STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2004
v	No. 246800 Wayne Circuit Court
MARKETTA RANDLE, Defendant-Appellant.	LC No. 02-008077-01

Before: Owens, P.J. and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of second-degree murder, MCL750.317 for which she was sentenced to sixteen to thirty years' imprisonment. We affirm.

I. Basic Facts

One summer evening, defendant and the victim, defendant's boyfriend and the father of her child, were at home when a fifteen-year-old girl came by and asked defendant for a ride. This ignited an argument that began on the front porch. Defendant and the victim went into the house where they shared a room, and continued the argument. Diane Brown, the victim's aunt, who also owned the home, overheard defendant say to the victim "don't play me like that why you play me like that." Defendant and the victim continued their argument into the basement. After some time had passed, Brown heard defendant call for help because the victim was bleeding. She sent her son to the basement, where the victim was found unconscious laying near a shovel.

There were no witnesses to the struggle in the basement. Several people who overheard parts of the argument testified that they called emergency medical services but the 911 tapes were never produced at the trial. After waiting for several hours for EMS to arrive, defendant herself took the victim to the hospital. Within a half hour of arriving at the hospital, the victim died. The cause of death was determined to be a result of a single half-inch wide four-inch deep chest wound that severed his heart.

Defendant gave two statements to police officers. At the hospital, defendant told a police officer that she ran upstairs to get away from the victim and later found him in the basement

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

where he appeared to have fallen on a shovel. But later defendant stated that the victim was choking and dragging her and she grabbed a nearby steak knife and stabbed him in self-defense.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to sustain her conviction of second-degree murder because the prosecution did not establish beyond a reasonable doubt that defendant acted with malice. We disagree.

We review claims regarding of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court views the evidence in a light most favorable to the prosecution and must determine whether a rational trier of fact could have found all the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence of the elements of a crime, and credibility conflicts are resolved in favor of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

Defendant argues that the prosecution failed to prove malice beyond a reasonable doubt because there was evidence that defendant stabbed the victim in self-defense and that she called EMS and ultimately took defendant to the hospital herself. But the evidence also showed that defendant stabbed the victim with a steak knife in the chest causing a four-inch deep puncture wound that cut part of the victim's heart and caused his death. A rational trier of fact could have found beyond a reasonable doubt that defendant either intended to cause great bodily harm to the victim or acted in wanton and willful disregard of the likelihood that the natural tendency of stabbing a person in the heart with a steak knife is to cause death or great bodily harm. The fact that there was also evidence showing that defendant acted in self-defense or tried to assist the victim afterward does not require reversal because questions of credibility are resolved in favor of the jury verdict. Therefore, we find sufficient evidence to support defendant's conviction.

III. Jury Instruction

Defendant next argues that the trial court erred in its instruction to the jury that it may infer from the prosecution's failure to produce the 911 tape that it would have been unfavorable to the prosecution adding at the end of the instruction "if you want to." We disagree.

We review this claim of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). A trial court's instructions must include all the elements of the charged offenses and "must not omit material issues, defenses, and theories if the evidence supports them." *Id.* "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144.

The trial court instructed the jury as follows:

> Now there's been testimony regarding a tape who's [sic] appearance was the responsibility of the prosecution.
>
> You may infer that that evidence would have been unfavorable to the prosecutions [sic] case if you want to. The prosecution hasn't produced evidence of a statement that it claims the defendant made.

This appears to be a variation on CJI2d 5.12 which reads:

> _____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

Defendant argues that the instruction as given was improper because the trial court added the phrase "if you want to." But defendant waived this issue by expressly approving the instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). After the trial court read the jury instructions, it asked "Are both sides satisfied with the instructions?" In response, defense counsel stated "Yes, we're satisfied." As such, we find that any error is extinguished by defendant's waiver.

But even if defendant had not waived the alleged error, defendant has failed to show plain error affecting her substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). CJI2d 5.12 states: "You *may* infer that this witness's testimony would have been unfavorable to the prosecution's case." The definition of "may" is "To be allowed or permitted to." *The American Heritage Dictionary* (2d college ed). Thus, by stating "if you want to," the trial court merely rephrased and reiterated a portion of the standard jury instruction. The trial court did not add any additional or different meaning nor did it take away the meaning of the instruction as written. Defendant's argument is premised on the incorrect assumption that the instruction as written *requires* the jury to infer that the testimony would have been unfavorable to the prosecution. If that were the case, the instruction would have used the word "shall." Accordingly, defendant has failed to show plain error in regard to this jury instruction.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs