shake him or put him up against the wall." The victim's sister further testified that defendant yelled at the victim when she hit him. She called him "stupid" and "dumb." She testified that, on one occasion, when the victim urinated on the floor, defendant made him lick the urine off of the floor. On another occasion, she held the victim's head over the top stair, put her knees on his back, and threatened to throw him down the stairs. In addition, Hart testified that the victim was always in trouble, that there was no light in his bedroom, and that he had no toys. According to Hart, defendant said "bitter" things to the victim every time she saw them together. On January 21, 2004, before Hart called the police, she heard defendant call the victim and his sister "psycho f***ing brats." Further, trial testimony indicated that defendant singled the victim out. She did not treat her other children, or her stepdaughter, in the same manner that she treated the victim. She did not hit them or say bitter things to them.

We find that the evidence was sufficient to enable the jury to conclude that defendant intended to commit the acts that caused the victim to suffer physical injuries and serious mental harm. Further, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that defendant intended to cause serious physical harm or serious mental harm, or knew that serious physical harm or serious mental harm would be caused by her acts. *Maynor, supra* at 291, 295-297.

In reaching our conclusion, we note that defendant testified at trial that she loved the victim as if he was her own son. She denied that she caused the victim's bruises, that she hit him in the head, that she picked him up by the ears, that she made him lick urine off of the floor, that she called him a "psycho f***ing brat," or that she singled him out from the other children.

However, in determining whether sufficient evidence has been presented, we will not interfere with the jury's role in determining the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). "[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Further, we must resolve all conflicts in the evidence in favor of the prosecution. *Nowack, supra* at 400. Thus, the evidence was sufficient to sustain defendant's conviction of first-degree child abuse.

II Effective Assistance of Counsel

Defendant next contends that her trial counsel was ineffective for failing to present certain testimony and evidence at trial. Defendant did not move the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), or for a new trial based on ineffective assistance of counsel. Therefore, this issue is unpreserved. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *Id.*

A. Standard of Review

The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). [*People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).]

Defendant argues that defense counsel was ineffective for failing to call the following witnesses who would have corroborated her testimony that she did not abuse the victim: (1) Paul Fatato, a therapist, who allegedly would have testified that he saw the victim's younger brother hit people; (2) Alice Wilson, defendant's neighbor, who allegedly would have testified that, on one occasion, the victim was injured when he ran into a pole in the basement; he later said that defendant caused his injury; and (3) Amy Knickerbocker, defendant's cousin, who allegedly would have testified that defendant and the victim had a close relationship.

It is well established that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not

substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Moreover, other than the defendant's statements in her brief on appeal, there is no evidence showing that these witnesses existed or that their testimony would have benefited defendant had they been called to testify at trial. Thus, there are no errors apparent on the record. See *People v Pratt*, 254 Mich App 425, 426-427, 430; 656 NW2d 866 (2002). Moreover, we note that defendant has the burden of establishing the factual predicate for her claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has not done so in this case. Further, this Court has held that the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). With respect to these witnesses, the record reveals that the substance of their proposed testimony would have been cumulative to evidence already admitted. Given the cumulative nature of their testimony, the failure to call these witnesses did not deprive defendant of a substantial defense. Moreover, in light of the other evidence presented at trial, defendant has not shown that a reasonable probability exists that, if defense counsel had called the witnesses to testify at trial, the outcome of the proceedings would have been different. Thus, defendant's argument that she was denied effective assistance of counsel is without merit. See *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Cf. *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996).

Defendant also argues that defense counsel was ineffective for failing to present the following evidence at trial: (1) that defendant's husband was disabled and was home 24 hours a day; (2) that Matt Wilson, defendant's husband's best friend, frequented defendant's home and could verify how defendant disciplined the children; (3) that Douglas White, defendant's ex-husband, frequented defendant's home and did not believe that defendant was abusing her children; and (4) that Amanda White, Douglas's wife, observed how defendant's children acted around her, and how they reacted to defendant. Defendant's argument is without merit. The four witnesses at issue testified at trial, and their testimony revealed the exact assertions upon which defendant now bases her claim of ineffective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to present evidence that the victim was being abused when he lived with his biological mother, and for failing to emphasize how many times the victim and his sister changed their stories. However, defendant failed to present any evidence in support of these claims. She has not met his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *Hoag, supra.* Thus, defendant is not entitled to relief on this issue.

In her brief on appeal, defendant requests that this Court remand this case to the trial court for an evidentiary hearing on her claim of ineffective assistance of counsel. Defendant's request is neither timely nor procedurally appropriate given that she has not supported her request with an affidavit or offer of proof regarding the facts to be established at a hearing on remand. See MCR 7.211; *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983). Accordingly, we find that an evidentiary hearing is unwarranted, and we deny defendant's request for remand.

Defendant next contends on appeal that the trial court erred in allowing Dr. Haugen to testify that the victim's behavior was consistent with that of a child abuse victim.

"In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). The grounds for objection at trial and the grounds raised on appeal must be the same. MRE 103; *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). In this case, before Dr. Haugen testified, defendant argued that he should not be allowed to testify regarding any statements that the victim made to him about the identity of the perpetrator of the alleged abuse. The trial court ruled that Dr. Haugen could testify regarding the results of the psychological testing that he performed on the victim, but that he could not testify regarding any statements that the victim made regarding the perpetrator of the abuse. Defendant did not object to Dr. Haugen's testimony on any other grounds, and did not argue below that Dr. Haugen's testimony exceeded the scope of the testimony permitted under the trial court's ruling. Therefore, this issue is unpreserved. We review unpreserved evidentiary issues for plain error affecting substantial rights. *Knox, supra* at 508. "We will reverse only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003).

Under MRE 702, qualified experts may testify to scientific, technical, or other specialized knowledge which will assist the trier of fact in understanding the evidence or determining a fact in issue. *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003). For expert testimony to be admissible, the expert must be qualified, the evidence must provide the trier of fact with a better understanding of the evidence or assist in determining a fact in issue, and the evidence must be from a recognized discipline. *People v Coy*, 258 Mich App 1, 10; 669 NW2d 831 (2003). Defendant does not challenge Dr. Haugen's qualifications and does not dispute that the evidence was from a recognized discipline. Furthermore, Dr. Haugen's testimony, that the characteristics exhibited by the victim were consistent those exhibited by child abuse victims in general, assisted the trier of fact in understanding the evidence or determining a fact in issue in this case. Thus, the evidence was admissible under MRE 702. Defendant does not challenge the admissibility of the evidence under this rule.

Rather, defendant argues that Dr. Haugen's testimony exceeded the scope of expert testimony permitted under *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). In *Peterson*, our Supreme Court held that, in child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *Id.* at 352. However,

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]

The instant case does not involve any allegations of sexual abuse and, thus, *Peterson* is not dispositive of this issue.

Nevertheless, we recognize that the same concerns are present in this case as were present in *Peterson.* A psychologist's opinion whether abuse in fact occurred is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony. See *People v Beckley*, 434 Mich 691, 726-729; 456 NW2d 391 (1990). Further, "[p]sychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility." *Id.* at 728. Thus, testimony that a victim's behavior is consistent with that of other abuse victims is acceptable to explain the victim's behavior, but an ultimate conclusion on whether abuse occurred is not permitted. *Peterson, supra.*

Even assuming, without deciding, that *Peterson* governs the admissibility of expert testimony in child abuse cases where no sexual abuse is alleged, defendant would not be entitled to relief on this issue. Contrary to defendant's argument, Dr. Haugen's testimony was consistent with the guidelines set forth in *Peterson.* Dr. Haugen testified regarding the typical symptoms of child abuse. He also testified that the victim's behavior was consistent with those of a child abuse victim (Tr II, 239-240). The record reveals that this testimony was offered to rebut an attack on the victim's credibility. Defendant testified at trial that the victim "liked to lie all the time," that he "lied all the time" and that "he would lie about everything." (Tr II, 320, 325.) Dr. Haugen did not testify that the abuse occurred, that the victim was truthful, or that defendant was guilty. *Peterson, supra* at 352. Accordingly, we find no error in the admission of this expert witness testimony that justifies reversal of defendant's conviction.

III Sentencing

Finally, defendant contends that her sentence was disproportionate and, therefore, she is entitled to resentencing. However, defendant concedes that her sentence was within the recommended minimum sentence range under the properly calculated legislative guidelines. MCL 769.34(10) provides, in relevant part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant has not alleged that the trial court erred in scoring the sentencing guidelines or that it relied upon inaccurate information in determining her sentence. We must, therefore, affirm defendant's sentence. "Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality, if the sentence falls within the guidelines." *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).

Defendant nevertheless argues that MCL 769.34(10) is unconstitutional because it violates the separation of powers and due process, and is in derogation of her right to appeal her sentence under the state constitution. See Const 1963, art 1, § 20; Const 1963, art 3, § 2. Defendant failed to preserve this issue for appeal because she did not challenge the constitutionality of MCL 769.34(10) below. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Thus, we review this issue for plain error affecting substantial rights. *Id.* Our Supreme Court has rejected defendant's arguments concerning the constitutionality of MCL 769.34(10). See *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003); *People v Hegwood*, 465

Mich 432, 436-437; 636 NW2d 127 (2001). We are bound to follow these decisions. See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Thus, defendant has failed to establish that, in sentencing defendant, the trial court committed plain error affecting her substantial rights. Accordingly, we affirm her sentence.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra