

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL EUGENE BETZER, JR.,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 227647

Hillsdale Circuit Court

LC No. 99-238705-FC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321, for the death of his girlfriend's child. The trial court sentenced defendant to eighty-six to 180 months' imprisonment. Defendant now appeals by right. We affirm.

Defendant first asserts that the jury's verdict was against the great weight of evidence. We disagree.

This Court will not address a claim that a conviction is against the great weight of evidence unless the defendant moved for a new trial in the trial court, absent manifest injustice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Because defendant failed to move for a new trial, this issue is unpreserved. We conclude that manifest injustice would not result from failure to review this issue¹ because defendant's argument is largely that the prosecution witnesses were not credible and that the Michigan Supreme Court acknowledged "the power of the trial judge to sit as a thirteenth juror, and grant a new trial based upon a lack of credibility of witnesses." Four years ago, our Supreme Court specifically rejected the "thirteenth juror" approach to credibility questions in the context of a great weight of the evidence issue and ruled that where there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *People v Lemmon*, 456 Mich 625, 640, 642-643, 647; 576 NW2d 129 (1998). This issue is wholly without merit.

¹ In addressing this unpreserved issue on appeal, we also conclude that there has been no showing of a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant also asserts that offense variables 3, 6, and 10 were incorrectly scored, warranting resentencing before a new judge. Again, we disagree.

On appeal, a party may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless he raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. MCL 769.34(10); *People v Harmon*, 248 Mich App 522, 530; ___ NW2d ___ (2001). Because defendant only objected to the scoring of offense variables 6 and 10, he forfeited any issue on appeal regarding the propriety of the score assessed for offense variable three. *Id.*

Because the crime for which defendant was sentenced was committed on or about October 25, 1999, the statutory guidelines apply. *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). “The interpretation and application of statutes is a question of law that is reviewed de novo by this Court.” *People v Al-Saiegh*, 244 Mich App 391, 394; 625 NW2d 419 (2001).

First, OV 6 concerns the “offender’s intent to kill or injure another individual.” MCL 777.36. “An unlawful act, committed with the intent to injure or in a grossly negligent manner, that proximately causes death is involuntary manslaughter.” *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997). There was evidence that the child’s skull was hit against another object at least two, and maybe three times. The jury concluded that defendant intended to injure the child. In addition, the deputy coroner testified that every bone except one had been crushed in the upper portion of the child’s skull. Where such tremendous force is used, several times, to inflict such extensive harm, there is clearly an intent to injure, and therefore, ten points were properly assessed. MCL 777.36(1)(c).

Second, OV 10 concerns the “exploitation of a vulnerable victim.” MCL 777.40. MCL 777.40(1)(c) provides that five points be assessed where “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” Defendant, an adult, exploited the difference in size and strength between himself and the infant victim. He could not have inflicted the injuries in the manner that he did on a person of his own size and strength. Consequently, we find that OV 10 was correctly scored.

We affirm.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens