

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE J. BURKETT,

Defendant-Appellant.

UNPUBLISHED

July 18, 1997

No. 195943

Oakland Circuit Court

LC No. 95-143119-FC

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(b); MSA 28.548(1)(b), and of being an habitual offender, third offense, MCL 769.11(1)(b); MSA 28.1083(1)(b). Defendant was sentenced to life imprisonment without the possibility of parole. Defendant appeals as of right. We affirm.

On appeal, defendant first claims that the trial court committed error requiring reversal by admitting graphic photographs of the murder victim. We disagree. In *People v Zeitler*, 183 Mich App 68, 69-70; 454 NW2d 192 (1990), this Court summarized the standard for admitting photographic evidence as follows:

Generally, the admission of photographic evidence is within the discretion of the trial court. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). Photographs are not inadmissible merely because they are gruesome and shocking. *People v Stewart*, 126 Mich App 374, 377-378; 337 NW2d 68 (1983). However, such photographs should not be admitted if their probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Turner*, 17 Mich App 123, 130; 169 NW2d 330 (1969). The danger is that exposure to vivid and gruesome images of the victim will cause a juror to forget that the defendant may not be responsible for the outrage. *People v Bryant*, 129 Mich App 574, 581; 342 NW2d 86 (1983).

In the present case, the trial court properly exercised its discretion by admitting photographs of defendant's face as it appeared after the murder. By showing a lack of scarring or bruising on the victim's face, the photographs were relevant to counter defendant's self-defense claim by rebutting his testimony that he and the victim engaged in mutual combat before defendant stabbed her. Additionally, the amount of blood depicted on the crime scene photograph was relevant to counter defendant's claim that he did not intend to hurt the victim. Finally, there was not a reasonable likelihood that the photographs inflamed the jury to the point where they lost focus of the issues to be decided. Therefore, the photographs were not overly prejudicial to defendant in this case, and the trial court did not abuse its discretion in admitting them into evidence. See *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995).

Next, defendant argues that the prosecutor's statements resulted in an unfair trial. However, defendant did not object on this basis below. Therefore, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or where a miscarriage of justice would result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). Assuming without deciding that the prosecutor improperly questioned defendant about the credibility of prosecution witnesses or appealed to sympathies for the victim's family, we hold that a curative instruction could have cured any resulting prejudice. Also, declining appellate review of this unpreserved issue will not result in a miscarriage of justice. Indeed, given the overwhelming evidence against defendant and the trial court's instruction to the jury that they should not let sympathy influence their decision, we hold that defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1996).

In a related argument, defendant contends that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 671; 528 NW2d 842 (1995). In light of the overwhelming evidence against defendant, we conclude that defendant has not sustained his burden of proving that counsel's errors, if any, affected the result of trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994). Indeed, two eyewitnesses identified defendant as the man who carried property out of the victim's apartment after they heard a loud noise. After the murder, each witness saw defendant enter a green station wagon which was noisy due to a malfunctioning muffler. The described vehicle was similar to defendant's girlfriend's automobile that had been loaned to defendant on the night of the murder. Moreover, defendant admitted that he entered the victim's apartment and stabbed the victim after she told him that she did not have any money.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin