

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOMER HERBERT BANKS,

Defendant-Appellant.

UNPUBLISHED

May 9, 1997

No. 184278

Gladwin Circuit Court

LC No. 94-005408

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree murder, MCL 750.316; MSA 28.548. Defendant was sentenced to two concurrent terms of life imprisonment without parole. We affirm.

Defendant first argues that error requiring reversal occurred when the prosecutor impermissibly elicited testimony regarding his post-arrest silence in violation of his Fifth Amendment right to remain silent. We disagree. This issue is not preserved for our review because defendant failed to object to the prosecutor's line of questioning upon cross-examination. Because this issue concerns a constitutional right, however, we will review the claim to determine if the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

During cross-examination, the prosecutor posed the following questions and defendant gave the following answers:

Q. And do you remember telling Detective Halleck that you knew more about the case
- - there was more you could tell him, but you wouldn't unless you could talk to your
wife first? Do you remember that?

A. At the police station.

Q. And do you remember you were allowed to speak briefly to your wife, and then said
no more?

A. Yes, sir.

It is not clear from the above whether defendant invoked his Fifth Amendment right to remain silent, or whether defendant initially spoke to the police, then chose not to answer questions. We find it unnecessary, however, to resolve this inquiry because the erroneous admission of evidence of a defendant's silence can be harmless error. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). Upon redirect, defense counsel asked defendant to explain why he refused to give any further information to the police. Defendant responded that he feared Mafia hit men would target him and his family if he spoke about the crime. Therefore, the evidence of defendant's silence was not represented to the jury as substantive evidence of defendant's guilt. Rather, the jury was left with the impression that defendant remained silent in order to protect his family. We conclude that any error in the admission of the evidence was harmless and was not decisive of the outcome.

Defendant next argues that the prosecutor made impermissible comments during his rebuttal closing argument. We disagree. Because defendant failed to object to the prosecutor's remarks, our review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). In closing, defense counsel directly questioned whether the prosecutor believed his own witnesses' stories. In rebuttal, the prosecutor told the jury that he was prohibited by law from arguing to them that he believed his witnesses, but that, "I sure wish I wasn't." We conclude that this comment was appropriate in light of defense counsel's challenge to the prosecutor's personal belief in his witnesses' stories.

Defendant also argues that the prosecutor made an impermissible civic duty argument. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Such arguments inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Our review of the record indicates that the prosecutor did not argue that the jurors should convict defendant as part of the civic duty, but that he argued the jury should do justice in this case based upon the overwhelming facts presented at trial. Such an argument is not improper.

Defendant claims that the gruesome photographs of the murder victims and the crime scene admitted by the trial court were substantially more prejudicial than probative. We disagree. The decision whether to admit photographic evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Photographs are not inadmissible merely because they are gruesome or shocking. *Anderson, supra*. The photographs admitted in this case, although bloody, did not carry a prejudicial effect that substantially outweighed their probative value. The charges against defendant were two counts of first-degree murder, of which an essential element is premeditation. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). The photographs were relevant to the issue of premeditation because they showed the execution-style in which the murders were performed. *Anderson, supra*. Defendant argues that he offered to stipulate to the degree of the murders, but it is a well-settled principle of law that a not guilty plea puts at issue all elements of a criminal offense, and such stipulations are not binding on a jury. *People v Mills*, 450 Mich 61, 69-71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). The trial court carefully limited the number of photographs that the prosecution was allowed to introduce. We do not think that the trial court abused its discretion.

Defendant also argues that he received ineffective assistance of trial counsel. We disagree. Our review of this issue is limited to the record because defendant did not request a *Ginther*¹ hearing in the lower court. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). To determine if defendant was denied the effective assistance of counsel, we must determine if defendant can prove both prongs of the test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which are: (1) defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced. To show prejudice, the defendant must establish that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant complains that his trial counsel failed to object to the prosecutor's line of questioning, which elicited his silence in the face of police questioning, and that his trial counsel failed to object to the prosecutor's improper remarks during rebuttal closing argument. We have addressed both of those issues above. We decided that the prosecutor's closing remarks were not improper, therefore, no objection was warranted. We also noted that defense counsel elicited testimony from defendant that he refused to talk to police because he feared for the safety of himself and his family. We think that this was a matter of trial strategy with which this Court will not interfere. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Finally, defendant argues that the cumulative effect of the above errors renders it mandatory for us to reverse his convictions and grant a new trial. We disagree. We do not conclude that any errors were committed at trial, save the admission of defendant's silence, which was harmless because no Fifth Amendment violation occurred.

We affirm.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

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