STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SCOTT TURNER,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 229934
Jackson Circuit Court
LC No. 00-002346-FC

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316, and assault with intent to commit murder, MCL 750.83. He was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment without parole for the murder conviction, and a concurrent life term for the assault conviction. He appeals as of right. We affirm.

This case arose out of a home invasion in which defendant admitted that he used a knife to break into the Bates' second-story apartment, where they had recently moved. Defendant contended he thought the home was vacant and simply needed a place to stay for the night. Two of the three minor children also inside the apartment saw the intruder, and one of them, Tabitha Bates, identified him as defendant. Defendant contended that when the victim, Martin Bates, confronted him with a gun, defendant became scared and reached for the gun, believing that Martin would shoot him. Defendant claimed that during the struggle, he must have unintentionally stabbed Martin and his wife Rhonda Bates, who joined the fight. Defendant stated that he was only trying to get out of the apartment. Rhonda eventually ran for help and Tabitha saw her father bleed to death. Soon after, Rhonda realized she was bleeding profusely from being stabbed multiple times all over her body. Martin died from a single stab wound to his thigh, which severed his femoral artery and vein.

I

Defendant argues that his trial attorney was ineffective for failing to move to suppress his statement to the police on the ground that he was not properly advised of his *Miranda*[1] rights before making the statement. We disagree.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable." *Id.* (emphasis in original). In deciding this issue, we review the trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

As a threshold matter, we must determine whether defendant was in custody for purposes of *Miranda*. As this Court observed in *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001), "*Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation."

Here, after conducting an evidentiary hearing, the trial court found that, although defendant was incarcerated at the time he gave his statement, he was not in custody as contemplated by *Miranda*. We agree. This case is factually similar to *Herndon, supra*. Here, defendant was incarcerated in prison for an unrelated offense. The purpose of his incarceration was not to "*facilitate* his interrogation" in the investigation of the present case. *Id*. at 396 (emphasis in original). Thus, he was not in "custody" for purposes of *Miranda* unless there was "more" than the fact of his incarceration. *Id*. The testimony showed that defendant did not need a pass to attend his meeting with the officers because the meeting was held in defendant's cell block. Once he was "called out," he could either walk over freely without restraint or choose not to go to the meeting. No penalty would have been imposed if he chose not to meet with the officers. Also, the office setting was not an "inherently compelling" atmosphere against which *Miranda* protects. The door was not locked, defendant was not placed in handcuffs or other restraints, and he was free to leave at any time. Accordingly, we find no clear error in the trial court's determination that defendant was not in custody for purposes of *Miranda*. Because *Miranda* warnings were not required, trial counsel was not ineffective for failing to move to suppress defendant's statement on the ground that defendant was not properly advised of his *Miranda* rights.

II

Next, defendant argues that defense counsel was ineffective for failing to object to the first-degree felony murder charge on procedural grounds, namely, that he was not bound over for trial on a felony murder theory following the preliminary examination. We again disagree.

This question implicates the constitutional issue of due process, i.e., whether defendant received fair notice that he would be required to defend against the charge of which he was convicted. *People v Snell*, 118 Mich App 750, 759; 325 NW2d 563 (1982).

Defendant was charged with "OPEN MURDER-STATUTORY SHORT FORM . . . did murder Martin Bates; contrary to MCL 750.316 . . . " (emphasis in original). MCL 767.71 provides, in part, that "it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased . . . ." In addition, MCL 767.44 permits an information or indictment to state a short form for murder ["A.B. murdered C.D."] and further provides that "the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of

particulars setting up specifically the nature of the offense charged." In this case, there is no indication that a bill of particulars was ever requested.

It has long been recognized that a charge of open murder gives notice to the defendant that he must defend against first-degree murder and second-degree murder. *People v Treichel*, 229 Mich 303; 200 NW 950 (1924); *People v Spalla*, 83 Mich App 661, 664-665; 269 NW2d 259 (1978), rev'd on other grounds 408 Mich 876 (1980). It has also long been recognized that a charge of open murder includes first-degree felony murder. *People v McKinney*, 65 Mich App 131, 133-136; 237 NW2d 215 (1975).

In *McKinney, supra* at 134-135, the defendant was charged with open murder in both the warrant and information pursuant to MCL 767.44, and both the warrant and information cited MCL 750.316. The defendant was bound over on a charge of "open murder." *McKinney, supra* at 134-135. On appeal, the defendant argued "that the corpus delicti of felony murder was not established at the preliminary examination, and therefore, the circuit court never obtained jurisdiction to try defendant on a felony-murder charge." *Id*. at 133. This Court disagreed, stating:

> Michigan courts have long recognized the propriety of the open charge of murder. *Brownell v People*, 38 Mich 732 (1878); *Cargen v People*, 39 Mich 549 (1878); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955). The courts have also held that a person may properly be charged with and convicted of first-degree murder under a theory of premeditation and deliberation, where such a charge has been made in the statutory short form language. *People v Collins*, 216 Mich 541; 185 NW 850 (1921); *People v Brown*, 23 Mich App 528; 179 NW2d 58 (1970). The same rule applies when the defendant is convicted of first-degree murder on a felony-murder theory, as is demonstrated in *People v Page*, 198 Mich 524; 165 NW 755 (1917).

In light of the foregoing, we find no merit to defendant's claim that defense counsel was ineffective for not challenging the felony-murder charge on procedural grounds. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998).

III

Defendant argues that the trial court erred in admitting statements made by the victim's 10-year-old son to a police officer under the excited utterance exception to the hearsay rule, MRE 803(2). We review the trial court's decision for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

As this Court observed in *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996):

> The Supreme Court has set forth three criteria that must be met before a statement can be admitted into evidence as an excited utterance. First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event. *People v Straight*, 430

Mich 418, 424; 424 NW2d 257 (1988), citing *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979).

In *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), our Supreme Court explained:

> The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19.

It is "the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Smith*, *supra* at 551.

> Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. It is necessary to consider whether there was a plausible explanation for the delay. . . . [T]here is no express time limit for excited utterances. "Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum. . . . The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. [*Id*. at 551-552 (citations omitted).]

In this case, the record demonstrates that the witness' statements arose out of a startling event, namely, a violent assault of the witness' parents by an intruder during the night. The statements were made to a police officer shortly after the event occurred. According to the officer, the witness was sitting in the police car, but was still crying and emotionally upset from having observed his parents being stabbed with a knife by an intruder. The record sufficiently demonstrates that the witness was still under the stress and overwhelming influence of the events. Under the circumstances, there was no time for contrivance or misrepresentation. *Smith*, *supra*. Finally, the witness' statements related to the circumstances of the startling event. Accordingly, the trial court did not abuse its discretion by admitting the statements under MRE 803(2).

IV

Defendant's final claim of error is that the trial court abused its discretion when it admitted a fifty-five minute videotape of the crime scene, which included footage of the victim's bloody body and large amounts of blood splatters. The admission of photographic evidence is reviewed for an abuse of discretion. *People v Zeitler*, 183 Mich App 68, 69-70; 454 NW2d 192 (1990). Photographic evidence is admissible if it is substantially necessary or instructive to show material facts or conditions. *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973). Such evidence is not inadmissible merely because it may be gruesome and shocking. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983). However, photographic evidence should not be admitted if the probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Zeitler*, *supra*; *People v Bryant*, 129 Mich App 574, 581; 342 NW2d 86 (1983).

In *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995), our Supreme Court explained:

> The decision to admit or exclude photographs is within the sole discretion of the trial court. . . . Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. . . . Photographs may also be used to corroborate a witness' testimony. . . . Gruesomeness alone need not cause exclusion. . . . The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice.
>
> * * *
>
> All evidence offered by the parties is "prejudicial" to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded. [*Id*. at 75 (citations omitted; emphasis in original.]

The probative value of evidence is "substantially outweighed" by the danger of unfair prejudice when it would be weighed by the jury "substantially out of proportion to its logically damaging effect" or "it would be inequitable to allow the proponent of the evidence to use it." *Id*. at 75-76.

Having reviewed the videotape, we conclude that the probative value of the tape was not substantially outweighed by the danger of unfair prejudice. The tape supports and corroborates the testimony of several witnesses and is not especially vivid, gruesome, or shocking. The trial court did not abuse its discretion in admitting the tape.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell

I concur in the result only.

/s/ Joel P. Hoekstra