STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2009
v	No. 281466 Wayne Circuit Court
DESHON ARRON MILLER, Defendant-Appellant.	LC No. 06-011689-01

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to 20 to 40 years in prison. We affirm.

Defendant argues on appeal that there was insufficient evidence to support a verdict of second-degree murder. We disagree. Sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Nevertheless, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (Citations omitted).

Defendant argues that he did not intend to kill Erica Coleman and the killing happened under circumstances that should have reduced the crime to voluntary manslaughter, and therefore, there was insufficient evidence to find defendant guilty beyond a reasonable doubt of second-degree murder. We disagree.

Under Michigan law, first-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). All other murders are second-degree murder. MCL 750.317. The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), citing *People v Goecke*, 457 Mich 442, 464; 579 NW2d

868 (1998). Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke, supra*, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

A defendant seeking to reduce a second-degree murder charge to voluntary manslaughter "must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *People v Mendoza*, 468 Mich 527, 535-536; 664 NW2d 685 (2003). "[P]rovocation is not an element of voluntary manslaughter . . . . it is the circumstance that negates the presence of malice." *Id.* at 536.

Defendant argues that there was adequate provocation in the form of a physical altercation between himself and Coleman, during which Coleman informed him that she did not want to get married and otherwise insulted him. Defendant further contends that there was not adequate time for his passions to cool because it takes a mere two and a half minutes to choke the life out of someone.

These arguments have no merit. First, defendant's own confession makes it clear that the altercation was purely verbal – he and Coleman were arguing about the children, a "lie" defendant told about another woman, and the state of their relationship in general. In fact, Coleman was lying on the couch when defendant attacked her. All that is left, then, are words, which are generally not considered to be adequate provocation. *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Rather, the issue of adequate provocation presents a factual issue for resolution by the trier of fact. *Id*.

In this case, it is clear from the record that arguments and verbal abuse were a regular part of the relationship. In fact, the upstairs neighbor testified that she heard such arguing three to four times a week. Moreover, one cannot overlook the incident of May 20, 2006, in which defendant felt comfortable enough to open the door to speak with the neighbor using one hand, while maintaining a stranglehold on Coleman with the other. Therefore, because the arguing was commonplace and defendant had a "short fuse" that had led to previous violence, there was sufficient evidence for the trial court to conclude that the argument on September 19 to 20, 2006, was not adequate provocation.

Defendant's second argument – that there was no time for defendant to return to reason – is similarly unsupported by the facts. In her testimony, Dr. Hlavaty, the assistant Wayne County Medical Examiner, explained that after 30 seconds of pressure on the neck, a victim loses consciousness. After this initial 30 seconds, the "assailant has to maintain that constant pressure on the neck for an additional two to two and a half minutes before the victim dies." It is true, as the trial court noted, that during this time "defendant had to use muscle strength to maintain constant pressure." He could also observe that Coleman was on the floor, unconscious.

Moreover, as described by the upstairs neighbor, defendant had choked Coleman before. A reasonable trier of fact could conclude, as did the trial court, that when defendant choked Coleman on this prior occasion, "he returned to reason and let her go." Therefore, there was sufficient evidence for the trial court to find that the killing did not result from uncooled passion,

as is necessary to reduce the charge to voluntary manslaughter; rather, there was an intent to kill, which satisfies the malice element of second-degree murder.

Defendant also argues on appeal that the trial court erred in the scoring of Offense Variable (OV) 6. We disagree. The interpretation of statutory sentencing guidelines is reviewed de novo. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). An appellate court must affirm a sentence that is within the appropriate guidelines range unless there is "an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence . . . . Scoring decisions for which there is any evidence in support will be upheld." *Endres, supra*. Findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Under MCL 777.36(1)(b), OV 6 should be scored at 25 if "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 77.36(2)(b) states, on the other hand, "[s]core 10 points if a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent."

Defendant states that OV 6 should be scored at ten points. This argument has no merit. First, defendant did not kill in a "combative" situation. The only "combat" that took place was verbal in nature. As noted above, defendant's own statement makes it clear that he and Coleman were arguing about the children, a "lie" defendant told about another woman, and the state of their relationship in general. In fact, according to defendant's statement, Coleman was lying on the couch when defendant grabbed her by the neck and strangled her to death. Defendant has not referenced any case law supporting a definition of "combative" that includes verbal altercations.

Finally, there is nothing in the record to support a claim that Coleman "victimized" defendant. The couple had frequent arguments. The upstairs neighbor testified that defendant's insults of choice were "b----" and "ho." Coleman is reported to have said in response that she was "tired of this s---." Coleman was the one who suffered physical abuse, as shown by the incident on May 20, 2006, and ultimately death. Defendant did not present any evidence of physical injuries inflicted by Coleman during the incident leading to death or at any other time. Again, defendant has pointed to no case law wherein verbal insults during a mutual argument would rise to the level of victimization by the decedent. Thus, the trial court properly scored 25 points for OV 6.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood