STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT EARL KING,

Defendant-Appellant.

UNPUBLISHED
December 18, 2001

No. 223720
Oakland Circuit Court
LC No. 98-160932-FC

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317. He was sentenced to life imprisonment and appeals as of right. We affirm.

Defendant was living in an abandoned home with three other individuals. Defendant and Keith Dale Woods were consuming crack cocaine in the home. The victim and Tim Ford were also present in the home, but did not have any drugs. The victim was upset that the two men did not share. He spoke of killing men while they slept when he was in Vietnam. The victim continued to speak and "flicked" his knife open and shut, which angered defendant. Defendant charged at the victim and punched him in the nose. Defendant then threw the victim out of a second story window. Defendant saw the victim moving, went outside, picked up a "4 X 4," and hit the victim. The victim was also cut with a knife.

Police received a report of a dead body near the abandoned home. The "4 X 4" was located near the body with blood on an end. However, the knife was not near the body. During a search of the home, the police found articles identifying defendant and Ford. Police went to local shelters and found defendant leaving a church. Defendant was taken to the police station. Before being admitted into the police vehicle, defendant was patted down for weapons. A crack pipe and knife were found on defendant. At the station, defendant gave a statement accusing Ford of committing the murder. Defendant was arrested for the possession of the crack pipe.

Ford was apprehended, but accused defendant of committing the murder. Police officers advised defendant of his *Miranda*[1] rights. Defendant admitted killing the victim. The confession was recorded and transcribed. Prior to trial, defendant moved to suppress the confession.

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

Defendant testified that police did not advise him that he was under arrest. He also testified that he did not understand that his statements could be used against him. The trial court found that defendant's statements were voluntary, knowing, and intelligent, and admitted them at trial.[2]

Defendant first argues that the trial court abused its discretion by admitting gruesome photographs. We disagree. The decision to admit or exclude photographs rests within the discretion of the trial court. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). If a photograph is admissible for a proper purpose, it is not rendered inadmissible because of the presentation of the image of the gruesome crime to the jury. *Id*. at 549-550. In the present case, the photographs were admissible to demonstrate intent. Despite suffering injury from being pushed out a second story window, the victim was then beaten with a wooden board and cut with a knife. The photographs contradicted defendant's assertion that his intent at the time of the offense rose only to the level of manslaughter. Accordingly, the trial court did not abuse its discretion in admitting the photographic evidence.

Defendant next argues that he was denied due process when the trial court failed to instruct the jury in accordance with the former instruction for provocation. We disagree. The trial court properly instructed the jury with regard to the law applicable to the case. *People v Sullivan*, 231 Mich App 510, 517-519; 586 NW2d 578 (1998).[3] Individualized mental disturbances or special traits were not relevant to this issue. *Id*.

Defendant next argues that the prosecutor committed misconduct requiring reversal by referring to testimony excluded from trial and by denigrating defense counsel and defendant's expert witness. We disagree. This claim of error was not preserved by objection in the trial court. Therefore, defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Prosecutorial misconduct is reviewed on a case-by-case basis, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 251, 261-267, n 7; 531 NW2d 659 (1995). Review of the record reveals that the prosecutor did not improperly refer to evidence that was excluded by the trial court, but rather, referenced what occurred during the police investigation. Furthermore, the prosecutor did not malign defense counsel or defendant's expert. Accordingly, this claim of error is without merit.

Defendant next argues that police improperly conducted a *Terry*[4] stop and any statements to police were not knowingly, voluntarily, and intelligently made. We disagree. When examining a motion to suppress evidence, we review the trial court's factual findings to determine if they are clearly erroneous, but review conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). The stop and pat down of defendant for the limited purpose of discovering weapons was proper where police had a reasonable suspicion of criminal activity and reasonable fear for their own safety. *People v McCrady*, 213 Mich App

[2] We note that the first statement that accused Ford was suppressed by the trial court because of the failure to advise defendant of his *Miranda* rights.

[3] The *Sullivan* decision was affirmed by an equal division of the Supreme Court. 461 Mich 992 (2000).

[4] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

474, 482; 540 NW2d 718 (1995). Police were investigating a murder. The victim had been pushed out a second story window, beaten with a wooden "4 X 4," and cut with a knife. While the wooden stick board was found at the scene, the knife was not near the body. Items found at the home indicated that defendant had been staying at the home. The police vehicle used to transport defendant did not have screening to contain defendant in the back seat. Frisks that occur for the officer's own protection are justified under *Terry*. *People v Otto*, 91 Mich App 444, 451; 284 NW2d 273 (1979). Additionally, defendant's waiver of his rights was voluntary, knowing, and intelligent. *People v Daoud*, 462 Mich 621, 639; 614 NW2d 152 (2000).

Defendant next argues that he was denied his right to a fair and impartial jury because minorities were underrepresented in the jury venire. We disagree. We note and defendant concedes that he cannot meet the criteria, *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000), to establish his claim on the record available. Furthermore, on appeal, it appears that defendant has presented evidence regarding a particular array, but presents no comparison of jury venires in general to the population of Oakland County. Finally, we note that defendant's objection did not adequately preserve this issue for appellate review. Defendant accepted the jury, then noted that he had additional peremptory challenges to exercise, but would not because it would not make any difference. Trial is the time to challenge the nature of the proceedings, and a defendant may not harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).[5]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff

[5] Based on our conclusion that defendant's issues do not rise to the level of error, we need not address his claim of cumulative error.