S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CLEOPHAS NELSON,

Defendant-Appellant.

UNPUBLISHED
July 30, 2009

No. 283567
Ottawa Circuit Court
LC No. 07-031006-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ROBERT EUGENE WILLIAMS,

Defendant-Appellant.

No. 283568
Ottawa Circuit Court
LC No. 07-031005-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE BASS PARKER,

Defendant-Appellant.

No. 283569
Ottawa Circuit Court
LC No. 07-031322-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR CARLTON PAIVA,

No. 283570
Ottawa Circuit Court
LC No. 07-031007-FC

Defendant-Appellant.

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

After a jury trial, defendants James Cleophas Nelson, Anthony Robert Eugene Williams, Freddie Bass Parker, and Arthur Carlton Paiva were convicted of the murder of Janet Chandler under multiple first-degree murder theories and sentenced to life imprisonment. Defendants appeal their convictions. We affirm.

The convictions in this case arose from the cold-case investigation into the death of Janet Chandler, a 22-year-old Hope College student who was abducted and murdered in 1979. The case was reopened in 2004 after eight students and a professor at Hope College produced and distributed a documentary entitled *Who Killed Janet Chandler?*, triggering renewed interest in the long-unsolved murder.

I. Facts

Chandler, a senior majoring in music at Hope College, worked part-time as a night auditor at the Blue Mill Inn (the inn) in Holland, Michigan, beginning in August 1978. She lived with Laurie Swank, her manager at the Blue Mill Inn, in a duplex nearby. In the fall of 1978, in response to a strike at its plant in Holland, Chemetron Corporation (Chemetron) hired the Wackenhut Corporation (Wackenhut) to supply guards to provide security for the plant. Between 50 and 80 guards, including defendants Nelson, Williams, and Parker, stayed at the inn for the duration of the strike. Paiva, the on-site coordinator and highest-ranked Holland-based guard, stayed at a guesthouse on the plant grounds.

Chandler, Swank, and other female employees of the inn soon became friendly with the guards and allegedly began sexual relationships with them. Chandler is asserted to have had a sexual relationship with Paiva soon after the Chemetron strike began, but Paiva was abusive and the relationship ended. It was asserted that Chandler had several sexual relationships with other guards, possibly including the other defendants. Swank, who was jealous of the attention that Chandler received from the guards, told Paiva about Chandler's relationships with other guards in order to make him think less of her.

Paiva became extremely upset when he learned of Chandler's relationships with other men, calling Chandler a "whore" and vowing "that he would take care of it." Soon thereafter, Paiva and Nelson, along with other guards and hotel workers, began planning a "surprise party" in which they would abduct Chandler and "f--- her to death."

During the night of January 30-31, 1979, the guards abducted Chandler and took her to the guesthouse for the "surprise party." At the party, several witnesses reported seeing Chandler being raped and abused. When Patty Ward, Paiva's girlfriend at the time, arrived at the party,

she saw Chandler sitting on a couch next to Nelson. She saw Nelson verbally abuse Chandler and wrap a belt around her to pull her toward him.[1] According to Ward, Nelson then moved Chandler to a nearby bedroom. When Ward saw them in the bedroom a few minutes later, Chandler told her that she was "all right." Paiva then made Ward leave the room and Nelson and two other men took Chandler to an upstairs bedroom.

After Chandler was taken upstairs, her clothing was removed, her arms and legs were bound, and her eyes and mouth were covered with duct tape. She was then raped repeatedly. Several guards then lined up outside the room; Parker stood by the door and decided who could enter. Paiva, however, had ultimate authority to decide who could rape Chandler.

Paiva had asked another guard, Ronald Wirick, to take photographs as the guards raped Chandler.[2] Wirick witnessed and photographed Paiva, Parker, Lynch, Nelson, and other guards force Chandler to perform fellatio on them and penetrate Chandler's vagina and anus. Wirick noted that Chandler seemed to be drifting in and out of consciousness and occasionally struggled to break free.

Swank and two other women at the party, Cheryl Ruiz and Diane Marsman, provided the most detailed testimony regarding what occurred in the bedroom. Ruiz and Marsman testified that Nelson, Paiva, Parker, and Williams all raped Chandler and struck her face with their penises. Ruiz recalled that when Parker was finished raping Chandler, he left the room adjusting his pants and saying, "That was a good f---." Ruiz also testified that Williams clamored for a turn to rape Chandler, ejaculated on her back, and pulled her hair as he assaulted her from behind. Marsman reported that she saw Nelson anally penetrate Chandler and that she saw Williams and Parker vaginally penetrate Chandler. Apparently Paiva was particularly brutal in his treatment of Chandler and directed the order in which the other guards were permitted to rape Chandler. As the rapes continued, Paiva frequently yelled profanities, most notably, "f--- her to death" and "That f---ing bitch, she deserves to die. She deserves to be f---ed." Other participants yelled out similar profanities. Several guards also used the belt around Chandler's neck to hold her as they penetrated her. The guards would pull on the belt, forcing her head up, and then release it.

Swank admitted that she was complicit in Chandler's rape and death, encouraging the guards and yelling profanities as they raped Chandler. Swank testified that Parker, Nelson, Paiva, and others vaginally penetrated Chandler.[3] She also saw Nelson strike Chandler repeatedly.

As another guard, Robert Lynch, raped Chandler, he pulled on the belt and released it until someone exclaimed, "She's dead." Swank quickly fled the scene and drove back to the inn,

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[1] Ward claimed that when she tried to stop Nelson, he threatened to treat her the same way as he was treating Chandler if she interfered.

[2] Wirick later gave the film to another guard with the understanding that the guard would give the film to Paiva. This film was not recovered.

[3] Swank did not know Williams at the time and, therefore, could not identify him.

while Paiva ran from the room in an agitated state, cursing and upsetting furniture. Some guards fled, while others began cleaning the guesthouse. Williams, Lynch, Nelson, and Paiva washed off Chandler's body in a shower and wrapped it in a tarp. Lynch took Chandler's body and dumped it in a wooded area near a turnaround on I-196 outside Grand Haven, Michigan.[4] The defendants threatened Swank, Ruiz, Ward, Marsman, and Wirick to keep quiet about Chandler's death, and the witnesses did for over 25 years.

The Chemetron strike ended approximately two weeks after Chandler's death, and the Wackenhut guards, including defendants, disbursed around the country. Swank moved back to her home in Pennsylvania shortly thereafter. The investigators' leads dried up and the case remained unsolved for decades. In 2003, a class of communications students from Hope College, along with their professor, began investigating the murder and filmed a documentary entitled *Who Killed Janet Chandler?* Soon thereafter, a cold-case team consisting of investigators from the Holland Police Department and the Michigan State Police began reinvestigating the case and, eventually, witnesses began coming forward and discussing defendants' roles in Chandler's murder. As a result of this investigation, Nelson, Parker, Williams, Paiva, Lynch, and Swank were each charged in relation to Chandler's death. Swank pleaded to a charge of second-degree murder with a term of 10 to 20 years' imprisonment in exchange for her agreement to testify truthfully at defendants' trial. Lynch pleaded guilty to second-degree murder and accepted a sentence of 25 to 40 years' imprisonment.

Paiva was found guilty of one count of first-degree murder, Nelson, Parker, and Williams were each found guilty of one count of second-degree murder, and all defendants were convicted of two counts of felony murder arising from the kidnapping of and criminal sexual conduct against Chandler. The trial court vacated Nelson's, Parker's, and Williams's second-degree murder convictions and sentenced each defendant to life imprisonment for first-degree felony murder under two alternate theories. Paiva was also sentenced to life imprisonment for first-degree murder under three alternate theories.

II. Nelson's and Williams's Challenges to the Sufficiency of the Evidence

On appeal, Nelson and Williams claim that the prosecution presented insufficient evidence to support their convictions. We disagree. The prosecution presented sufficient evidence to support both Nelson's and Williams's convictions of first-degree felony murder.[5] We review a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, we view the evidence in a light most favorable to the prosecution to

[4] At approximately 1:30 a.m. on February 1, 1979, a snowplow driver discovered Chandler's naked body as he was using the turnaround to cross the highway median.

[5] Because the trial court vacated Williams's conviction for second-degree murder, we will not consider whether the prosecution presented sufficient evidence to support a conviction under that theory.

determine if a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were established. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). As a result, we are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). However, to establish that the evidence presented was sufficient to support defendant's conviction, "the prosecutor need not negate every reasonable theory consistent with 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).

The prosecutor need not present direct evidence linking a defendant to the crime in order to provide sufficient evidence to support a conviction; "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Id.* 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." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Furthermore, "[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." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of felony murder are as follows:

> Felony murder consists of (1) [t]he 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.[6] [*People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993) (emphasis in original).]

The jury convicted Williams and Nelson of felony murder under two separate theories, namely, the jury determined that felony murder occurred in the perpetration of criminal sexual conduct and kidnapping.

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[6] MCL 750.316 states:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
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> * * *
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate . . . criminal sexual conduct in the first, second, or third degree, . . . [or] kidnapping . . . .

Nelson merely claims that the evidence presented by the prosecution was insufficient to establish that he was at the party and, therefore, the prosecution did not present sufficient evidence to support the jury's conviction of felony murder. In particular, Nelson claims that the witnesses who placed him at the guesthouse at the time of the party either lied to the jury or "had poor memories due to their physical conditions and the passage of time." Nelson also notes that no physical evidence establishes that he was present at the party. However, Swank, Ward, Wirick, Ruiz, and Marsman all testified at trial that they saw Nelson at the party. Ward also testified that she saw Nelson wrap a belt around Chandler at the party, and Swank, Wirick, Ruiz, and Marsman all testified that they saw Nelson rape Chandler. By claiming that the testimony of these witnesses should be disregarded because the witnesses either lied or had poor memories of the event, Nelson essentially requests that we make a credibility determination regarding these witnesses and their testimony. However, questions of credibility 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 Nelson was present and raped Chandler at the party, Nelson's claim of error lacks merit.

Similarly, the gist of Williams's claims is that the prosecution failed to establish that he committed felony murder because the testimony of the witnesses inculpating Williams in Chandler's death was unreliable and, without this testimony, the prosecution could not establish that Williams committed felony murder. Yet Wackenhut guard Harry Keith, Ruiz, and Marsman testified that they saw Williams at the party, and Ruiz and Marsman testified that they saw Williams rape Chandler. Further, Joseph Cipolla, an inmate held briefly with Williams in a holding cell in the Kent County Jail, testified that Williams admitted to him that he had participated in Chandler's rape and murder. Williams's claims that the testimony of Ruiz, Marsman, and Cipolla was unreliable merely goes to the weight that should be ascribed to their testimony, and again, questions of credibility are the province of the jury and should not be reconsidered by this court. *Id.* Because the testimony of these witnesses is sufficient to establish that Williams was present and raped Chandler at the party, Williams's claim of error lacks merit.[7]

III. Williams's and Parker's Motions for Suppression of Witness Identifications

Williams challenges the in-court identifications by Marsman and Ruiz identifying him as participating in Chandler's rape and murder. Williams claims that Marsman and Ruiz only identified Williams as participating in the rape and murder of Chandler after they were subjected to "ongoing aggressive police 'interviews.'" Parker challenges witnesses' pretrial identifications

[7] Williams also claims that "[b]oth Lynch and Swank testified that Williams did not participate in these events." However, this is a misstatement of the testimony of these witnesses. Swank testified that she did not know Williams and that, as a result, she could not identify him as one of the guards participating in Chandler's rape and murder. Lynch admitted that his memory had been so damaged by years of alcoholism that his recollections of the events surrounding Chandler's death were not reliable. Neither witness's testimony should be taken as an affirmative denial of Williams's participation in Chandler's murder.

of him on the same grounds. We conclude, however, that the trial court's admission of these identifications was not erroneous.[8]

A defendant can establish that an identification procedure denied him due process of law if the identification was unduly suggestive, leading to the likelihood of misidentification:

> In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial. However, in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. [*People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993) (citations omitted).]

However, in light of the totality of the circumstances in this case, the pretrial identification procedures that Williams claims occurred in this case were not so suggestive that they led to a substantial likelihood of misidentification.

The cases that Williams cites in support of his argument address the possibility of witness identification of an unknown defendant. See *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972); *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled by *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), and *Kurylczyk*, *supra*. Yet this was not a situation in which the police were trying to unlock the memory of someone who had caught a fleeting glimpse of a robber in the midst of a crime. Ruiz and Marsman both admitted that they knew several of the guards, including Williams, and Ruiz acknowledged that she was dating Williams at the time of Chandler's murder. In fact, Ruiz specifically recalled that it was her boyfriend committing horrific acts when she saw Williams rape Chandler. Further, Ruiz and Marsman both acknowledged at trial that their initial reluctance to identify Williams as one of the guards who raped Chandler did not stem from a failure to be able to clearly identify Williams as one of the perpetrators of the offense, but from a fear that they would be targeted by the defendants or subjected to prosecution themselves if they told investigators what they knew about Chandler's death. The techniques used by investigators appear to have been used not to get Ruiz and Marsman to recall an unknown assailant, but to encourage them to acknowledge that they saw someone they knew fairly well commit a criminal act. When considered in light of the totality of the circumstances, any pretrial identification of Williams by Ruiz and Marsman

[8] We review de novo the trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, "[o]n review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (citations omitted).

was not so unduly suggestive that it led to a substantial likelihood that either woman misidentified Williams as one of Chandler's rapists and murderers.

Further, Williams does not claim that either woman misidentified him or confused him with another guard. Instead, his concerns are that the women's identifications of him are faulty because the crime occurred approximately 28 years before, that Ruiz had a brain aneurysm which, he claims, possibly affected her memory, and that the women did not acknowledge that Williams raped and murdered Chandler when they were initially questioned by investigators. Yet these concerns do not call into question whether the identification procedures used by the investigators were unduly suggestive and violated Williams's due process rights; instead, they call into question the credibility of the witnesses' testimony that they saw Williams rape and murder Chandler. But again, questions of credibility are the province of the jury, not this court. *Avant, supra*. Williams's counsel vigorously cross-examined Ruiz and Marsman regarding their physical and mental states and their reluctance to testify, and the jury acted within its province when it determined the extent to which it would rely on Ruiz's and Marsman's testimony that Williams participated in the rape and murder of Chandler. The admission of Ruiz's and Marsman's identification testimony does not require reversal of Williams' conviction.

On appeal, Parker sets forth an argument that is similar to Williams's, arguing that the trial court erred when it admitted the identification testimony of eyewitnesses. However, Parker never identifies specific testimony that he claims should not have been admitted, and he only briefly asserts that identification testimony provided by Marsman, who identified both Williams and Parker as being present at the scene, should not have been admitted. Therefore, to the extent that Parker argues that Marsman's testimony should not have been admitted because a pretrial identification procedure was unduly suggestive, our determination that Marsman's testimony was properly admitted is applicable to Parker as well. Because Parker does not identify any other identification testimony that he claims should not have been admitted, the balance of his claim of error is abandoned and we need not consider it further. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

IV. Williams's and Parker's Motions for Admission of Evidence

A. Williams's Request for Admission of Wackenhut Records

Williams argues that the trial court should have permitted him to introduce Wackenhut records that he claimed indicated that he was not working as a guard at Chemetron on January 31, 1979, and, therefore, could not have been involved in Chandler's murder. We disagree.[9] The trial court did not unilaterally preclude the introduction of these records. Instead, it recognized that the records would be admissible under the business-records exception, MRE 803(6), if the records' authenticity could be established pursuant to this rule, and it permitted Williams to introduce these records if he provided a proper foundation to admit the documents. Williams's

[9] We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

failure to establish the authenticity of these records cannot be used to establish that the trial court somehow precluded the admission of these records in the first place.

In an attempt to argue that the trial court should have admitted the Wackenhut records under MRE 803(6), Williams claims that it would be unduly burdensome for him to attempt to establish the authenticity of these records and the fact that they were kept in the normal course of business. Instead, he claims that because nothing indicates that Paiva created the records, the trial court should have admitted them. However, Williams provides no authority to support the assertion that the trial court erred when it told him that he must establish the authenticity of these business records before the trial court would admit them as evidence. Instead, MRE 803(6) clearly provides that Williams was required to introduce evidence in the form of certification or testimony by the records custodian or another qualified witness to establish that the records in question were made in the ordinary course of business,[10] and MRE 901 required Williams to provide sufficient evidence to support a finding that the documents are what he claimed, i.e., records kept by Wackenhut. Accordingly, the trial court did not err when it required Williams to provide evidence authenticating the Wackenhut documents pursuant to MRE 803(6) and MRE 901 before admitting the documents into evidence.

Next, Williams argues that the trial court should have admitted the Wackenhut records pursuant to MRE 803(24) because even if the records were not admissible under one of the stated hearsay exceptions, they were properly admissible because they contained "equivalent circumstantial guarantees of trustworthiness."[11] However, the Wackenhut records do not rise to

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[10] MRE 803(6) states that the following exception is not excluded by the hearsay rule, even though the declarant is available as a witness:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[11] MRE 803(24) states that the following exception is not excluded by the hearsay rule, even though the declarant is available as a witness:

> Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than

(continued…)

a level that would justify their admission under this hearsay exception. Although Williams offers the records as evidence that he was not in the Holland area at the time of the murder because he apparently had been dismissed from his employment with Wackenhut as a security guard in Holland by this time, the records do not provide the airtight alibi of the sort that Williams implies. The records merely indicate that Williams had not been working in Holland for approximately a week at the time of the murder; they do not indicate that Williams was not in Holland when Chandler was murdered, nor do they preclude a conclusion that Williams might have left Holland briefly after his employment ended and then returned before the murder occurred. Further, by requesting the admission of these records under MRE 803(24), Williams essentially seeks to admit evidence that, if properly authenticated, would be admissible under another hearsay subrule without even illustrating that he made an attempt to authenticate the documents and establish their admission under the proper subrule. Williams provides no authority to support his proposition that he can use MRE 803(24) to admit evidence simply because he did not want to go through the additional steps necessary to admit this evidence under MRE 803(6). To the contrary, such an attempt to use MRE 803(24) to circumvent the standards set forth to admit evidence under another hearsay exception would undermine the purpose of these hearsay exceptions and make them irrelevant in the face of an all-powerful "catch-all" exception.

Finally, Williams was not denied his right to present a defense when the trial court permitted admission of the documents if Williams could provide evidence authenticating them. "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). The trial court did not deny Williams his right of due process. Instead, it simply instructed Williams to comply with the requirements for ensuring that evidence was reliable and properly admissible before it would permit the admission of the Wackenhut records.

B. Parker's Motion to Admit Hearsay Testimony

Parker claims that the trial court abused its discretion when it denied his motion to admit the testimony of Aaron Feldkamp, Tim Cook, and Bob Lookingbill, three inmates being held

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(…continued)

> any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

with Paiva, pursuant to either MRE 803(24) or MRE 804(b)(7),[12] the two residual hearsay exceptions under the Michigan Rules of Evidence. We disagree.[13]

According to Parker, when Paiva was being held at the Ottawa County Jail, he told Feldkamp, Cook, and Lookingbill that Parker was not in Michigan on the day of Chandler's murder. Parker claims that the inmates' testimony exhibited "equivalent circumstantial guarantees of trustworthiness" and should have been admitted under a residual hearsay exception. As our Supreme Court noted, "the inquiry into trustworthiness aligns with the inquiry demanded by the Confrontation Clause, which requires courts to examine the 'totality of the circumstances that surround the making of the statement' for 'particularized guarantees of trustworthiness.'" *People v Katt*, 468 Mich 272, 290-291; 662 NW2d 12 (2003), quoting *United States v Clarke*, 2 F3d 81, 84 (CA 4, 1993). Although "[t]here is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness," the Supreme Court noted that "courts should consider all factors that add to or detract from the statement's reliability" when evaluating its trustworthiness. *Katt*, *supra* at 291-292.

However, we do not believe that Paiva's alleged statements contain the "equivalent guarantee of trustworthiness" that Parker claims existed in this case. According to Parker, Paiva's statement that Parker was not in Michigan at the time of the murder was trustworthy because they "were not made in anticipation of litigation, and, importantly, were manifestly unfavorable to codefendant Paiva, since it necessarily implies that **he was there**, and in a position to comment on who was **not there**." However, the premise is without support and the conclusion cannot necessarily be drawn from Paiva's comments. Parker claimed that Paiva merely told the inmates that Parker was not in Michigan at the time of the murder. Yet assuming that Paiva made these statements, he could have easily maintained his own innocence and still made this statement. As the on-site coordinator for the guards, Paiva knew whether certain guards had stopped working by the time of the murder and he could support his statement on that

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[12] MRE 804(b)(7) states that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[13] We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *Lukity*, *supra* at 488.

knowledge without implicating himself. But, Parker offers the statement as one against interest as inculpating to Paiva and exculpating to himself. Paiva was in custody awaiting trial with codefendant Parker as a co-perpetrator of rape and murder. The statements were clearly made as he awaited and anticipated his own prosecution. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. MRE 804(b)(3). The corroborating circumstances escape this record.

Further, Parker provides no indication that the inmates were anything more than jailhouse acquaintances of Paiva, nor does Parker explain possible reasons why Paiva might have made these statements to them. Consequently, the totality of the circumstances that surround the making of Paiva's alleged statements tend to indicate that the statements were not particularly trustworthy.

Further, even if this testimony exhibited "equivalent circumstantial guarantees of trustworthiness," it would not be admissible under either MRE 803(24) or MRE 804(7) because the testimony is not "more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." Our Supreme Court has explained that this requirement

> "essentially creates a 'best evidence' requirement." This is a high bar and will effectively limit use of the residual exception to exceptional circumstances. For instance, nonhearsay evidence on a material fact will nearly always have more probative value than hearsay statements, because nonhearsay derives from firsthand knowledge. Thus, the residual exception normally will not be available if there is nonhearsay evidence on point. [*Katt*, *supra* at 293 (citations omitted).]

The evidence that Parker purports to present through the testimony of the inmates is that Paiva told them that Parker was not in Michigan on the day of Chandler's murder. According to Parker, this evidence would establish that he did not participate in Chandler's death. However, this is not the most probative evidence available to Parker. In fact, at trial the parties admitted testimony that was equally probative or more probative of Parker's innocence than Paiva's alleged statements to the inmates. In particular, Parker introduced the testimony of Garry Truman, a fellow guard working at the Chemetron strike, who testified that he and Parker had left Michigan and drove to their homes in West Virginia a couple of days later, apparently before Chandler's murder.

Finally, Parker claims that the trial court's failure to admit this testimony denied him his due process right to present a defense. We disagree. "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Hayes*, *supra* at 279, quoting *Chambers*, *supra* at 302. Like Williams, the trial court did not deny Parker his right of due process; instead, it simply required Parker to comply with the evidentiary requirements for admitting hearsay testimony.

V. Parker's Claim of Ineffective Assistance of Counsel

Parker claims that his counsel was ineffective when it failed to admit the inmates' testimony regarding Paiva's statements under MRE 804(b)(3) as a statement against interest. We disagree.[14]

Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* We review factual findings for clear error and constitutional determinations de novo. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Criminal defendants are entitled to effective representation at every critical stage of proceedings against them. *People v Abernathy*, 153 Mich App 567, 568-569; 396 NW2d 436 (1985). However, counsel is not ineffective merely because the outcome is not optimal. *People v Davidovich*, 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Instead, counsel is ineffective if it has "sunk to a level at which it is a problem of constitutional dimension." *Id.*

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley* (*After Remand*), 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

To establish that counsel's deficient performance prejudiced the defense, the defendant must show that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In other words, the defendant must show that because of counsel's deficient performance, the resulting proceedings "were fundamentally unfair or unreliable." *Rodgers*, *supra* at 714. This requires the defendant to demonstrate a reasonable probability that but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma*, *supra* at 302-303.

[14] A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because the trial court did not hold a *Ginther* hearing, our review is limited to error apparent on the record.

The trial court did not abuse its discretion when it failed to allow the admission of the inmates' testimony under MRE 804(b)(3).[15] However, Paiva's statement to the inmates is not a statement against interest and, therefore, is not admissible under MRE 804(b)(3). Parker claims that Paiva's alleged statements to the inmates that Parker was not in Michigan at the time of Chandler's murder was a statement against interest because by indicating that Parker "was not there" at the time of Chandler's murder, Paiva was essentially admitting to the inmates that he was present at Chandler's murder. Yet as we explained earlier, Parker cannot draw this conclusion from Paiva's comments because Paiva could have easily maintained his innocence and still made this statement. We cannot conclude that Paiva's statement was so far contrary to his interests or so far tended to subject him to liability that a reasonable person in his position would not have made the statement unless he believed it to be true. In addition, to the extent that Parker claims that Paiva's statement tends to expose himself to criminal liability and exculpate Parker, Parker has failed to provide evidence of corroborating circumstances that "clearly indicate the trustworthiness of the statement," as required by MRE 804(b)(3). Consequently, testimony regarding Paiva's statements to the inmates is not admissible as a statement against interest under MRE 804(b)(3). Counsel's decision not to pursue a meritless position does not constitute ineffective assistance of counsel. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Therefore, Parker's counsel was not ineffective for failing to pursue this motion.

Next, Parker claims that his counsel was ineffective when he failed to establish a foundation for the admission of the Wackenhut records. However, even if Parker's attorney failed to make a sufficient effort to establish a foundation to admit the Wackenhut records, his actions do not constitute grounds for reversal because they do not overcome the presumption that his decision constituted sound trial strategy. See *Riley*, *supra* at 140. Although the records do not indicate that Parker was working at the time of the strike, they also list his whereabouts on January 31 as "in Holland not assigned." This notation would undermine the alibi that Parker was trying to establish, namely, that he had left the Holland area and was in West Virginia at the time of Chandler's murder. Parker's attorney's decision not to lay a foundation to admit the Wackenhut records is a matter of trial strategy, and "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687

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[15] MRE 804(b)(3) states that the following is not excluded by the hearsay rule set forth in MRE 802 if the declarant is unavailable as a witness:

> *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

NW2d 342 (2004). Accordingly, Parker has failed to establish that his attorney's actions denied him the effective assistance of counsel.

VI. Williams's and Parker's Motions for Separate Trials

Next, Williams and Parker argue that the trial court failed to provide them with separate trials. However, we conclude that the trial court did not abuse its discretion when it denied Williams' and Parker's motions for separate trials.[16]

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Instead, the trial court has the discretion 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 trial court is only required to grant a defendant's motion for severance "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). Stated differently, complete severance is required "'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), quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). A defendant must provide the 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. Instead, 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.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993). "'[I]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial,'" is not sufficient to require severance. *Id.*, quoting *Yefsky*, *supra* at 896. Also, "finger pointing" is not a sufficient reason to grant separate trials. *Id.* at 360-361. In sum, severance 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, quoting *Zafiro*, *supra* at 539.

MCR 6.121(D) gives the trial court discretionary authority to sever a trial in the interest of fairness and indicates several factors to consider when determining whether severance would be appropriate:

> On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a

[16] We review a trial court's decision to try defendants separately or jointly for an abuse of discretion. See MCL 768.5.

> fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

Before trial, Parker argued that he should receive a separate trial to alleviate the possibility that the other defendants might attempt to testify at trial and blame him for Chandler's death in an effort to exculpate themselves. Yet none of the defendants testified at trial, obviating any concern that he and the other defendants would directly present irreconcilable defenses. Instead, on appeal Parker claims that evidence concerning the wrongful acts of the other defendants created "spillover prejudice" and overshadowed evidence presented by his alibi witness, Garry Truman, who claimed that Parker had driven to West Virginia with him a few days before Chandler's murder. However, incidental spillover prejudice is not sufficient to require severance. *Hana, supra* at 349.

Further, the trial court did not abuse its discretion when it determined that severance was not necessary to ensure that all defendants received a fair trial. Defendants' joint trial involved numerous witnesses and substantially identical evidence. Further, Chandler's murder, the investigation, and the associated legal proceedings had generated local interest and substantial local media coverage. As a result, jury selection in the case had taken two days and numerous individuals had undergone questioning before a jury panel was selected. Given the notoriety of the trial, it would likely be even more difficult to find an unbiased jury for subsequent trials occurring after the verdict in the first trial had been released, hindering some defendants' opportunity for a fair trial.

Also, holding separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The defendants largely presented similar defenses, namely, that they were not present when Chandler was raped and murdered, and the evidence presented by the prosecution largely consisted of testimony by witnesses who stated that they saw most or all of the defendants rape Chandler at the party. Many of the same witnesses would need to be called at each trial and several of these witnesses lived out of state. Transporting and housing these witnesses for three or four trials would lead to additional expense and require additional time on the part of several witnesses, many of whom would present substantially the same testimony at each trial. Considering that the joint trial for the four defendants took over ten days, having separate trials for Williams and Parker would stretch judicial resources and divert several days of the trial court's time away from other matters on its docket. Consequently, the interests of justice, judicial economy, and orderly administration favored a joint trial.

Finally, Parker was not prevented from presenting a defense as a result of being part of a joint trial. Parker had the opportunity to present his alibi witness, and he does not allege that he was not permitted to admit other evidence or otherwise present a vigorous defense. Instead, Parker claims that he was prejudiced because he believes that the jury might have ignored his alibi witness when they convicted him. However, it is the function of the jury to weigh evidence, and we will not second-guess their determinations regarding the weight to give Truman's testimony. *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

Williams merely claims that he was harmed as a result of the trial court's refusal to grant him a separate trial because he was not permitted to introduce the Wackenhut records. According to Williams, the trial court would have admitted these records if Nelson had not expressed concerns about the presence of his name on the records and wished to redact them. However, as discussed earlier, the trial court did not simply refuse to admit the security records; instead, it specifically indicated that it would admit the records under the business-records exception, MRE 803(6), if Williams established the authenticity of these documents and otherwise laid a foundation for their admission.

Finally, the risk of prejudice from a joint trial was allayed when the trial court gave the jurors a proper cautionary instruction. *Hana*, *supra* at 351, 356. The trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis, and cautioned the jury that each case must be considered and decided separately and on the evidence as it applied 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).

VII. Williams's and Parker's Claims of Prosecutorial Misconduct

Williams argues that the prosecutor committed misconduct by playing clips of witnesses' trial testimony that she had apparently acquired from local news organizations. Both Williams and Parker also argue that the prosecutor committed misconduct by making a "civic duty" argument during her closing remarks. We disagree. A claim of prosecutorial misconduct is a constitutional issue that this Court may review de novo on appeal. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *Id.* at 272. "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). To determine if a prosecutor's comments during his closing argument were improper, we must evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship that these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecutor played video clips of witness testimony at four points during her closing argument.[17] First, the prosecutor played two clips of Swank's testimony. In the first clip, Swank admitted that she was part of the "cheering session" that occurred as Chandler was raped, that she was jealous of Chandler, and that she participated in Chandler's rape and murder in an effort

[17] Apparently the prosecutor got these clips from news coverage of the trial proceedings. The prosecutor played these clips by aiming a digital projector at a white board used as a screen. She would pause her argument and replay the video and audio footage of portions of a witness's testimony. Nelson's attorney also acquired some of these clips, but apparently the other defense attorneys did not think to acquire any clips.

to be accepted by the guards. In the second clip, Swank testified that Paiva said, "How do you like that, bitch?" as he raped Chandler. The prosecutor then played a clip of Johnson's testimony in which Johnson testified that he and other guards did not tell the police what they knew about Chandler's murder because they followed a code of silence. Finally, the prosecutor played a clip of the testimony of Angela Baisden, an acquaintance of Nelson who testified that in the early 1990s, Nelson told her that he "killed somebody in Michigan in the '70s."

Williams claims that the prosecutor committed misconduct when she played these video clips because his counsel did not have advance notice that the prosecutor had acquired and planned to play these video clips during her closing argument. Williams admits that Michigan has no prohibition against playing video clips of trial testimony during closing arguments or that Michigan has invoked a statutory or administrative requirement to disclose to the opposing party that video clips of trial testimony would be played during closing arguments. Instead, Williams argues that he was denied a fair trial because, as a result of the prosecutor's failure to disclose her plan to play taped testimony from the trial during her closing argument, "[t]he jury was left with an implication that the prosecution had access to a video of the entire trial such that their remarks were not based upon memory but upon a verbatim record of what was said." However, the test of prosecutorial misconduct is not whether the prosecution had access to a verbatim record of trial testimony in a form that defense counsel had not tried to acquire, but whether the defendant was denied a fair and impartial trial as a result of the prosecutor's remarks or actions. See *Abraham*, *supra* at 272. The trial court determined that the video clips played by the prosecutor accurately conveyed the testimony presented at trial, and Williams did not dispute that the testimony played in the video clips accurately reflected the witnesses' trial testimony. By playing the video clips, the prosecution conveyed an accurate representation of Swank's, Johnson's, and Baisden's testimony in a manner that the prosecutor determined would forcefully convey her argument to the jurors. The prosecutor did not commit prosecutorial misconduct simply because she accurately presented evidence from the trial to the jurors in a manner that Williams dislikes.

Regardless, any concern that the prosecutor implied to the jury that her remarks and arguments were based on a verbatim record of what was said at trial, while Williams's counsel's arguments were based on memory and recollection of trial testimony, lacks merit because Williams's attorney read portions of the trial transcript to the jury during his closing argument. In so doing, Williams's counsel would have made clear to the jury that he also had access to a verbatim record of what had been said at trial and was basing his remarks on this verbatim record. Further, Williams's attorney did not give his closing argument until the day after the prosecutor gave her argument and the trial court permitted her use of the video clips. Therefore, if Williams's counsel wanted to find video clips to play during their closing argument, they had an evening to contact the local media, ask for video clips, and peruse the video provided to find clips to support their argument.[18]

[18] In addition, any error would be harmless because the jurors were instructed that the video clips played during the closing argument were not evidence and, therefore, should not be considered when determining the verdict. "It is well established that jurors are presumed to follow their instructions." *Graves*, *supra* at 486. Therefore, we presume that the jury did not consider the

(continued…)

Both Williams and Parker challenge portions of the prosecutor's closing statement on the grounds that she made an improper civic duty argument. We disagree. Again, we examine the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *Abraham, supra* at 272-273. Even where error is found, reversal is not required unless the defendant meets his burden of establishing that the error was outcome-determinative and resulted in a miscarriage of justice. *People v Brownridge* (*On Remand*), 237 Mich App 210, 216; 602 NW2d 584 (1999). "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Consequently, a prosecutor is prohibited from appealing to the jury to sympathize with the victim, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), and the prosecutor may not tell the jury that it should convict as part of its "civic duty," *Matuszak, supra* at 56.

Parker claims that during her closing argument, "the prosecutor energetically, explicitly and repeatedly exhorted the jury to convict as a matter of 'justice' and to avoid 'doing nothing'" when she made the challenged statements. He then argues that the prosecutor deprived him of a fair trial when she made the challenged comments "by repeatedly asking the jury to focus on their duty to convict rather than the evidence, and by exhorting the jury that it had a duty to avoid 'doing nothing.'" However, we disagree with Parker's assessment of the prosecutor's closing argument as indicative of a civic duty argument. Admittedly, the prosecutor asked the jurors to deliver a verdict that was consistent with justice, but she also emphasized that justice would be achieved by returning a verdict based on evidence and not on sympathy, and she explained how the evidence supported a verdict finding Parker and his fellow defendants guilty. Considered in context, the prosecutor did not "inject issues into the trial that are broader than a defendant's guilt or innocence" or otherwise raise a civic duty argument when she made the challenged statements in her closing argument. See *Potra, supra* at 512.

In addition, the prosecutor did not argue that the jury would be "doing nothing" if it failed to convict the defendants, as Parker implies. Instead, the portion of the prosecutor's rebuttal argument that Parker challenges concerns the prosecutor's response to Williams's statements in his closing argument that Ruiz's and Marsman's testimony was not credible. The prosecutor's attempts to explain to the jury that the testimony of Ruiz and Marsman was not "nothing," but inculpated defendants in Chandler's death, constituted a proper response to Williams's closing argument and was not an improper civic duty argument.[19] See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (recognizing that a prosecutor is allowed to respond to a defendant's arguments).

(…continued)

video clips when determining that the defendants were guilty.

[19] In addition, the trial court properly instructed the jury that defendant was presumed to be innocent and did not have to prove that he did not commit the charged offenses. Further, the trial court properly instructed the jury that the prosecution's closing statement is not evidence. See MCR 6.414(G). Again, we presume that to the extent that the prosecutor's argument bordered on a plea to the jury's civic duty, the jury did not consider this plea during their deliberations. *Graves, supra* at 486.

Williams merely argues, "The State urged the jury to deliver 'justice' for Janet Chandler in bombastic terms. There is a likelihood that the jury convicted Williams because the prosecution's rhetoric overwhelmed their ability to distinguish his case from that of the others." Williams does not analyze the prosecutor's remarks in relationship to his arguments and the evidence presented at trial to explain why he believes that he was denied a fair and impartial trial. See *Brown, supra* at 152. For this reason, we will not consider Williams's arguments further.[20] See *Mitcham, supra* at 203.

VIII. Williams's Sentence

Finally, Williams claims that his presentence investigation report (PSIR) should be corrected to reflect changes made by the trial court. Specifically, Williams notes that his PSIR does not reflect the trial court's decision to delete reference to seven convictions that had incorrectly been attributed to him.[21] MCR 6.425(E) governs challenges to the accuracy of the information contained in a PSIR, and MCR 6.425(E)(2) requires that the trial court order the correction of the PSIR when it determines that a challenge to the accuracy of the PSIR has merit. Here, the trial court agreed with both parties that the convictions in question should not be attributed to Williams or included in his PSIR. Defendant is entitled to the removal of references to these convictions from the PSIR, and we remand Williams's case to the trial court to fulfill this administrative task. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

IX. Paiva's Challenge to the Admission of Autopsy Report

On appeal, Paiva claims that the trial court's admission of the autopsy report denied him of his Sixth Amendment right to confront and cross-examine Dr. Glaser, who made the report in 1979 and had since died. Paiva claims that the autopsy report is testimonial and, therefore, its admission violates the Sixth Amendment prohibition against the admission of "testimonial statements of witnesses absent from trial" in the absence of a prior opportunity for cross-examination of that witness. [22]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this "bedrock procedural guarantee," the United States Supreme Court has determined that testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 42, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697

[20] Williams also argues that the cumulative effect of the errors that he raised requires reversal. We disagree. The allegations of error made by Williams on appeal are unfounded, and any errors that might have occurred in this case did not prejudice him. Because prejudicial error has not been identified in this case, there is no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

[21] The prosecutor requested the deletion of these convictions from the presentence report at the sentencing hearing.

NW2d 144 (2005). Statements are testimonial where the "primary purpose" of the statement or the questioning that elicits the statement "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 244 (2006). The Supreme Court recently in *Melendez-Diaz v Massachusetts*, ____US ____; 129 S Ct 2527 (2009), reaffirmed the *Crawford* principles associated with the right of confrontation of witnesses. In describing classes of testimonial statements to which the Confrontation Clause would apply, the Court stated:

> "Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; *statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*." [*Melendez-Diaz, supra* at 2531 (emphasis supplied), citing *Crawford, supra* at 51-52, 124 S.Ct. 1354 (internal quotation marks and citations omitted).]

Melendez-Diaz concerned the utilization of certificate/affidavits by forensic analysts identifying a compound as cocaine. The certificates were admitted into evidence at defendant's trial pursuant to state law allowing the certificates as prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed. Because it was offered against the defendant to prove a contested fact, it was testimonial, subject to the Confrontation Clause, and error to admit the documents into evidence. The Court did draw comparisons between such affidavit evidence, scientific findings, coroner's reports, and business and public records in the context of vulnerability to the limitations of the Confrontation Clause.

While Chandler's autopsy report as utilized here may be subject to arguments both for and against application of the teachings of *Crawford* and its progeny, we need not make that determination. If we assume the admission into evidence in this trial of the autopsy report as a *Crawford* violation, such error is subject to harmless error analysis. "When constitutional error occurs and is preserved, as defendant here alleges the admission of hearsay in violation of the right of confrontation to be such an error, a new trial must be ordered unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005); *People v Bauder*, 269 Mich App 174, 179-180; 712 NW2d 506 (2005).

Defendants, at trial, neither contested that Chandler was raped and killed nor that the manner of her death was by strangulation. Rather, the theories of defense were nonparticipation at the event that resulted in the crimes and their identification as participants. The clear import of the autopsy report and the subsequent testimony by Dr. Start based on the autopsy report was that Chandler was killed by strangulation. Several witnesses to the crimes testified to the participation by defendants in the crimes charged and to Paiva in particular. The evidence clearly established that Chandler was raped, brutalized, bound and gagged, and that a belt circumscribed her neck with the loose end used as a tether and lever to asphyxiate Chandler. Several witnesses testified that Paiva coordinated the gang rape of Chandler and violently raped

her several times. Witnesses testified that Paiva was present when Chandler was being raped, strangled, and brutalized. The evidence established that he not only participated in the crimes, but he directed and encouraged their continuation until Chandler ultimately died. Paiva was present and shouted orders to the participants until Chandler was pronounced dead by the participants. Even in the absence of an autopsy report, this eyewitness evidence was sufficient to support Paiva's convictions. Any error in admitting the autopsy report and Dr. Start's resultant testimony is harmless beyond a reasonable doubt in the face of overwhelming evidence that Paiva committed murder. *Shepherd, supra* at 347; *Bauder, supra* at 179-180.[23]

Affirmed. We remand Williams's case [283568] for the ministerial task of making agreed-upon changes to the PSIR. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

[23] To the extent that Parker claims that arguments made on appeal by the other defendants are also applicable to his case, he fails to provide any authority or rationale to support these assertions separate from that which we have already considered and denied.