

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSCOE LEE HALSELL,

Defendant-Appellant.

UNPUBLISHED

July 14, 2000

No. 205541

Recorder's Court

LC No. 96-006591

Before: Griffin, P.J., and Holbrook, Jr. and J.B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced to life imprisonment without parole. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is that the trial court reversibly erred by instructing the jury on mental retardation when the instruction was not supported by the evidence. We disagree. At the start of trial, defense counsel requested the very instruction he now claims as error, thanked the court when told that instruction would be given, and then expressed satisfaction with the instructions given to the jury. It is well settled that we will not allow a defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Further, in closing argument, defense counsel referred to one of the medical reports which (quoting defense counsel) ". . . says [defendant is] functioning at a mentally retarded level." Defense counsel subsequently described defendant as "[s]omebody that's functioning like a sixth grader - - a retarded sixth grader." In any event, the trial court did not err because the instructions given, including the instruction on mental retardation, are mandatory when, as here, there is a claim of insanity. *People v Grant*, 445 Mich 535, 541-542; 520 NW2d 123 (1994); MCL 768.29a(1); MSA 28 1052(1)(1); *People v Girard*, 96 Mich App 594, 596 n 2, 596-597; 293 NW2d 639 (1980); see also CJI2d 7.9 and 7.11 and accompanying use notes. Finally, even if defendant had objected and even if the instruction was erroneous, defendant cannot show prejudice because the instruction afforded the jury an additional

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

means by which to find defendant not guilty by reason of insanity. *People v Carines*, 460 Mich 750, 772; 597 NW2d 130 (1999).

Defendant next argues that the trial court reversibly erred by denying his motion to suppress his statement to police. We disagree. Whether a defendant's confession is voluntary, knowing, and intelligent is a question of law which this Court reviews under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J), 44 (Weaver, J); 551 NW2d 355 (1996). A trial court is given deference with regard to the credibility of witnesses, and will not be reversed unless the court's findings are clearly erroneous. *Id.*, at 29-30. Factors to consider in determining whether a statement is voluntary are: the age of the accused, his intelligence level, the extent of his previous experience with the police, the repeated and prolonged nature of the questioning, the length of the detention before the statement was given, the failure to advise the accused of his constitutional rights, whether the accused was injured, intoxicated or drugged or in ill health, whether he was deprived of food, sleep or medical attention, and whether he was physically abused or threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

According to the testimony at the *Walker*¹ hearing, defendant was arrested after having called police saying that he thought he killed his wife and locked his kids in a room. Although defendant was subjected to questioning on two separate occasions, both occurred within five hours after his arrest. He admitted to a problem with crack and having smoked it at some point in the two days after leaving his wife's house and before his arrest, but did not appear to be under the influence of drugs nor did he indicate he was tired when he gave the statement. His pupils were neither dilated nor constricted, his speech was not slurred, he did not appear nervous and answered all questions coherently. At one point, defendant talked about his job at Chrysler. He was not subjected to prolonged questioning, and did not appear to either officer who took his statement to be under any physical or mental stress. Defendant was given his *Miranda*² rights on two separate occasions and indicated both times that he understood them. One of the officers brought defendant a cup of coffee, but defendant did not ask for any food or indicate that he was hungry. Defendant had graduated from high school and had one or two years of college. The court acknowledged reports which initially found defendant incompetent to stand trial and subsequently found that he was competent to waive his *Miranda* rights. Based on the totality of the circumstances, including the factors listed in *Cipriano, supra*, we conclude that defendant's statements to police were voluntary, and it cannot be said that the trial court's decision was clearly erroneous. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998); *Cheatham, supra* at 29-30; *Cipriano, supra* at 334.

Defendant next argues that the admission of grisly photographs of his wife constituted reversible error. We disagree. Decisions whether to admit evidence are within the sole discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Photographs of a crime victim are admissible if they are substantially

¹ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

necessary or instructive in showing material facts or conditions. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995); *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). As long as they are admissible for a proper purpose, photographs are not rendered inadmissible merely because they portray the gruesome details of a crime, even if they may tend to arouse the passions or prejudices of jurors. *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997); *Hoffman, supra* at 18. Photographs that are solely calculated to arouse the sympathies and prejudices of jurors, however, should be excluded. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998); *Howard, supra* at 549.

We note initially that, after reviewing the photographs, the trial court excluded one which showed the victim after the police had removed some of her clothing. The remaining photographs were properly admitted in this case. The pictures depicted the victim's body as it was discovered inside the bedroom of the house, and showed that she was stabbed several times on her face, chest, and back and that the bedroom had been ransacked. The photographs aided the prosecutor in establishing the elements of first-degree murder, including that defendant had time to reflect while he repeatedly stabbed the victim. *Anderson, supra* at 536; *Hoffman, supra* at 19. They corroborated the testimony of the medical examiner, and could actually have aided defendant's insanity defense in that the jurors could have concluded that no sane person could have committed the crime depicted. *People v Zeitler*, 183 Mich App 68, 70; 454 NW2d 192 (1990).

Defendant's final issue on appeal is that reversal is required because of the use of multiple peremptory challenges before a replacement juror was selected. We again disagree. Challenges to a jury selection process are reviewed de novo. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). A defendant is entitled to a jury selection procedure which is "fair and impartial." MCR 2.511(A)(4); *People v Green (On Rem)*, ___ Mich App ___; ___ NW2d ___ (2000) (Docket No. 202259, issued 5/9/2000). See also, *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981); *People v Colon*, 233 Mich App 295, 303; 591 NW2d 692 (1998). Where a defendant fails to object to the jury selection process, reversal is not required. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987); *People v Lawless*, 136 Mich App 628, 636; 357 NW2d 724 (1984). MCR 2.511(F) requires that after a party challenges a juror, either peremptorily or for cause, another juror must be selected before further challenges are made. *Colon, supra* at 302.

In this case, at one point in an otherwise meticulously conducted jury voir dire, the trial court allowed defendant to make four successive peremptory challenges without seating another juror after each challenge as required by MCR 2.511(F). *Lewis, supra* at 32; *Lawless, supra* at 636. However, reversal is not required because defendant did not object and expressed satisfaction with the jury. *Lewis, supra* at 32; *Lawless, supra* at 636. In any event, based on our review of the record, we are convinced that the effect of the trial court's momentary departure from the correct procedure is *de minimus*. See *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990), reversing *People v Russell*, 182 Mich App 314; 451 NW2d 625 (1990).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan