

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELISSA ANNE MEMMER,

Defendant-Appellant.

UNPUBLISHED

August 11, 2005

No. 254839

Macomb Circuit Court

LC No. 2003-003094-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2), and assault with intent to commit murder, MCL 750.83. She was sentenced to concurrent prisons terms of ten to fifteen years for the child abuse conviction, and twenty-five to fifty years for the assault conviction. She appeals as of right, and we affirm.

Defendant first argues that her convictions and sentences for both first-degree child abuse and assault with intent to commit murder violate her double jeopardy protections against multiple punishments for the same offense.¹ We disagree.

A constitutional double jeopardy challenge presents a question of law that this Court reviews de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense, including multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996); *People v Hill*, 257 Mich App 126, 150; 667 NW2d 78 (2003). The prohibition against multiple punishments for the same offense protects the defendant from being sentenced to more punishment than the Legislature intended. *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). As such, the intent of the Legislature is the determining factor in evaluating a double jeopardy claim under both the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). This Court determines legislative intent with regard to the federal constitution by applying the “same-elements test” set

¹ Defendant raised this issue in a motion for a new trial, which the trial court denied.

forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), which requires the reviewing court to determine “whether each provision requires proof of a fact which the other does not.” Under the state constitution, legislative intent is determined by “traditional means . . . such as the subject, language, and history of the statutes.” *Denio, supra* at 708. Relevant factors to consider in determining legislative intent include, but are not limited to, whether each statute prohibits conduct violative of distinct social norms, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. *Id.*; *People v Fox*, 232 Mich App 541, 556; 591 NW2d 384 (1998).

The child abuse statute provides that “[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). “Child” means a person who is less than eighteen years old and is not emancipated. MCL 750.136b(1)(a). “Person” refers to “a child’s parent or guardian or any other person who cares for, has custody of, or has authority over a child . . .” MCL 750.136b(1)(d). “Serious physical harm” is “any physical injury” 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” refers to “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).

The assault with intent to commit murder statute provides that “[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony . . .” MCL 750.83. To sustain a conviction for assault with intent to commit murder, the prosecution must establish beyond a reasonable doubt that the defendant committed “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Defendant’s dual convictions and punishments for first-degree child abuse and assault with intent to commit murder do not violate either the federal or state protections against double jeopardy. A comparison of the elements of these two offenses reveals that each requires proof of a fact that the other does not. *Blockburger, supra*. The assault with intent to commit murder statute requires an actual intent to kill. By contrast, the first-degree child abuse statute does not require an intent to kill, but requires a physical or mental injury, a victim under eighteen years of age, and a perpetrator with supervisory authority over the child. MCL 750.136b(1) and (2).

Additionally, each statute prohibits conduct that is violative of distinct social norms. The assault with intent to commit murder statute is designed to protect all persons, regardless of age, against injurious crimes. See *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992). In contrast, the societal interest served in criminalizing all degrees of child abuse is to protect children from the abuses and excesses of adults to whose authority the children have been subordinated, and to protect children from assaultive behavior. See *People v Flowers*, 222 Mich App 732, 735; 565 NW2d 12 (1997). Finally, the amount of punishment expressly authorized by the Legislature for each crime is different. Assault with intent to commit murder is punishable by imprisonment for life or any term of years, MCL 750.83, whereas first-degree child abuse is punishable by imprisonment for not more than fifteen years, MCL 750.136b(2).

Because the crimes have disparate elements, each punishes conduct violative of distinct social norms, and each has differing penalties, we conclude that the Legislature intended that the crimes of assault with intent to commit murder and first-degree child abuse be punished separately. In sum, defendant's convictions do not violate the double jeopardy protection against multiple punishments.

Next, defendant argues that she was denied a fair trial by the admission of her statements to the police because they constituted impermissible hearsay, and violated the requirements of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). MRE 801(d)(2) provides that “[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party’s own statement . . .” Thus, defendant’s statements to the police constituted were not hearsay, and were admissible under MRE 801(d)(2). *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996).

Further, we reject defendant’s contention that admission of her statements violated *Crawford, supra*. In *Crawford*, the United States Supreme Court held that testimonial statements by a non-testifying witness are admissible against a criminal defendant only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.*; see also *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). There is no logical basis for applying *Crawford* to the circumstances presented here, i.e., where defendant is both the non-testifying witness and the criminal defendant, and defendant has failed to sufficiently argue how *Crawford* is implicated. Reversal is not warranted on this basis.

Next, defendant argues that there was insufficient evidence to convict her of assault with intent to commit murder and first-degree child abuse. We disagree.

When ascertaining whether sufficient evidence was presented to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact’s role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

For both offenses, defendant challenges whether the evidence was sufficient to prove the requisite specific intent. With regard to intent, to convict defendant of first-degree child abuse, the prosecution was required to establish beyond a reasonable doubt not only that defendant intended to commit the charged act, but also that she intended to cause serious physical or serious mental harm to the child or knew that serious physical or serious mental harm would be caused by the act. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); MCL 750.136b(2). To sustain a conviction for assault with intent to commit murder, the prosecution was required to establish beyond a reasonable doubt that defendant committed an assault with an actual intent to kill. *Hoffman, supra*; MCL 750.83. “An actor’s intent may be inferred from all

of the facts and circumstances, and 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). Evidence of the injuries inflicted is also probative of an intent to kill. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

Evidence was presented that the victim suffered severe brain damage as a result of being intentionally deprived of oxygen for a minimum of two minutes. The expert medical testimony established that there was no medical explanation for the victim's injuries. Rather, the injuries were consistent with strangulation or forceful asphyxiation. There was no dispute that, besides the victim's infant step-brother, defendant was the only person in the home with the victim. In a statement to the police, defendant admitted tying the victim's hands behind his back with a bandanna, covering his head with a sheet, and pushing his face into a doggy pillow. Defendant admitted knowing that the victim likely could not breathe. The police confiscated a bandanna from inside defendant's closet, bearing the victim's blood, and a doggy pillow from the victim's bedroom. There was also evidence that defendant gave several inconsistent statements to the police about how the victim was injured.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with the requisite intent for each offense, i.e., an intent to seriously harm the victim and an intent to kill, respectively. Although defendant asserts that evidence supporting her intent was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Furthermore, contrary to what defendant argues, the rule prohibiting an "inference upon inference" was overruled by our Supreme Court in *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Thus, a trier of fact is not precluded from making multiple inferences in reaching a decision as long as each inference is independently supported by established fact. *Id.* The evidence was sufficient to sustain defendant's convictions of assault with intent to commit murder and first-degree child abuse.

We also reject defendant's claim that Detective Hogan gave inadmissible expert opinion testimony, contrary to MRE 702. Defendant contends that the detective impermissibly testified that her behavior and explanations about how the victim's injuries occurred were "odd" and "strange," and that she expressed no concern about the victim's condition.

Because defendant failed to timely object to the detective's testimony,² this Court reviews this unpreserved evidentiary issue for plain error affecting defendant's substantial rights. *Carines, supra.*

Defendant has not demonstrated plain error affecting her substantial rights. Because the detective was not offered as an expert, defendant's reliance on MRE 702 is misplaced. MRE 701, which governs the admissibility of the detective's opinion, provides:

² Defendant did raise this issue in a motion for a new trial.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Even assuming the statements did not fall under MRE 701, given the compelling evidence in this case, including defendant's own inculpatory statements and the victim's injuries, it is highly improbable that the challenged testimony affected the outcome of the proceedings. *Carines, supra*. In sum, we agree with the trial court that "[t]aken as a whole, the testimony did not deprive Defendant of a fair trial."

Defendant also argues that defense counsel was ineffective for stipulating to the admission of a videotape showing the victim's injuries, and for failing to object to the victim's brief presence in the courtroom because both only served to evoke sympathy.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Assuming without deciding that counsel should have attempted to have the admission of the tape denied as more prejudicial than probative, we find no violation of the constitutional right to effective assistance of counsel. Photographic evidence is admissible if relevant, pertinent, competent, and material to any issue in the case.³ *Mills, supra* at 66-74; *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Photographic evidence that is calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The videotape was relevant to the element of injury of the first-degree child abuse charge; to establish that the harm inflicted seriously impaired the child's health. While the court would have been justified in denying admission of the tape on the basis that the testimony adequately established the degree of injury, and the tape was unduly prejudicial given its cumulative nature, it was not an abuse of discretion to admit the tape as relevant to the element of injury. Thus, defendant cannot show that but for counsel's failure to object, the result would have been different.

We also reject defendant's contention that defense counsel was ineffective for failing to object to the victim's presence in the courtroom. Upon seeing the child in the courtroom, the trial court immediately directed that he be removed. The trial court also instructed the jury not to

³ The admission of videotaped evidence is "closely analogous" to the admission of photographic evidence and the same rules of admissibility apply to the admission of both forms of evidence, although the trial court must take into account the differences between the two media when determining admissibility. *People v Barker*, 179 Mich App 702, 710; 446 NW2d 549 (1989); *People v Sharbnow*, 174 Mich App 94, 102-103; 435 NW2d 772 (1989).

be influenced by sympathy or prejudice, to decide the case based only on the properly admitted evidence, and to follow the court's instructions. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, defendant cannot demonstrate that defense counsel's inaction was prejudicial and, thus, cannot establish a claim of ineffective assistance of counsel. *Effinger, supra*.

Lastly, defendant challenges her sentence. She contends that the trial court erred when it upwardly departed from the sentencing guidelines recommended sentence range of 135 to 225 months (i.e., 11.25 to 18.75 years) and sentenced her to twenty-five to fifty years' imprisonment for her assault with intent to commit murder conviction, without articulating substantial and compelling reasons.

Under the sentencing guidelines statute, in most instances the trial court must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on certain specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended only to apply in "exceptional cases." *Babcock, supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274; see also *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 274. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

Plaintiff concedes that one of the court's articulated reasons for departure, i.e., lack of remorse, is not objective and verifiable and does not constitute a substantial and compelling reason to depart from the sentencing guidelines. See *People v Daniel*, 462 Mich 1, 11-12; 609 NW2d 557 (2000).

However, the trial court relied on other factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines.⁴ Although defendant was scored ten points for OV 1 (aggravated use of a weapon), MCL 777.31(1)(c), one point for OV 2 (lethal potential of weapon), MCL 777.32(1)(e), twenty-five points for OV 3 (physical injury to a victim), MCL 777.33(1)(c), ten points for OV 4 (psychological injury to a victim), MCL 777.34(1)(a), twenty-five points for OV 6 (unpremeditated intent to kill or injure), MCL 777.36(1)(a), fifty points for OV 7 (aggravated physical abuse), and ten points for OV 10 (exploitation of a vulnerable victim), MCL 777.40(1)(b), the trial court did not err by finding that the offense and offender characteristics that are unique to this assault with intent to commit murder were not adequately reflected in the guidelines. In other words, as noted by the trial court, the factors did not adequately account for defendant's lack of conscience and lack of concern for this victim.

The facts show that defendant, while caring for her fiancé's two-year-old child, severely attacked him, tied his hands behind his back, and pushed his face into a doggy pillow for at least two minutes. After the child lost consciousness and stopped breathing, defendant did not immediately call 911, but instead called a friend. When defendant did call 911, she was advised of the importance of administering CPR. The record supports the trial court's finding that defendant "half-heartedly" administered CPR, if at all. One dispatch operator testified that "[t]here was no way [defendant] could be doing rescue breathing and continue to carry on a conversation." Defendant's friend likewise indicated that, although defendant was attempting to administer CPR, she "kept stopping" and never continued "for very long." Also, when emergency personnel arrived, defendant was not performing CPR on the victim.

The record also supports the trial court's finding that defendant exhibited a complete lack of conscience and compassion. Defendant's friend, as well as medical personnel and a police detective, all testified that defendant never expressed any concern about the victim, or inquired about his injuries or prognosis. Rather, defendant's primary concern was about her boyfriend "being mad at [her]," and her own well-being. In fact, before the victim was taken to the hospital, defendant asked an officer, "What's going to happened to [her]?" In sum, the objective and verifiable reasons justifying departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of defendant's sentence. For the same reasons, the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272.

Although one of the reasons articulated by the trial court is not substantial and compelling, remand for resentencing is unnecessary. If a trial court articulates multiple reasons for a departure, but some of the reasons are found to be invalid, this Court must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Id.* at 260, 273. If this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for

⁴ The sentencing judge presided over defendant's trial and, thus, was familiar with the facts of the case.

rearticulation or resentencing is necessary. *Id.* at 260-261. Here, having reviewed the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone.

Although the trial court articulated its reasons for departure on the record, it failed to complete the required sentencing information report departure evaluation. *Armstrong, supra* at 425. We therefore remand the case to the trial court for the limited purpose of performing the ministerial task of completing a departure evaluation. *Id.* at 426.

Defendant also claims that she must be resentenced because the trial court's findings supporting her sentence were not determined by a jury, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).⁵ Consequently, defendant's argument is without merit. Defendant is not entitled to resentencing on this basis.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

⁵ We recognize that the Supreme Court granted leave to appeal on March 31, 2005 in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004), lv gtd 472 Mich 881; 693 NW2d 823 (2005), "limited to the issue whether *Blakely, supra*, and *United States v Booker*, 543 US ; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. However, at present, *Claypool, supra*, is controlling.