

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERESE KEGLER,

Defendant-Appellant.

FOR PUBLICATION

September 15, 2005

9:00 a.m.

No. 255637

Wayne Circuit Court

LC No. 04-000886-02

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

COOPER, P.J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. I would find that the trial court improperly assessed 50 points for offense variable (OV) 7, aggravated physical abuse.

Pursuant to MCL 777.37(1)(a), OV 7 is scored at 50 points when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."¹ Defendant's conduct was appalling and callous. However, I do not agree that it amounted to torture or excessive brutality, as opposed to the conduct of her codefendant.² The statute specifically defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification."³ Accepting the literal language of the statute and

¹ MCL 777.37(1)(a).

² See *People v Wilson*, 265 Mich App 386, 398; 695 NW2d 351 (2005) (finding a score of 50 points appropriate where "[t]he victim's testimony detailed a brutal attack, which took place over several hours, involving being attacked by weapons and being kicked, punched, slapped, and choked numerous times, ending in injuries requiring treatment in a hospital," followed by a lengthy recovery period); *People v Hornsby*, 251 Mich App 468, 469; 650 NW2d 700 (2002) (finding "terrorism" where the defendant held a shift supervisor at gunpoint while he cocked the gun and repeatedly threatened the lives of the supervisor and her employees).

³ MCL 777.37(3). Defendant stated that her intent in placing Mr. Wilson's body outside was to humiliate him. However, there is no indication that she experienced any gratification from this behavior. The gratification referenced in this statute comes from watching someone suffer.

(continued...)

the definition it provides, as mandated by the Michigan Supreme Court,⁴ a victim must actually experience pain or humiliation in order to have been treated with sadism.

A victim must be alive and conscious to have fear and anxiety, to be subjected to pain or humiliation, or to suffer. The evidence clearly shows that Mr. Wilson was unconscious and, undoubtedly, already dead when defendant and Mr. Brantley left his body outside and when they placed him in defendant's trunk. The medical examiner testified that Mr. Wilson would have lost consciousness within 90 seconds of being strangled and would have died within three to five minutes. Defendant was uncertain whether she felt Mr. Wilson's pulse when she and Mr. Brantley placed his body outside, or whether she heard Mr. Wilson grunt when they placed his body in her trunk. However, defendant definitively asserted that Mr. Wilson never regained consciousness. Therefore, I would find that the trial court could not properly base defendant's score on these acts.

Reducing defendant's offense variable score by 50 points would place her at offense variable level I. The recommended minimum sentencing range for a defendant in offense variable level I and prior record variable level A is 7-1/2 to 12-1/2 years.⁵ As defendant's minimum sentence of 15 years would exceed the corrected sentencing range, I would remand for resentencing.⁶

/s/ Jessica R. Cooper

(...continued)

However, a corpse no longer suffers. Obviously, there is a prohibition against desecrating a dead body in this state, MCL 750.160, but that behavior is not of the type contemplated under this particular statute.

⁴ *Elezovic v Ford Motor Co*, 472 Mich 408, 419 n 16; 697 NW2d 851 (2005); *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

⁵ MCL 777.61.

⁶ MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003).