

No. 1-11-2203

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 16394
)	
PATRICK WHITE,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court did not abuse its discretion by allowing the jury to view autopsy photographs during deliberations in trial for first degree murder. The \$200 DNA fee is vacated.

¶ 2 Following a jury trial in May 2011, defendant, Patrick White, was convicted of first-degree murder and sentenced to 55 years' imprisonment. On appeal, defendant contends that he was denied a fair trial when the trial court allowed certain autopsy photographs in the jury room during deliberations. Defendant also challenges the imposition of a DNA fee (730 ILCS 5/5-4-3 (West 2010)) on the basis that his DNA had previously been taken, analyzed, and indexed.

¶ 3 **BACKGROUND**

¶ 4 The State charged defendant with the first degree murder of Joseph John Kenski, who was bludgeoned in his home on August 2, 2002, and died two days later. Police found defendant's fingerprints on restaurant menus recovered inside the victim's home. Police also discovered a brick

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in the home believed to be the murder weapon.

¶ 5 During opening statements, defense counsel informed the jurors that they would hear no testimony as to defendant's DNA being found on the brick which was recovered by the police. Counsel also noted that the witnesses would not testify that they saw defendant "use any sort of object to cause the death" of the victim.

¶ 6 Manuel Hernandez testified that on August 2, 2002, at 3 p.m., he was on the porch of his home on North Greenview Avenue, Chicago, when he saw a man carrying a bag of flyers walk by the victim's home across the street. The man had a flyer in his hand. The man first passed the victim's home, but then walked back and quickly went inside. Hernandez described the man as an African-American, "husky," and as 30 or 40 years old. Hernandez told his wife to call the police, and he and his son went to the victim's home where they found the victim on the living-room floor. As Hernandez left the victim's home, he saw the same man he had seen earlier, but without the bag of flyers, jump the fence and run into the alley. Hernandez testified that he did not see the man's face so he was unable to identify him in a lineup a month later.

¶ 7 Joseph Kenski, the victim's son, testified he lived with his father in August 2002, but was not at home during the incident. He testified that the restaurant flyers were not on the living room floor when he left the house on August 2.

¶ 8 Chicago police officer Gerald Ostafin, a forensic investigator, testified that on August 2, 2002, he took photographs and dusted the victim's home for fingerprints. Officer Ostafin collected evidence from the crime scene, including menus from Ms. Egg Roll and Primo Pizza restaurants, and a brick which were all on the living-room floor.

¶ 9 Nhan Van Vo testified that during the late morning hours of August 2, 2002, he, and the owner of the pizza restaurant, and one other person, passed out menus for the Ms. Egg Roll and Primo Pizza restaurants on Greenview Avenue. He did not know defendant and had never seen defendant before this trial. Vo said that defendant did not pass out flyers with this group on August

2, 2002.

¶ 10 Anthony Rideout testified that he has a prior battery conviction, and that he was currently serving an 11-year sentence on a 2007 conviction for home invasion. On September 27, 2009, Rideout was housed in the segregation unit at the Dixon Correctional Center (DOC), and heard other inmates talking nearby. One of the inmates identified himself as “Patrick.” Rideout could see that the other inmate was an African-American male in A-wing, cell 47, but he could not see his face. Rideout heard Patrick tell another inmate that he was charged with murder and home invasion, and asked if he could be convicted based on a fingerprint on a flyer. Rideout then asked Patrick what county his case was in, and if police found a weapon. Rideout testified that Patrick told him the case was in Cook County, and that no weapon was found, “but it didn't matter because he wiped it down.” Patrick also stated that he had been in a lineup for the murder seven years earlier, but was not identified. Rideout wrote down what Patrick said and notified the State's Attorney's office by letter. Rideout acknowledged that he hoped to get a reduction in his sentence by notifying authorities, but stated that no one had promised him a sentence reduction for his testimony in this case. He was, however, promised that LaSalle County would be notified of his testimony, and that relocation assistance would be provided for his protection.

¶ 11 The parties stipulated that from September 27, 2009, through November 30, 2009, defendant was incarcerated at the DOC and was assigned to A-wing, cell 47.

¶ 12 Holly Williams testified that she has three prior convictions for retail theft. She was then living out of state, and the State had paid her travel expenses to court. Williams testified that she met defendant in 2005 at a “recovery home” for drug addiction. They started dating and lived together for three months at a Chicago hotel. During their three-month relationship, they relapsed, and Williams was using heroin once a day. In July 2005, defendant told her that he had committed a murder on Chicago's north side. He also told her that he had been arrested for the crime, but that he was released because there was insufficient evidence to charge him. Williams testified that she

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was not under the influence of narcotics when defendant made these statements.

¶ 13 The parties stipulated that a DNA analyst would testify that she tested swabs taken from the brick recovered from the victim's home, but found an insufficient amount of DNA material present to generate results.

¶ 14 Latent print examiner Courtney Melendez testified that she examined the brick recovered from the victim's home. She did not find any fingerprints on the brick, noting that "the surface of the brick was not a good surface to receive latent prints." Melendez also examined five paper menus from Ms. Egg Roll and Pizza Primo restaurants that police found in the victim's home. Melendez found four latent fingerprint impressions on the menus which she compared with defendant's fingerprint card and determined that the fingerprints matched. She also compared the fingerprints of four other individuals, including Hernandez and Vo, and determined their prints did not match the fingerprints on the menus.

¶ 15 Dr. Adrienne Segovia, a forensic pathologist, testified that she performed an autopsy which included external and internal examinations of the victim's body. The external examination revealed bruises, scrape marks, and multiple lacerations to the victim's head. There were also bruises on the victim's chest and arms, and bleeding in the white of one of his eyes.

¶ 16 Dr. Segovia testified that People's exhibit number 3 was a photograph of the victim, depicting his head and neck injuries, including bruising around the eyes, and abrasions and scrape marks. Dr. Segovia identified People's exhibit number 30 as a photograph depicting lacerations to the skin on the left side of the victim's head, and bruising surrounding the left ear. People's exhibit number 31 was a close-up photograph of bruising and lacerations to the left side of the victim's head. People's exhibit number 32 was a close-up photograph of the left side of the victim's head depicting lacerations above the left ear. Dr. Segovia identified People's exhibit number 33 as a photograph of the left side of the victim's head, with the ear pulled forward, to show the bruising behind the left ear which she found consistent with internal bleeding in the victim's head.

¶ 17 Dr. Segovia further testified that she made an incision behind the ear, pulled up the scalp, opened the skull, and removed the brain. She observed internal injuries consisting of bleeding over the skull and multiple fractures to the skull itself. There was also bleeding over the brain on both sides and the bottom, and the brain was swollen.

¶ 18 Dr. Segovia then identified the photographs of her internal examination of the victim, including: People's exhibit number 36, showing multiple fractures of the left temporal bone of the skull; People's exhibit number 37, showing the open skull and bleeding on the right side; and People's exhibit number 40, showing the base of the skull and fractures to that area. Dr. Segovia further testified that the victim's injuries were consistent with being struck in the head with an object such as a brick. Dr. Segovia opined that the victim died as a result of cranial cerebral injuries due to blunt head trauma, and that the manner of death was homicide.

¶ 19 Before the State rested, the trial court admitted the autopsy photographs into evidence without objection from defendant. The photographs were not published to the jury at that time.

¶ 20 During closing argument, the State asserted that Dr. Segovia testified that the victim died from "[b]lunt force trauma in the head," and that the victim received a skull fracture from being hit over the head with the brick. The State argued, "what else would you intend to do when you hit someone over the head with enough force to fracture their skull and cause them" to die, other than intending to kill them, or cause great bodily harm?

¶ 21 Defense counsel agreed that the victim was brutally murdered, but argued that this was not at issue in this case. Rather, "the question here is who did it and have they proven anybody did it." Counsel pointed out that Hernandez did not testify about any type of weapon or brick in defendant's hands.

¶ 22 Before submitting the case to the jury, the parties discussed with the trial court which exhibits would be sent to the jury room during deliberations. Defense counsel objected to the autopsy photographs being sent to the jury room and maintained that because defendant did not dispute the

cause of death, there was no purpose for sending those photographs back other than to inflame the jury.

¶ 23 The trial court found that the probative value of the photographs outweighed any prejudice and allowed a certain number of them to go to the jury room. The trial court noted that the State was required to prove *mens rea*, and that the cause of the victim's death and the photographs were material to these issues. The trial court found that four internal examination photographs (People's exhibits numbered 34, 35, 38 and 39) were unduly prejudicial and duplicative and refused to send these particular photographs to the jury room.

¶ 24 The jury was instructed, in relevant part, that the State had the burden of proving defendant performed acts which caused the death of the victim, and that defendant intended to kill or do great bodily harm to the victim, or knew that his acts created a strong probability of death or great bodily harm to the victim. The jury returned a verdict of guilty on the charge of first-degree murder. Defendant filed a motion for a new trial which included a claim that the trial court erred in allowing the postmortem photographs to go to the jury room during deliberations. The trial court denied the motion. This appeal followed.

¶ 25 **ANALYSIS**

¶ 26 On appeal, defendant argues that the trial court denied him a fair trial when it allowed "gruesome autopsy photographs" of the victim in the jury room during deliberations. Defendant contends the photographs had no probative value and were highly prejudicial where he had not contested the cause and manner of death, nor *mens rea*, but denied he was the offender.

¶ 27 In its brief, the State responds that the photographs were properly *admitted* into evidence. In his reply brief, defendant claims the photographs were improperly admitted *and* sent to the jury. Defendant, however, did not object to the admission of the contested photographs and did not raise the admission of this evidence as an issue in his posttrial motion. Accordingly, he cannot challenge their admission on appeal. *People v. White*, 25 Ill. App. 3d 391, 394 (1974); *People v. Wright*, 2012

IL App (1st) 073106, ¶ 119 (2012) (“to preserve an issue for an appellate review, a defendant must raise the issue, first, at trial and, second, in a posttrial motion”). The sole issue on appeal as to this evidence is whether the trial court abused its discretion when it allowed the contested photographs to be sent to the jury room during deliberations.

¶ 28 The decision as to which exhibits may be taken to the jury room lies within the discretion of the trial court. *People v. Montague*, 149 Ill. App. 3d 332, 343 (1986). When making the determination, the trial court must “balance the probative value against any prejudicial effect.” *Id.* at 344. The trial court’s decision “will not be disturbed absent a showing of prejudicial abuse.” *People v. Yoho*, 164 Ill. App. 3d 17, 21 (1987). Because photographs tend to establish facts at issue, it is not necessarily an abuse of discretion for a trial court to permit a jury to view such evidence, even when they are “disgusting or gruesome.” *Id.*

¶ 29 The photographs at issue depicted the external and internal injuries sustained by the victim and were taken during the victim’s autopsy. Dr. Segovia referred to and relied on the photographs during her direct examination. The record reveals that the State laid a proper foundation for the admission of these photographs. The trial court correctly determined that the photographs which were sent to the jury room would allow the jury to better understand the testimony of Dr. Segovia as to the cause and manner of death, and to assess her opinions that the victim died from blunt force trauma to the head, and that his skull fractures were consistent with being hit by a brick. See *Montague*, 149 Ill. App. 3d at 344 (finding the trial court did not abuse its discretion in allowing two photographs to be taken to the jury room where the photographs tended to establish the cause of death, the use of force, the deceased’s wounds, and the manner in which the wounds were inflicted). The trial court further determined that four of the autopsy photographs were overly prejudicial and duplicative, and declined to send them to the jury room. We find the trial court carefully considered the issue and did not abuse its discretion in finding that the probative value of the autopsy photographs which were sent to the jury room outweighed any prejudicial effect, and by permitting

the photographs to go to the jury room.

¶ 30 In support of his argument that the trial court erred, defendant primarily relies on *People v. Garlick*, 46 Ill. App. 3d 216 (1977), and *People v. Coleman*, 116 Ill. App. 3d 28 (1983). His reliance is misplaced.

¶ 31 The *Coleman* court addressed only the issue of the *admissibility* of an autopsy photograph and found the trial court erred in admitting the photograph into evidence where it “had no probative value whatsoever.” *Id.* at 36. The State had argued that the challenged photograph was probative of the victim’s identity. *Id.* But the pathologist had testified that it “was no use to him” in establishing the victim’s identity. *Id.* In this case, we are not faced with an issue of admissibility and the photographs here were probative and aided the jury in its determinations. The holding in *Coleman* does not support reversal in this case.

¶ 32 In *Garlick*, although the defendant argued that he was denied a fair trial when the trial court allowed a “gruesome, color photograph of the deceased’s massive head wound to go to the jury,” the *Garlick* court’s decision was based on its finding that the photograph was not admissible. *Garlick*, 46 Ill. App. 3d at 224. The defendant in that case had admitted guilt, but presented a defense of insanity. The photograph was found to have no probative value as to any material issue in the case, and was found to have only a purpose to inflame the jury which “prejudice[d] the jury in the grossest manner.” *Id.* Here, defendant did not admit the offense and his guilt was an issue in the case. The State had the burden of proving defendant acted against the victim, defendant’s actions caused the victim’s death, and that his acts were done with the requisite intent. The jury was instructed to determine whether the State had met its burden. As we previously discussed, the photographs were probative and material to these issues and not overly prejudicial.

¶ 33 Further, even if a trial court errs in a decision to send photographs to the jury, the error is harmless where there is overwhelming evidence of a defendant’s guilt and it is beyond a reasonable doubt that the photographic evidence did not contribute to the verdict of guilty. *Yoho*, 164 Ill. App.

3d at 21. “The determination of harmless error must be analyzed on the particular facts of each case, considering the trial record as a whole.” *People v. Myles*, 131 Ill. App. 3d 1034, 1044 (1985). “Error is harmless where a reviewing court can safely conclude that a trial without the error would produce no different result.” *Id.*

¶ 34 The State’s evidence included Williams’s testimony that defendant had confessed to committing a murder on the north side of Chicago. Rideout testified that he heard defendant say he had wiped down a murder weapon, and defendant asked if he could be convicted of a murder in Cook County based on a fingerprint found on a flyer. Hernandez observed a man enter the victim’s home with a bag of flyers and one flyer in his hand and flee without them at the time of the victim’s beating. Police found flyers near the victim’s body with defendant’s fingerprints on them. The flyers had not been there earlier that day. The evidence showed that the victim died due to blunt trauma, and his skull fractures were consistent with having been struck by a brick. The police recovered a brick near the victim at the scene. Because there was ample evidence of defendant’s guilt of first degree murder, we find beyond a reasonable doubt that the photographs, even if erroneously sent to the jury room, did not contribute to defendant’s guilty verdict.

¶ 35 Defendant next contends that the \$200 DNA fee must be vacated because he submitted a DNA sample in a prior conviction. Based on the decision in *People v. Marshall*, 242 Ill. 2d 285 (2011), the State agrees. Pursuant to our authority under Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)), we vacate the \$200 DNA fee, and modify the trial court’s order to that effect.

¶ 36 **CONCLUSION**

¶ 37 Therefore, we vacate the \$200 DNA assessment, but affirm the judgment of the circuit court of Cook County in all other respects.

¶ 38 Affirmed as modified.