

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AIRICK TRAMMELL SMITH,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 236044

Eaton Circuit Court

LC No. 01-020016-FC

Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of second-degree murder, MCL 750.317, and removing a body without medical examiner permission, MCL 52.204. Defendant was sentenced by the trial court to 270 to 365 months (22 ½ to 30 years and 5 months) in prison for the second-degree murder conviction, and a concurrent sentence of 365 days’ imprisonment for removing a body without medical examiner permission. We affirm.

Defendant first contends on appeal that there was insufficient evidence to support his conviction of second-degree murder. We disagree. In reviewing the sufficiency of the evidence, this Court analyzes the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that each essential element of the crime was proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Nowack, supra* at 400. This Court will not interfere with the jury’s role of determining intent, the weight of the evidence, or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The prosecution need not negate every reasonable theory consistent with innocence; instead, it need only convince the jury that the elements of the crime have been proven beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *Nowack, supra* at 400.

The elements of second-degree murder are: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as a state of mind consisting of the

intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464. A defendant's intent or state of mind, like all the elements of a crime, may be shown by circumstantial evidence. *People v Dumas*, 454 Mich 390, 398; 563 NW2d 31 (1997).

In the instant case, the evidence established that the female victim, whose body showed the presence of drugs and alcohol, was asphyxiated during a struggle with defendant. A forensic pathologist who performed the autopsy on the victim testified that her injuries were consistent with being choked with a person's arm. There were bruises on the victim's chin, left breast, both forearms, and hands. There were additional bruises on the front of the victim's legs, between the knee and the ankle. The evidence indicated that wounds on the back of the victim's hands and arms were defensive injuries inflicted before the victim died. A witness for the defense, a forensic pathologist, testified that the victim had been in a "severe struggle," appeared to have defended herself, and was struck at least once, hard, in the chest. The only point on which the pathologists disagreed was whether a bar arm hold or a carotid sleeper hold was used by defendant to exert pressure on the victim's neck, causing unconsciousness and ensuing death. Both medical experts agreed that it is common knowledge that choking a person by the neck can lead to death.

Tevell McClain, a codefendant who pleaded guilty to the crime of accessory after the fact to murder based on his involvement in this case, MCL 750.505, testified that he witnessed the quarrel between defendant and the victim at an apartment that culminated in the victim's death. Defendant and McClain provided crack cocaine to people at the apartment and the victim owed defendant some money. McClain testified that a yelling quarrel turned into a physical fight. Defendant punched the victim in the eye and both defendant and the victim fell to the floor. Defendant wrestled with the victim and had his arms around her neck. McClain attempted to intervene, without success. Defendant stayed on top of the victim for "shorter than a minute," but the victim suddenly stopped moving. McClain testified that he panicked: "I knew what happened She was dead." The two men proceeded to clean up the scene to eliminate any evidence and carried the victim's body down to a creek. They later returned and buried her body in a shallow grave in the woods. A passerby walking her dog subsequently noticed the gravesite and notified the police, who discovered the victim's body.

Defendant argues that "the evidence showed only that Defendant caused the victim's loss of consciousness, followed by a period during which he was on top of her, but not continuing to cut off her airway or blood supply." Defendant maintains that it was not shown beyond a reasonable doubt that the victim was dead or unresuscitatable at that point, and that "if Defendant and McClain erroneously concluded that she was dead and their subsequent actions resulted in her death, Defendant was guilty of, at most, manslaughter." We disagree.

There was ample evidence demonstrating that defendant caused the victim's death by choking her without an excuse or justification. The fatal fight started as an argument over money owed by the victim to defendant for crack cocaine. The victim pleaded with defendant to stop. When McClain tried to intervene, defendant told him that the victim would tell. Her defensive wounds indicated that she was the victim of an assault, characterized by defendant's own witness as "a severe struggle." McClain saw the victim face down on the floor with defendant's arms around her neck, choking her. As previously noted, the medical experts agreed

that it is common knowledge that one can kill or do great bodily harm to someone by choking them. All of these facts, and the inferences drawn therefrom, demonstrate that defendant caused the victim's death without excuse or justification. Moreover, defendant acted with malice because he possessed the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Defendant was angry with the victim because she owed him money for crack cocaine. He hit her in the eye and they engaged in a "severe struggle" that ended when the larger defendant choked the smaller victim to death. We conclude that there was sufficient evidence to support defendant's conviction for second-degree murder. *Goecke, supra*.

Defendant also alleges that the trial court erred by denying defendant's challenge to the scoring of offense variable (OV) 7 at fifty points based on its finding that that victim suffered from aggravated physical assault. Specifically, defendant argues that OV 7 should not have been scored because the circumstances of the crime did not warrant it. We disagree.

"Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score." *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999), quoting *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). See also *People v Leverage*, 243 Mich App 337, 349; 622 NW2d 325 (2000). MCL 777.37, which governs the scoring of OV 7, states that fifty points should be scored on that variable when a "victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37(a). To the extent defendant suggests that no facts supported the trial court's scoring of OV 7, in light of the factual scenario established by the record and set forth above, we cannot conclude that the trial court abused its discretion in scoring OV 7 at fifty points. *Cain, supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey