

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AZIZUL ISLAM,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 231264

Wayne Circuit Court

LC No. 00-002335

Before: Bandstra, P.J., and Zahra and Meter, J.J.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(a), and mutilation of a body, MCL 750.160. He was sentenced to concurrent prison terms of life without parole for the murder conviction and four to ten years for the mutilation conviction. He appeals as of right. We affirm.

I. Facts

The decedent met defendant in London, England. The two then married and moved to Plymouth, Michigan, where they lived with their two children. The relationship broke down and the decedent returned to England in August 1999, to live with her sister. Defendant remained in Michigan with the children. In September 1999, while in England, the decedent became involved with another man. The decedent returned to the United States on December 16, 1999, to finalize her divorce and to see her children.

On December 18, 1999, the decedent called her boyfriend and told him that she was frightened and afraid that defendant was going to poison her. On December 19, 1999, the decedent spoke with her sister, and reiterated her fear that defendant was going to poison her. Also on December 19, 1999, while the decedent was speaking with her boyfriend, defendant interrupted the conversation, yelled obscenities at the boyfriend and the phone call ended abruptly. Later that day the decedent spoke with her boyfriend again, and informed him that she planned to meet with her attorney and would try to get an earlier flight to London. The decedent's boyfriend never heard from the decedent again. Defendant testified that on December 20, 1999, he went to run errands and when he returned, the decedent was gone.

On December 22, 1999, employees of an A & W restaurant in Dearborn found garbage bags in a dumpster that normally contained only grease. After examining the bags, they

discovered that one of them contained severed human limbs. The bags contained a pair of arms, cut off just below the elbow, and a pair of legs cut off above the knee. The fingertips were missing on both hands.

On December 23, 1999, defendant rented a minivan for the day. Defendant's neighbor testified that at approximately 11:00 a.m. on December 23, 1999, defendant asked his neighbor to help him place a plastic Rubbermaid garbage can from his garage into a white minivan that had a plastic sheet covering the back seat and floor. At approximately 2:00 p.m. on December 23, 1999, a couple testified that they saw a light colored or white minivan parked near Walbridge Road in Toledo, Ohio, and a person of middle eastern descent standing near the van.

Defendant returned the minivan later in the afternoon on December 23, 1999. The van had been driven 213 miles. Defendant told the car rental company that he needed the van to pick up relatives from the airport.

On December 31, 1999, a human torso was discovered near Walbridge Road in Curtice, Ohio. The torso was found in a field wrapped in a number of layers of plastic bags and tied with rope. The limbs had been severed from the torso and the head had been removed. The parties stipulated that the limbs found in the dumpster matched the torso found in Ohio. Both the medical examiner and the coroner found multiple gray paint particles on the limbs and torso.

On January 4, 2000, while interviewing defendant at his home, a police officer noticed that a portion of the basement floor had been freshly painted and a roller and roller pan were sitting on the floor. On January 7, 2000, the police brought a death investigation dog into the home. The dog ran into the basement and signaled that it had located human remains in the washer and dryer area of the room, in the paint tray, on the roller and on a mop. The paint was removed from the newly painted area and the police discovered blood stains underneath. An evidence analyst compared the gray paint samples taken from the limbs and torso with those taken from defendant's basement floor and they had a consistent chemical composition. The evidence technician also indicated that a piece of beige paint found in one of the garbage bags containing the torso matched paint found in defendant's roller pan.

II. Analysis

Defendant first argues that the prosecutor improperly used peremptory challenges to systematically exclude minority jurors from the jury panel.¹ The trial court found that the prosecutor's stated reasons for exercising the peremptory challenges were race-neutral and denied defendant's motion for a mistrial. We are satisfied from our review of the record that the trial court did not abuse its discretion in rejecting defendant's claim of purposeful discrimination. *Batson v Kentucky*, 476 US 79, 98 n 21; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Howard*, 226 Mich App 528, 536 n 3; 575 NW2d 16 (1997).

Next defendant argues that the trial court erred in allowing the prosecution to submit testimony from the decedent's sister and boyfriend, who stated that the decedent had told them

¹ Contrary to what defendant asserts on appeal, the record indicates that Juror Howard was dismissed for cause with the consent of the parties.

she was afraid of defendant and suspected that he was planning to “put something in her tea.” Defendant argues that the trial court erred in admitting these statements under the state of mind exception to the hearsay rule, MRE 803(3), because they were not relevant. We disagree.

The decedent’s statements indicating that she was frightened of defendant fall within the purview of MRE 803(3) and were relevant to the issues of premeditation and motive. MRE 401; *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). The statements indicating that the decedent was afraid that defendant would put something in her tea were not, in fact, hearsay because they were not used to prove the truth of the matter asserted, i.e., that defendant was going to place, or did place, something in the decedent’s tea. MRE 801(c). Rather, they were probative of the decedent’s fear of defendant and thus, were likewise relevant. *Fisher, supra*, 449 Mich 453. The trial court did not abuse its discretion in allowing the statements. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant also claims that the trial court abused its discretion in admitting gruesome photographs of the decedent’s body. We disagree. The challenged photographs, although graphic, were relevant to support the prosecution’s claim that the body had been mutilated after death. The photographs also depicted evidence of a cogent plan to secretly dispose of the body to avoid discovery and thus, supported the prosecution’s theory of premeditation. See *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992); *People v Kvam*, 160 Mich App 189, 194; 408 NW2d 71 (1987). In addition, a number of the admitted photographs depicted trace evidence of paint found on the decedent’s limbs and torso, which the prosecution claimed matched paint in defendant’s basement. In this regard, the photographs were relevant in allowing the jury to assess the credibility of the prosecution’s witnesses and the weight of their testimony. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Significantly, the trial court did not allow additional photographs that were merely cumulative or more graphic than those shown to the jury. The trial court did not abuse its discretion in admitting the challenged photographs, notwithstanding their graphic nature.

Defendant also argues that the trial court erred by refusing to instruct the jury in accordance with CJI2d 16.15. However, our review of the record indicates that, while defendant initially requested that the trial court read CJI2d 16.15 in its entirety, he later modified his request and asked the court to read only the last sentence of that instruction. The trial court acceded to this request, over the prosecutor’s objection. Because the trial court instructed the jury as defendant requested, defendant has affirmatively waived any claim of error in this regard. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Defendant additionally asserts that it was improper for the prosecutor to refer, during his rebuttal closing argument, to defendant’s failure to deny his involvement in the decedent’s death when questioned by the police following his arrest. Defendant maintains that the prosecutor’s remark constituted improper commentary on defendant’s exercise of his right to remain silent. See *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973). We disagree. Defendant did, in fact, voluntarily make a number of statements to the police after waiving his right to remain silent. The prosecutor was free to comment on relevant omissions from those statements without violating defendant’s right to remain silent. *People v McReavy*, 436 Mich 197, 211-213; 462 NW2d 1 (1990); *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991); *People v Whitty*, 96 Mich App 403, 420; 292 NW2d 214 (1980); *People v Richendollar*, 85 Mich App 74, 82; 270 NW2d 530 (1978).

Defendant also challenges the prosecutor's pretrial motion to endorse an expert witness pursuant to MCL 767.40a, in order to discuss the analytic comparison of paint found on the decedent's body with samples taken from defendant's basement. We review a trial court's decision to permit a prosecutor to endorse a witness less than thirty days before trial for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). MCL 767.40a(4) allows a prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." Additionally, to warrant relief on appeal, an objecting defendant must show prejudice from the late endorsement. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991).

In the instant case, defendant contends that the trial court erred by failing to determine that the prosecutor had good cause for the late endorsement. However, even if the trial court erred by accepting the prosecutor's good cause argument, "any error must be measured by the extent to which the purpose of the indorsement requirement, to allow a defendant to adequately prepare for trial, was impaired." *People v Kanouse*, 131 Mich App 363, 367-368; 346 NW2d 101 (1984), modified 421 Mich 885 (1985). Here, defendant admits that defense counsel was given additional time to interview the prosecution's expert. Although defendant maintains that it was not reasonable for him to be able to obtain an expert to rebut the prosecution witness' testimony in time for trial, the record does not support this assertion. When the trial court repeatedly asked defense counsel whether he wanted a continuance, counsel first provided conflicting answers and then made it clear that he only wanted a continuance if defendant would be released on bond or if it would result in the dismissal of the case under the 180-day rule, see *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Defense counsel, in effect, refused a continuance, which the trial court seemed willing to grant in order to mitigate any prejudice to defendant from the late endorsement. Defendant cannot now claim prejudice from defense counsel's decision not to accept the continuance. To allow him to do so would have the impermissible effect of harboring error as an appellate parachute. See *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995).

Last, defendant argues that his mandatory sentence of life imprisonment without parole for first-degree murder is unconstitutional. We disagree. As both our Supreme Court and this Court have previously decided, the statutory sentence of life imprisonment without the possibility of parole does not constitute cruel and unusual punishment under Const 1963, art 1, § 16. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Lobaito*, 133 Mich App 547, 565; 351 NW2d 233 (1984). Defendant's argument that his sentence violates the "indeterminate sentencing" provision of Const 1963, art 4, § 45, is likewise without merit. *People v Snider*, 239 Mich App 393, 425-428; 608 NW2d 502 (2000). Therefore, defendant is not entitled to relief.

III. Conclusion

In sum, the trial court did not abuse its discretion in finding credible the prosecution's race-neutral reasons for removing jurors from the panel. The trial court did not abuse its discretion in allowing statements made by the decedent concerning her fear that defendant may put something in her tea. The trial court did not abuse its discretion in allowing the prosecution to present relative and probative photographs of the decedent's body. Defendant has waived the issue of jury instructions on appeal. The prosecutor did not commit misconduct by commenting with regard to defendant's failure to assert a defense subsequently claimed at trial. Additionally,

the trial court did not abuse its discretion in allowing the prosecution to add a witness to its witness list shortly before trial. Lastly, defendant's life sentence without the possibility of parole is constitutional.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter