

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON LEE EBEL,

Defendant-Appellant.

UNPUBLISHED

August 16, 2011

No. 296285

Macomb Circuit Court

LC No. 2009-003928-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, and armed robbery, MCL 750.529. We affirm.

Michael McCarthy died after being struck with a piece of rock or concrete which knocked him to the ground where he was severely beaten about the head and face with a pool stick and/or kicking and stomping feet. On the day he was killed, McCarthy had been involved in a dispute with defendant over marijuana.

On appeal, defendant argues that there was insufficient evidence to support his second-degree murder and armed robbery convictions as either the principal actor or an aider and abettor. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). We review the record in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007) (citation omitted). The elements of the crime may be established by circumstantial evidence and reasonable inferences arising from the evidence. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010) (citation omitted). Appellate review of such a challenge is deferential and conflicts in the evidence must be resolved in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We may not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

To establish the crime of second-degree murder, the prosecution must prove: (1) a death, (2) caused by an act of the defendant, (3) committed with malice, and (4) without justification or

excuse. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The term “malice” is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the use of a weapon, from circumstantial evidence, or from evidence that the defendant intentionally set into motion a force likely to cause either death or great bodily harm. *People v Roper*, 286 Mich App 77, 84-86; 777 NW2d 483 (2009).

To establish the crime of armed robbery, the prosecutor must at least prove: (1) an assault, and (2) a felonious taking of property from the victim, (3) while armed with a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); see, also, MCL 750.529.

A person who “procures, counsels, aids, or abets” in the commission of a crime can be convicted and punished as if he directly committed the offense. MCL 767.39. To support an aiding and abetting conviction, the prosecutor must establish that (1) the crime was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001); see, also, *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006). “‘Aiding and abetting’ describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted).

Here, the evidence included that defendant told police that he was angry at McCarthy, who was defendant’s father’s friend and a large man, because McCarthy took his marijuana and pushed him while defendant was at his father’s house. Subsequently, defendant found and gathered his friends, Thomas Post, Kevin Antone, and Jacob Androsuk, “to confront [McCarthy] and get the marijuana back.” He also retrieved a piece of a pool stick. Then the four friends walked about three blocks to defendant’s father’s house to confront McCarthy. Defendant admitted to police that he confronted McCarthy and demanded the return of his marijuana. Defendant also admitted that he threw a piece of rock or concrete at McCarthy and struck him in the head. Notably, even after being told that Antone claimed to have thrown the rock at McCarthy, defendant maintained to police that he struck McCarthy. The medical examiner testified that McCarthy’s injuries were consistent with being hit by a large, heavy rock or something similar.

Defendant told police that after being struck, McCarthy “went down and made a few like gurgling sounds.” According to Post’s testimony, Antone then started kicking and stomping on McCarthy. Post also saw Antone take a bag out of McCarthy’s pocket. According to the medical examiner’s testimony, McCarthy had a circular depressed fracture of the temporal bone on the left side of his head that “matches almost identically” to the circular base of the pool stick collected from the murder scene. Defendant was the only person seen with a pool stick and he was also seen dropping the pool stick. And, the medical examiner testified, McCarthy died from very severe head injuries, including multiple fractures of the skull and facial bones, as well as

extensive injuries to the brain, caused by multiple (at least five to seven) blunt impacts to the head and face by more than one type of mechanism.

Viewing this evidence as a whole and in the light most favorable to the prosecution, a reasonable jury could infer and find that defendant recruited his friends and retrieved a weapon to use during his planned confrontation with McCarthy. Defendant then confronted McCarthy and struck him in the head with a large piece of rock or concrete, knocking him to the ground. While McCarthy was on the ground and in obvious distress making gurgling sounds, defendant struck McCarthy in the head with the pool stick and at least one of his cohorts kicked and stomped on his face and head before retrieving a bag of marijuana from McCarthy's pocket. McCarthy died from his resulting head injuries.

Clearly, the elements of second-degree murder with defendant acting as the principal were established. McCarthy died from head injuries. The head injuries were caused by acts of defendant. Defendant acted with malice as can be inferred from the nature and extent of McCarthy's injuries and the manner in which they were inflicted. That is, a reasonable jury could infer that defendant intended to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result when defendant knocked McCarthy down with a large piece of rock or concrete thrown at his head and then struck him in the head with a pool stick. See *People v Lange*, 251 Mich App 247, 251-252; 650 NW2d 691 (2002). And, finally, there was no justification or excuse for defendant causing McCarthy's death. Thus, we need not determine whether defendant could have been convicted of second-degree murder under an aiding and abetting theory—he could properly be convicted as the principal. And we reject defendant's claims on appeal that he did not act with malice and was not a cause of defendant's deadly injuries. These claims are clearly defeated by the evidence.

The evidence, viewed as a whole and in the light most favorable to the prosecution, was also sufficient for the jury to conclude that defendant was guilty of armed robbery under an aiding and abetting theory. Defendant does not dispute that McCarthy was assaulted while defendant was armed with a dangerous weapon. But defendant claims that a felonious taking of property did not occur here because McCarthy's right to possess the marijuana was not superior to defendant's right to possess it. However, there was evidence from which a jury could infer that McCarthy was the owner of the marijuana that Antone removed from McCarthy's pocket. The police found marijuana by McCarthy's body. And, the jury could have rejected defendant's claim that McCarthy took defendant's marijuana. The jury is free to determine the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Thus, the evidence was sufficient to prove that an armed robbery was committed.

The evidence was also sufficient to prove that defendant aided and abetted in the commission of this armed robbery. He sought and gathered up his friends for assistance, retrieved a weapon, and planned the confrontation with McCarthy. When McCarthy was found and refused to turn over the marijuana, defendant struck him in the head with a large piece of rock or concrete causing him to fall to the ground. Defendant then struck McCarthy in the head with a pool stick while at least one of his friends kicked and stomped on McCarthy's head and face before removing a bag of marijuana from McCarthy's pocket as he lay on the ground. From

this evidence, a rational trier of fact could have found, beyond a reasonable doubt, that defendant aided and abetted the commission of armed robbery; therefore, we need not consider whether the evidence established that he was the principal.

Because we have not vacated either of defendant's convictions, defendant is not entitled to resentencing.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder

/s/ Donald S. Owens