

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN RAY LAMBERT,

Defendant-Appellant.

UNPUBLISHED

April 10, 2007

No. 267765

Genesee Circuit Court

LC No. 95-051617-FC

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of premeditated first-degree murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), and breaking and entering an occupied dwelling, MCL 750.110. The trial court sentenced defendant, as an habitual offender, second offense, MCL 769.10, to life in prison without parole for the murder conviction, life in prison without parole for the felony murder conviction, and 15 to 22-1/2 years' imprisonment for the breaking and entering conviction. We affirm defendant's convictions, but remand to the trial court to modify defendant's judgment of sentence.

The victim, a 97-year-old woman, died between the evening of September 6, 1993, and the early morning hours of September 7, 1993. On September 7, witnesses found the victim's body on the floor beside her bed. There was a large amount of blood on her face, her neck, her nightgown, and the carpet beneath her body. Her purse was bloodstained and empty. It was apparent that someone removed the screen from the victim's bedroom window and left the outside door to her bedroom unlocked.

Dr. Willys Mueller determined that the victim died as a result of manual strangulation. But, according to Dr. Mueller, the amount of blood on and around her body indicated that she also suffered numerous "torture" wounds before being strangled. There were several abrasions and contusions on her face, five stab wounds on or near her neck, and incised wounds on her forearms. Some of the victim's wounds were caused by a sharp instrument such as a knife, while others appeared to be caused by a circular object such as a ballpoint pen.

In December 1994, during an interview with Detectives Thomas Korabik and Gary Elford, defendant admitted to entering the victim's bedroom with his friend, Robert Bigelow. When defendant saw the victim, he placed her in a "sleeper hold" and stabbed her near the eye. Defendant said that, after the murder, he and Bigelow took \$200 from the victim's purse and that

they later threw several items, including a knife, into a creek. At trial, defendant admitted to choking the victim, but maintained that her death was accidental. Defendant testified that, while he held the victim's neck, Bigelow stabbed her with a pencil or pen. Subsequently, however, defendant denied seeing Bigelow stab the victim. Additionally, defendant denied stabbing the victim himself, seeing a knife, or receiving any money after the murder.

Defendant first claims on appeal that his convictions of first-degree premeditated murder and felony murder, arising from the death of a single victim, violate constitutional protections against double jeopardy. We agree. This Court has previously held that when a defendant is convicted of both first-degree premeditated murder and felony murder arising out of the death of a single victim, as is the case here, double jeopardy is violated. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). Accordingly, we remand to the trial court to modify defendant's judgment of sentence to reflect a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder. See *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005); *Bigelow*, *supra* at 220-221.

Defendant next contends that the trial court abused its discretion when it admitted the rebuttal testimony of Detectives Korabik and Elford. Specifically, defendant claims that their rebuttal testimony was improper because the testimony was cumulative to evidence introduced in plaintiff's case-in-chief. We find no error. We review a trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id.*

Rebuttal evidence is admissible to explain, contradict, or otherwise refute an opponent's evidence. *Figgures*, *supra* at 399. A party may not introduce evidence during rebuttal unless it is properly responsive to evidence introduced or a theory developed by the opponent. *Id.*; *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). If evidence is responsive, it is proper rebuttal even if it overlaps evidence admitted in the case-in-chief. *Figgures*, *supra* at 399; *Pesquera*, *supra* at 314.

We find that, although the detectives' testimony overlapped evidence introduced in plaintiff's case-in-chief, the testimony was properly responsive to defendant's testimony. In the prosecution's case-in-chief, one of the detectives read the transcript of defendant's statement to the jury. During his testimony, defendant challenged the accuracy of the transcript and denied receiving money after the murder, seeing a knife, stabbing the victim, or telling the police that he stabbed the victim. On rebuttal, the detectives refuted this testimony with evidence of defendant's admissions during the December 1994 interview. By testifying from their personal recollections of the interview, the detectives undermined defendant's claim that the interview transcript was incorrect. Further, we note that the prosecutor did not artificially create an issue for rebuttal by eliciting denials from defendant so that he could present the rebuttal testimony. Reversal is not required.

Finally, defendant asserts that the trial court abused its discretion when it admitted gruesome photographs of the victim's body at the crime scene and the autopsy. We disagree. The decision to admit photographs as evidence is within the discretion of the trial court and will

not be overturned on appeal absent a clear abuse of discretion. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006).

Generally, all relevant evidence is admissible. MRE 402; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

We find no merit to defendant's argument that the photographs lacked relevancy. Evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable. MRE 401; *Crawford, supra* at 388. The crime of first-degree premeditated murder requires proof that the perpetrator intentionally murdered the victim with premeditation and deliberation. MCL 750.316; *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Although the victim ultimately died as a result of manual strangulation, evidence that the perpetrator wounded her in a number of ways, including by stabbing her several times in the neck, is relevant to the question of intent. See *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The amount of blood on and around the victim's body indicated that she suffered numerous "torture" wounds before being strangled and was, therefore, relevant to show premeditation and deliberation.

Further, we disagree that the photographs were unfairly prejudicial because of their gruesome nature. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). While admitting gruesome photographs for the purpose of arousing the sympathies or prejudices of the jury is improper, such photographs are not rendered inadmissible merely because they vividly depict a gruesome or shocking crime. *Mills, supra* at 76-77. Here, although the photographs were gruesome, they accurately depicted a brutal murder and were highly probative because they were relevant to issues of consequence at trial. Therefore, we conclude that the probative value of the evidence substantially outweighed the danger of unfair prejudice.

Defendant additionally argues that the photographs were needlessly cumulative. While it is true that several witnesses testified about the scene of the crime and the victim's injuries, photographs are not excludable merely because a witness can orally testify about the information contained in them. *Id.* at 76. Photographs may be used to corroborate testimony. *Id.* The photographs at issue complemented testimony about the number and types of wounds inflicted on the victim, as well as the amount of blood on and around her body.

The trial court did not abuse its discretion in admitting the challenged photographs at trial.

Affirmed, but remanded for amendment of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis