

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHALONDA SHANTAY UPSHAW,

Defendant-Appellant.

UNPUBLISHED

July 2, 1996

No. 170545

LC No. 93-002278

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to serve fifteen to forty years in prison. We affirm.

Defendant first argues that the trial court erred in its determination of voluntariness regarding her post-arrest statements to police. We disagree. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Johnson*, 202 Mich App 281, 287 (1992); 508 NW2d 509 (1993). This Court will not disturb a trial court's determination of voluntariness unless it is clearly erroneous. *Johnson, supra* at 288. Therefore, we will affirm the trial court's decision unless, upon review of the record, we are left with a definite and firm conviction that a mistake has been made. *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991).

In evaluating the admissibility of a statement, this Court reviews the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors articulated by the Michigan Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). These factors include: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the

* Circuit judge, sitting on the Court of Appeals by assignment.

accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. *Id.* Here, defendant was advised of her rights. She never requested to speak to counsel nor refused to speak with the interrogating officer. Further, there was no evidence of psychological or physical coercion or abuse by the interrogating officers. Defendant slept for one hour in her cell prior to her interview. Moreover, she exhibited no signs of intoxication. For these reasons, we conclude that defendant's statement was freely and voluntarily made.

Defendant next argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt the elements of second-degree murder. Specifically, defendant contends that the prosecution failed to prove the malice element of the offense. We disagree. When considering a sufficiency of the evidence challenge following a waiver trial, this court, viewing the evidence in the light most favorable to the prosecution, must determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Here, defendant told police that she initiated her attack on the victim from behind, that she repeatedly stabbed the victim in the back, and that, upon realizing the victim was still alive, continued the onslaught by stabbing victim in the chest. Based upon the evidence presented, we conclude that there was sufficient evidence to convict defendant of second-degree murder. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993); *People v Spearman*, 195 Mich App 434, 438; 491 NW2d 606 (1992).

Defendant next argues that the trial court erred in failing to consider the lesser offense of voluntary manslaughter. We disagree. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *People v Kang*, 209 Mich App 540, 550; 531 NW2d 806 (1995). Moreover, the sufficiency of the trial court's findings are reviewed in the context of the evidence and the specific legal and factual issues raised by the parties. *People v Simon*, 189 Mich App 565, 568-569; 473 NW2d 785 (1991). Factual findings are sufficient as long as it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988). Since there was no showing of provocation, we find no error in the trial court's refusal to consider the offense of voluntary manslaughter.

Defendant also argues that the trial court improperly scored offense variable (OV) 3, intent to kill or injure, and OV 4, aggravated physical abuse. We disagree. Appellate review of a trial court's scoring of sentencing guidelines is limited. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). A sentencing judge has discretion in determining the number of points to be scored, provided that there is evidence on the record to support a particular score. *Harris, supra* at 663. This court will affirm a scoring decision for which there is any supporting evidence. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

Defendant maintains that the circumstances surrounding the victim's death rose to the level of "a combative situation" and, as a result, that she should have been assessed ten points for OV 3. However, the record indicates that the victim was helpless when she was stabbed by defendant. The victim's stature and position, relative to that of defendant, placed the victim at a considerable disadvantage. We conclude that these circumstances do not rise to the level of combativeness; therefore, we affirm the trial court's scoring decision with respect to OV 3. Similarly, the number and location of the stab wounds supports the trial court's scoring of OV 4. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994).

Affirmed.

/s/ Myron H. Wahls
/s/ Robert J. Young, Jr.
/s/ Harry A. Beach