

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEIL ANTONIO DASGUPTA,

Defendant-Appellant.

UNPUBLISHED

May 23, 2013

No. 308869

Wayne Circuit Court

LC No. 11-009212-FC

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. Because defendant failed to establish that the district court judge was biased and his claim of error at his preliminary examination does not warrant setting aside his convictions; the trial court did not abuse its discretion by admitting autopsy photographs of the victim; the trial court did not improperly admit other-acts evidence involving defendant; defendant was not denied the effective assistance of counsel; and the prosecution presented sufficient evidence to support defendant's convictions, we affirm.

Defendant's convictions arise out of the July 28, 2010, beating death of Robin Johnson. According to witness Deangelo Adams, defendant and Johnson were involved in an altercation while Johnson was sitting in the driver's seat of his white Cadillac talking to defendant, who was standing just outside the driver's door of the vehicle. Adams observed defendant hit Johnson and saw a man named "Shawn" open the passenger door and grab Johnson's keys to prevent him from driving away. After Johnson got out of the car, defendant, Shawn, and an unknown man chased Johnson, who fell to the ground. Defendant and Shawn then stomped and hit Johnson while the other man searched through Johnson's pockets and removed a necklace from around Johnson's neck. At one point, defendant used a metal object to hit Johnson, who died as a result of blunt force trauma.

I. PRELIMINARY EXAMINATION

Defendant first argues that he was denied his right to a fair trial and a fair preliminary examination because the district court judge who presided over defendant's preliminary examination exhibited bias against defendant and his family. Defendant further asserts that he was denied the effective assistance of counsel because his attorney failed to file a motion in the circuit court to recuse the district court judge or to quash defendant's bindover. We review

unpreserved claims of judicial bias for plain error that affected the defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

“A criminal defendant is entitled to a neutral and detached magistrate.” *Id.* (quotation marks and citation omitted). “Comments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of [judicial] impartiality.” *Id.* at 598. In any event, “the presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless.” *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Defendant argues that the district court judge's bias against him was evident from the judge's repeated chastisement of defendant's mother and brother regarding his brother's poor behavior in the courtroom and his mother's lack of discipline over his brother. The district court judge also expressed concern that Adams was being threatened and those persons purportedly responsible for the threats were permitted to be in the courtroom. According to defendant, the judge's conduct and tone clearly exhibited bias against defendant and his associates.

Defendant fails to establish his claim of bias because he fails to point to any conduct directed toward him. Rather, he points to conduct directed toward his mother and brother and to the court's concern that persons who threatened Adams were permitted to be in the courtroom during Adams's testimony. Even assuming that the judge's comments were indirectly hostile to defendant and defense counsel, they were insufficient to pierce the veil of judicial impartiality. In any event, defendant fails to demonstrate how the district court judge's conduct during the preliminary examination denied him a fair trial. As discussed later in this opinion, the prosecution presented sufficient evidence to support defendant's convictions. Therefore, even if the district court judge erroneously bound defendant over as a result of purported bias, defendant's claim of error is moot. “[T]he presentation of sufficient evidence to convict at trial renders any erroneous bindover decision harmless.” *Id.* Further, because defendant's claims of bias are without merit, he has failed to establish that he was denied the effective assistance of counsel. “Counsel is not ineffective for failing to make a futile objection.” *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

II. GRUESOME PHOTOGRAPHS

Defendant next argues that the trial court erred by allowing the jury to view autopsy photographs of Johnson's facial and head injuries because the photographs were far more prejudicial than probative. We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). “The trial court abuses its discretion when its decision is outside the range of principled outcomes.” *Id.*

“Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. “Generally, all relevant evidence is admissible at trial.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Even if relevant, however, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” *Id.* “Photographic evidence is generally admissible as long as it

is relevant, MRE 401, and not unduly prejudicial, MRE 403.” *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

Generally, the admission of photographic evidence is within the discretion of the trial court. Photographs are not inadmissible merely because they are gruesome and shocking. However, such photographs should not be admitted if their probative value is substantially outweighed by the danger of unfair prejudice. 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 Zeitler*, 183 Mich App 68, 69; 454 NW2d 192 (1990) (citations omitted).]

“While gruesome photographs should not be admitted solely to garner sympathy from the jury, a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details.” *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). Further, because the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes any of the elements, photographs may be helpful to meet this burden. *Id.* Photographs may also be used to corroborate a witness’s testimony concerning the cause of death. See *Gayheart*, 285 Mich App at 227.

In this case, defendant was charged with first-degree felony murder, which required the prosecution to establish:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the felony murder statute]. [*People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (quotation marks and citation omitted; first brackets in original).]

The photographs of Johnson primarily depicted his facial injuries, including cuts and bruises to his mouth and face, and injuries to his head. Because the prosecution was required to establish that defendant intended to kill Johnson, to cause him great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, the photographs were admissible to establish defendant’s intent. See *Mesik*, 285 Mich App at 544. Accordingly, the trial court did not abuse its discretion by admitting the photographs.

III. OTHER-ACTS EVIDENCE

Defendant next argues that the prosecution improperly elicited testimony from Adams regarding defendant’s reputation for crime and violence. Defendant contends that such testimony was improper because the prosecution did not file a motion to admit such evidence, and the evidence was more prejudicial than probative. We review an unpreserved claim

regarding the improper admission of evidence for plain error that affected the defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

In order for other-acts evidence to be admissible, the prosecution

must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b). Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*Id.* at 509 (quotation marks, brackets and citation omitted).]

"Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Id.*

Defendant improperly characterizes Adams's testimony as other-acts evidence. Rather, the evidence was relevant to Adams's credibility, which defendant challenged at the outset of the trial. During his opening statement, defense counsel attacked Adams's credibility and argued that Adams was not worthy of belief because he waited approximately one year to tell the police about defendant's involvement in Johnson's death, because Adams's reasoning for not coming forward sooner had not been consistent, and because Adams's purported recollection of the incident had not been consistent. Defense counsel asserted that Adams was precise in fabricating his testimony, that Adams had a reputation of shooting his gun in the neighborhood but would lie and say that he did not own a gun, and that Adams had accused defendant and his brother of shooting at Adams's house, but that Adams was going to lie and say that he never made that accusation. The prosecution's questioning of Adams regarding why he did not try to help Johnson after the beating and Adams's response that he was scared were relevant to Adams's credibility. When asked why he was scared, Adams testified that defendant and Shawn "will beat you up, break in your house, they will kill you[,] they known [sic] for that[,] they got a tough reputation . . . I have a family at home" Thus, the record demonstrates that the evidence was not admitted to establish defendant's character or his propensity to engage in criminal behavior. Rather, it was relevant to Adams's credibility, which was at issue because defendant challenged it. Because defendant himself raised the issue of Adams's credibility, he cannot now challenge the testimony that the prosecution elicited in order to respond to the challenge. See *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001). Further, because the testimony was proper, counsel did not render ineffective assistance by failing to object to the testimony. "Counsel is not ineffective for failing to make a futile objection." *Horn*, 279 Mich App at 39-40.

IV. SUFFICIENCY OF THE EVIDENCE¹

¹ While defendant references the great weight of the evidence in his statement of questions presented, his argument focuses solely on the sufficiency, rather than the great weight, of the evidence.

Finally, defendant argues that the prosecution failed to present sufficient evidence to support his convictions because no evidence, other than Adams's incredible testimony, was presented to show that defendant was one of the perpetrators. "This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (quotation marks and citation omitted). We must view the evidence and resolve all evidentiary conflicts in favor of the prosecution. *Id.*

"The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *Smith*, 478 Mich at 319. To establish first-degree felony murder, the prosecution was required to prove:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b) [*Id.* at 318-319 (quotation marks, brackets and citation omitted).

"Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). In addition, questions involving witness credibility and the weight to be accorded to the evidence are matters for the jury to determine. *Id.*

Defendant's argument is primarily based on his contention that Adams's testimony was incredible because he was an unreliable witness. Witness credibility, however, is a question for the jury, and we are constrained to view the evidence in favor of the prosecution. *Lockett*, 295 Mich App at 180; *Harrison*, 283 Mich App at 378. Therefore, defendant's argument is without merit.

Further, the prosecution presented sufficient evidence for a rational jury to conclude that defendant committed the offenses beyond a reasonable doubt. Adams testified that defendant approached Johnson's driver's side door and remarked that Johnson had a lot of money on him. While Johnson was counting his money, defendant started hitting him, and Shawn opened the passenger door, pushed Johnson, grabbed the car keys, and tried to prevent Johnson from driving away. After Johnson got out of the car, defendant, Shawn, and an unknown man chased Johnson, who fell to the ground. Defendant began stomping Johnson while Shawn hit him. Both men continued beating Johnson while the unknown man went through Johnson's pockets and took a necklace from around Johnson's neck. At one point, defendant used a metal object to beat Johnson, who died of blunt force trauma. Thus, contrary to defendant's argument, the evidence

was sufficient to show that he participated in the attack. Accordingly, the evidence was sufficient to support defendant's convictions.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens