

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL BISBEE,

Defendant-Appellant.

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UNPUBLISHED

May 16, 1997

No. 183790

Saginaw Circuit Court

LC No. 93-008506-FC

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard\*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and was sentenced to thirty to fifty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the 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). The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which if successful, would make the killing a murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Here, defendant asserts that the evidence does not support a finding of an intent to kill. We disagree.

The intent to kill element of assault with intent to murder need not be proven by direct evidence. Rather, the fact finder should consider “whether the instrument and means used were naturally adapted to produce death [along with the defendant’s] conduct and declarations prior to, at the time, and after the assault....” *People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988), quoting *Roberts v People*, 19 Mich 401, 415 (1870). In this case, the victim testified that defendant covered her nose and mouth with one hand while applying pressure to her throat with the other. When the victim could not get any air, defendant held her in that position and “just watched.” Viewing this evidence in a

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\* Circuit judge, sitting on the Court of Appeals by assignment.

light most favorable to the prosecution, a reasonable person could determine, beyond a reasonable doubt, that defendant intended to kill the victim by cutting off her air supply. See *People v Warren (After Remand)*, 200 Mich App 586, 588-589; 504 NW2d 907 (1993). Accordingly, there was sufficient evidence to sustain defendant's conviction and the trial court properly denied defendant's motion for directed verdict.

Defendant next argues that the trial judge abused her discretion in allowing the prosecution to introduce color enlargements of photographs depicting the victim's neck and face injuries. We agree that, when compared to the original prints, the distorted red shading of the enlargements makes some of the injuries look more severe. Because the more accurate originals were available, the enlargements were not substantially necessary or instructive, and the trial court should not have allowed them into evidence. However, any error in the admission of the enlargements was harmless. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Both the originals and the enlargements were introduced at trial and identified as such. Given the overall red cast of the enlargements, any reasonable juror would have known that the difference in shading between the enlargements and the originals was a product of the process used to reproduce the photographs and that they were not particularly representative. We therefore decline to reverse on this ground.

Defendant also contends that resentencing is required because the trial judge erred in determining that his bare hands were a "weapon" for purposes of scoring Offense Variable 1 of the sentencing guidelines. Under *People v Mitchell*, 454 Mich 145; \_\_\_ NW2d \_\_\_ (1997), however, the argument that the trial court misinterpreted the guidelines "does not state a cognizable claim for relief." Because "[a]ppellate courts are not to interpret the guidelines or to score or rescore the variables for offenses and prior record to determine if they were correctly applied," *id.*, we cannot address this claim.

Defendant's final claim is that resentencing is required because his thirty- to fifty-year sentence, which exceeded the sentencing guidelines' recommendation of a minimum sentence in the range of seven to fifteen years, was disproportionately harsh under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant, the boyfriend of the victim's roommate and an acquaintance of the victim, used the roommate's key to let himself into the victim's apartment at night. He then removed his shoes so that he would not awaken the victim and proceeded to enter her bedroom and tried to strangle her by placing one hand over her nose and mouth and the other hand on her throat. As noted by the trial court, the attack was both unprovoked and senseless, and was rendered more appalling by the fact that defendant and the victim had previously enjoyed a friendly relationship. Compare *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). The victim was ambushed in her own bed; she had no chance to escape, and no opportunity to defend herself against her attacker. While the sentence was severe, under these circumstances, we find no abuse of discretion.

Affirmed.

/s/ Barbara B. MacKenzie  
/s/ Donald E. Holbrook, Jr.  
/s/ Timothy P. Pickard