

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN DELICH,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 233016
Van Buren Circuit Court
LC No. 00-011967-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to mandatory life imprisonment for the first-degree murder conviction and imprisonment for two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder because there was insufficient evidence on the issue of intent. We review de novo a trial court's decision on a motion for a directed verdict to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316; *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation and deliberation can be inferred from the circumstances surrounding the killing. *Id.* After reviewing the evidence in a light most favorable to the prosecution, we conclude that the evidence is sufficient to support the conclusion that defendant intended to kill his son, the victim. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next argues that the trial court erred in refusing to instruct the jury on the offense of statutory involuntary manslaughter. A trial court is not permitted to give a jury instruction on a cognate lesser included offense. *People v Reese*, 466 Mich 440, 446; 647 NW2d

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

498 (2002); *People v Cornell*, 466 Mich 335, 355; 646 NW2d 127 (2002); *People v Pasha*, 466 Mich 378, 384, n9; 645 NW2d 275 (2002). Defendant was charged with and tried for the offense of first-degree murder. Involuntary manslaughter is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). Therefore, the trial court did not err in refusing defendant's request for an instruction on involuntary manslaughter.

Defendant next argues that the trial court abused its discretion in admitting into evidence a photograph of the victim's head. According to defendant, the photograph was more prejudicial than probative and should have been excluded under MRE 403. However, the photograph was relevant to the issue of defendant's intent to kill the victim. MRE 401. Evidence of injury is admissible to show intent to kill. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). In addition, although the photograph is gruesome, photographs that are pertinent, relevant, competent or material on any issue are not inadmissible merely because they show gruesome or shocking details of the crime. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983).

Furthermore, the prosecutor was willing to substitute a sketch of the victim's head for the actual photograph until the forensic pathologist who performed the autopsy testified that the photograph more accurately depicted the nature of the injuries to the victim. The photograph was relevant to the issue of defendant's intent and accurately depicted the nature, location, and extent of the victim's wounds. Therefore, the probative value of the photograph was not outweighed by the danger of unfair prejudice, and the trial court did not abuse its discretion in admitting the photograph into evidence.

Defendant finally argues that the trial court abused its discretion in admitting improper character evidence. At the request of the jury, the trial court questioned defendant's daughter, and she testified that defendant had always had an antagonistic relationship with his children and that he had always been verbally abusive to his children. That testimony concerned the nature of defendant's relationship with his children. It did not concern defendant's character and should not have been precluded under MRE 404(a). Moreover, the testimony was not elicited to show that defendant acted in conformity with a bad character trait. The trial court is free to ask questions of witnesses that assist in the search for truth as long as the questions would be appropriate if asked by either party and do not give the appearance of partiality. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Because the testimony was not improper character evidence under MRE 404(a) and the trial court's questions of the witness were appropriate, the trial court did not abuse its discretion in admitting defendant's daughter's testimony.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof