

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA GENE SCHULTZ,

Defendant-Appellant.

UNPUBLISHED

December 11, 1998

No. 204846

Van Buren Circuit Court

LC No. 97-010223 FC

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to two concurrent terms of life imprisonment without parole. He appeals as of right. We affirm.

Defendant argues that the admission into evidence of an audio tape of a recorded conversation between himself and his estranged wife violated the marital communications privilege, MCL 600.2162; MSA 27A.2162. We disagree. The trial court correctly ruled that the marital communications privilege is a narrow testimonial privilege that applies only to a spouse's *testimony* and does not preclude the introduction of a marital communication through other means, including a tape recording. *People v Fisher*, 442 Mich 560, 575; 503 NW2d 50 (1993).¹

Defendant also argues that the trial court erred in admitting into evidence four graphic photographs of the victims, especially where he was willing to stipulate to the relevant facts depicted in the photographs. Again, we disagree. When defendant entered his plea of not guilty, he put *all* of the elements of his criminal offenses at issue. *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). The prosecutor then had the burden of proving each of the elements beyond a reasonable doubt. Even though defendant offered to stipulate to some of the elements, subject to MRE 403, the prosecutor was entitled to present all the relevant evidence of its own choice on every element of the crimes where the point at issue involved more than defendant's legal status. *Id.* at 71. See *Old Chief v United States*, 519 US 172; 117 S Ct 644, 653-656; 136 L Ed 2d 574 (1997).

The admission of photographs as evidence is within the discretion of the trial court. *Mills, supra* at 76. Here, the trial court did not abuse its discretion in admitting the photographs on the basis that they were more probative than prejudicial in showing defendant's intent to kill the victims and to corroborate the testimony of the prosecution witnesses regarding the nature and extent of the victims' injuries. *Id.* at 71, 76-78.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Richard A. Bandstra

¹ We are not sure that our Supreme Court, when it decided *Fisher*, envisioned a situation like the present case, in which one spouse cooperates with police to tape record an otherwise confidential marital communication. Nonetheless, as an intermediate appellate court, we decline defendant's request to "re-examine" *Fisher*. *Riley v Northland Geriatric Center*, 425 Mich 668, 680; 391 NW2d 331 (1986).