S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2014
v	No. 316940 Macomb Circuit Court
TERRY RITA BORGIA, Defendant-Appellant.	LC No. 2010-005143-FC

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). She was sentenced to life imprisonment without the possibility of parole for the first-degree felony murder conviction and to 95 to 180 months' imprisonment for the first-degree child abuse conviction. She appeals as of right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from the drowning of a small child that occurred on January 11, 2010, in Clinton Township, Michigan. On the morning of January 11, 2010, defendant was present in her apartment in Clinton Township with her daughter Tonina Borgia and her grandson, DT. DT was the son of defendant's other daughter, Amy Alkasmikha; defendant and Tonina were babysitting DT on January 11, 2010. DT was four years old. Between 7:00 a.m. and 8:00 a.m., a 911 call was made from defendant's home to report a drowned child. A group of firefighters were the first to arrive on the scene; when they arrived at the apartment, they found that no lights were on and the front door of the apartment was locked. After the firefighters knocked on the front door for approximately 10 to 15 seconds, defendant opened the door and let them into the apartment. Defendant appeared calm, and she said nothing as she led the firefighters into the interior of the apartment. Defendant led the firefighters to a bathroom along the main hallway of the apartment; inside, DT was lying on his back, unconscious, on the bathroom floor. Tonina was kneeling next to DT in the bathroom, speaking to an unknown person on a cordless phone.

As firefighters began first aid procedures on DT, Mark Turo, one of the firefighters present, questioned defendant about what had happened. Defendant told Turo that DT had been sleeping on the couch in the living room of the apartment, and that approximately one hour before the firefighters arrived, she placed him in the bathtub. Defendant stated that she had not checked on DT after she placed him in the bathtub. Turo stated that neither defendant nor

Tonina could answer his basic questions about DT's background, including what his last name was and what his birthday was. Defendant also initially told Turo that she was DT's mother. Preston Susalla was one of the first police officers to arrive on the scene; she also questioned defendant and Tonina about what had happened to DT. Susalla stated that defendant was calm and emotionless throughout their conversation; however, Tonina was hysterical. Defendant told Susalla that "approximately 10 minutes after waking up she went into the bathroom and filled the bathtub, filled it with water." Defendant told Susalla that "[a]fter filling the bathtub with water, she then walked into the living room where DT was sleeping on the couch, and she picked him up and then proceeded to walk into the bathroom where she [had] filled the tub full of water." Defendant stated that she placed DT in the tub, with his pajamas still on, and then walked into the kitchen; she also stated that she did not check on him for 25 minutes until Tonina discovered him.

Leo Melise, a police detective, also interviewed defendant at the apartment. Defendant told Melise that she had awoken at approximately 6:00 a.m. that morning, brushed her teeth, showered, and then she ran a bath for DT. Defendant told Melise that she placed DT in the bathtub with his pajamas still on, and then walked away. After defendant spoke with Melise, she was arrested and transported to a police station. Police officers discovered five inches of standing water in the bathtub; additionally, the floor around the bathtub was wet. Police officers also recovered wet children's pajamas and a wet mop from the apartment.

DT was declared deceased at a hospital after being transported from the apartment in an ambulance, and an autopsy was performed. Daniel Spitz, who performed the autopsy, observed bruising on DT's scalp and neck that were consistent with physical trauma. Additionally, Spitz found petechiae around DT's eyes; he stated that petechiae are broken blood vessels that form in response to increased pressure in the head and face. Spitz also found tearing inside DT's lip that was consistent with his lips having been pressed hard against his teeth. Spitz determined that DT's cause of death was forced submersion and drowning, and also that the manner of death was homicide.

Throughout the trial, defendant's counsel argued that defendant was attempting to falsely take responsibility for DT's death in an attempt to protect Tonina; defense counsel argued that Tonina actually killed DT. Vicky Antishin, defendant's other daughter, testified that she believed Tonina was responsible for DT's death. Specifically, Vicky testified that several days after DT's death, Tonina was staying at her house, and Tonina had spoken around her children with "satanic talk." Further, Vicky stated that Tonina attempted to kidnap one of Vicky's children by pulling the child out the front door of Vicky's house on the same day. Additionally, Vicky stated that Tonina had confessed to killing DT one day as the two were driving together to one of defendant's court dates. Vicky also testified that DT was exceptionally strong for a small child, and that defendant would have been unable to physically overpower him.

Tonina was not present for defendant's trial; however, Tonina's November 30, 2012 testimony, from one of defendant's prior mistrials[1], was read for the jury. Tonina denied killing DT, and stated she believed defendant had killed DT because she was tired of being a grandmother and having to constantly babysit him. Tonina also stated that defendant had suffered from mental problems in the past several years, had attempted suicide, and that her daughters had attempted to have her admitted to a mental hospital. Tonina also admitted that she personally suffered from bipolar syndrome and psychosis, and that she had taken antipsychotic medications throughout her adult life. Tonina stated that she went to bed between 9:00 p.m. and 10:00 p.m. on January 10, 2010, and that defendant and DT were together in the living room at that time. Tonina awoke at approximately 5:00 a.m. on January 11, 2010, and defendant knocked on her door; defendant stated that she had killed DT. Tonina walked to the bathroom and saw DT floating in the bathtub. Additionally, recorded audio tapes of Tonina's conversations with a police detective were played for the jury; during two of the interviews, she denied killing DT, but in an April 2011 interview, she admitted to killing DT.

During closing arguments, the prosecutor stated:

> And then I heard [defense counsel] stand up here and indicate right off the bat, . . . his client is not saying a word in her own defense, she is perfectly happy to fall on the sword. If that were true, she would have pled to it. And I say this, I say let's give her her wish, let's convict her, not because she is a martyr . . . but because she is a murderer.

Defendant objected to the prosecutor's statement and requested a curative instruction. The trial court agreed and provided the jury with the instruction that the lawyers' opening statements and closing arguments are not evidence, and also an instruction that the jury should ignore the prosecutor's comments to the effect that defendant should have pleaded guilty. On April 17, 2013, defendant filed a motion for a new trial; defendant argued that the prosecutor's statement during closing argument denied her a fair trial. On June 12, 2013, the trial court denied defendant's motion for a new trial, ruling that the prosecutor's statement was made in direct response to defense counsel's argument that defendant was "falling on a sword and taking the blame for her daughter." Further, the trial court ruled that the prosecutor's statement did not implicate defendant's silence at trial; rather, it implicated defendant's failure to plead guilty.

This appeal followed.

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[1] Defendant was initially charged with first-degree premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b). The trial court ordered three separate mistrials during attempted prosecutions of defendant. On June 8, 2012, a mistrial was declared because an inadmissible statement made by defendant to police was submitted to the jury. Another mistrial was declared because Tonina suddenly became unavailable as a witness. Yet another mistrial was declared because the jury was unable to reach a verdict.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that insufficient evidence existed for a reasonable jury to convict her of first-degree felony murder and first-degree child abuse. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor 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 Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Pursuant to MCL 750.316(1)(b), a person is guilty of first-degree felony murder if he or she murders another person while in the perpetration of first-degree child abuse, among other underlying offenses. A person is guilty of first-degree child abuse if the person knowingly or intentionally causes serious physical or serious mental harm to a child. *People v Magyar*, 250 Mich App 408, 412-413; 648 NW2d 215 (2002) (citing MCL 750.136b(2)).

Taking the evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that defendant was guilty of first-degree felony murder and first-degree child abuse. Defendant argues that Tonina was responsible for DT's death; specifically, defendant notes that evidence existed that Tonina confessed to the crimes. However, defendant confessed to placing DT in the bathtub to three separate emergency responders on the morning of the offenses. Tonina stated that defendant informed her that she had killed DT before emergency responders arrived. DT was found in the hallway bathroom, not the bathroom attached to Tonina's bedroom. Further, when emergency responders arrived at the apartment, they found Tonina to be extremely upset and hysterical about DT's condition; however, defendant was calm and did not ask any questions. Taking the evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that defendant drowned DT. Drowning a child constitutes first-degree child abuse because it involves intentionally causing serious harm to a child; if that drowning results in death, the perpetrator is also guilty of first-degree felony murder. MCL 750.136b(2); MCL 750.316(1)(b). Accordingly, sufficient evidence existed to support defendant's convictions.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor improperly commented on her failure to testify at trial in the presence of the jury. Specifically, defendant contends that the prosecutor argued defendant's failure to testify was an admission of her guilt. Defendant argues that her right to a fair trial was violated because the prosecutor's statements shifted the burden of proof. We disagree.

"Where issues of prosecutorial misconduct are preserved, [this Court] review[s] them de novo to determine if the defendant was denied a fair and impartial trial." *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Generally, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court makes determinations of prosecutorial misconduct on a case by case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments made by the prosecution must be read as a whole and evaluated in the context of a defendant's arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). It is improper for the prosecution to argue that the burden of proof lies with the defendant regarding any element of a criminal offense. *People v Fields*, 450 Mich 94, 113-114; 538 NW2d 356 (1995).

Pursuant to MCL 600.2159, a defendant's "neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." This Court has stated that "[a] prosecutor is not permitted to comment on a defendant's failure to take the stand." *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991) (citing *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). That prohibition "is an important corollary to the Fifth Amendment privilege against self-incrimination. *Id*. (citing US Const, Am V; Const 1963, art 1, § 17).

During defendant's closing argument, defense counsel stated:

> You've sat, you've watched [defendant] for this past week sitting there like a lump of mush, not lifting a finger, not saying a word in her own defense. Why do you suppose that is? [Defendant] has a death wish of sorts. She is perfectly happy, and what you see now it's been like that for three years, she is perfectly happy to fall on the sword and go to the Pope to spare her daughter. Maybe you wouldn't do that, maybe I wouldn't do that. That's her choice, and her decision.
>
> I am not going to let that happen. From the first time a policeman walked into her apartment on that January morning, that's been her attitude and it hasn't changed over the three years. I did it, it is me, take me.

During the prosecution's rebuttal argument, the prosecutor stated:

> And then I heard [defense counsel] stand up here and indicate right off the bat, . . . his client is not saying a word in her own defense, she is perfectly happy to fall on the sword. If that were true, she would have pled to it. And I say this, I say let's

> give her her wish, let's convict her, not because she is a martyr . . . but because she is a murderer.

Although the prosecutor did mention that defendant failed to testify, by highlighting that she had not said anything in her own defense, the context indicates that the prosecutor was merely reiterating and responding to defense counsel's assertion that defendant was taking the blame for an offense she did not commit. The crux of the prosecutor's statement was that defendant could have pleaded guilty to the charged offenses if she wished to be convicted instead of Tonina; it was not an attempt to shift the burden of proof to defendant. In the context of the trial, the prosecutor's statement was isolated and in direct response to the theory of defense counsel: that defendant was falsely taking the blame for Tonina.

In any event, even if the prosecutor's statement was improper, it did not deprive defendant of a fair and impartial trial. The prosecutor's comment was in response to defense counsel's closing argument; defense counsel attempted to frame defendant's failure to testify as evidence that she was attempting to falsely take blame for the crimes. Further, the prosecutor's comment was isolated in the context of the trial and the arguments of both parties; defendant's failure to testify was not an issue at any other point in the trial. Further, the trial court gave a curative jury instruction, stating:

> [A]s I told you at the beginning, I told you during the trial, and I just told you now what these two fine lawyers tell you during their opening statements and their closing arguments are not evidence. All right. Now, there was a statement regarding something that the defendant did or did not do. I don't want you to consider that. I mean, it's – just don't consider it whatsoever, like it was never said.

The trial court's instruction cured any improper statement by the prosecution. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not demonstrated that the curative instruction was insufficient to correct any prejudice caused by the prosecutor's comment. Accordingly, her right to a fair and impartial trial was not violated.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly