

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTORIANO SALINAS III,

Defendant-Appellant.

UNPUBLISHED

October 2, 1998

No. 201451

Bay Circuit Court

LC No. 95-001337 FH

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder. MCL 750.84; MSA 28.279. Defendant was subsequently adjudicated to be an habitual offender, second offense, MCL 769.10; MSA 28.1082, and was sentenced to five and one-half to fifteen years' imprisonment. Defendant appeals by right. We affirm.

Defendant first argues that the trial court erred by admitting the victim's post-surgery photographs. He maintains that their appearance was grotesque and that they were therefore immaterial and had no probative value. Alternatively, defendant argues that the photographs were unduly prejudicial. He maintains that the court's decision to admit them should be reviewed de novo. However, a trial court's decision to admit photographic evidence is reviewed for an abuse of discretion. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). On review, this Court must determine if the evidence was substantially necessary or instructive to show material facts or conditions, or whether the photographs were merely introduced to excite passion and prejudice. *People v Doby*, 120 Mich App 241, 257; 327 NW2d 455 (1982). Photographs that are pertinent, relevant, competent, or material on any issue in the case are not rendered inadmissible merely because they show the details of a gruesome or shocking crime. *Doby*, *supra* at 257. Photographs are relevant if they are material and their probative value is not substantially outweighed by the danger of unfair prejudice. *People v Zeitler*, 183 Mich App 68, 69; 454 NW2d 192 (1990). To be material, evidence need only relate to a matter in issue. *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996). Here, the jury was instructed that the prosecutor was required to prove great bodily harm, a physical injury that could seriously and permanently harm the health or function of the body. Although the surgery itself

was not an issue, the seriousness and permanency of the injuries were at issue. Moreover, defendant asserted self-defense and the degree of the victim's injury could go toward the element of intent. In fact, this Court found that even autopsy photographs were relevant where they shed light on the defendant's claim of self-defense and the credibility of that claim. *People v Barker*, 179 Mich App 702, 710; 446 NW2d 549 (1989). Defendant did not object to the admission of seven other photographs of the victim's injuries, and in light of the above, it cannot be said that the trial court abused its discretion in admitting the photographs.

Defendant next argues that the prosecution improperly told the jury that defendant's intent and ability to injure the victim were issues that were not in dispute and that defendant would rather confuse the jury than explain his location in the street. Moreover, defendant alleges that the prosecutor disparaged the role of defense counsel by saying that counsel's role was to confuse the jury in order to get his client acquitted. He argues that such comments impermissibly shifted the burden of proof, were incapable of cure by instruction, and amounted to prosecutorial misconduct, requiring reversal and remand for a new trial. Defendant did not object to the prosecutor's comments and consequently, this issue has not been preserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Regardless, the prosecutor's comments, taken in context, did not amount to prosecutorial misconduct, nor did they result in the denial of defendant's right to a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Even if the comments were improper, they were capable of cure by instruction.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff