

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN EVAN SUNICH,

Defendant-Appellant.

UNPUBLISHED

June 25, 2009

No. 283577

Cheboygan Circuit Court

LC No. 07-003645-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GLENN EVAN SUNICH,

Defendant-Appellee.

No. 283724

Cheboygan Circuit Court

LC No. 07-003645-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

In Docket No. 283577, defendant appeals as of right his jury trial convictions of obstruction of justice, MCL 750.505a, four counts of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and one count of conspiracy to commit obstruction of justice, MCL 750.505a. The trial court sentenced defendant to 18 months to five years' imprisonment for obstruction of justice, 54 months to 20 years' imprisonment for each conviction of delivery of less than 50 grams of a controlled substance, and 18 months to five years' imprisonment for conspiracy. The jury also convicted defendant of manslaughter. After the jury returned the verdict, the trial court invited defendant to renew his motion for a directed verdict of acquittal on the manslaughter count. In Docket No. 283724, plaintiff appeals as of right from the trial court's grant of defendant's motion for a directed verdict on the conviction of manslaughter, MCL 750.321. These appeals have been consolidated for purposes of hearing and decision. We affirm defendant's convictions, reverse the trial court's grant of directed verdict on the charge of involuntary manslaughter, and remand for reinstatement and sentencing on the manslaughter conviction.

This case arises out of defendant's delivery of drugs to Robert Smith and Nathan Raymond, and the subsequent death of Smith in defendant's trailer. During trial, defendant acknowledged that he and two friends transferred Smith's body into Smith's vehicle and left the vehicle and body in a secluded wooded area.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to convict him of delivering narcotics to Smith. We disagree.

A. Standard of Review

We review de novo the issue of sufficiency of the evidence to sustain a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a claim for sufficiency of the evidence, we review all evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Conflicting evidence must be resolved in favor of the prosecution. *Id.* "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

B. Analysis

Defendant acknowledges that circumstantial evidence may be sufficient to support a conviction, *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991), but still claims that there was no direct evidence that he delivered drugs to Smith. Defendant contends that Smith stole the narcotics, and notes that there was testimony that Smith had stolen narcotics from others, as well.¹

The trial court instructed the jury that the prosecution had the burden to prove each element beyond a reasonable doubt separately for each delivery charge. The elements included: (1) that defendant delivered a controlled substance, which was outlined in each count, along with the date and to whom it was allegedly delivered, (2) the substance delivered was in some counts was morphine and some counts was fentanyl, (3) defendant knew he was delivering either morphine or fentanyl, (4) defendant was not legally authorized to deliver this substance, and (5) the delivery took place on or about November or December of 2005 in Cheboygan County.

During trial, the prosecution presented evidence that defendant was engaged in the practice of selling drugs, including fentanyl and morphine. One of defendant's buyers stated that defendant's trailer was "basically a known drug facility" where she could get drugs.

¹ David W. Farhat testified that he believed that Smith stole a prescribed duragesic pain patch from him. Farhat said that he thought duragesic is fentanyl. Farhat stated that Smith denied taking the patch.

Further evidence was presented that defendant had a prescription for fentanyl and morphine that he filled on December 5, 2005. Shortly before he died in December 2005, Smith was living with defendant in defendant's trailer. Smith's autopsy revealed that Smith had extremely high levels of fentanyl and morphine in his body, and this combination of drugs caused his death. Smith's ex-girlfriend testified that years prior to Smith's death, she and Smith would get used fentanyl patches from defendant, and one of defendant's previous buyers testified that in the past, she saw Smith get drugs from defendant.

This evidence supported an inference that defendant delivered fentanyl and morphine to Smith. *Hardiman*, *supra* at 428. We defer to the jury's superior ability to assess the credibility of the witnesses. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Sufficient evidence supported defendant's convictions of delivery of controlled substance to Smith.

II. Resentencing

A. Standard of Review

This Court reviews a trial court's sentencing decision for an abuse of discretion. *Cain*, *supra*, 238 Mich App at 130. An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *People v Smith*, 482 Mich 292, 327; 754 NW2d 284 (2008), citing *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

The accuracy of a judgment of sentence is a question of law. This Court reviews questions of law de novo. See *Babcock*, *supra*, 469 Mich at 264.

B. Analysis

Initially, we note given of our disposition of Issue I, defendant's request for resentencing predicated upon the fact that he did not deliver narcotics to Smith fails.

Defendant also argues that offense variable (OV) 3 was improperly scored for the delivery of narcotics convictions as to Raymond because those deliveries did not result in a victim being killed. We disagree.

Offense variable 3 states, "[s]core 100 points if death results from the commission of the offense and homicide is not the sentencing offense." MCL 777.33(2)(b). However, defendant does not point to anything in the language of the sentencing guidelines scoring instructions that would prevent a trial court from considering the same conduct when scoring each OV. MCL 777.22 states, "For *all* crimes against a person, score offense variables 1, 2, 3," MCL 777.22(1) (emphasis added). Further, this Court has found that where crimes involve one continuum of conduct, it is logical and reasonable to consider the entirety of the defendant's conduct in calculating the sentencing guideline range with respect to each offense. *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

Here, defendant was convicted of delivery of narcotics to both Raymond and Smith. Upon finding Smith's body in his trailer, defendant's main concern was to get Smith off of his property. To accomplish this task, he asked for help from two friends, one being Raymond.

There was testimony that defendant provided Raymond with a second dose of narcotics, at Raymond's request, as a way of showing his appreciation, an act which resulted in the second delivery of narcotics charge to Raymond. Because each of these delivery charges was one continuum of conduct, eventually resulting in Smith's death, the trial court did not abuse its discretion in sentencing defendant.

III. Directed Verdict

Plaintiff argues that the trial court abused its discretion in granting defendant's motion for a directed verdict of acquittal on the conviction of manslaughter.

A. Standard of Review

We review a trial court's decision on a motion for a directed verdict de novo, considering whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

B. Analysis

In granting the motion, the trial court reasoned that because Smith was an experienced drug user, it was not apparent to defendant that there was a likelihood that Smith would be injured as a result of using the drugs provided by defendant. This reasoning is flawed. Defendant testified that he knew that too much fentanyl or morphine could kill a person, that these drugs were not intended to be "mainlined" or injected, and that injecting either fentanyl or morphine was likely to cause great bodily harm. Defendant also testified that he knew Smith was a severe drug user. Clearly, defendant understood that these risks were true for himself, as well as for those individuals to whom defendant sold drugs. Every time defendant sold these drugs to another individual, there was a high likelihood of injury or death. Simply because Smith was an experienced user does not negate the risk associated with fentanyl and morphine.

The trial court also reasoned that Smith's death was not the natural and necessary result of defendant's delivery of drugs, and therefore defendant's conviction could not stand. We disagree. In *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995), our Supreme Court noted that, "In order to convict a defendant of a criminal negligence offense, the prosecutor must prove beyond a reasonable doubt that the defendant's conduct was a factual cause of the fatal accident." In *People v Albers*, 258 Mich App 578, 583-584; 672 NW2d 336 (2003), the defendant was convicted of involuntary manslaughter after her six-year old son, who had a history of setting fires in the home, obtained a lighter and started a fire in their apartment, resulting in the death of a twenty-two-month old child in an adjoining apartment. *Id.* at 580.

In this case, defendant engaged in the active and ongoing practice of selling drugs to others, notwithstanding that he understood that taking these drugs could lead to injury or death of himself or another. Based on past practices, the drug addicts in the area knew when defendant would be receiving his prescription drugs each month, and understood defendant's house to be a place where fentanyl and morphine could be purchased. Defendant's disregard for the safety of

others led to Smith's death. Like the defendant in *Albers*, defendant provided the means that would lead to the death of another, although he was not the direct cause.

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman, supra* at 428. Based on the jury instructions and the evidence presented, a rational trier of fact could have concluded that (1) Smith died as a result of overdosing on drugs given to him by defendant, (2) defendant acted in a grossly negligent manner, and (3) defendant had no excuse or justification for his actions. Moreover, in considering gross negligence, a rational trier of fact could also have concluded that (1) defendant knew of the danger to another and did not take ordinary care to avoid injuring another, (2) defendant could have avoided injuring another by use of ordinary care, i.e. by not selling fentanyl and morphine, (3) defendant failed to use ordinary care to prevent injuring another when to a reasonable person it must have been apparent that the result was likely to be serious injury, and (4) that Smith's death was the natural or necessary result of defendant's act. We reverse the trial court's grant of defendant's motion for a directed verdict on the charge of manslaughter.

Affirmed in part and reversed in part, and remanded with instructions to the trial court to reinstate defendant's manslaughter conviction and sentence on that charge. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly