

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN CHRISTOPHER BLACKSHERE,

Defendant-Appellant.

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UNPUBLISHED

March 26, 2009

No. 281463

Wayne Circuit Court

LC No. 07-006304-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of first-degree felony murder, MCL 750.316(1)(b). He was sentenced to life imprisonment without the possibility of parole for each conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for modification of the judgment of sentence to reflect two convictions of first-degree murder, each supported by two separate theories.

Defendant's convictions arise from the January 2, 2007, stabbing deaths of Mark Barnard and Megan Soroka at Cheli's Chili Bar in Detroit, after which a robbery was staged and more than \$8,000 was stolen from the restaurant's safes.

Defendant first argues that a new trial is required because the trial court gave an improper jury instruction advising the jury how to consider evidence of disguised handwriting. This Court reviews claims of instructional error de novo. *People v Clark*, 274 Mich App 248, 255; 732 NW2d 605 (2007).

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). Claims of instructional error require examination of the instructions in their entirety. *Clark, supra* at 255. "Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if the instructions are imperfect, there is no error if they fairly represented the issues to be tried and sufficiently protected the defendant's rights." *Id.* at 255-256, quoting *People v Milton*, 257 Mich App 467, 475; 688 NW2d 387 (2003).

Defendant was asked to submit a handwriting sample to be used to compare his writing with the writing in a letter received by the prosecutor's office in which a different person

allegedly confessed to the charged crimes. Evidence was presented at trial that defendant attempted to disguise his writing in the handwriting sample. The trial court gave the following instruction to the jury:

Now, the prosecution has also introduced evidence that the defendant attempted to disguise his handwriting when giving samples to the police. Such an attempt, if made, may be considered by you as circumstantial evidence of guilt.

Before you consider any attempt by the defendant to disguise his handwriting against the defendant, you must determine whether the attempt to disguise handwriting when giving samples to the police was made by the defendant.

If you determine that an attempt to disguise his handwriting was made by the defendant, then you may consider the attempt to disguise his handwriting as consciousness of guilt on the part of the defendant. And it may be used by you to determine the guilt or innocence of the defendant of the charged offense.

Defendant argues that this instruction lessened the prosecution's burden of proof because it allowed the jury to infer guilt, but did not instruct the jury that there could be innocent reasons for the act, such as panic, mistake, or fear. We find no error.

The instruction was permissive. It stated that the jury could infer consciousness of guilt if it found that defendant attempted to disguise his handwriting, but it did not require that the jury do so. The instruction also provided that a finding of an attempt to disguise his handwriting could be used to determine either defendant's guilt "or innocence." Viewed in conjunction with the trial court's other instructions, which properly instructed the jury on the burden of proof, the disguised handwriting instruction did not lessen the prosecution's burden of proof or deprive defendant of his theory of defense. The jury was instructed that it had to find each element of the offenses beyond a reasonable doubt, and that the weighing of the evidence was solely within its province. Although defendant contends that the jury should have been instructed that there could be "innocent reasons" for disguising handwriting, the absence of this language did not alter the substance of the instruction. Further, defendant never proffered an innocent reason for his disguised handwriting. We conclude that the instruction fairly presented the issue and sufficiently protected defendant's rights.

Defendant next argues that the trial court abused its discretion in admitting autopsy photographs of the victims' non-fatal injuries, because they were cumulative to the medical examiner's body diagrams and only served to inflame the jury. We review the trial court's decision to admit the photographs for an abuse of discretion. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006), quoting *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). An abuse of discretion occurs when the trial court's decision results in "an outcome falling outside th[e] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Demonstrative evidence is admissible if it is relevant and its probative value is not substantially outweighed by its prejudicial effect. *People v Unger (On Remand)*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994) (citations omitted).]

Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

"In order to convict a defendant of first-degree premeditated murder, the prosecution must first prove that the defendant intentionally killed the victim." *Unger, supra* at 223. Here, the autopsy photographs were relevant to establish defendant's intent to kill because they depicted the area of the body defendant struck. Even though most of the wounds were non-fatal injuries, testimony showed that some could have been fatal based on their location if the stab wounds had been deeper. Further, the victims' defensive wounds showed that defendant continued to attack even in the face of resistance. While the diagrams of the victims' bodies showed the location of the wounds, the marks were mere pencil lines and did not depict the wounds as accurately as the photographs did. Thus, the photographs of the victims' non-fatal injuries were not irrelevant or merely cumulative to the diagrams.

Further, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. They were relevant to show an intent to kill and served a purpose other than to inflame the jury. Although they showed cuts in the victims' skin, they were not gruesome. Accordingly, the trial court did not abuse its discretion in admitting the autopsy photographs.

Lastly, defendant argues that his convictions and sentences for two counts each of first-degree premeditated murder and first-degree felony murder, arising from two deaths, violate his double jeopardy rights. We agree. "While double jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim, we will uphold a single conviction for murder based on two alternative theories." *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005). Although the trial court agreed at sentencing that defendant could only be sentenced for two murders, the judgment of sentence erroneously reflects four separate convictions and sentences for first-degree murder. Therefore, defendant is entitled to have his judgment of sentence modified to reflect two convictions and sentences of first-degree murder, with each conviction supported by two alternate theories. *Id.*

We affirm as modified and remand for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra