

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT L. WAGNER,

Defendant-Appellant.

UNPUBLISHED
November 3, 1998

No. 202445
Recorder's Court
LC No. 96-006265

Before: Young Jr., P.J., and Wahls and Jansen, JJ.

MEMORANDUM.

Defendant appeals by right his conviction after a bench trial for second-degree murder, MCL 750.317; MSA 28.549. We affirm.

Defendant's conviction arises from the murder by strangulation of his girlfriend. Defendant contends that his second-degree murder conviction was not supported by the evidence where he was provoked into committing the murder. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Second-degree murder is established where the defendant causes a death with malice and without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. Malice may be inferred from the facts and circumstances of the killing. *Id.* The trial court could properly infer malice from the act of strangling decedent for four to five minutes prior to her death.

The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The provocation must be adequate to cause a reasonable person to lose

control. *Id.* The evidence presented did not require the trial court to find that the necessary provocation was present in this case.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Myron H. Wahls

/s/ Kathleen Jansen