FOURTH DIVISION
March 31, 2014

No. 1-12-2600

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 1428
	)	
BRIAN HARGARTEN,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in admitting autopsy photographs and an audio recording of a 911 call. Defendant's mittimus is corrected to reflect a single first degree murder conviction.

¶ 2 Following a jury trial, defendant Brian Hargarten was convicted of first degree murder and sentenced to 62 years' imprisonment. He argues on appeal that he was denied a fair trial, where the trial court erroneously admitted autopsy photographs and an audio recording of a 911 telephone call. He further argues that his mittimus incorrectly reflects two first degree murder convictions. We affirm defendant's conviction, but order that his mittimus be amended to reflect a single first degree murder conviction.

¶ 3 I. BACKGROUND

¶ 4 On December 3, 2008, Eduardo Toledo, Jose Rivera, Ramon Rivera, Sergio Rivera, Orlando Ortega and four brothers—Erik, Jose, Alan, and Alejandro Macias—played video games and smoked marijuana in the basement apartment of 6024 South Sacramento Avenue in Chicago, Illinois. After several hours, they set out in two groups. The first walked toward a store at 59th Street and Sacramento Avenue. The second headed in the same direction toward Alejandro's friend's house to retrieve an iPod. Toledo was in the second group, which trailed the first by less than a block. Although the walk was less than two blocks, it required crossing 60th Street, the "boundary" between two gangs: the Ambrose street gang and the Satan Disciples.

¶ 5 As the first group crossed 60th Street, a man wearing a ski mask and dark clothing and holding a gun to his side ran out of an alley and toward the first group. Drawing closer, the gunman appeared to recognize some of the group's members and pulled down his ski mask, revealing his face. Jose Rivera testified that he recognized the man as "Brian," AKA "Crazy." The gunman told the group to start "dippin' forks," indicating that they should display the Satan Disciples' pitchfork hand sign upside down to show disrespect. The gunman then walked toward the alley.

¶ 6 Shortly thereafter, as the second group crossed 60th Street, the gunman approached Toledo. Standing approximately four feet away, the gunman inquired about Toledo's gang affiliation and asked if Toledo had a "shag" haircut, often indicative of gang involvement. The gunman shot Toledo once in the face and ran to the alley. Toledo fell to the ground, and Jose Rivera called 911.

¶ 7 Forensic investigator Brian Smith testified at trial that he videotaped and photographed the scene of the offense. While examining the scene, he also found a fired cartridge case. The

parties stipulated that an Illinois State Police forensic scientist was unable to recover fingerprint impressions from the cartridge.

¶ 8 Detective Jessica Jones testified that she interviewed Erik and Alejandro Macias at the scene, while her partner, Detective Tim Nolan, interviewed Jose Macias. Following these interviews, they searched for an armed 5'6" or 5'7" Hispanic male in his 20s wearing a dark hat, a black jacket, and a ski mask. Days later, after speaking with Toledo's parents, the detectives arranged a photo array, which they showed to Jose Rivera, who immediately identified defendant as the shooter. Defendant was arrested the following day, December 14, 2008. Later that day, Jose Rivera and Alan, Jose, and Erik Macias identified defendant in a lineup and provided police with handwritten statements describing the offense.

¶ 9 The parties stipulated that medical examiner Dr. Ponni Arunkumar would testify that Toledo was shot through his left eye, and the soot and stippling on his face indicated that that he was shot from less than six inches away. Over defendant's objection, the State was allowed to display photographs of Toledo's autopsy while it read the stipulation. The photographs depicted an entry wound in Toldeo's left eye socket and an exit wound at the back of his head. Dr. Arunkumar concluded that Toledo had died from a gunshot wound.

¶ 10 The State was also allowed to play a recording of Jose Rivera's 911 call. Defendant presented no evidence at trial.

¶ 11 The jury deliberated from 6:00 p.m. until 9:00 p.m., when it sent a note stating that it could not reach a verdict. The court sequestered the jury overnight. The following morning, the jury found defendant guilty of first degree murder. It also found that he had personally discharged a firearm that proximately caused Toledo's death. The trial court sentenced defendant to 62 years' imprisonment, which included a 25-year firearm enhancement.

¶ 12 II. ANALYSIS

¶ 13 Defendant raises two issues on appeal. He first argues that he was denied a fair trial, where the trial court erroneously admitted autopsy photographs and an audio recording of Jose Rivera's 911 call. He further argues that his mittimus incorrectly reflects two first degree murder convictions.

¶ 14 A. Evidentiary Issues

¶ 15 Defendant argues that the trial court erroneously allowed the State to publish gruesome autopsy photographs depicting the entrance wound in Toledo's left eye socket and exit wound on the back of his head. Specifically, defendant contends that the photographs lacked probative value, because "[t]he cause of Toledo's death was not an issue at trial," and the photographs were highly prejudicial, because they were "gruesome," "gratuitous," and "gory." The State responds that the photographs were not especially gruesome and were properly shown in an effort to prove every element of the offense.

¶ 16 The parties agree that we should review the trial court's decision for an abuse of discretion. See *People v. Scott*, 148 Ill. 2d 479, 546-47 (1992) (citing *People v. Lefler*, 38 Ill. 2d 216, 221 (1967)) (whether a photograph of the deceased should be admitted falls within a trial court's discretion).

¶ 17 Even gruesome or disturbing photographs may be admitted into evidence if they are "relevant to establish any fact [at] issue." *People v. Lucas*, 132 Ill. 2d 399, 439 (1989); *People v. Garlick*, 46 Ill. App. 3d 216, 224 (1977). Specifically, gruesome evidence may be relevant "to corroborate oral testimony or to show the condition of the crime scene." *People v. Richardson*, 401 Ill. App. 3d 45, 52 (2010). Irrelevant exhibits introduced solely to inflame the jury, however, should not be admitted. *People v. Rissley*, 165 Ill. 2d 364, 405 (1995). Courts must

also weigh an exhibit's prejudicial effect and probative value. *Lucas*, 132 Ill. 2d at 439. If evidence has sufficient probative value, it may be admitted despite its gruesome or inflammatory nature. *Lefler*, 38 Ill. 2d at 221; *People v. Driskel*, 224 Ill. App. 3d 304, 314 (1991). Competent evidence should not be excluded merely because it may arouse feelings of horror or indignation. *Driskel*, 224 Ill. App. 3d at 315.

¶ 18 Here, the parties stipulated that Dr. Arunkumar would testify that Toledo died from a gunshot wound and that soot and stippling indicated that the gun was within six inches of Toledo's face. While the State read this stipulation, it published photographs of Toledo's autopsy on a screen. Defendant objected, arguing that the photographs' prejudicial effect outweighed their probative value. The State responded that the photographs corroborated the eyewitnesses' testimony, as well as the soot and stippling to which Dr. Arunkumar would testify. The trial court agreed with the State and allowed admission and publication of four photographs, but barred the admission of several others.

¶ 19 Defendant argues that the trial court's ruling was erroneous, because neither the cause of death nor the distance from which Toledo was shot was an issue at trial. Defendant's argument has been repeatedly rejected by Illinois courts. See, *e.g.*, *People v. Anderson*, 237 Ill. App. 3d 621, 631-32 (1992) (cause of death and nature of injuries need not be contested at trial to admit autopsy photographs). Autopsy photographs—even gruesome ones—may be admitted if they tend to establish any element of the offense. *People v. Szudy*, 262 Ill. App. 3d 695, 712-13 (1994) (citing *People v. Lucas*, 132 Ill. App. 2d 399, 439 (1989)). Specifically, as our supreme court has observed, "[w]hen a defendant in a murder trial pleads not guilty, the prosecution is allowed to prove every element of the crime charged and every relevant fact." *People v. Chapman*, 194 Ill. 2d 186, 219-20 (2000). "Photographs of a decedent may be admitted to prove

the nature and extent of injuries and the force needed to inflict them, the position, condition and location of the body, the manner and cause of death [or] to aid in understanding the testimony of a pathologist or other witness." *People v. Richardson*, 401 Ill. App. 3d 45, 52 (2010).

¶ 20 The photographs here were probative of the nature and extent of the injuries and the condition of Toledo's body. They also corroborated the stipulated testimony of Dr. Arunkumar regarding soot and stippling. Although these issues were not contested at trial, they concerned elements of the offense that the State was required to prove beyond a reasonable doubt. The photographs—standard autopsy photographs showing the decedent's face, entrance wound, and exit wound—are unpleasant, but not particularly gruesome or gory given the nature of the offense. Further, the trial court was selective in determining which photographs to admit, barring several that were duplicative. Thus, we cannot say that the trial court abused its discretion in admitting and allowing publication of these photographs.

¶ 21 Defendant compares this case to *People v. Garlick*, 46 Ill. App. 3d 216 (1977), and *People v. Coleman*, 116 Ill. App. 3d 28 (1983). Those cases are readily distinguishable. In *Garlick*, the defendant admitted that he had killed his wife, but mounted an insanity defense. *Garlick*, 46 Ill. App. 3d at 221. The trial court allowed publication of "a gruesome, color photograph of the deceased's massive head wound." *Id.* at 224. The appellate court held that, "[i]n view of the defendant's admission of this offense and his defense of insanity, this photograph was not probative of any material issue in this case." *Id.*

¶ 22 In contrast, here, defendant did not admit committing the offense. Thus, at trial, the State was required to prove every element of the offense. *Szudy*, 262 Ill. App. 3d at 713. The photographs were probative of the nature and extent of the injuries and condition of Toledo's body and also corroborated the stipulated testimony of Dr. Arunkumar regarding soot and

stippling. See *People v. Maldonado*, 402 Ill. App. 3d 411, 420 (2010) (distinguishing *Garlick* on similar grounds).

¶ 23 The autopsy photograph in *People v. Coleman* also differed considerably from those in the instant case both in terms of probative value and prejudicial effect. There, the State introduced a photograph of "decedent's decomposing, maggot-infested, partially autopsied body." *Coleman*, 116 Ill. App. 3d at 35. The appellate court noted that "[s]everal teeth are missing, and the brain is exposed and laying next to the head." *Id.* The court noted that calling the photograph " 'absolutely hideous' " was mild. *Id.* Turning to the photograph's probative value, the *Coleman* court observed that the State's pathologist had testified that the photograph was "of no use to him in establishing the identity of the decedent." *Id.* at 36.

¶ 24 As we stated above, the photographs in this case, while unpleasant to view, accurately reflected the harm resulting from the offense. Unlike in *Coleman*, the photographs did not depict decomposition, maggots, or harm caused strictly by the autopsy procedure. While the State's claim that "[t]here is no blood" in the photographs is an exaggeration—several photographs show blood near Toledo's nose, as well as near the entrance and exit wounds—the amount of blood was minimal, and indeed far less than the blood present on Toledo's body at the scene of the offense. Additionally, unlike in *Coleman*, the photographs were probative of the injuries inflicted and corroborative of the medical examiner's stipulated testimony.

¶ 25 In short, because defendant pled not guilty and proceeded to trial, the State had the right—and, indeed, the burden—to prove every element of the offense, regardless of whether defendant considered those elements to be contested issues at trial. *Chapman*, 194 Ill. 2d at 219-20. We hold that the trial court did not abuse its discretion in admitting these photographs.

¶ 26 Defendant also argues on appeal that he was denied a fair trial, where the trial court admitted and allowed publication of the audio recording of Jose Rivera's 911 call. Specifically, as he did with the autopsy photographs, defendant contends that the recording's prejudicial effect outweighed its probative value. The State responds that the recording was probative, because it corroborated Rivera's testimony that he called 911 immediately following the offense and stayed at the scene until he heard sirens.[1]

¶ 27 Evidence is admissible if it is relevant and its prejudicial effect does not substantially outweigh its probative value. *People v. Gonzalez*, 142 Ill. 2d 481, 487 (1991). As our supreme court explained in addressing the admission of a 911 recording, relevant evidence "will not be excluded merely because it may prejudice the accused or because it might arouse feelings of horror or indignation in the jury." *People v. Williams*, 181 Ill. 2d 297, 314 (1998). Rather, trial judges must weigh the prejudicial effect and probative value of a piece of evidence. *Id.* The decision to admit a 911 recording is within a trial judge's discretion, and we will not interfere with that decision absent an abuse of discretion. *Id.*

¶ 28 Here, according to defendant, Rivera was "hysterical" in the 911 recording, "screaming and sobbing that his friend had just been shot in the area of 60th Street and Sacramento and pleading for help." It is true that Rivera sounds hysterical. Much of the recording—less than a minute long—is incomprehensible, though the phrases "they just shot my guy" and "my boy just got shot" can be made out.

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[1] Relying on *Michigan v. Bryant*, __ U.S. __, 131 S. Ct. 1143 (2011), the State also argues that the recording did not constitute hearsay. However, defendant does not raise a hearsay challenge on appeal. Further, *Bryant* concerned the Confrontation Clause, not hearsay. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011 (1998) (describing the difference between the two). Accordingly, we do not address this argument.

¶ 29 Defendant argues that any facts established by the 911 recording's publication had already been established by Rivera's testimony. However, Illinois courts have consistently held that 911 recordings may be admitted, even where they are cumulative to oral testimony. *Williams*, 181 Ill. 2d at 314; *People v. Jurczak*, 147 Ill. App. 3d 206, 213 (1986). Thus, the fact that Rivera testified that he called 911 immediately following the offense does not bar admission or publication of the 911 recording.

¶ 30 Additionally, although the recording captured Rivera in a hysterical moment and may have raised feelings of horror or indignation in the jury, this alone does not bar its admission. *Williams*, 181 Ill. 2d at 314; *People v. Edgeston*, 157 Ill. 2d 201, 237-38 (1993). We agree with the State that the recording was probative and properly corroborated Rivera's testimony that he called 911 immediately after the offense. Although Rivera is clearly shocked and speaking frantically in the call, we cannot say that the call's content was simply inflammatory or that its prejudicial effect outweighed its probative value. We therefore hold that the trial court did not abuse its discretion in admitting and allowing publication of the 911 recordings.

¶ 31 B. Mittimus

¶ 32 Defendant argues that his mittimus inaccurately reflects two first degree murder convictions. The State concedes that the trial court erred. Defendant was convicted of murdering Toledo. There were no other decedents in this case. Yet his mittimus shows two convictions. One corresponds to count 5 and reflects 37 years' imprisonment. The other corresponds to count 1 and reflects 25 years' imprisonment. It therefore appears that the trial judge mistakenly entered a second conviction for the 25-year firearm enhancement. A defendant may not be convicted of more than one offense arising out of the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). Supreme Court Rule 615(b)(1) permits us to correct mittimi

where necessary. Accordingly, defendant's mittimus shall be corrected to reflect a single conviction for first degree murder on count 5 and a sentence of 62 years' imprisonment.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm defendant's conviction and sentence. Petitioner's mittimus shall be corrected to reflect one count of first degree murder.

¶ 35 Affirmed; mittimus corrected.