

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER DAVID OAKES,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 191401

Kent Circuit Court

LC No. 95-000250-FC

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and was sentenced to life imprisonment without parole for his conviction. He appeals as of right, and we affirm.

Defendant first argues that there was insufficient evidence to support a verdict that defendant was the perpetrator. We disagree. When reviewing a sufficiency of the evidence claim, this Court must consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution has proven the essential elements of the charged crime beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, we have reviewed the evidence presented by the prosecution and conclude that based upon the evidence of defendant's association with the victim just prior to the murder, the circumstances surrounding defendant's alleged "discovery" of the body, defendant's contradictory statements and the bite marks, sufficient evidence supported defendant's conviction as the perpetrator.

Defendant next argues that the prosecutor improperly referred to his right of silence by stating: "Don't judge him. You can't. You know nothing about him. All you know is he's a long-distance truck driver." We disagree. Issues of prosecutorial misconduct are decided by this Court on a case by case basis, and this Court must review the pertinent portion of the record and the prosecutor's remarks

in context to ascertain whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Here, defendant mischaracterizes the statement at issue. The prosecutor was merely arguing that the jurors must, based on the facts of the case, determine whether he had proven beyond a reasonable doubt that defendant committed first-degree murder, and that they should not judge defendant. Defendant was not denied a fair or impartial trial.

Next, defendant argues that the trial court erroneously admitted gruesome photographs of the victim. We disagree. This Court reviews a trial court's decision to admit or exclude photographs for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212; NW 2d 504 (1995). In addressing the admissibility of photographs, it must be determined whether the evidence is relevant under MRE 401, and if so, whether the evidence should be excluded under MRE 403 when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 66.

In the case at hand, the photographs at issue were relevant to establishing first-degree murder. See *People v Anderson*, 209 Mich App 527, 536-537; 531 NW2d 780 (1995); *People v Hoffman*, 205 Mich App 1, 18-19; 518 NW2d 817 (1994); *People v Coddington*, 188 Mich App 584, 589-590; 470 NW2d 478 (1991). The inquiry then becomes whether the probative value was substantially outweighed by unfair prejudice. Photographs are not excludable simply because they are gruesome or because a witness can orally testify to the contents of the photograph. *Mills, supra* at 76. Here, the photographs at issue accurately represented the numerous injuries that the victim sustained, and they were probative of defendant's intent, and whether the killing was premeditated and deliberate. Moreover, the trial court admitted only those photographs that were necessary and omitted those that were repetitive. We agree with the trial court that the probative force of the photographs at issue was not substantially outweighed by the danger of unfair prejudice and, therefore, the trial court did not abuse its discretion in admitting the photographs.

Defendant also argues that he was prejudiced by the erroneous admission of hearsay testimony. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801. Here, the testimony at issue was not offered to prove the truth of the matter asserted. Thus, the trial court did not abuse its discretion in admitting the evidence at issue.

Defendant next argues that the trial court erred by instructing the jurors on an alternate instruction on premeditated murder rather than Criminal Jury Instructions 2d (CJI2d) 16.1, the instruction requested by defendant. Jury instructions are reviewed de novo to determine whether the issues to be tried were fairly presented and defendant's rights were adequately protected. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The failure of a trial court to include a requested jury instruction is error requiring reversal if the requested jury instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively

present a given defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). In the case at bar, although CJI2d would have been substantially correct, it was substantially covered in the charge that was given to the jury. Moreover, the trial court's failure to give CJI2d 16.1 did not seriously impair defendant's ability to effectively present a given defense.

Finally, defendant argues that he was denied a fair trial by the admission of blood evidence based upon serological electrophoresis. To preserve the issue for appeal, a party must object at trial to the adequacy of a test's foundation. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). Here, defense counsel objected to the introduction of statistical information relating to the blood evidence on the ground that the witness was not a mathematician; however, he did not object to the adequacy of the test's foundation. An appeal based on one ground is not preserved where the objection at trial was on a different ground. *Id.* Thus, the issue is not preserved for appeal.

Moreover, in addition to being unpreserved for appeal, defendant's claim is without merit. Here, a single system electrophoresis technique was used. In *People v Stoughton*, 185 Mich App 219, 229; 460 NW2d 591 (1990), this Court held that the single system technique has been accepted by the scientific community and that it is not subject to the independent validation requirement. Furthermore, with respect to electrophoretic typing of dried evidentiary bloodstains, this Court, in *People v Gistover*, 189 Mich App 44, 53; 472 NW2d 27 (1991), held:

[W]here adequate safeguards have been implemented, such as utilization of samples of known types as controls for comparison, a second, independent reading by another analyst, use of analysts who periodically undergo proficiency testing, adherence to established protocols, reports of only unambiguous banding patterns, and where PGM, GLO and EsD markers have not been typed simultaneously, the results of electrophoretic typing of dried evidentiary bloodstains is admissible into evidence in this state because it has gained general scientific acceptance for reliability among impartial and disinterested experts in the field. Where these minimal criteria have been met, the issue of the test results' admissibility need not be relitigated in each case.

In the instant case, several of these safeguards were implemented. Samples of known types as controls for comparison were utilized. A second, independent reading by another analyst was conducted. The analysts within the Michigan State Police serology unit periodically undergo proficiency testing. PGM, GLO and EsD markers were not typed simultaneously. Thus, this Court is not left with a definite and firm conviction that the trial court erroneously admitted the evidence at issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski