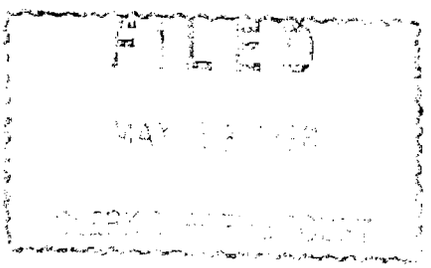
IN THE COURT OF APPEALS OF IOWA

No. 8-137 / 97-280



STATE OF IOWA,
Appellee,

vs.

PAENG SAENGAROUN,
Appellant.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy, Judge.

The defendant, Paeng Saengaroun, appeals two convictions for first-degree murder. **AFFIRMED.**

James A. Schall, Storm Lake, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Charles N. Thoman, Assistant Attorneys General, and Philip E. Havens, County Attorney, for appellee.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Paeng Saengaroun appeals two convictions for first-degree murder.

Saengaroun and his wife, Kong, were having marital problems, with Saengaroun accusing Kong of having an affair.

On April 9, Saengaroun shot Kong and her father, Song Ratsythong, with a .32 caliber pistol. Siphanh Saosauong, a friend of Song's, witnessed the shootings. The State charged Saengaroun with two counts of first-degree murder on April 16, 1996. On January 22, 1997, the jury returned two guilty verdicts of first-degree murder. Saengaroun was subsequently sentenced to two terms of life imprisonment.

I. Amended trial information. In August 1996, the State moved to amend the trial information from two counts of murder in the first degree to include an alternative theory of murder—under either a premeditation alternative or a felony-murder alternative based on the underlying offense of willful injury. Saengaroun shot Kong following her statement to him that she would not "take him back." Immediately after Saengaroun shot Kong, Song said, "You should not do that to my daughter." Saengaroun then shot Song, which supports willful injury as the underlying offense. We note the felony-murder alternative instruction was only submitted to the jury with respect to the murder of Song. The amended information also alleged that Saengaroun was armed with a firearm at the time of the commission of the offenses. The court allowed the amendment.

Saengaroun challenged the amendment arguing no factual basis existed to support a separate charge of willful injury as the underlying felony for the felony-murder alternative.

We review a court's decision to allow an amendment of the trial information pursuant to Iowa Rule of Criminal Procedure 4(8) for errors at law. Iowa R. App. P. 4.; *see Steinkuehler v. State*, 507 N.W.2d 716 (Iowa App. 1993).

We reject Saengaroun's argument as did the trial court. We held in *Steinkuehler*, 507 N.W.2d at 723, that Iowa Rule of Criminal Procedure 4(8)[1] "permits the State to amend an information by charging a different *means* of committing an offense." *Id.* (Emphasis in original.) Thus, we allow an amendment to a trial information if it does not charge a wholly new or different offense and does not prejudice any rights of the defendant. *Id.; State v. Fuhrmann*, 257 N.W.2d 619, 624 (Iowa 1977); *see* Iowa R. Crim. P. 4(8). There is no requirement in Iowa that the

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[1] Iowa Rule of Criminal Procedure 4(8) provides in relevant part:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or admissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

Id. Iowa Rule of Criminal Procedure 4(8) is made applicable to amendment of trial information by Iowa Rule of Criminal Procedure 5(5). *See Steinkuehler*, 507 N.W.2d at 723.

underlying felony—here willful injury—be independent of the homicide. *See State v. Beeman*, 315 N.W.2d 770, 777 (Iowa 1982).

Moreover, we do not find Saengaroun's substantial rights were prejudiced by the timing of the amendment which was granted in August 1996, as he had nearly seven months before the January 13, 1997, trial to prepare a defense addressing the amended information.

Regarding Saengaroun's objection to the trial information amendment reflecting he possessed a firearm during the commission of the offenses, we find any enhanced penalties associated with the firearm amendment had a nominal impact on his case as Saengaroun received two concurrent life sentences. Neither would this have constituted a surprise impacting Saengaroun's trial strategy. *See State v. Gray*, 429 N.W.2d 571, 572 (Iowa App. 1988). We do not find the trial court erred in allowing the amendment.

II. Felony-murder instruction. Saengaroun argues the court erred in submitting the felony-murder instruction for Song when the underlying felony was willful injury. Saengaroun additionally argues the trial court erred in combining the marshaling elements for premeditated and felony-murder in a single instruction.

We will not disturb a trial court's decisions regarding jury instructions unless we find an abuse of discretion. *State v. Cunningham,* 463 N.W.2d 886, 889 (Iowa 1987). We will not reverse this case and order a new trial unless we find the

instructions as a whole insufficiently convey the applicable law. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa App. 1993).

We find Saengaroun's first objection to Instruction 19 lacks merit as willful injury may serve as the underlying felony for a felony-murder charge, as discussed above. *See State v. Ragland*, 420 N.W.2d 791, 793 (Iowa 1988).

Neither do we find merit in Saengaroun's second objection to Instruction 19. *State v. Liggins*, 557 N.W.2d 263 (Iowa 1996) is instructive regarding the permissible construction of jury instructions:

> The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. When a single instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation.

Id. at 267 (citations omitted). We do not in this case question the propriety of including the premeditated murder and felony murder alternatives in the marshaling instruction with regard to Song. It is "consistent with the applicable uniform jury instruction and the murder statute." *See Gavin v. State*, 425 N.W.2d 673, 677 (Iowa App. 1988). We accordingly affirm this issue.

III. Motion in limine. The court denied Saengaroun's motion in limine to exclude evidence regarding threats made by him to Kong in January or February 1996. The contested evidence included testimony from Saengaroun's co-worker, Mr. Needs,

that Saengaroun had told him in November or December of 1995 that if he ever caught his wife cheating he would kill her. Needs further testified that in February 1996, Saengaroun told him he followed his wife and tape recorded her phone conversations, and proceeded to confront her about the affair. When Kong denied the affair, Needs testified Saengaroun told him about the incident where he tied her up with the phone cord and physically tortured her with the hot pepper and a machete.

Additional testimony Saengaroun contends should have been excluded was the testimony of Saeng Ratsythong, his mother-in-law, who also was told Kong was tied up with a phone cord and that he was going to kill her, further relaying acts of torture he committed toward her daughter.

Saengaroun contends his motion in limine should have been granted. We only reverse a district court's ruling admitting evidence of other crimes upon an abuse of discretion. *State v. Butler*, 415 N.W.2d 634, 636 (Iowa 1987).

Rule 404(b) provides for the admissibility of evidence regarding prior misconduct:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We find the testimony of Needs and Saeng was relevant and properly admitted by the trial court to prove malice aforethought (an element of first-degree murder

under Iowa Code sections 707.1 and 707.2), intent, motive, preparation, and absence of mistake or accident. In this vein, the probative value of the evidence substantially outweighs the danger of unfair prejudice. *See* Iowa R. Evid. 403.[2] Even if we would have found the evidence was improperly admitted, we would not find prejudice, and thus no reversible error, as the evidence of a defendant's guilt, including a witness present at the time of the shootings, is overwhelming. *See State v. Brookhiser*, 375 N.W.2d 287, 289 (Iowa App. 1985). We accordingly find the trial court did not abuse its discretion and affirm this issue.

IV. Admissibility of photographs. Saengaroun contends the trial court erred in admitting certain photographs showing the bodies of the victims. The admissibility of photographs of homicide victims lies within the trial court's discretion. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984).

We note Saengaroun did not object to some of the photos, and in any event, failed to cite any authority under this division of his brief. Iowa Rule of Appellate Procedure 14(a)(3) states in relevant part that "[f]ailure in the brief to state, to argue

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[2] Iowa Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

or cite authority in support of an issue may be deemed a waiver of that issue." *Id.* This issue is waived.

We defer to the discretionary call of the trial court as governed by our two-part test for admissibility: (1) is the evidence relevant; and (2) does its probative value outweigh its prejudicial effect. *State v. Fetters*, 562 N.W.2d 770, 778 (Iowa App. 1997). The trial court did not abuse its discretion in this regard.

The medical examiner, Dr. Thomas Bennett, testified as to the nature of the fatal gunshot wounds. We agree with trial court that the autopsy photographs were relevant to illustrate and explain Bennett's testimony. The gruesomeness of autopsy photographs does not render them inadmissible. *State v. Brown*, 397 N.W.2d 689, 700 (Iowa 1986). "Murder is often a gruesome affair giving rise to equally gruesome evidence. That alone is not sufficient reason to exclude that evidence." *Id.*

V. Exclusion of evidence. Saengaroun further argues the trial court erred in excluding from evidence the audio tape and the attendant transcription of the telephone conversation between him and his wife, Kong.

The recorded conversation involves Kong's decision as to whether she should come back to her husband. Saengaroun submits this evidence is relevant because it lacks any threats of violence or intimidation on his part, and would effectively neutralize the State's evidence, demonstrating intent, malice aforethought, and premeditation through his threats between December of 1995 and February of 1996.

We will reverse trial court rulings pursuant to Iowa Rule of Evidence 403 upon a finding of a clear abuse of discretion. *State v. Clay*, 455 N.W.2d 272, 274 (Iowa App. 1990).

The trial court made a judgment call clearly within its discretion. It concluded "parts of the tape were hearsay and that the relevance, if any, of the taped telephone conversation was outweighed by the prejudicial effect on the State . . . [t]he parts of the tape that could be relevant and have some probative value were, in effect, cumulative." *See State v. Gardner*, 490 N.W.2d 838, 841 (Iowa 1992) ("Evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or by considerations of needless presentation of cumulative evidence."). We consider the court's reasoning and decision to exclude this evidence is entirely within its range of discretion; we affirm this issue.

Having considered all issues properly before us on appeal, we affirm the trial court's decision in its entirety and uphold Saengaroun's convictions.

AFFIRMED.