

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEE MURRAY,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 137294
LC No. 90-043067

Before: Markey, P.J., and McDonald and M. J. Talbot*, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, two counts of kidnapping, MCL 750.349; MSA 28.581, two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), MSA 28.788(2)(1)(e), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and arson of an unoccupied dwelling, MCL 750.73; MSA 28.268. Defendant was sentenced to life imprisonment on each of the first-degree murder, kidnapping and criminal sexual conduct convictions, two years on the felony-firearm conviction and five to ten years on the arson conviction. We affirm.

Defendant first argues that he was denied his right to effective assistance of counsel because counsel failed to properly present an alibi defense. To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that under an objective standard of reasonableness counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy and that any deficiency in counsel's performance was prejudicial to his case. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991).

Following a two day *Ginther*¹ hearing, the trial court found that the alibi witnesses testimony did not provide defendant with a complete alibi and, furthermore, that the testimony of the witnesses

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

conflicted. The trial court held that counsel's failure to file a notice of alibi did not constitute ineffective assistance of counsel. A reading of the testimony of the alleged alibi witnesses showed that defendant's alibi was either incomplete or fabricated by defendant himself and/or the witnesses. We agree with the trial court. In light of the fact that defendant's alibi was incomplete, counsel did not err in failing to file a notice of alibi or in calling the alleged alibi witnesses. *People v McMillan*, 213 Mich App 134; ___ NW2d ___ (1995); *People v Kelly*, 186 Mich App 524; 465 NW2d 569 (1990). Accordingly, counsel's representation of defendant was not ineffective. *LaVearn, supra* at 213.

Next, defendant alleges that he was denied his right to a fair trial due to several instances of prosecutorial misconduct. However, because defendant did not object to the complained of comments or conduct, this issue is not properly before this Court. *People v Gonzalez*, 178 Mich App 526; 444 NW2d 228 (1989). Furthermore, a reading of the record shows that failure to review this issue will not result in manifest injustice. *Id.*

Defendant also argues that the trial court erred in admitting into evidence photographs of the decedent and the victim. The photographs showed the decedent's charred body both at the scene and lying on a table in the morgue, as well as the burn scars on the victim's buttocks.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495; 513 NW2d 431 (1994). Photographic evidence is admissible if it is "substantially necessary or instructive to show material facts or conditions." *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Photographs are not inadmissible merely because they are gruesome or shocking. The trial court should, however, prevent the jury from seeing those photographs which might "lead the jury to abdicate its truth-finding function and convict on passion." *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). Furthermore, photographs taken during an autopsy must be subjected to more careful scrutiny because they depict the corpse not as it was left by its assailant, but by the "probing instruments and procedures of the medical examiner." *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969). Here, the photographs of the knife burn marks on the decedent's body were admitted to show premeditation and deliberation and the photographs of the knife burn scars on the victim were admitted to place her at the scene in an attempt to bolster her credibility. We are of the opinion that the photographs were substantially necessary to show material facts or conditions. *People v Anderson*, 209 Mich App 527; 531 NW2d 780 (1995); *Hoffman, supra* at 18. As such, the trial court did not abuse its discretion in admitting the photographs. *McAlister, supra* at 505.

Defendant next contends that the trial court's instruction on "reasonable doubt" was erroneous and incomplete. Because defendant did not object to the instructions as given, this issue is not properly before this Court. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737(1993). Further, a reading of the record shows that failure to review this issue will not result in manifest injustice, as the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Van Dorsten, supra* at 544-545; *People v Wolford*, 189 Mich App 478; 472 NW2d 767 (1991).

Additionally, defendant argues that the trial court did not properly caution the jury on the use of impeachment evidence. Although defendant objected to the impeachment testimony itself and requested a cautionary instruction, he did not object to the instruction that was given and, as such, this issue is also not properly before this Court. *Van Dorsten, supra* at 544-545. Further, a reading of the record shows that failure to review this issue will not result in manifest injustice, as the instruction informed the jury that the witness' testimony could only be used for impeachment purposes. *Id.*; *Wolford, supra* at 481.

Finally, defendant alleges that the trial court erred in admitting the testimony of two police officers when the prejudicial effect of that testimony outweighed any probative value it might have. Because defendant did not object to the admission of the officers' testimony, this issue is not properly before this Court. *Considine, supra* at 162.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).