

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7643
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREG DINGLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR-1:92-115-B)

(April 1, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Greg Dingler appeals his conviction by a federal district court jury for the second degree murder of Alan Byram on the Natchez Trace Parkway, a federal enclave, in violation

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of 18 U.S.C. § 1111. On appeal, Dingler insists that the evidence presented to the jury at his trial is separate from that of his compatriot, Danny McGee, who was convicted of the same crime is insufficient to support Dingler's second degree murder conviction. When we view that evidence under the appropriate standard for federal criminal jury convictions, we find no reversible error and therefore affirm.

I

FACTS AND PROCEEDINGS

Dingler and McGee stopped to use the restroom at the Pharr Mounds rest stop along the Natchez Trace Parkway in Mississippi. They had a short conversation with the victim, Mr. Byram, who was present at the rest stop, then left to purchase beer. Dingler and McGee returned to the rest stop after purchasing beer and had another conversation with Byram, who was sitting on a park bench in front of the building. The conversation eventually turned to the fact that Byram was a homosexual. Byram then either asked McGee "if he was gay" or made a homosexual advance toward McGee. In response, McGee walked to his truck, retrieved a metal pipe with a bolt on one end, and hit Byram in the head, knocking him to the pavement with a single blow. Dingler then took the pipe from McGee and started beating Byram with it repeatedly. After stating that he thought he had killed Byram, Dingler dragged the body behind the building and left the rest stop in Byram's automobile, with McGee following in his truck. Dingler ran Byram's car off the side of the road and was picked up by McGee. Later the pipe was thrown

into a creek.

The next day McGee telephoned his girlfriend, Sherry Wilkinson McGee, and asked her to meet him. When she arrived, Dingler and McGee described to her how they had killed Byram. Dingler explained that he continued to beat Byram because "the guy was getting up."

Four days after the crime, Dingler contacted David Crumby and told him that he (Dingler) and McGee had killed Byram because Byram told McGee that he was "cute." About a week later, Dingler told Crumby that when he (Dingler) and McGee left the rest stop to purchase beer, Dingler suggested to McGee that they "roll" Byram, but that McGee "chickened out" on the way back to the rest stop. Dingler also repeated to Crumby how he and McGee had killed Byram.

In McGee's statement to law enforcement officers, he said that after he struck Byram once or twice, Dingler took the pipe and continued beating the victim. McGee also testified during his own murder trial that Dingler had continued to beat Byram.

The medical examiner testified that the cause of Byram's death was a subdural hemorrhage, caused by a skull fracture and severe beating. The medical examiner testified that Byram had received some ten blows to the head, and that his death occurred "between the initial blows and the last blow, somewhere in between."

Dingler was convicted in a jury trial of second degree murder, and was sentenced to a term of 210 months imprisonment. Dingler timely appealed.

II

ANALYSIS

Dingler argues that the evidence was insufficient to support his conviction for second degree murder. We review the sufficiency of the evidence to determine whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Martinez, 975 F.2d 159, 160-61 (5th Cir. 1992), cert. denied, 113 S.Ct. 1346 (1993). In making this determination, we view the evidence in the light most favorable to the government. United States v. Shabazz, 993 F.2d 431, 441 (5th Cir. 1993). All reasonable inferences from the evidence are construed in accordance with the jury's verdict. Martinez, 975 F.2d at 161. The jury is the sole determiner of the weight and credibility of the evidence. Id.

Second degree murder under 18 U.S.C. § 1111 includes (1) the physical element of unlawfully causing the death of another, and (2) the mental element of malice, satisfied by an intent to kill, an intent to cause serious bodily injury, or the existence of an extreme recklessness and wanton disregard for human life. United States v. Browner, 889 F.2d 549, 552 (5th Cir. 1989). Malice may be established by evidence of conduct that is a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm. United States v. Shaw, 701 F.2d 367, 393 n.20 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984).

It is uncontested that McGee struck the first blow to Byram. David Crumby and Sherry McGee each testified, however, that Dingler admitted to them that he struck the ensuing blows that killed Byram. This testimony was corroborated by McGee's testimony, by statements to law enforcement officers, and by medical testimony. Although Dingler challenges the credibility of Crumby and Sherry McGee, the jury alone is responsible for credibility determinations. See Martinez, 975 F.2d at 161. We will not substitute our determination of credibility for that of the jury. Id.

The jury could have inferred the element of malice from the severity of the beating. Further, as the sole judge of credibility, the jury was entitled to reject Dingler's testimony that he never struck Byram, but fled as soon as McGee struck him. See Martinez, 975 F.2d at 161. Based on the evidence, a reasonable trier of fact easily could have found Dingler guilty beyond a reasonable doubt. His conviction is therefore
AFFIRMED.