STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 1999
v	No. 214806 Gogebic Circuit Court
DONALD CHARLES WIEDBRAUK, Defendant-Appellant.	LC No. 97-000097 FC

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), in connection with the shooting death of his estranged wife's companion, Ed Williford. Defendant was sentenced to twenty-five to forty years' imprisonment for the second-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

The trial court did not err in admitting the testimony of defendant's wife under the spousal privilege exception found in MCL 600.2162; MSA 27A.2162. The spousal privilege statute provides that one spouse may not be a witness against the other without consent, except when the cause of action grows out of a personal wrong or injury committed by one against the other. *People v Vann*, 448 Mich 47; 528 NW2d 693 (1995). In *Vann*, our Supreme Court found that an assault against a third party grew out of a personal wrong or injury by the defendant to his wife where the evidence indicated that the third-party assault occurred contemporaneously with the defendant's assault of his wife. The Court distinguished *People v Love*, 425 Mich 691, 696; 391 NW2d 738 (1986), because the alleged wrong in that case, kidnapping, occurred *after* the murder of the third party and, therefore, the third party's cause of action did not "grow out of" the personal injury or wrong committed against the wife. See also *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998), lv gtd 460 Mich 851 (1999).

In the instant case, the offense committed against Williford occurred contemporaneously with defendant's assault of his wife and, therefore, grew out of a personal wrong or injury by defendant to his wife. Accordingly, the trial court did not abuse its discretion in allowing defendant's wife to testify against defendant. *Vann, supra*.

II

Defendant argues that the trial court abused its discretion in denying defendant's request for the appointment of a forensic pathologist. MCL 775.15; MSA 28.1252; *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990). In its initial ruling, the trial court denied defendant's request without prejudice, observing that defendant failed to make a threshold showing of necessity under *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), because there was nothing in the preliminary examination testimony of the medical examiner to raise an issue or question of fact regarding the entrance and exit of the fatal gunshot wound. In a subsequent ruling, the trial court, after carefully reviewing the autopsy report on the record, denied the motion with prejudice after concluding that there was no discrepancy between the medical examiner's testimony and the autopsy report, which indicated that the victim died from a gunshot wound to his back. We find no abuse of discretion with the trial court's rulings.

III

Next, we find no error in the trial court's determination that defendant's custodial statements were voluntary. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992); *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). Although defendant claims that he was "intoxicated, confused, agitated and upset" when he made the custodial statements to Officer Passuello and Detective Tait, the evidence indicated that he was not intoxicated such that he was unable to voluntarily give a statement. Further, while defendant may have been agitated and anxious and suffering from a depression disorder, the evidence failed to show that the police exploited these deficiencies as to annul the voluntariness of his custodial statements. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Moreover, there was no evidence that defendant was subject to threats, use of force, trickery or deceit, or deprived of food, sleep or medication. Finally, there was nothing about the duration and condition of defendant's detention suggesting that defendant's statements to Detective Tait were involuntary. Considering the totality of the circumstances, there is no indication that defendant's custodial statements were not voluntary. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

IV

The record fails to demonstrate that the trial court abused its discretion by admitting photographs and a videotape of the crime scene. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). At the outset, we note that defendant preserved this issue only with respect to exhibits 28 to 37 and 48. As for the unpreserved, forfeited errors claimed by defendant, he has failed

to establish any plain error affecting his substantial rights. *People v Carines*, 460 Mich 750; ___ NW2d ___ (1999).

Photographs are not inadmissible merely because they are gruesome or shocking. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983). "Photographs are admissible if substantially necessary or instructive to show material facts or conditions." *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994), citing *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972). In *Eddington*, the Supreme Court observed:

> The people are not required to present their case on any theory of alternative proofs.
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> * * *
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> In a criminal case, the burden is upon the people to prove every element of the crime charged. These are not nice pictures but they are not any more gruesome than some of the testimony by witnesses. The pictures showed the victims as they were found. The pictures depict the corpus delicti. [387 Mich at 562.]

See also *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995), modified 450 Mich 1212; 539 NW2d 504 (1995). However, such photographs should not be admitted if their probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Turner*, 17 Mich App 123, 130; 169 NW2d 330 (1969).

In this case, the trial court determined that the photographs showing the victim's wounds had probative value on the issue of defendant's claim that he shot the victim in self-defense. Moreover, the trial court determined that the probative value of the photographs was not substantially outweighed by their prejudicial effect, and that the photographs were not cumulative. As plaintiff points out, the photographs were necessary to prove that the victim's injuries reflected the testimony of the eyewitness and to counter the defendant's assertion that he shot the victim in self-defense. Further, the prosecution introduced the photographs through the medical examiner to describe the injuries that the victim suffered as a result of the shooting and to demonstrate that defendant's second shot entered the victim's back, not his chest. As for the video tape of the crime scene, the record indicates that the prosecutor agreed not to show the last few minutes of the tape, which were apparently gruesome. On this record, we discern no abuse of the trial court's discretion in admitting the photographs and videotape into evidence.

V

The trial court also did not err in denying defendant's request to instruct the jury on the lesser included cognate offenses of: (1) felonious assault; (2) careless, reckless or negligent use of a firearm resulting in death; (3) discharge of a firearm while intentionally aimed without malice; and (4) reckless and wanton use of a firearm. Because it was uncontroverted that the victim died of a gunshot wound, and that defendant admitted that he caused the death by shooting the victim, defendant was not entitled

to cognate lesser offense instructions whose purpose is to punish behavior not intended to cause death. *People v Bailey*, 451 Mich 657, 671-675, 682; 549 NW2d 325 (1996).

VI

Next, defendant claims that he was denied a fair trial when the police and prosecutor permitted the cremation of the victim's body eight days after the autopsy, and thus failed to preserve evidence that might have been favorable to him. Specifically, defendant claims that an independent examination of the body might have yielded exculpatory evidence because the medical examiner's autopsy report and testimony were inconsistent and ambiguous. We disagree.

Defendant has failed to show bad faith on the part of the police or prosecutor in allowing the cremation of the victim's body after the autopsy. *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Leigh*, 182 Mich App 96, 97; 451 NW2d 512 (1989). The victim's body was returned to his family in accordance with MCL 52.205(5); MSA 5.953(5)(5). We also note that, although defendant was represented by counsel immediately after being charged in this matter, he did not request that the body be retained, even though the medical examiner could have retained the body longer if it were necessary for the detection of a crime. Moreover, as already indicated, the trial court properly concluded that there was no inconsistency in the medical examiner's testimony and the autopsy report regarding whether the victim died from a gunshot wound that entered his back. Defendant further claims that the crime scene was not preserved for inspection and that tests were not performed regarding a possible bullet hole in the wall or flesh and blood splatter placement. However, defendant did not preserve these issues by raising them at trial and the record fails to disclose plain error affecting defendant's substantial rights. Accordingly, appellate relief is precluded. *Carines, supra*.

VII

Defendant was also not denied his right to a fair trial on the basis of prosecutorial misconduct. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). While there was no specific evidence in the record supporting the prosecutor's remark in closing argument that defendant parked his truck a distance of one-half mile from the victim's house, the focal point of the prosecutor's statement was that defendant had used stealth in breaking into the victim's house. In any case, the trial court advised the jury in response to defendant's objection that the prosecutor's remarks were not evidence and that the jurors were to use their collective memory in determining the facts of the case. Thus, the remark did not deny defendant a fair trial. Finally, defendant's claim that the prosecutor improperly questioned him about the personal protection order was not preserved with an appropriate objection at trial. Moreover, defendant has failed to show any plain error affecting his substantial rights. *Carines, supra*. Indeed, as plaintiff points out, defense counsel himself brought up the matter during his direct examination of defendant, thus opening the door to this evidence. Under the circumstances, defendant has failed to demonstrate any basis for appellate relief.

VIII

Next, we reject defendant's claim that he was denied his right to a speedy trial. *People v Simpson*, 207 Mich App 560; 526 NW2d 33 (1994). The record indicates that when defendant raised the issue at a hearing on June 16, 1997, he understood that the earliest possible trial date would be in January 1998, in light of the anticipated delay in getting forensic examination results and resolving additional suppression motions. Thus, defendant effectively waived the issue. *Carines*, *supra*, n 7. In any event, defendant has failed to carry his burden of showing that he suffered any prejudice resulting from the delay. *People v Heard*, 178 Mich App 692, 699; 444 NW2d 542 (1989).

IX

Defendant's challenges to the scoring of offense variables three, four, six, thirteen, and twenty-five of the sentencing guidelines fail to state a cognizable claim on appeal. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); *People v Peerenboom*, 224 Mich App 195, 202-203; 568 NW2d 153 (1997). Specifically, defendant has failed to show that the factual predicates for the scoring decisions were "wholly unsupported" or "materially false," or that his sentence of twenty-five to forty years' imprisonment for second-degree murder is disproportionate. *Mitchell*, *supra*.

X

Finally, the trial court did not abuse its discretion in allowing defendant's wife to make a statement at sentencing. *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994); *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). We agree with the prosecutor that defendant's wife was a "victim" as defined in the Crime Victim's Rights Act, MCL 780.752(1)(i); MSA 28.1287(752)(1)(i), because she suffered direct physical and emotional harm as a result of the crimes committed in this case. However, even if defendant's wife were not a victim within the meaning of the act, "a sentencing court is [still] afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *Albert*, *supra* at 75.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski