

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JASON BROGLIN,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 274342
Berrien Circuit Court
LC No. 06-401128-FC

Before: Wilder, P.J., and Saad, C.J. and Smolenski, J.

PER CURIAM.

Defendant Eric Jason Broglin appeals as of right his conviction for first-degree felony murder, MCL 750.316(1)(b). Defendant was convicted on September 14, 2006, following a jury trial before Berrien Circuit Judge Charles T. LaSata. He was sentenced to life imprisonment. We affirm.

First, defendant argues that he was denied a fair trial when the prosecutor referred to the decedent as a “victim.” We review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor’s remarks in context to determine whether defendant received a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003). Even where error is found, reversal is not required unless defendant meets his burden of establishing that the error was outcome-determinative and most likely resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

The trial court deemed it appropriate for the prosecutor to use the term victim. “Victim” is defined as “[a] person harmed by a crime, tort, or other wrong.” Black’s Law Dictionary (8th ed). Because this term does not imply that a crime was committed, the trial court did not err when it made this ruling. Furthermore, the trial court instructed the jury that the lawyers’ statements, arguments, and questions to witnesses were not evidence. Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Accordingly, we presume that the jurors did not consider the prosecutor’s references to Aiden as a “victim” as evidence that defendant killed Aiden, and no prosecutorial misconduct occurred.

Second, defendant argues that the trial court violated his right to a fair trial by an impartial jury by empanelling a jury whose members were referred to only by juror numbers.

Defendant failed to preserve this issue with a timely objection on the merits. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Therefore, we review for plain error affecting defendant's substantial rights. *Id.* "[T]he practice of impaneling an 'anonymous jury' is an extreme measure, in which 'certain biographical information about potential jurors' is withheld, even from the parties." *People v Williams*, 241 Mich App 519, 523; 616 NW2d 710 (2000). "[T]he use of an 'anonymous jury' may promote the safety of prospective jurors, but at a potential expense to two interests of the defendant: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence." *Id.* at 522-523. "In order to successfully challenge the use of an 'anonymous jury,' the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised." *Id.* at 523.

Based on the record before us, defendant has not shown that his trial counsel was deprived of information about the prospective jurors. This Court has recently determined that a defendant must show that he was deprived of information about the jurors themselves to establish that the practice of referring to jurors by numbers deprived him of the right to a fair trial. See *People v Hanks*, 276 Mich App 91, 94; 740 NW2d 530 (2007). Thus, no plain error requiring reversal occurred when the jurors were identified by number.

Third, defendant argues that the trial court abused its discretion by admitting into evidence autopsy photographs of the victim's exposed skull. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside [a] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Generally, all relevant evidence is admissible, unless otherwise provided by law, and irrelevant evidence is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Although relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." MRE 403. To show that the probative value of evidence is substantially outweighed by the danger of unfair prejudice, a defendant must show that the challenged evidence "will be given undue or preemptive weight by the jury," or that "it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Prejudice alone is not enough to exclude evidence, because "all evidence is somewhat prejudicial to a defendant—it must be so to be relevant." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Unfair prejudice refers to the possibility that a jury decides a case by placing undue weight on marginally probative evidence. *Id.* "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Further, photographs may be used to corroborate a witness' testimony. *Id.* Gruesomeness alone does not require a trial court to

exclude photographic evidence. *Id.* Instead, the trial court must determine whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.*

The trial court did not abuse its discretion by admitting the photographs. The elements of first-degree felony murder are: “(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b), including first-degree child abuse]. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). To prove that defendant committed first-degree child abuse, the prosecutor was required to show that defendant knowingly or intentionally caused serious physical or mental harm to the victim, with the specific intent to cause the harm, and not merely the intent to do the act which caused the harm. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). Therefore, the prosecutor was required to prove defendant’s intent. Defendant’s intent may be inferred from circumstantial evidence, including evidence of the victim’s injuries, and because of the difficulty of proving intent, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). The challenged photographs were relevant to show the nature of the victim’s injuries, which was relevant in turn to the issue of intent. Furthermore, the photographs were instructive in depicting the location, nature, and extent of one of the victim’s injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Nothing in the record indicates that the photographs, although gruesome, were given undue preemptive weight. Further, the danger of unfair prejudice was mitigated by the trial court’s instructions. The trial court instructed the jury that it “must not let sympathy or prejudice influence [their] decision.” Again, jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *Bauder, supra* at 190.

Fourth, defendant argues that he was denied his due process right to a fair trial when the prosecutor improperly appealed to the jury’s civic duty in her closing argument by asking the jury to convict defendant for the victim’s sake. Again, we review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor’s remarks in context to determine whether defendant received a fair and impartial trial. *Abraham, supra* at 272-273. Even where error is found, reversal is not required unless the defendant meets his burden of establishing that the error was outcome-determinative and most likely resulted in a miscarriage of justice. *Brownridge, supra* at 216. A prosecutor is prohibited from appealing to the jury to sympathize with the victim, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), and the prosecutor may not tell the jury that it should convict as part of its “civic duty,” *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). “Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence and because they encourage the jurors to suspend their own powers of judgment.” *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Considered in context, the prosecutor’s challenged rebuttal argument was not improper. The prosecutor’s remarks did not inject issues into the case beyond the guilt or innocence of defendant. They also did not constitute an improper appeal to the jurors to sympathize with the victim. The prosecutor’s remarks were a fair response to defense counsel’s argument that defendant was the only person affected by the proceedings. A prosecutor is allowed to respond

to defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Furthermore, any potential prejudice was cured by the trial court's instructions that the attorneys' arguments were not evidence and that the jury must base its decision solely on the evidence that was properly admitted at trial. See *id.* at 455.

Finally, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to use an article supporting the theory that a seven-month-old child could have a depressed skull fracture from an accidental fall to impeach the forensic examiner's opinion that defendant's explanation of how the accident occurred was implausible. The trial court did not conduct a *Ginther*¹ hearing, so the issue is not preserved and our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* We review factual findings for clear error and review constitutional determinations de novo. *Id.*

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, "a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant has not established that it was unreasonable for his trial counsel to refrain from using the article to impeach the prosecutor's witnesses. The article is based on facts distinguishable from those in this case, because the child that was the subject of the article did not suffer brain damage or have retinal hemorrhaging. Further, at trial, the forensic examiner acknowledged that there could be exceptions to his opinion that the victim's injuries were inconsistent with the accident described by defendant when he testified, "You can't always - - you never say always, never say never." Thus, the article would not necessarily have impeached the witness. Further, questions regarding whether and how to impeach a witness are matters of trial strategy best left to counsel's professional judgment, *Flowers, supra* at 737, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *LaVearn, supra* at 216, nor will we assess counsel's competence with the benefit of hindsight, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Affirmed.

/s/ Kurtis T. Wilder

/s/ Henry William Saad

/s/ Michael R. Smolenski