

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DOUGLAS HOLLON,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 216731

Calhoun Circuit Court

LC No. 98-001759-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The first-degree felony murder conviction was subsequently dismissed. Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to serve concurrent terms of life imprisonment without parole for his first-degree premeditated murder conviction and life imprisonment for his armed robbery conviction, to be preceded by concurrent two-year terms for his felony-firearm convictions. Defendant appeals as of right. We affirm.

This case arises out of a robbery and shooting death that occurred at a rest area located off I-69 during the early morning hours of November 22, 1997. Following his arrest, defendant confessed to the robbery and shooting, but claimed that the killing was accidental. On appeal, defendant first argues that he was denied a fair trial by the improper admission of several color photographs depicting the victim and crime scene. We disagree. This Court reviews a trial court's decision to admit or exclude photographic evidence for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds, 450 Mich 1212 (1995).

Photographic evidence is admissible if relevant, pertinent, competent, and material to any issue in the case. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Photographs are not inadmissible merely because they are gruesome or shocking, but the trial court should exclude those photographs that could lead the jury to abdicate its truth-finding function and convict on the basis

of passion. *Id.* The proper inquiry is whether the probative value of the photographs is substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 76.

In this case, with the exception of two autopsy photographs, each of the photographs challenged by defendant depicts the crime scene as found by the police. Specifically, these photographs offered several different views of the victim's body as it was positioned inside the cab of his truck at the time the officers arrived at the scene. Defendant's theory was that the shooting was accidental and occurred only after the victim grabbed the barrel of defendant's shotgun and struggled to take the weapon from defendant. Contrary to any indication of a struggle, the challenged photographs depict the victim seated upright inside the cab of the truck with both hands resting neatly in his lap. The photographs further depict the victim's wallet slightly cupped by his left hand, indicating a relaxed position at the time he was shot. Inasmuch as these photographs tend to contradict defendant's claim of a struggle, the photographic evidence was highly probative of the credibility of his claim that the shooting was accidental and bore strongly on the issue of intent. In addition, the crime scene photographs aided the jury in understanding the testimony of the witnesses that explained the evidence relating to the crime scene. Although the photographs are unpleasant, their probative value was not outweighed by the danger of unfair prejudice. Accordingly, these photographs were properly admitted by the trial court.

With respect to the autopsy photographs to which defendant objected, we note that these photographs merely depict the nature, extent, and location of the wound inflicted by defendant on the victim. The autopsy photographs illustrated the testimony of the medical and forensic firearm examiners regarding the shot pattern and positioning of the gun relative to the victim at the time the gun was fired. Such matters were probative of the intentional or accidental nature of the shooting. See *Coddington, supra* at 598-599. While defendant claims that the circumstances depicted in each of the disputed photographs were adequately described by the testimony of the prosecution witnesses and thus, the photographs were not reasonably necessary, photographs are not inadmissible simply because a witness can orally testify about the information contained in the photographs, and photographs may be used to corroborate or further explain witness testimony where relevant and probative. *Mills, supra* at 76. Moreover, contrary to defendant's argument, because the shot pattern and location of the fatal wound were not clearly visible in the crime scene photographs, the autopsy photographs were not cumulative. Therefore, we conclude that the trial court did not abuse its discretion in admitting these photographs.

Next, defendant asserts that his convictions of both felony murder and armed robbery violated his constitutional right against double jeopardy by subjecting him to multiple punishments for the same offense. Defendant argues that, as the predicate offense to his felony murder conviction, his conviction of armed robbery must be vacated. We disagree. This issue presents a question of law, which we review de novo. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

Defendant correctly argues that convictions for both felony murder and the predicate offense violate double jeopardy principles. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Here, however, trial court dismissed defendant's felony murder conviction.¹ Therefore, because defendant was not sentenced for both felony murder and the predicate felony, defendant's conviction and sentence for

armed robbery do not violate the double jeopardy principle prohibiting multiple punishments for the same offense.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff

¹ Although the trial court stated at the sentencing hearing that it was sentencing defendant for first-degree murder on the basis of two theories, premeditated murder and felony murder, the judgment of sentence indicated that the court dismissed the felony murder conviction. A court speaks through its written orders rather than its oral statements. *People v Carlos Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993).