STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 27, 2000

No. 213952
Oakland Circuit Court
LC No. 97-157041-FC

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

PER CURIAM.

Defendant appeals by right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, and second-degree murder, MCL 750.317; MSA 28.549, in the stabbing death of his ex-wife. Defendant was sentenced to life in prison. We vacate defendant's second-degree murder conviction and sentence, but otherwise affirm.

Defendant first contends that the trial court erred in allowing the prosecution's medical expert to criticize the opinions of defendant's expert witness while not allowing defendant's expert the same opportunity to comment on the opinions of the prosecution's expert. This claim is without merit. Contrary to defendant's claim, defense counsel never asked defendant's expert, a psychiatrist, to directly critique the opinions of the prosecution's expert, a forensic psychologist. Instead, counsel asked why "two different [hypothetical] psychiatrists" would come to different conclusions. We find no abuse of discretion in the trial court's decision not to allow the question.

Defendant also challenges the admission of several items of evidence. First, defendant contends that the personal protection order (PPO) taken out by the victim against defendant was hearsay and should not have been admitted by the trial court. Specifically, defendant argues that because a PPO is an ex-parte order, there was no evidence that it was ever served on defendant.

MCL 600.2106; MSA 27A.2106, governs the admissibility of court orders, and provides in pertinent part:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

In *People v Williams*, 134 Mich App 639; 351 NW2d 878 (1984), this Court relied on MCL 600.2106; MSA 27A.2106, in holding that a circuit court order terminating the defendant's parental rights in favor of the two victims did not violate the defendant's right to confrontation and was not impermissible hearsay. *Id.*, 641. In so holding, this Court distinguished *People v Patton*, 411 Mich 490; 308 NW2d 163 (1981), wherein the Michigan Supreme Court held an affidavit prepared by the defendant's murdered wife preparatory to issuance of a preliminary injunction in their divorce proceeding to be hearsay, and thus, was improperly admitted into evidence. In *Williams*, the distinguishing factor was that the evidence offered was a circuit court order, and thus, was validly admitted under MCL 600.2106; MSA 27A.2106.

The evidence contained in the certified PPO in this case was clearly relevant to the question whether defendant premeditated the victim's murder. MRE 401. We do not agree that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. In addition, as noted by the prosecution, the PPO would have been proper rebuttal evidence with respect to defendant's claim that he continued in an ongoing sexual relationship with the victim until a week or two before the murder. Accordingly, this Court holds that the trial court did not abuse its discretion in admitting the PPO.

Second, defendant contends that the trial court erred in allowing a graphic videotape of the scene and gruesome photographs of the victim into evidence. As stated above, we review the trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Photographs that are otherwise admissible for a proper purpose are not rendered inadmissible merely because of their graphic nature. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). The relevant issue is whether the probative value of the photographs was substantially outweighed by unfair prejudice. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909, modified 450 Mich 1212 (1995); MRE 403. This Court has held that pictures of the wounds suffered by the decedent are relevant to the issue of premeditation and deliberation. *Mills, supra.; People v Hoffman*, 205 Mich App 1, 19; 518 NW2d 817 (1994); *People v Coddington*, 188 Mich App 584, 598-599; 470 NW2d 478 (1991). Accordingly, because the photographs did not unfairly enhance the graphic nature of the crime and they were relevant to the premeditation and deliberation issue, we hold that their probative value was not substantially outweighed by their possible prejudice. *Mills, supra*, 71; MRE 403.

Addressing the videotape, the trial court held that the videotape would assist the jury and allowed a redacted copy of the tape to be played to the jury. We agree with the trial court and

conclude that the videotape was not gruesome and that it was beneficial in enhancing the jury's visual understanding of the crime scene. As such, it was relevant and the probative value of the videotape was not substantially outweighed by the minimal chance of unfair prejudice to defendant. *Mills, supra*, 71; MRE 403.

Third, defendant contends that the trial court erred in admitting a tape of the victim's 911 call. Specifically, defendant argues that statements made by the operator on the 911 tape were highly inflammatory opinions and, as such, were prejudicial to defendant and should have resulted in the exclusion of the 911 tape. The prosecution, on the other hand, contends that the statements fell into either the present sense impression or the excited utterance exceptions to the hearsay rule.

A statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is excepted from the rule barring hearsay evidence. MRE 803(2). Traditional justification for this rule lies in the belief that 'special reliability' can be afforded a statement while under sufficient stress or excitement because 'the declarant's powers of reflection and fabrication' are removed. *People v Straight,* 430 Mich 418, 423; 424 NW2d 257 (1988) citing McCormick, Evidence (3d ed), § 297, p 855.

The admission of a hearsay statement as an excited utterance requires that three conditions be met: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion. *Straight, supra,* 424. In the instant case, the operator certainly heard a startling and emotional incident, her statements were made contemporaneously to the incident, and they directly related to what she heard. We find that the statements made by the operator were admissible under the excited utterance exception to the hearsay rule. The trial court did not abuse its discretion in admitting the 911 tape into evidence.

Defendant also contends that the trial court erred in not giving the requested diminished capacity jury instruction. Jury instructions are reviewed de novo on appeal. *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999). The instructions must include all of the elements of the crime charged and must not exclude any material issues, defenses or theories if there is evidence to support them. *People v Daniel,* 207 Mich App 47, 53; 523 NW2d 830 (1994).

The prosecution's expert testified that a person's thought processes may be so disturbed by rage or anger that the person would have a hard time thinking about what he or she was doing. The prosecution's expert stated that if defendant was angry at the time he committed the murder, that did not mean that he was mentally ill or insane. Defense counsel asked the prosecution's expert whether he had an opinion as to whether defendant's anger, rage and passion clouded his judgment on the day of the incident. The prosecution's expert replied, "I don't know whether it did or not." Defendant contends that the testimony of the prosecution's expert was sufficient to support the diminished capacity jury instruction.

We note that, in this case, defendant did not give pretrial notice that he would be presenting a defense based on diminished capacity. *People v Jones,* 151 Mich App 1, 4; 390 NW2d 189 (1986);

People v Denton, 138 Mich App 568, 570; 360 NW2d 245 (1984). Further, defendant did not introduce any evidence that his capacity was diminished by anger or any other affliction. Rather, defendant seized upon the prosecution expert's opinion that a hypothetical person could have diminished capacity as a result of rage and passion. As there was no direct evidence that defendant's capacity was indeed diminished at the time of the murder, the trial court correctly ruled that defendant was not entitled to the diminished capacity instruction. *Jones*, *supra*.

Finally, although defendant does not raise it as an issue, defendant correctly notes that his two convictions for murdering the same person violates double jeopardy under *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). We agree and note that the prosecutor acknowledged at sentencing that one of defendant's sentences would need to be vacated. Accordingly, we remand for the limited purpose of correcting defendant's judgment of sentence to reflect that defendant's second-degree murder conviction and sentence are vacated. We affirm defendant's first-degree murder conviction and mandatory life sentence.

Affirmed in part, vacated in part, and remanded for clerical correction. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Janet T. Neff
/s/ Peter D. O'Connell