STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HEATH ELMER MCGOWAN,

Defendant-Appellant.

UNPUBLISHED
December 15, 2009

No. 274829
Montcalm Circuit Court
LC No. 06-007353-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JAMES GRIFFES,

Defendant-Appellant.

No. 275197
Montcalm Circuit Court
LC No. 06-007355-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINT ALLAN MCGOWAN,

Defendant-Appellant.

No. 276385
Montcalm Circuit Court
LC No. 06-007354-FC

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendants appeal as of right their convictions and sentences for first-degree felony murder, MCL 750.316(b), felony firearm, MCL 750.227b, and receiving and concealing stolen property (firearms), MCL 750.535(2)(b).[1] We affirm defendants' convictions and sentences, but remand to the trial court solely for the ministerial purpose of correcting defendant Heath McGowan's judgment of sentence.

I. Factual History

This appeal concerns the murder of 88-year old Henry Marrott within his home. Marrott was widely referred to as "Walking Sam" in the local area and in the town of Trufant, Michigan where he resided. Marrott's body was discovered by his lawn care service, having noticed an odor emanating from the home and a massive amount of flies at a window. Upon entering the home, a member of the lawn crew observed the victim's legs hanging out of a bed. On investigation, police observed the basement door area to be ajar and that the locking mechanism to the basement "appeared to have been broken or jimmied somehow."

At the time of discovery, the victim's body was badly decomposed and insects had begun to infest the corpse. Forensic entomologists were used to establish the date or time of death. Dr. Richard W. Meritt, an expert in forensic entomology determined the post mortem interval, indicating that the victim's death occurred on either July 19 or July 20, 2002. A forensic dentist confirmed the victim's identity by comparing his dental records with the jaw of the corpse. The medical examiner concluded that the victim's death was a homicide caused by "craniocerebral trauma or head injury."

There were no immediate arrests and a reward was offered for information. Police interviewed hundreds of people during the three-year investigation of this murder, which later evolved into a "cold case investigation" by the Michigan State Police. Timothy Hannah brought defendant Heath McGowan's name to the attention of police approximately four months after the death, while an inmate at the Montcalm County Correctional Facility. Police continued to investigate the crime leading to Heath McGowan becoming a more prominent suspect. However, it was not until a one-man grand jury was convened in the fall of 2005 that information was obtained and "this case burst wide open." Following a five-day hearing, in early 2006 the grand jury authorized indictments for Heath McGowan, Clint McGowan, Eddie Griffes, Michael Hansen and Melissa Mudgett on 14 separate counts, including open murder and felony murder.[2] In addition, indictments were also authorized for Tara Waldorf and Brian Hansen[3] for one count each of accessory after the fact.

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[1] Defendant Heath McGowan was also convicted of first-degree premeditated murder, MCL 750.316. Defendants were convicted of additional felonies, which the trial court either dismissed or vacated the sentences pertaining to these offenses.

[2] At the time of this trial, Heath McGowan was already incarcerated for an unrelated felony conviction of operating and maintaining a methamphetamine laboratory.

[3] Unrelated to Michael Hansen.

Ultimately, co-defendant Michael Hansen pleaded guilty to second-degree murder, receiving a sentence of 22 ½ to 50 years imprisonment.[4] In return, Hansen testified regarding the events leading up to and occurring after the murder. According to Hansen, while at the home of Tiffany Taylor, he and Heath were informed that Marrott had both Oxycontin and money in his home. Later, when at Jody Smith's apartment, Smith and the co-defendants discussed going to the victim's house when he would not be there to steal the money and drugs. Heath and Clint McGowan, along with Griffes, Hansen and two women, Tara Waldorf and Melissa Mudgett drove to the victim's home in the evening. Waldorf and Mudgett remained in the vehicle. The McGowans, Hansen and Griffes entered the victim's home. Hansen remained at the front door as a lookout. Contrary to their expectations, Marrott was at home and argued with Heath. Hansen indicated that Heath struck Marrott in the head "with his hand or something." While in the home, the McGowans and Griffes searched for drugs and money and left with an "old black powder pistol," an unknown quantity of Oxycontin pills and a "lock box" containing money. The four men and two women then drove to a state recreational facility for the visually disabled located near the home of McGowans' parents, later referred to as "the blind camp." At that location, the pills and money were divided.

Tara Waldorf acknowledged being in the vehicle and at the victim's home with the McGowans, Griffes, Hansen and Mudgett when the crime occurred. At the time of these events she was approximately 16 years of age and had been drinking heavily with Mudgett throughout the day. Waldorf and Mudgett remained in the vehicle when the men entered the home. Waldorf indicated that the men were arguing when they returned to the vehicle and that Clint was punching Heath's seat. She recalled Clint carrying a metal box upon return to the vehicle, but did not remember any other significant details regarding the evening. Waldorf acknowledged lying to the grand jury and police on at least three occasions. She indicated she was not aware of Griffes' name initially, but did identify him as being in the vehicle through photographs shown during the grand jury. In return for her testimony, Waldorf was allowed to plead to being an accessory after the fact and was placed on probation through the Holmes Youthful Trainee Act (HYTA).

Melissa Mudgett was the girlfriend of Heath McGowan and the mother of at least one of Heath's children. She was friends with Waldorf, the McGowans and Hansen at the time of the events and was also a methamphetamine addict. Mudgett testified that she and Tara met up with the McGowans, Hansen and Griffes and were told they were going to get some pills. She recalls stopping at the victim's house, but she remained in the vehicle with Waldorf. When the men returned to the vehicle from the home, Clint had a box and the men were angry. She recalled Heath having pills and money and saying, "I beat him up . . . ." Mudgett discovered that Marrott was killed several days later when Heath "said he beat an old man and put him under a mattress." She also overheard conversations between Hansen and Heath indicating a need to "get rid of the gun." She testified that while in the vehicle leaving the victim's home that Clint acknowledged that Heath had beaten "that guy up and messed him up pretty bad." Mudgett admitted lying repeatedly to police and the grand jury regarding her lack of knowledge of the events. Mudgett

[4] Hansen was a friend of Heath McGowan. Hansen was also a methamphetamine addict and assisted Heath McGowan as a methamphetamine cook.

was jailed for one and one-half weeks as a material witness. At that time, she requested to speak with police, as she was pregnant and near her due date. Mudgett pleaded guilty to being an accessory after the fact, but had not been sentenced at the time of trial. She indicated her belief that she would receive sentencing consideration and anticipated her sentence would be "[t]hree years felony probation, with a fine."

II. Issues and Analysis

A. Denial of Expert Witness Fees

On appeal, defendants all contend the trial court erred in denying them expert witness fees to permit them to retain an expert witness to testify regarding the effects of methamphetamine use on memory, effectively denying them a defense. Defendants also challenge the trial court rulings, which permitted Detective Sally Wolter to testify regarding the effects of methamphetamine use on various witnesses. Defendant Heath McGowan also asserts the ineffective assistance of counsel due to the failure of his attorneys to bring or join in co-defendants' motion for expert witness fees. This Court reviews for an abuse of discretion a trial court's decision on a motion for payment of expert witness fees. See *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002).

The trial court conducted a hearing on a series of pretrial motions, including a written motion by counsel for defendant Griffes seeking expert witness fees. Defendant sought $1200 to retain Ben Kuslikis, Ph.D. as an expert witness in pharmacology and toxicology. Counsel asserted testimony from such an expert was necessary to aid the jury in understanding "why these witnesses are making these false statements" and, impliedly, to challenge their credibility based on memory problems evidenced by habitual methamphetamine users. Counsel for defendant Clint McGowan did not file a written motion, but orally concurred regarding the necessity of securing funds to retain this expert to testify at trial given the indigent status of defendants. Notably, Griffes' counsel implied that the presence of the proposed witness would be of assistance to almost everyone, stating: "It's probably going to help the Prosecution in a certain fashion here, probably against Heath McGowan . . . ." Counsel for defendant Heath McGowan was not present and did not participate.

The prosecutor contested the necessity of defendants securing an expert witness, since all of the purported witnesses readily acknowledged difficulties with their memories and that cross-examination would be sufficient to demonstrate these problems and was the proper method to challenge their credibility. The prosecution expressed concern for the jury's potential misuse of the expert's testimony in determining the credibility of these witnesses.

In ruling, the trial court discussed the requirements of MCL 775.15 and MRE 702 and case law interpreting those provisions. The trial court rejected defendants' request for expert witness fees finding that the reasons "defendants want them here for is to have Dr. Kuslikis to testify about the credibility of witnesses and that's not understanding the evidence to determine the facts at issue."

At trial, Michigan State Police Detective Sergeant Sally Wolter, the lead investigator for this homicide, testified regarding her experience, education and training with regard to methamphetamine users and laboratories. Wolter described her experiences in dealing with methamphetamine users, indicating they demonstrated "similar" behaviors, including insomnia and paranoia. Describing the methods used to interview methamphetamine addicts, Wolter acknowledged severe memory deficits for these individuals and the problems inherent in attempting to secure reliable information. Wolter testified that she interviewed the various witnesses when they were incarcerated on other charges in order to have access to them when they were "sober." With specific reference to Melissa Mudgett, Wolter acknowledged that, initially, the witness repeatedly denied any knowledge or involvement in this crime. On the third interview with this individual, Wolter discovered that taking the witness to the actual physical environment of the local blind camp served as a trigger for her to recall the events and identify the other individuals present pertaining to this homicide. Based on her experience, Wolter also testified regarding the "street value" of $65 for an Oxycontin pill and the existence of a "code of silence" among methamphetamine users.

The denial of the request for funds for an expert was also addressed on remand from this Court to the trial court of defendants' motions for a new trial based on newly discovered evidence. On remand, the trial court again denied the propriety of awarding funds for an expert. Based on the determination that expert witness fees were not required, defendant's claim of ineffective assistance of counsel for failure to join in the original motion with co-defendants was determined to have no merit.

Authorization for the payment of expert witness fees for an accused is statutorily based. MCL 775.15. The statute leaves the decision to approve the payment of expert witness fees for a defendant to the discretion of the court when the accused can demonstrate "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . ." *Id.* A defendant must show a nexus between the facts of the case and the need for the expert, and there must be an indication that the expert testimony would likely be of benefit to the defense. *Id.;* see, also, *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

Contrary to defendants' assertions, the trial court properly declined to award expert witness fees. Defendants' proposed expert was to be used to call into question the testimony of witnesses who were admitted methamphetamine addicts based on problems evidenced with memory and cognitive functioning. Given that every witness identified as a methamphetamine user openly acknowledged that they experienced problems with their memory and recall of events, an expert was unnecessary. Each witness, on direct examination by the prosecutor, repeatedly acknowledged their inability to clearly recall events or place events into a time perspective and complained of difficulties with their memories. The lack of reliability regarding their recall was further explored and emphasized on cross-examination. Even testimony by the lead investigating officer, Wolter, acknowledged that methamphetamine addicts demonstrated poor memories and difficulty with the recall and temporal sequencing of events. At best, an expert's testimony would have been merely duplicative and the absence of an appointed expert did not serve to deprive defendants of an opportunity to put forth their defense.

Further, Wolter was not actually qualified as an expert, reducing any risk that the jury might place undue emphasis on her testimony. Noting that Wolter was "certified" in

methamphetamine laboratories and their dismantlement merely served to explain her experience and training as an investigator and her familiarity with methamphetamine addicts as a means to provide the jury with background on the difficulties encountered in this investigation and to explain the length of time that passed between the commission of the actual crime and effectuation of arrests. Based on the instructions provided, the jury was clearly made aware that it was free to accept or reject Wolter's testimony. Moreover, Wolter's testimony did not provide the sole evidence pertaining to defendants' participation in this murder, given the testimony of other individuals, such as Michael Hansen, who were present at the scene. As such, defendants have failed to establish any error or impediment to their ability to present a defense.

Heath McGowan separately contends that his defense counsel was ineffective for failing to seek or join with co-defendants in seeking the appointment of an expert. To establish ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for the attorney's error, a different outcome reasonably would have resulted. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Defendant has failed to establish an evidentiary error regarding the trial court's denial of expert witness fees. Accordingly, he cannot establish a claim for ineffective assistance of counsel for his attorney's failure to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. Peremptory Challenges

Defendants assert the trial court committed reversible error during jury selection because of inconsistencies in the method of rotation used in exercising their peremptory challenges. Defendant Heath McGowan contends the trial court erred in the number of peremptory challenges awarded to defendants and the prosecutor based on a conflict, existing at the time of trial, between the relevant court rule and statute governing peremptory challenges. This Court reviews alleged violations regarding the process for the proper selection of a jury de novo. *People v Fletcher*, 260 Mich App 531, 554; 679 NW2d 127 (2004).

At the outset of jury voir dire, the trial court rotated peremptory challenges between the prosecutor and defendants' counsel. After the prosecutor had exercised four peremptory challenges and defendants had exercised 12 peremptory challenges[5] using this rotation and followed by the exercise of seven consecutive peremptory challenges by the prosecution, the problem and a method to correct the rotation was identified. Upon resumption of the jury voir dire, peremptory challenges were rotated between the prosecutor and alternating defendants until the jury was approved and seated. At the point of approving the jury, the prosecutor had exercised 15 peremptory challenges, counsel for Heath McGowan had expended all nine of his challenges, whereas Clint McGowan retained one peremptory challenge, having expended eight and counsel for Griffes, inexplicably used ten peremptory challenges.

In accordance with MCR 6.412(E)(1), each defendant was provided nine peremptory challenges with the prosecutor having 27 peremptory challenges based on the number of

[5] Counsel for each defendant had exercised 4 peremptory challenges.

defendants. Heath McGowan and Griffes contend that the trial court erred in granting each defendant only nine peremptory challenges in accordance with the court rule and assert that the proper number of challenges to be exercised was defined by statute. At the time of trial, and before amendment of this statute by 2006 PA 655, MCL 768.13 provided, in relevant part:

> Sec. 13. Any person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily 20 of the persons drawn to serve as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily 15 of such persons, and no more. In cases involving 2 or more defendants, who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily 20 persons returned as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times 15 of the persons returned as jurors as there may be defendants being so jointly tried.

Defendants Heath McGowan and Griffes contend defendants were each entitled to additional peremptory challenges, or to 20 peremptory challenges each.

While defendants are correct that a conflict existed between the relevant court rule and statute pertaining to peremptory challenges, they incorrectly assert that the statute governs the court rule in such a procedural matter. As discussed by this Court in *People v Watkins*, 277 Mich App 358, 363; 745 NW2d 149 (2007):

> Our Supreme Court has exclusive rulemaking authority with respect to matters of practice and procedure for the administration of our state's courts. Const 1963, art 6, § 5, *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007). Generally, if a court rule conflicts with a statute, the court rule governs when the matter pertains to practice and procedure. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). However, to the extent that the statute, as applied, addresses an issue of substantive law, the statute prevails. See *id.*

Therefore, defendants have failed to demonstrate any error since the number of peremptory challenges provided to each defendant and the prosecutor was consistent with the applicable court rule governing peremptory challenges.

A criminal defendant has the right to be tried by a fair and impartial jury, US Const, Am VI; Const 1963, art 1, § 20, but has no constitutional right to peremptory challenges. The right to peremptory challenges arises from statute, MCL 768.12, and court rule, MCR 6.412(E). *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), overruled in part on other grounds *People v Miller*, 482 Mich 540 (2008). "[P]eremptory challenges have long been an important tool for ensuring a fair trial, both in fact and in appearance," and "Michigan common law has long provided that peremptory challenges could be exercised at any time before the jury was sworn." *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998), abrogated on other grounds *People v Bell*, 473 Mich 275 (2005). All three defendants assert the failure to follow the proper rotational method for exercise of peremptory challenges constituted reversible error. The methodology to be used to exercise peremptory challenges is contained in MCR 2.511(E)(3).

Initially, we note that Clint McGowan exercised only eight of his allotted nine peremptory challenges. MCR 6.412(E)(1). When presented with the final two opportunities to exercise his remaining peremptory challenge before impaneling the jury, defendant's counsel elected to "pass." In accordance with MCR 2.511(E)(3)(b), "[a] 'pass' is not counted as a challenge *but is a waiver of further challenge to the panel as constituted at that time."* (Emphasis added). Because counsel for Clint McGowan exercised only eight of his nine peremptory challenges and by "passing" indicated his satisfaction with the jury, appellate consideration of the propriety of the jury selection method should be deemed waived for this defendant. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990).

With regard to the remaining two defendants, it should be noted that MCR 2.511(A)(4) permits the selection of jurors "by any other fair and impartial method directed by the court or agreed to by the parties." In this instance, defendants did not actually object to the jury selection procedure being used by the trial court. When the irregularity in the rotation process was brought to the trial court's attention, a corrective action was developed and followed without objection by defendants. Further, the record does not indicate any objection or refusal to express satisfaction by defendants to the seating of the jury. Under these circumstances, reversal is not warranted. *Fletcher*, *supra* at 555-556. Moreover, while the jury selection process was acknowledged by the trial court to be flawed, we cannot conclude that the process was unfair or that defendants were deprived of having an impartial jury hear their case. MCR 6.412(A); MCR 2.511(A)(4); *People v Green (On Remand)*, 241 Mich App 40, 48; 613 NW2d 744 (2000). Defendants seem to imply that the procedure followed was improper because each party would not exhaust its peremptory challenges at the same time. However, there is no authority to support this contention and, in fact, this Court has previously rejected such an argument. See *People v Finney*, 113 Mich App 638, 641; 318 NW2d 519 (1982); *People v American Medical Centers, of Michigan, Ltd*, 118 Mich App 135, 146-148; 324 NW2d 782 (1982). In addition, MCR 2.511(E)(3)(c) specifically provides for situations in which one party will have exhausted all of their peremptory challenges while another party has peremptory challenges remaining. Notably, defendants have failed to identify any of the seated jurors they would have peremptorily challenged, have not otherwise established any potential unfairness in exercising all of their peremptory challenges, and have identified no prejudice suffered by them resulting from the makeup of the jury. As such, defendants' contention of error fails.

C. Autopsy Photographs

Defendants also object to the admission of autopsy photographs depicting the decomposing and maggot-infested skull of the victim as unnecessarily gruesome and prejudicial. Defendants argue that use of the photographs was completely unnecessary since the cause of the victim's death was undisputed. This Court reviews the admission of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Further, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether . . . a rule of evidence precludes the admissibility of evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Specifically, defendants contend that a series of ten photographs, comprising two exhibits, depicting the victim's decomposing skull and the presence of maggots was unnecessarily prejudicial and should not have been shown to the jury. Defendants filed a pretrial

motion seeking to preclude the use of the photographs by the prosecution. The trial court did not preclude the use of the photographs but limited those used to the ones presented at the motion.

At trial, during the testimony of the medical examiner, Dr. Stephen Cohle, two exhibits (identified as numbers 105 and 106), comprised of ten photographs of the victim were admitted. Exhibit 105 contained "six photographs of the body, mostly of the head," while exhibit 106 was comprised of "four photographs, primarily of the neck area, but a couple of pieces of skull." All of the photographs comprising these exhibits were taken during the autopsy of the victim. Defense counsel indicated they relied on their "previously stated . . . objections" when the prosecution sought formal admission of the photographs/exhibits at trial.

Based on testimony by Dr. Cohle, the photographs comprising exhibit 105 showed (a) "the appearance of Mr. Marrott's head as he was received," (b) a view of the victim's head following removal of decomposing tissue, which showed "multiple fractures, particularly of the upper jaw" along with "fractures on the right side of the forehead," (c) the right side of the victim's head showing a "number of complex fractures" and depicting a "depressed fracture where a hard object struck him on the head and drove some of the skull fragments inward," (d) a view of the top of the head and right side of the skull evidencing fracture lines, (e) a "view of the floor of the skull" following removal of the skull cap with a bone saw, which showed a "fracture line." Dr. Cohle noted that many of the bones in this area were "missing" due to the severity of the fractures and the process of decomposition. The sixth picture in this exhibit displayed the "upper mid-back area" where a substantial amount of tissue was missing. Dr. Cohle indicated that the process of decomposition precluded his ability to "rule out" damage to the area due to the absence of tissue to examine. When questioned regarding these photographs, Dr. Cohle opined that the victim suffered "at least four to five severe blows . . . to the top of his head and to his face." Although a fist could have caused some of the facial fractures, Dr. Cohle opined that the victim had to be struck with an object to cause the "depressed fracture of the head or a complex fracture of the skull."

Of the four photographs comprising exhibit 106, the first photograph showed "two pieces of skull" demonstrating fragmentation, which were found in that condition and not caused by the autopsy process. Dr. Cohle noted that one of the skull fragments demonstrated the existence of "black . . . smudgy material," which he opined "was transferred from whatever weapon was hitting him on the head." Dr. Cohle indicated this photograph was taken "to show the black material on the edges of the fractures and . . . to show that there were actually pieces of skull that were just created by his head being hit." The remaining three photographs of this exhibit showed the victim's neck area; specifically, the victim's Adams' apple or "thyroid cartilage" and a fracture to the "hyoid bone." Dr. Cohle indicated that the photographs of the victim's neck area were to demonstrate "that the bony structures and the cartilaginal structures in the neck are fractured, due to either a great deal of force applied to the neck in the form of a blow such as a karate chop or something like that, or perhaps just from manual strangulation." Dr. Cohle indicated that he found no evidence of a bullet wound on the victim, but could not expressly rule out the possibility of the victim having been shot and the wound not being evident due to the location and subsequent decomposition.

In accordance with prior rulings by our Supreme Court, photographic evidence is admissible for the purpose of corroborating the testimony of a witness. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Photographs are not deemed to be

inadmissible simply because other testimony or evidence encompasses the same issue, or simply because they are gruesome or difficult to view. *Id.* It is only when evidence is so unfairly prejudicial that its prejudicial effect would substantially outweigh its probative value that it will be deemed inadmissible. MRE 403. Notably:

> Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994) (citations omitted).]

Only two of the ten photographs admitted actually show the decomposing body or skull of the victim and the maggot infestation. As such, the majority of the photographs are not unnecessarily gruesome or prejudicial merely because they were taken during the autopsy process. The remaining photographs show portions of the victim's skull and internal neck structures, which are relevant to verify both the manner of death and the type and severity of force used to kill this victim. Although defendants did not contest the manner of the victim's death, the prosecutor retained the burden and duty of proving all of the elements of first-degree murder, including intent. *People v Mesik (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (2009), slip op p 5. The photographs were of assistance in meeting the prosecutor's burden given their depiction of the extent and nature of the victim's injuries. Despite the testimony of the medical examiner regarding the nature of the injuries, the jury is not required to depend exclusively or solely on the testimony of an expert, but is entitled to observe the extent and nature of the injuries for itself. *Mills*, *supra* at 72-73. Further, of integral importance in this trial, was the establishment of a date of death for the victim, which necessitated the testimony of a forensic entomologist. As such, the two photographs depicting the decomposed state of the victim's body were probative of the methodologies employed to determine a time/date of death for the victim and, thus, served an instructive purpose for the jury. Finally, even if this Court were to concur that the trial court should have exercised its discretion and omitted two of the ten photographs, given the amount of other evidence of defendants' guilt, it cannot be said that it is more probable than not that the result of the trial would have been different. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

D. Spousal Privilege

Defendant Heath McGowan contends the trial court erred in failing to advise his wife, Lori McGowan, of her right to exercise her spousal privilege and not testify against her husband. On appeal, Heath submits the one-page affidavit of his former wife, Lori McGowan Linderman, dated April 18, 2008, averring that she was not informed of her "spousal privilege" and that, had she been informed of this right, she would not have testified against defendant at trial.

Lori testified before the grand jury and as a witness called by the prosecution. Lori acknowledged that she had filed for divorce and was awaiting a final judgment.[6] Based on

[6] Per Lori's affidavit, she and Heath were married from June 29, 2001 until November 1, 2006.

defendant's failure to object at trial, this issue is unpreserved and need not be addressed unless a curative instruction would not have eliminated the prejudicial impact or failure to address the issue would result in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Notably, the majority of the alleged errors do not involve a confidential *communication*, which is a prerequisite to invoke the spousal privilege.

At trial, Lori asserted she did not use any controlled substances, but that she had observed Heath and his friends using drugs on a regular basis. Lori described Heath's behavior as "pretty out of control" when using illegal substances. She testified that she first became aware of the murder of Henry Marrott on January 22, 2003, "[b]ecause that was the day that Heath told me he killed him." Allegedly, at the time Heath made these statements to Lori, Brian Hansen was also present. On cross-examination, Lori indicated that Heath was not specific in making this admission in that he did not disclose the name, location, date or any identifying information pertaining to the alleged murder victim. Lori acknowledged when she later asked Heath about this admission, he denied having committed the murder or making such a statement. Lori acknowledged that she had heard of Heath "being involved in a murder before this," and admitted that she initially denied any knowledge about the murder when interviewed by police stating, "I didn't know for sure because when he told me, he was on drugs and I wanted to give him the benefit of the doubt, being his wife."

In her 2008 affidavit, Lori implies coercion by police in securing her testimony, averring: "That the police threatened that, unless I testified truthfully against Heath, my children would be taken away from me and I would be prosecuted for perjury and sent to prison." However, at trial when questioned by the prosecutor Lori acknowledged her testimony to be voluntary, indicating, "Because if he did it, there needs to be some justice for the guy." She specifically denied any coercion, particularly with regard to threats regarding the custody of her children, in procuring her testimony.

Heath asserts the trial court erred in allowing Lori to testify against him without having been informed of her spousal or marital communication privileges pursuant to MCL 600.2162(2) and (7). At the outset, this Court finds that Lori's testimony regarding Heath's purported admission to having committed a murder does not violate the marital-communications privilege because of the undisputed presence of Brian Hansen at the time of the disclosure. "To invoke the marital communications privilege, the communication must be made during the marriage, be intended to be confidential, and not be made in the presence of a third party." *People v Fisher*, 442 Mich 560, 588 n 10; 503 NW2d 50 (1993) (citations omitted). The alleged statement could have also been admissible through the testimony of Brian Hansen. In addition, it is important to note that Lori does not recant any of her testimony, but merely asserts she would have invoked her spousal privilege to avoid testifying.

A review of the testimony by Lori demonstrates that it was cumulative or duplicative of the testimony of other witnesses, including defendant. In addition to Lori, at least 16 additional witnesses at trial testified that Heath had either admitted to murdering this specific victim or had made general statements indicating he had murdered someone. Consistent with Lori's testimony, several other witnesses averred that Heath not only used illegal substances but was also a methamphetamine "cook." Heath acknowledged his own drug use and his contentious relationship with his brother, Clint, who also admitted to strained relations with Heath. Michael Hansen, who acknowledged being present at the scene of the murder, testified regarding the

volatile nature of Heath's temper and its relationship to his drug use. Griffes also testified regarding Heath's paranoid behavior. Hansen, along with Melissa Mudgett, indicated they observed Heath with the sawed off barrel of a gun, which was confirmed by Paul Donald of the Michigan State Police Laboratory, who verified the presence of Heath's DNA on the gun barrel.

Notably, Heath only asserts he was prejudiced by his wife's testimony, not that such testimony impelled defendant to testify at trial. See *Harrison v United States,* 392 US 219, 222; 88 S Ct 2008; 20 L Ed 2d 1047 (1968). As discussed by this Court in *People v Armentero,* 148 Mich App 120, 128-129; 384 NW2d 98 (1986):

> [T]he only modern justification for the spousal privilege is preservation of martial harmony . . . . [T]he spousal privilege in Michigan is narrow in its justification and ought to be correspondingly narrowly construed in its scope. [Citing *People v Wadkins,* 101 Mich App 272, 283; 300 NW2d 542 (1980).]

As noted in *People v Love,* 127 Mich App 596, 601; 339 NW2d 493 (1983), aff'd in part and rev'd in part 425 Mich 691 (1986), the statutory spousal privilege does not have a constitutional foundation. Consequently:

> This leads to the conclusion in the within case that the violation of [the] spousal privilege did not result in the admission of "illegal evidence . . . . The evidence was improper under a general marital harmony policy of state statutory law, but not "illegal" as an infringement of a basic constitutional right or as unreliable evidence which would deny defendant a fair trial. [*Armentero, supra* at 129.]

In this instance, the recognized purpose underlying the spousal privilege was inapplicable as Lori and Heath were within days of the dissolution of their marriage. Further, as the right or privilege was vested in Lori, under the circumstances of this case, there is no remedy for Heath given the limited nature of his allegations on appeal and because Lori's testimony did not, primarily, deal with spousal communications. The vast majority of Lori's testimony was cumulative to that of other witnesses who provided more damaging and specific testimony regarding Heath's admission to the murder and his behavior. Further, there existed a balance in Lori's testimony given her acknowledgement that Heath later denied any admission to the murder and that she doubted his veracity at the time of the damaging statement due to his drug use. Lori also provided exculpatory testimony suggesting that the monies used by Heath to purchase a vehicle and other items was obtained through her and not the result of having robbed the murder victim. Finally, the veracity of the statements contained in Lori's affidavit are suspect given her sworn trial testimony that she voluntarily went to police and the lack of coercion in gaining her cooperation. As such, any error is harmless, particularly based on the absence of any suggestion that Lori's testimony was not reliable.

E. New Discovered Evidence

Defendants Heath and Clint McGowan contend this matter should be remanded to the trial court for additional hearings based on new discovered evidence involving the affidavits of Jonathan Klunder and Melissa Mudgett. A new trial may be granted based on newly discovered evidence. *People v Davis,* 199 Mich App 502, 515; 503 NW2d 457 (1993). For a new trial to be granted, a defendant is required to demonstrate: "(1) 'the evidence itself, not merely its

materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress,* 468 Mich 678, 692; 664 NW2d 174 (2003) (citation omitted). In other words, a defendant is required to show the existence of both "'good cause' and 'actual prejudice.'" See *People v Kimble,* 470 Mich 305, 313-314; 684 NW2d 669 (2004).

This case has already been remanded back to the trial court twice to address claims of newly discovered evidence. The first remand occurred on May 23, 2008, when this Court directed the trial court to address an affidavit by a prison inmate, Jonathan Klunder, asserting newly discovered evidence, which would exculpate defendants. Klunder asserted he is familiar with Aaron, Anthony and Kyle Chapman. Aaron and Anthony Chapman were convicted of the murder of an elderly woman in Montcalm County, which occurred in 2001. There existed similarities between her murder and that of Henry Marrott regarding the method of murder and age of the victims. Kyle Chapman was granted immunity in exchange for his testimony in the 2001 murder. Klunder claimed to have a conversation with Kyle Chapman in 2004 suggesting that both the murder of the elderly woman and the murder of Marrott were committed by the Chapmans. This information was not provided to police and was not even conveyed by Klunder to Clint McGowan until February 2008, when both men were prisoners at the Cotton Correctional Facility. Following a hearing, the trial court rejected the motion for a new trial ruling that Klunder's statements constituted hearsay "of a prison snitch," which was "not consistent with the other eye witnesses and is not consistent with the fact that Heath McGowan told several other witnesses that he was involved in the killing." The trial court ruled the Klunder affidavit to constitute "non admissible hearsay which recites further hearsay information from Kyle Chapman told to Klunder." In addition, the trial court indicated that Klunder's testimony "was ambiguous and not credible." The trial court found the testimony of Kyle Chapman denying any inculpatory statements to Klunder to be more credible and consistent with both the facts and evidence given the ambiguity of the statements reported by Klunder.[7] It deemed the inconsistencies between the statements purportedly made by Chapman to Klunder and Chapman's trial testimony to not constitute a basis for a new trial "because newly discovered evidence is not grounds for a new trial where it merely [sic] used for impeachment purposes."

On January 13, 2009, this Court issued a second remand order to the trial court to take testimony from Melissa Mudgett and Sally Wolter due to an affidavit from Mudgett recanting her trial testimony. Mudgett claimed that police coerced and prompted her testimony and that she picked Griffes picture at random from a photographic line-up and that Heath did not commit the murder. The trial court conducted an evidentiary hearing, but Mudgett refused to testify invoking her Fifth Amendment rights. On remand, the trial court first addressed the

[7] In addition, Chapman previously informed police that Heath McGowan had admitted to him that Heath killed Marrott and reasserted this as fact at the evidentiary hearing conducted regarding Klunder's affidavit. Chapman was a witness at the Marrott murder trial and testified that Heath admitted beating an old man to obtain drugs in Trufant. Chapman also denied being in Michigan in July of 2002.

admissibility of Mudgett's affidavit pursuant to "*People v Poole*, 444 Mich 151, (1993)[8] and *People v Taylor*, 482 Mich 368 (2008)." The trial court noted that it viewed the affidavit as a statement and not as a confession because Mudgett did not admit guilt.

The trial court evaluated the admissibility of the affidavit in accordance with MRE 804(b), finding Mudgett met the requirement of being unavailable based on her assertion of her Fifth Amendment right and then proceeded to evaluate the categories of evidence within MRE 804(b) "that are not excluded by the hearsay rule if the declarant is unavailable as a witness." The trial court specifically found that only exceptions (3) statement against interest and (7) other exceptions were applicable and proceeded to evaluate each in accordance with the requirements elucidated in *Poole*. Evaluating the affidavit as a statement against interest the trial court found that although it was voluntary, it was not made contemporaneous with the murder. The trial court also determined that the statement was not made to friends, family, colleagues or confederates, but rather attorneys "who did not represent her and with whom she had had no prior contact," which did not favor admissibility. In addition, the statement was not "uttered spontaneously" but was the product of prompting and questioning by the attorneys and made at the request of the McGowan parents. The trial court noted that the attorneys prompting the statement "were Officers of the Court who gave her bad information or no information when she asked questions as to the consequences of her statement." Further, the trial court found that the attorneys prompted the McGowan parents to seek Mudgett's statement. Other factors favoring inadmissibility are the negation in the statement of any responsibility by Mudgett through her assertion now that she was not even present and Mudgett's attempt to curry favor with the McGowan parents who had custody of her oldest son, providing her with a motivation to lie. Purportedly Mudgett approached the McGowans to apologize and they requested she inform Heath's attorney that she was untruthful at trial. While initially skeptical, Mudgett agreed because the McGowans told her she would not get into trouble based on "double jeopardy." As a result, the trial court found the statement lacked the "requisite indicia of reliability." The trial court determined that the statement was not admissible because it did not comport with the requirements of MRE 804(b)(3) because there were no "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement."

The trial court then proceeded to review the testimony elicited from police as part of this hearing, finding that Detective Wolter's current testimony did not vary from her trial testimony and that there was no evidence of force or coercion by police in obtaining Mudgett's prior statement or testimony. The trial court even went so far to consider that a new trial would not be warranted even if Mudgett's affidavit were deemed admissible. Reviewing the requirements of MCR 6.431(B), permitting a trial court to grant a motion for a new trial "on any ground that would support reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice," the trial court found "no ground that would support reversal" and "that justice was done and the defendants are not innocent based on the evidence at trial" and the proffered affidavit. Evaluating the "new evidence" in accordance with "*People v Cress*, 468 Mich 678 (2003)," the trial court determined (a) that "[t]he evidence itself, not merely its

[8] Overruled in part on other grounds *People v Taylor*, 482 Mich 368 (2008).

materiality, is newly discovered" and (b) that "the newly discovered evidence is not cumulative." However, the trial court found:

> Because the testimony of Melissa Mudget at her first appearance before the Grand Jury was inconsistent with her statement to the police, and inconsistent with her testimony at her 2nd appearance before the Grand Jury, the defendants' attorneys could have discovered and produced the evidence of coercion at trial had they used reasonable diligence in following up with Melissa Mudget as to why there was such a difference in her testimony. They did not do so. During the trial, both of her versions were introduced into evidence by the People and she was cross examined by all three of the defendants' trial attorneys. Coercion was not brought up by anyone including Melissa Mudget. It is reasonable to not bring up coercion if in fact there was none and the record does not disclose any coercion.

The trial court also rejected that the "new evidence" would result in a different outcome at trial citing the testimony of Hansen and Waldorf who both acknowledged being present at the scene of the murder in conjunction with the testimony of several other witnesses asserting Heath's admissions to the murder, which were generally consistent despite these witnesses not being familiar or in contact with each other. The trial court discounted Mudgett's claim of coercion based on being jailed while pregnant and the potential to lose custody of her baby. As noted by the trial court:

> She said she was under arrest for non payment of child support (and as a material witness for the Grand Jury proceedings, although in [the affidavit] she incorrectly says she was under arrest for murder). These are statements of fact and were truthful consequences of her situation and not coercion. There is no duress in doing something which you have a legal right to do . . . . This is especially so in light of the fact that she is the one who contacted the [sic] Detective Wolters and asked to make a statement to her.

Finally, the trial court determined the affidavit to be incredible based on the two-year period between the trial and Mudgett's recantation and claim of coercion and the failure of the affidavit to "clearly exculpate any of the defendants." In the affidavit, Mudgett denies being present at the scene. Even if she was not there and was purportedly coerced into placing defendants at the murder that "does not mean they were in fact not there" given the testimony of Hansen, Waldorf and other witnesses "that Heath McGowan made statements to them that he had killed Henry."

With regard to the Klunder affidavit, we concur with the trial court's analysis. Based on the extended timeframe between Chapman's purported statement to Klunder and his revelation of the content of that statement to McGowan, the inconsistencies between the affidavit and Klunder's testimony before the trial court and the complete denunciation of the alleged statements by Kyle Chapman and their inconsistency with his trial testimony, the affidavit lacks any credibility or reliability. Similarly, this Court can find no fault with the trial court's thorough analysis and conclusion regarding the inadmissibility of the Mudgett affidavit. As reviewed by the trial court, the testimony is inconsistent with other witnesses and is suspect having been prompted by the McGowan parents, years after the conclusion of trial, and while they had control over access to Mudgett's eldest child. Further, while Mudgett's participation in the statement was voluntary the manner of eliciting the information through questioning

precludes any finding of spontaneity with regard to its actual content. In addition, it does not meet the criteria of MRE 804(b)(3). While the statement did subject Mudgett to "criminal liability" for perjury, it lacked the necessary "corroborating circumstances" to assure its trustworthiness. In addition, at the time the statement was given it is questionable that Mudgett understood the statement to be against her penal interest because the McGowan parents and the attorneys conducting the interview regarding her potential criminal liability had misled her. Finally, at best, it is difficult to construe how the asserted new evidence could be used for any purpose other than impeachment. As such, it does not comprise a basis for the grant of a new trial. *Davis, supra* at 516. Given the existence of other eyewitnesses who have not recanted their testimony and other witnesses who have testified to statements by McGowan asserting his involvement in this murder, it is highly unlikely that the asserted newly discovered evidence would make a different result probable. Hence, the trial court did not abuse its discretion by denying the motions for new trial.

F. Exculpatory Testimony

Defendant Heath McGowan asserts error by the trial court in refusing to permit witnesses to testify regarding exculpatory statements made by defendant pertaining to this murder because they comprised inadmissible hearsay. On appeal, defendant's argument is not premised on the correctness of the trial court's ruling regarding the inadmissibility of these statements based on hearsay. Rather, defendant contends the rulings of the trial court precluded his ability to present a defense and limited his ability to cross-examine witnesses. Generally, this Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, when a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes admission, we review the trial court's decision under a de novo standard of review. *Id.*

Despite objections by defense counsel, the trial court permitted the prosecutor to elicit testimony from several witnesses regarding admissions allegedly made by Heath about his involvement in the killing of Henry Marrott. Citing *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), abrogated on other grounds *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008), the trial court found the statements to be relevant and allowable pursuant to MCR 804(b)(3) "because it was made against interest by Mr. McGowan, under circumstances that a reasonable person in his position would not have made the statement unless he believed it to be true." However, the trial court precluded defense counsel, during the cross-examination of Timothy Hannah, to elicit testimony regarding Heath's denial of committing the murder. The prosecutor objected to the admission of such statements as hearsay under MRE 801(d)(2). Defense counsel responded noting the imbalance of permitting only the admission of purportedly inculpatory statements by defendant while precluding any of his exculpatory statements. Counsel further argued that these statements were admissible pursuant to *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), as their exclusion would constitute a denial of due process. The trial court continued to rule that the statements were inadmissible and constituted "clearly hearsay testimony because it doesn't come under 801(d)(2)."

Defendant appears to be confusing the concepts pertaining to hearsay exceptions for admissibility of testimony regarding statements against interest and due process. While a defendant has a constitutional right to present exculpatory evidence in support of his defense, *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), this right is not absolute.

Defendant is still required to comply with "established rules of procedure and evidence." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635. Therefore, for the exculpatory statements made to Hannah to be admissible as substantive evidence, "the statement must be admissible under the Michigan Rules of Evidence." *Poole, supra* at 157. In general, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." MRE 402. "Relevant evidence" is defined as meaning "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. Hearsay is not admissible as substantive evidence unless an exception to hearsay is applicable. MRE 801(c); MRE 802; *People v Barlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). As defendant concedes on appeal, the challenged exculpatory statement made by defendant to Hannah constituted inadmissible hearsay.

Further, defendant's contention that he was precluded, given the trial court's ruling of inadmissibility regarding these exculpatory statements, from presenting a defense is incorrect. Notably, defendant took the stand, testified and vehemently denied any involvement in the murder. In addition, while on the witness stand, Timothy Hannah recounted wearing a wire for police while in jail with defendant and that defendant did not admit to the killing during the monitored conversation. At least seven other witnesses testified that defendant either never admitted to the murder or that any statements made concerning his culpability were discounted or disbelieved due to defendant's drug use. As such, defendant was not precluded from presenting exculpatory evidence consistent with his defense.

G. Correction of Judgment of Sentence

Defendant Heath McGowan contends he was improperly convicted of two counts of murder arising from the death of only one victim, in violation of his double jeopardy rights. Whether double jeopardy is applicable comprises a question of law that this Court reviews de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The judgment of sentence lists the conviction for first-degree premeditated murder as "merged" with the felony murder conviction, with separate life sentences designated for both convictions. As argued on appeal, a defendant cannot be convicted and sentenced for both first-degree felony murder and first-degree premeditated murder for the death of a single victim. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005). Consequently, we remand this matter to the trial court solely for the ministerial purpose of correcting and modifying the judgment of sentence to reflect a total of one conviction and sentence for first-degree murder, with the conviction supported by two alternate theories. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

H. Change of Venue/Separate Trial

Defendant Griffes contends the trial court erred when it denied him a change of venue despite the existence of strong community sentiment and publicity regarding this murder. This Court reviews the denial of a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). An abuse of discretion is found to occur when the outcome selected by the trial court does not fall within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant Griffes filed a pre-trial motion seeking a change of venue, asserting that ongoing publicity in the local media in this small community precluded a fair trial due to "community sentiment and widespread exposure." Griffes contended an impartial jury could not be found to hear this case. The trial court denied the motion based on defendant's failure to show actual prejudice or such deep-seated animosity within the community to preclude the selection of a fair and impartial jury, but agreed to revisit the issue if a jury could not be selected. Following the seating of a jury, defendant renewed his motion for a change of venue. The trial court denied the motion, based on the majority of jurors stating they were not familiar with the case and the averments of the remaining jurors, who acknowledged seeing some media coverage of the case, indicating their ability to remain impartial and render a decision based on the evidence to be presented at trial.

As a general rule, a defendant is to be tried in the county where the crime was committed. MCL 600.8312. The trial court may change venue to another county when special circumstances exist, where justice demands or where a statute so provides. MCL 762.7. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008) (citation omitted). To achieve this, a change in the venue of a criminal trial may be deemed to be appropriate when "widespread media coverage and community interest have led to actual prejudice against the defendant." *Unger, supra* at 254.

"Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski, supra* at 500-501. When evaluating whether a defendant has been deprived of a fair trial because of pretrial publicity, the reviewing court is required to consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial in nature that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501. The reviewing court is also required to distinguish between "factual publicity" and that which would be construed as "invidious or inflammatory." *Id.* at 504.

When determining whether a change of venue was necessary because of pretrial publicity, the reviewing court should also consider the "quality and quantum of pretrial publicity," and then "closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski, supra* at 517. Taking these factors into consideration, it would appear that while there was considerable media coverage, the pretrial publicity was primarily factual in nature or involved representations that were later elicited as testimony during trial. Any perception of the inflammatory nature of the coverage is probably attributable to the nature of the crime, involving the beating death of an elderly man. "Consideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." It is also necessary to consider the entire voir dire. *Id.*

Potential jurors were extensively and individually questioned on voir dire regarding their exposure to information concerning this case and their ability to make an impartial determination solely based on the evidence. Hence, no impediment existed to the discovery of actual or potential biases, and the voir dire was sufficiently probing to uncover any biases. The majority of the jurors selected indicated they had little to no knowledge regarding the case and those who

did acknowledge some exposure to the pretrial publicity swore, under oath, that they could remain impartial, notwithstanding any exposure to media coverage. "[W]here potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue." *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). As noted by our Supreme Court, "[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Jendrzejewski*, *supra* at 519. Based on the averments of the impaneled jurors that they could remain impartial, defendant has failed to demonstrate that the pretrial publicity was so invidious and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501. Hence, based on the encompassing and thorough voir dire conducted by the trial court, we find that the jurors selected for this panel were not biased against defendant.

Defendant also contends the trial court erred in refusing to grant him a trial separate from his co-defendants. Defendant filed a motion seeking a separate trial pursuant to MCR 6.121(D), which the trial court denied.[9] The matter was addressed again on remand from this Court following co-defendant Clint McGowan's motion for a new trial. On remand, the trial court affirmed its original decision to not hold separate trials based on futility and the similarity of the defenses asserted. This Court reviews a trial court's decision to try defendants separately or jointly for an abuse of discretion. MCL 768.5.

Generally, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Rather, it is within the discretion of the trial court to try separately or jointly two or more defendants indicted for a criminal offense. MCL 768.5. Public policy favors joint trials "in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). A motion for severance should be granted only "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). Complete severance is necessitated "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *People v Hana*, 447 Mich 325, 359-360; 524 NW2d 682 (1994) (citation omitted). A defendant is required to provide the trial court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice" in order to demonstrate that severance is necessary. *Id.* at 346. Severance is not required if codefendants merely have inconsistent defenses. *Id.* at 349. Rather, the codefendants' defenses must be "irreconcilable." *Id.* The "'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* (citation omitted). "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial,'" is insufficient to necessitate a severance. *Id.* (citation omitted). In other words, severance of trials should be granted, "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Id.* at 359-360 (citation omitted).

[9] The trial court did, however, adjourn the trial to permit defendants' additional time to prepare.

In accordance with MCR 6.121(D) a trial court has the discretionary authority to sever a trial in the interest of fairness and indicates several factors to consider when determining whether severance would be appropriate. Before trial, Griffes sought a separate trial based on his defense that he was physically incapable of participating in the crime and based on concern that any association with his co-defendants would unnecessarily taint him in the eyes of the jury. Contrary to Griffes' assertion, and consistent with the trial court's rulings, the defenses of all defendants were the same – a denial of any involvement or participation in the crime. Griffes' defense included, as evidence of his lack of involvement, a medical condition limiting his mobility. However, this additional factor did not place Griffes in a position contrary to or distinguish his defense from that of his co-defendants. In addition, the testimony of co-defendants and Griffes were consistent regarding his assertion that he was not familiar with his co-defendants until some months after the crime occurred. Merely because there was evidence presented concerning the wrongful acts of the other defendants, such incidental or spillover prejudice is insufficient to require severance. *Hana, supra* at 349.

This trial involved numerous witnesses and evidence, which was substantially the same for all defendants. Separate trials would have been unnecessarily duplicative, time consuming and would incur excessive and substantial costs. Defendants all denied involvement. Almost every witness involved or presented by the prosecution would have to be called at each trial to relate substantially the same testimony. Considering that the joint trial for these three defendants took over 13 days, granting Griffes a separate trial would have stretched judicial resources and diverted time away from other matters pending on the trial court's docket. Hence, the interests of justice, judicial economy, and orderly administration favored a joint trial.

Griffes was not precluded from presenting a defense as a result of being part of a joint trial. Griffes had the opportunity to testify and present his alibi witnesses. Defendant implies that he was prejudiced because he believes that the jury might have ignored his alibi witnesses and convicted him simply on the basis of association with his co-defendants. However, it is solely within the purview of the jury to weigh evidence and make determinations of credibility. *People v Palmer,* 392 Mich 370, 375-376; 220 NW2d 393 (1974). Any risk of prejudice from a joint trial was dispelled based on the trial court's cautionary instructions to the jury. *Hana, supra* at 351, 356. The trial court thoroughly instructed the jurors on reasonable doubt and the determination of guilt or innocence on an individual basis, and informed the jury that each case was to be considered and decided separately based their individual merits and the evidence applicable to each defendant. "It is well established that jurors are presumed to follow their instructions." *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998).

I. Sufficiency of the Evidence

Griffes was found guilty by the jury of first-degree felony murder, but was not convicted on the charge of second-degree murder. This, argues defendant, combined with evidence of Griffes' physical infirmities suffered around the time of the murder, demonstrate that insufficient evidence existed to sustain his convictions. In addressing a challenge to the sufficiency of the evidence this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof" of the elements of a crime. *People v McGhee,* 268 Mich App 600,

623; 709 NW2d 595 (2005). Questions pertaining to credibility and intent are reserved for the trier of fact to resolve. *People v Avant,* 235 Mich App 499, 506; 597 NW2d 864 (1999). In general, this Court will not second-guess the trier of fact's determinations concerning what inferences fairly arise from the evidence or its determination regarding "the weight to be accorded those inferences." *People v Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002). To establish that the evidence presented was sufficient to support defendant's conviction, the prosecutor need not "negate every reasonable theory consistent with a defendant's innocence." *Id.* "The evidence is sufficient if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Wolford,* 189 Mich App 478, 480, 473 NW2d 767 (1991).

Griffes was involved in a serious motor vehicle accident on June 23, 2002. He was pulled from the vehicle and suffered an acetabular fracture of the hip and sustained a serious burn, requiring a skin graft to the top of one foot. As a result, Griffes was placed on medical restrictions for no weight bearing and was required to use a wheelchair to be maintained at an incline to prevent undue pressure on the hip fracture. Following discharge from the hospital on July 14, 2002, Griffes was transferred to a rehabilitation facility and remained for two days, but was uncooperative with treatment. Griffes returned to his parents' home to reside and receive outpatient treatment.

Griffes relies on the testimony of several physicians and other medical home care personnel who provided him assistance following his discharge to support his contention that he was physically incapable of performing the acts alleged. In addition, Michelle Sisson and her boyfriend, Brian Knapp, provided assistance to defendant while at home and reported seeing him routinely using a wheelchair. Griffes aunt, Tamala Strickland indicated she was visiting at the time and did not observe Griffes leave the house on either July 19 or 20, 2002, but later acknowledged she was not present at the home of defendant's parents on the 19th. Griffes testified that he did not know Heath McGowan or Mike Hansen until the end of September 2002. He denied knowing Tara Waldorf and asserted he did not meet Clint McGowan until late October 2002. Heath and Clint McGowan confirmed not being acquainted with Griffes around the time of the murder. Griffes notes that no physical evidence establishes his presence at the crime scene.

Identity is an essential element of every crime. *People v Oliphant,* 399 Mich 472, 489, 250 NW2d 443 (1976). The prosecution must present sufficient evidence that proves beyond a reasonable doubt that the accused committed the crimes alleged. *People v Kern,* 6 Mich App 406, 409; 149 NW2d 216 (1967). "Identity may be shown by either direct testimony or circumstantial evidence which gives the jury an abiding conviction to a moral certainty that the accused was the perpetrator of the offense." *Id.* at 409-410. In this instance, the prosecution presented sufficient evidence which would permit a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of the crimes charged either as a principal or an aider and abettor, having presented the testimony of three admitted accomplices, which placed defendant at the victim's home when the crime occurred. A prosecutor is not required to present direct evidence linking a defendant to a crime in order to establish sufficient evidence to sustain a conviction; "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *People v Lawton,* 196 Mich App 341, 350; 492 NW2d 810 (1992). Further, a fact-finder may infer a defendant's intent from

all the facts and circumstances provided. *Id.* "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. In addition, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Hardiman, supra* at 428.

Defendant was convicted of first-degree felony murder. The elements necessary to sustain a conviction for first-degree felony murder are:

> (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. [*People v Hutner,* 209 Mich App 280, 282-283; 530 NW2d 174 (1995).]

Based on the testimony of three accomplices, Griffes and his co-defendants went to the victim's home with the intent of stealing Oxycontin and money. Griffes was in the home of the victim when Heath McGowan repeatedly struck Henry Marrott about the head with an object, causing his death. During this assault, Griffes participated in the search of the victim's home for drugs and cash. Although Heath and Clint McGowan denied knowing Griffes at the time of the murder, Mike Hansen, Tara Waldorf and Melissa Mudgett all placed him at the crime scene and in the vehicle with them. As such, sufficient evidence of Griffes' participation in the murder and surrounding larceny existed to sustain his conviction.

Defendant asserts that his participation in the crime was physically impossible due to his injuries following the automobile accident. While all of the medical personnel cited by Griffes confirm the nature and extent of these injuries, they could not verify whether he ignored medical restrictions and ambulated. While all opined ambulation might be painful, it was not deemed impossible. In fact, Hendler, a home health service provider, observed defendant on July 23, 2002, ambulate approximately 80 feet. Mike Hansen also indicated observing Griffes ambulate and his presence at the apartment of Jody Smith when a decision was made to rob Marrott's home, which was confirmed by Smith. In addition, while acknowledging memory problems, Christy Lawler testified that she saw Griffes shortly after his motor vehicle accident riding a bicycle while carrying crutches. While unsure of the specific date of this encounter, Lawler indicated that Griffes showed her his skin graft, which appeared raw and still required bandaging. Griffes also claims that the witnesses who place him at the crime scene either lied or had poor memories due to their addictions, making any identification by these witnesses suspect. However, Hansen, Waldorf and Mudgett all testified before the grand jury and at trial that they were with Griffes at the scene. By claiming that the testimony of these witnesses should be disregarded because they either lied or had poor memories of the event, Griffes essentially requests that this Court make a credibility determination regarding these witnesses and their testimony. Questions pertaining to the credibility of witnesses are the province of the jury and we will not reconsider them. *Avant, supra* at 506. Because the testimony of these witnesses is sufficient to establish that Griffes was present and a participant at the murder scene, his claim of error lacks merit.

J. Exclusion of Alibi Witnesses

Defendant Clint McGowan contends the trial court abused its discretion when it refused to permit him to call Henry "Whip" Alexander as an alibi witness and precluded the testimony of his parents, Frank and Teresa McGowan, due to violation of a sequestration order. Defendant contends the preclusion of the testimony of these individuals essentially deprived him of a defense. This Court reviews for abuse of discretion a trial court's decision to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant did not indicate an intent to call Alexander as an alibi witness until the eighth day of trial, 36 days after the trial initiated. Although defendant asserted Alexander could not be located, this assertion was questioned when the prosecutor noted that Alexander was initially included on Heath McGowan's witness list and submitted a taped conversation between McGowan's parents and Heath indicating Alexander was watching Heath's children. Having reviewed this tape, the trial court determined that the McGowans were aware of the existence and location of this witness no later than October 6, 2006. However, defendant did not attempt to identify him as a witness until several weeks later. Because the late notice of the intent to call this individual as a witness precluded the prosecutor's opportunity to interview the witness or to determine whether any form of collusion had occurred between the witness and McGowan's parents, the trial court determined it would be prejudicial to the prosecutor to permit his testimony and denied defendant's request.

Pursuant to MCL 768.20(1), a defendant must file and serve a notice of alibi, listing names of witnesses, at least ten days before trial. There is a continuing duty to disclose additional names, as they become known. MCL 768.20(3). A failure to file and serve the written notice in accordance with the statutory time limits will result in exclusion of the alibi evidence. MCL 768.21(1). Under the circumstances of this case, the statutory notice to add Alexander as an alibi witness was not given and trial had substantially progressed. Defendant failed to show that he could not have provided this name in a timely manner in order to satisfy MCR 768.20(3). As such, the trial court did not abuse its discretion when it barred this witness from testifying. *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995).

Defendant also argues that the decision to exclude the testimony of his parents as alibi witnesses violated his constitutional right to present a defense. Defendant's parents were prohibited from testifying based on their violation of a sequestration order, which precluded communication between witnesses and defendants regarding testimony and evidence being provided during trial. The prosecutor provided evidence that both Heath and Clint McGowan discussed in detail trial testimony and evidence with their parents, Frank and Theresa McGowan. Notably, the prosecutor demonstrated that the McGowan parents were contacting other witnesses in violation of the court's order.

The purpose underlying the sequestration of witnesses is to prevent them from adapting their testimony to conform to the testimony of others and to aid in detecting testimony that is less than candid or truthful. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). To remedy the violation of a sequestration order, a trial court may: "(1) hold[] the offending witness in contempt; (2) permit[] cross-examination concerning the violation; and (3) preclude the witness from testifying." *Id.* Exclusion of a witness' testimony is considered to be "an extreme remedy that should be sparingly used." *Id.* In this instance, violation of the sequestration order was both ongoing and blatant, suggesting the purposeful interference in the testimony of witnesses and possible intimidation. Because the violations by the McGowans were not

inadvertent, but were continuing and clearly intended to influence testimony of witnesses, the trial court's decision to preclude their testimony did not comprise an abuse of discretion. *Id.* at 654-655.

While defendant was prohibited from presenting the testimony at issue, he was not precluded from offering a defense. He personally testified to his alibi and presented other witnesses to corroborate his assertion that he was not present or involved in the crime. Consequently, it was defendant's actions through the untimely identification of Alexander and involvement in the violation of the sequestration order that limited any presentation of his alibi defense.

III. Conclusions

We affirm defendants' convictions and sentences, but remand to the trial court solely for the ministerial purpose of correcting defendant Heath McGowan's judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis