STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v	No. 249026 Oakland Circuit Court
CARMEN TROSHIA RAPPUHN, Defendant-Appellant.	LC No. 2002-187499-FC

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced her to eighteen to fifty years' imprisonment. We affirm.

Defendant first argues that the circuit court erred by reinstating the charge of second-degree murder after the district court had failed to bind her over for trial on that charge. We disagree. In reviewing the circuit court's decision to reverse the district court, "we must determine whether the district court abused its discretion in concluding that there was not probable cause to believe defendant committed second-degree murder." *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). It is the duty of a magistrate to bind a defendant over for trial if it appears that a specific felony has been committed and there is probable cause to believe the defendant committed it. MCL 766.13; *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause requires evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the defendant's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

The offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke, supra* at 463-464. Defendant does not challenge that there was a death caused by her actions, nor does she argue that there was any justification or excuse. Instead, defendant argues that there was insufficient evidence that she acted with the malice required for second-degree murder. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act with wanton and willful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm." *Id.* at 464.

Evidence at the preliminary examination indicated that after defendant gave birth, she wrapped the newborn in a towel, placed it in a laundry basket, and placed a robe on top of the basket. Defendant's parents, unaware that defendant was pregnant, thereafter summoned medical help after observing defendant in distress. Despite being asked repeatedly by medical professionals and the police about whether she had given birth, defendant did not tell anyone about the baby for several hours after the birth. We conclude that this evidence was "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" that defendant acted with "wanton and wilful disregard of the likelihood that the natural tendency" of her behavior was to cause death or great bodily harm. *Justice*, *supra* at 344; *Goecke*, *supra* at 464. The district court abused its discretion in failing to bind defendant over for trial on the second-degree murder charge, and the circuit court correctly rectified the error. Contrary to defendant's suggestion, the wording of the circuit court's order was proper and complete and does not require reversal.

Next, defendant claims that there was insufficient evidence of malice presented at trial in order to sustain her conviction of second-degree murder. Again, we disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and 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 Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Dr. Valery Alexandrov testified that the baby was born alive and was breathing. He classified the death as a homicide and indicated that the cause of death was maternal abandonment and neglect, with asphyxia as a component. Testimony at trial showed that defendant placed the baby in a clothes basket and placed a robe on top of it. When paramedics and rescue personnel arrived to treat her, she did not indicate that she had given birth. Finally, the next morning, she stated that she had given birth between 9:30 p.m. and 10:00 p.m. the prior night and that the baby had been abandoned in a clothes basket. Viewed in the light most favorable to the prosecution, we believe this evidence was more than sufficient to establish that defendant acted with the requisite malice.

Defendant also argues that she must be resentenced because the trial court erred in scoring points under offense variable (OV) 8 and prior record variable (PRV) 6. While defendant argued below that OV 8 had been improperly scored, she failed to raise a challenge to PRV 6. Thus, defendant's claim regarding PRV 6 is reviewed for plain error affecting her substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant asserts that she should not have received fifteen points under OV 8 because the victim was not moved to a place of greater danger. OV 8 provides that fifteen points should be scored if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL

777.38(1)(a). The term "asported" is not defined in MCL 777.38. However, Black's Law Dictionary (7th ed) defines "asportation" as "the act of carrying away or removing." The evidence in this case shows that after defendant gave birth, she took the baby and placed it in a clothes basket and covered the baby with a robe. There is nothing in the statute or the dictionary definition that would limit application of the term to movement of a specific length or duration. Thus, we conclude that the action of moving the baby and placing it in a laundry basket was sufficient, for purposes of OV 8, to establish asportation, i.e., removing the newborn to a place of greater danger.[1]

Moreover, we do not agree with defendant that PRV 6 was misscored. PRV 6 provides that five points should be scored if "[t]he offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor." MCL 777.56(1)(d). Defendant notes that, at the time of sentencing, she only had two outstanding *civil* infractions, one for a mutilated driver's license and one for driving while her license was suspended (DWLS). However, DWLS is a misdemeanor offense under the applicable municipal ordinance. Additionally, defendant was "on probation or delayed sentence status or on bond awaiting adjudication or sentencing" for this crime. See *id.* Indeed, the presentence investigation report (PSIR) indicated that defendant's DWLS charge was set for a pretrial conference on May 27, 2003, and that a bench warrant for her arrest was issued on February 19, 2003. The prior issuance of a bench warrant indicates that some sort of bond necessarily was issued for the DWLS charge, and the "Evaluation and Plan" section of the PSIR explicitly states that defendant was on bond for the DWLS charge at the time of the instant offense. This information was sufficient to support the scoring of PRV 6. No plain error is apparent. Also, contrary to defendant's additional argument, her trial attorney was not ineffective in failing to object to the scoring of PRV 6. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004) ("[c]ounsel is not required to raise meritless or futile objections").

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

[1] We note that the dicta defendant cites from *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003), concerning the definition of "asportation" as it applies to the crime of kidnapping, is not binding on us. The *Spanke* Court was concerned solely with whether force must have been used in order for the court to make a finding of "asportation" under MCL 777.38(1)(a). We do not face that issue in the present case.