STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 277548 Ingham Circuit Court
STEVEN LEE MOY, Defendant-Appellant.	LC No. 06-000999-FC

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree felony murder, MCL 750.316(1)(b), and the trial court sentenced defendant to a term of life imprisonment. Defendant appeals as of right. We affirm.

On August 2, 2006, defendant was alone with his 13-month old stepdaughter, Anishia Moy, for several hours before her death. When Anishia's mother returned to the home, Anishia was cold and limp. Emergency medical personnel transported Aneshia to the hospital, where she was pronounced dead after several failed attempts to revive her. An autopsy revealed that Anishia had suffered numerous blunt force injuries and possible asphyxiation.

Defendant first argues that the trial court abused its discretion by admitting testimony regarding comments made by defendant while he was alone in an interview room of a police station that was being monitored by an officer by means of electronic monitoring. Defendant was overheard saying, "'oh, please forgive me God. Bring her back. Only you can do it father God. Please bring her back.'" Defendant also stated, "'I confess my sins'" and "'I am so sorry.'"

Defendant presents the narrow issue that law enforcement violated his Fourth Amendment right to privacy by electronically monitoring the interview room. The prosecutor responds that no error occurred because defendant did not have a reasonable expectation of privacy with regard to utterances made in the interview room.

The Fourth Amendment serves to safeguard an individual's privacy from unreasonable governmental intrusions. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). A defendant may challenge the admission of evidence obtained by governmental intrusion only if he had a legitimate expectation of privacy in the place invaded. *Rakas v Illinois*, 439 US 128,

143; 99 S Ct 421; 58 L Ed 2d 387 (1978). To determine whether a person had a reasonable expectation of privacy, it must be determined whether the person had a subjective expectation of privacy and whether that expectation was one that society recognizes as reasonable. *Smith v Maryland*, 442 US 735, 740; 99 S Ct 2577, 61 L Ed 2d 220 (1979); *People v Collins*, 438 Mich 8, 18; 475 NW2d 684 (1991).

In *Lanza v. New York*, 370 US 139; 82 S Ct 1218; 8 L Ed 2d 384 (1962), the United States Supreme Court addressed a Fourth Amendment challenge to the interception of a conversation between a prisoner and visitor by means of an electronic device installed in the visitor's room at a jail. The *Lanza* court concluded that Fourth Amendment protections do not extend to jails, noting that jails share none of the attributes of privacy of homes, offices, automobiles, or hotel rooms and that, "[i]n prison, official surveillance has traditionally been the order of the day." *Id.* at 143.

In *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), the Supreme Court later rejected the "protected areas" analysis employed in *Lanza*. In *Katz*, the Court issued its well-known proclamation that "the Fourth Amendment protects people, not places." *Id.* at 351. The *Katz* test embraces "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. Even though *Katz* thus called into question the continued viability of *Lanza*, post-*Katz* decisions have consistently followed *Lanza* and held that federal law permits the admission in evidence of monitored conversations in places such as jails, police cars, and police stations.[1] And in *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984), the Supreme Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell[.]" The Court added that it "believe[d] that it is accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement.'" *Id.* at 528.

Here, defendant was arrested and placed into an interview room to await interrogation. The circumstances here are comparable to an arrestee being placed in a jail cell. Defendant did not ask for privacy, and there was no suggestion by law enforcement that he had any. We do not believe that society is prepared to accept as reasonable defendant's subjective belief that he could sit in a police station interview room and utter statements without the possibility of being overheard by the police, at least in the absence of any evidence of police conduct intended to give defendant the impression that the room would be private. Cf. *People v Marland*, 135 Mich App 297, 301; 355 NW2d 378 (1984) (no reasonable expectation of privacy exists in a police car).

Defendant next argues that the prosecution failed to establish the specific intent required to prove first-degree child abuse, the predicate felony underlying his felony murder conviction, and that the prosecution did not show that Anishia's fatal injuries were inflicted during the time

[1] See, e.g., *United States v Hearst*, 563 F2d 1331 (CA 9, 1977); *Belmer v Commonwealth*, 36 Va App 448; 553 SE2d 123 (2001); *State v Smith*, 641 So2d 849 (Fla, 1994); *Ahmad A v Superior Court*, 215 Cal App 3d 528; 263 Cal Rptr 747 (1989).

she was alone with defendant on the day she died. "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). "'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)(g).

Defendant argues that the evidence presented in the case supports an inference that someone other than defendant abused Anishia. Regardless of whether Anishia was abused in the past, evidence was presented that the injuries from which the victim died were inflicted shortly before her death at a time when defendant alone had access to her. Thus, there was sufficient evidence to prove that defendant was the likely source of Anishia's fatal injuries. Further, the extent and brutality of those injuries supports the reasonable inference that they were knowingly or intentionally inflicted. See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). The evidence was sufficient to support defendant's conviction of both first-degree child abuse and first-degree felony murder.

Defendant also argues that the pathologist who performed the autopsy was not qualified to give an opinion on the "ultimate issue" in this case – whether the person who inflicted Anishia's injuries intended to kill her. Defendant did not object to the testimony in the trial court and, therefore, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Initially, we note that the challenged testimony was unresponsive to the question posed. "[A]dmitting a voluntary and unresponsive answer by a witness does not constitute error." *People v Williams*, 114 Mich App 186, 199; 318 NW2d 671 (1982).

In any event, defendant's characterization of the testimony is inaccurate. The pathologist did not testify that defendant killed Anishia. He testified that the child's multiple injuries occurred in "rapid succession in a[n] attempt to kill the child," but did so only in the context of explaining his thought pattern leading to the possibility of asphyxiation. The pathologist did not testify that defendant intended to kill Anishia. Defendant has failed to establish plain error affecting his substantial rights.

Defendant further argues that the trial court abused its discretion by failing to independently determine the accuracy of a transcript of defendant's interview with a police detective before admitting it as an exhibit. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

An audiotape of defendant's interview was played for the jury. Before the jury deliberated, defense counsel objected to providing a transcript of the interview to the jury as an exhibit because he noticed 56 errors in the transcript as he followed along with the audiotape. He acknowledged that "most . . . are of very little consequence. . . . there are a couple that appear to be somewhat substantive." The prosecutor offered to jointly review the substantive errors.[2]

[2] The prosecutor noted that the transcript omitted "a lot of ums, okays, and them talking over
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The parties went off the record for approximately one hour, and once back on the record the trial judge confirmed with his court reporter that "they've made a few minor corrections to the transcript, is that right?" The court reporter responded affirmatively, and the court asked defense counsel if the transcript "is fairly accurate now." Defense counsel responded, "I'd like my objection to stand just on the basis that I don't think it is as accurate a transcript as we could possibly get if [the court reporter] had done it for us."

The trial court took steps to insure the accuracy of the transcript by having the parties review the transcript with the court reporter and make corrections before showing the transcript to the jury. After this process, defense counsel did not identify any inaccuracies, and did not specify the existence of any continuing errors. Unlike the situation in *People v Lester*, 172 Mich App 769; 432 NW2d 433 (1988), on which defendant relies, defendant has not identified any portion of the tape that he contends was erroneously transcribed. Rather, he merely asserts that the trial court should have independently verified the accuracy of the transcript. Accordingly, he has failed to show that the trial court's decision to allow the jurors to review the transcript constituted an abuse of discretion.

Finally, defendant argues that a new trial is warranted because references to a prior conviction and sentence, as well as his parole status, were not properly redacted from the transcript of his police interview. However, after reviewing the record, we conclude that a properly redacted transcript was submitted to the jury and entered into evidence. No error having occurred, defendant's ineffective assistance of counsel argument necessarily fails. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) ("Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.").

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette

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each other at some points in the transcript."