STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERMAINE L. SELVY,

Defendant-Appellant.

UNPUBLISHED
April 21, 1998

No. 199365
Oakland Circuit Court
LC No. 96-145249-FC

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant was convicted of first-degree, premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life in prison for the first-degree murder conviction and two year's imprisonment for the felony-firearm conviction, and appeals as of right. We affirm.

Defendant's first claim on appeal is that the trial court abused its discretion in admitting two autopsy photographs of the gunshot wounds to the victim's arm and chest pursuant to MRE 401 and MRE 403. We disagree.

Relevant evidence is generally admissible unless the probative value of the evidence is substantially outweighed by unfair prejudice. MRE 401; MRE 403; *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Any relevant evidence will be damaging to some extent. *Id*. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 75-76. Stated another way:

> [U]nfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger or shock. [*People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995), citing *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).]

In this case, the trial court correctly concluded that the photographs were material and made a fact of consequence more probable than it would have been without the evidence. *Mills*, *supra* at 67. The multiple wounds depicted in the photographs were relevant to the prosecutor's argument that defendant deliberated and premeditated the victim's death. The wounds were scattered over the victim's torso and left arm. These numerous wounds in various places suggest that defendant had time to take a second look. See *People v Doyle (On Remand)*, 129 Mich App 145, 156; 342 NW2d 560 (1983).

Additionally, the probative value of the photographs was not substantially outweighed by unfair prejudice pursuant to MRE 403. Although the photographs vividly depicted the wounds, the photographs were not so horrifying or gruesome as to lead the jury to convict on passion alone. Thus, it was not an abuse of discretion for the trial court to admit them. See *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995).

Defendant's second claim on appeal is that the trial court erred when it refused to instruct the jury on the lesser included offense of voluntary manslaughter. We disagree.

Voluntary manslaughter is a cognate lesser included offense of murder, and a judge must instruct the jury on voluntary manslaughter where the evidence could support a conviction of the lesser offense. *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992). In this case, there is no evidence, which could support a conviction for voluntary manslaughter. Nothing in the record supports that the malice was negated by adequate and reasonable provocation. *Id.* No facts support a high speed chase or argument between the victim and defendant prior to the shooting[1]. Moreover, even if there was a high speed chase and the victim argued with defendant for a few seconds *through a rolled up window*, this is not evidence to support reasonable provocation to inflict multiple gunshot wounds to the victim. Thus, the trial court did not err when it refused to instruct the jury with regard to voluntary manslaughter. We also note that even if it had been error for the trial court to fail to instruct on voluntary manslaughter, the error was harmless where the jury convicted on the principle offense of first-degree murder and not on the lesser included offense of second-degree murder for which they had been instructed. See *People v Meyers*, 124 Mich App 148, 160; 335 NW2d 189 (1983).

Affirmed.

[1] Defendant's characterization of events is a misrepresentation of the testimony. Witness Fred Dowell did not testify that the victim's car followed the car in which defendant was riding at a high rate of speed. In fact, he testified that he could not tell if the victim's car was speeding as it followed them and that the victim's car did not catch up to them. Further, Dowell's testimony does not evidence that there was a high speed chase. Although the driver of the vehicle in which defendant was riding apparently sped up after hitting the victim's car, she only went a couple of blocks before stopping. The victim then pulled up behind her. Defendant jumped out of his vehicle, went to the victim's car, and shots were fired within a couple of seconds. The evidence further indicated that the victim's window was rolled up at the time of the shooting.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot