STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 12, 2013
v IVORY LEE SHAVER, Defendant-Appellant.	No. 305944 Van Buren Circuit Court LC No. 10-017030

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SCOTTIE BERNARD SHAVER, Defendant-Appellant.	No. 305945 Van Buren Circuit Court LC No. 10-017031

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SHEVOLIER JOVON GILL, Defendant-Appellant.	No. 306288 Van Buren Circuit Court LC No. 10-017032

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In Docket No. 305944, defendant Ivory Lee Shaver appeals as of right his jury conviction of first-degree murder supported by two theories: premeditated murder and felony-murder, MCL 750.316. Ivory was sentenced to life imprisonment without the possibility of parole. In Docket

No. 305945, defendant Scottie Bernard Shaver appeals as of right his jury conviction of first-degree murder supported by two theories: premeditated murder and felony-murder, MCL 750.316. Scottie was sentenced to life imprisonment without the possibility of parole. In Docket No. 306288, defendant Shevolier Jovon Gill appeals as of right her jury conviction of first-degree felony murder, MCL 750.316(1)(b).[1] Shevolier was sentenced to life imprisonment without the possibility of parole.[2]

Defendants' convictions stem from the death of Deborah Boothby, hereafter the victim. Police responded to a call and discovered the victim's body on the Blue Star Highway at about 2:30 a.m. on April 26, 1998. The victim was almost on the center line of the roadway and there was a large amount of blood around her head. The victim's jacket was ripped and it appeared that she had been hit by a vehicle. The victim was still alive, and was rushed to the South Haven emergency room. However, the victim died during transport. Police assumed the victim's death was the result of a hit and run accident. After no significant progress was made, the case was eventually closed. The case was re-opened in September 2007 by the Michigan State Police. In the course of the new investigation of the victim's death, Adrienne Burnette admitted to her involvement in the murder and cooperated with police, leading them to Ivory, Scottie, and Shevolier. Another break for police came in 2009, when Adrian Travier, an inmate who was incarcerated with Ivory, wrote a letter to the prosecutor indicating that Ivory confessed to the murder and stated that Scottie, Shevolier, and Ed Foster were involved.

Testimony at trial established that on April 25, 1998, the victim went to the Blue Star Lounge. The victim and Ivory had an on and off romantic relationship. Ivory was at the Blue Star Lounge that night with Shevolier. Witnesses described an argument between the victim, Ivory, and Shevolier, and testified that the victim threw her drink at Ivory and/or Shevolier. After the altercation between the victim, Ivory, and Shevolier, the lights came on at the lounge and everyone was asked to leave. Witnesses testified that the parking lot was crowded after the lounge was closed early, and a crowd of people formed around the victim, who was being hit, kicked, and stomped on. Witnesses specifically identified Ivory, Scottie, and Shevolier as among the people who were beating the victim. After the victim was apparently unconscious, several witnesses testified to observing Ivory and Scottie lift the victim up and place her in the backseat of Shevolier's car.[3] Witnesses testified that Shevolier was in the driver's seat, and that Ivory got into the front passenger seat and Ed Foster got into the backseat with the victim.

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[1] Shevolier was also convicted of second-degree murder, MCL 750.317; however, that conviction was vacated by the trial court to avoid a double jeopardy violation.

[2] A previous jury trial involving defendants Scottie Shaver, Ivory Shaver, Shevolier Gill, and Ed Foster ended with a hung jury in regard to defendants Scottie, Ivory, and Shevolier. Ed Foster, who had a separate jury, was convicted of first-degree murder. Scottie, Ivory, and Shevolier were retried jointly, with the same jury, and that retrial resulted in the above-stated convictions and is the subject of this appeal.

[3] Some witnesses testified that Ed Foster was one of the people who placed the victim in Shevolier's car.

Burnette testified to observing all the above-stated events, and then testified that as she was waiting in a line of cars to leave the lounge Scottie got into the front passenger seat of her car and told her to follow Shevolier's car. Burnette, who knew Scottie and was previously romantically involved with him, complied with his command and turned left toward Covert. She followed Shevolier's car into a park about a mile away from the lounge. The two cars drove through the park until they reached a turnaround area near an old pump house. At that point, Scottie got out of Burnette's car and Ivory, Shevolier, and Ed got out of Shevolier's car. The victim was pulled out of the car and dragged to a grassy area. The victim was conscious again and was screaming for help and begging defendants to stop. Burnette testified that Shevolier choked the victim while the men continued to beat her. Eventually, the victim stopped moving. Shevolier asked if the victim was dead, and Ivory stated that they were going to take her back to the lounge, dump her on the side of the road, and run her over with the car so it would appear that the victim was killed in a hit and run accident.

Ivory, Ed, and Shevolier got back into Shevolier's car, and the victim was placed back in the backseat. Burnette testified that she was "numb," and scared of what would happen to her. Scottie got back into Burnette's car and told her to follow Shevolier's car, which Ivory was now driving. Burnette testified that she followed Shevolier's car back toward the Blue Star Lounge, and that Scottie explained to her that their plan was to run the victim over and make her death look like an accident. Burnette testified that Shevolier's car drove just north of the lounge, and that Ivory and Ed got out of Shevolier's car and placed the victim behind it. She testified that they put the car in reverse and ran over the victim and then rolled forward back over her. Ivory was the driver. Scottie told Burnette to drive up to the Blue Star Lounge parking lot where he sold drugs to Keith Owens, a bouncer at the lounge. After the drug transaction, Scottie told Burnette that she was "going to leave this bar, you're going to run that bitch over and make sure she's dead this time." Burnette testified that she told Scottie she did not want to run the victim over, and Scottie said "you're going to run her over or else I'm going to pull you out and you're going to end up like her." So Burnette "did what [she] was told." The victim was still on the ground at this time, toward the side of the road with her upper body in the lane of traffic and her head toward the center line. Burnette testified that she was driving 25 or 30 miles per hour when she ran over the victim. After running over the victim she went back to her house with Scottie, who spent the night.

Burnette testified at defendants' trial pursuant to a plea agreement. Burnette pleaded guilty to second-degree murder and perjury. Pursuant to the deal, she agreed to provide truthful testimony at each and every court proceeding regarding the victim's murder. The plea deal also included a sentence agreement stating that Burnette would be sentenced to eight to 20 years' imprisonment for each count, and that the sentences would run concurrently. The entire agreement was admitted as evidence and read into the record during trial.

Defendants were tried jointly in front of the same jury and were convicted as previously stated. All three defendants appeal their convictions as of right. Their cases were consolidated on appeal.

I. DOCKET NO. 305944

On appeal, Ivory first argues that the trial court erred by denying defendants' motion for a mistrial after one juror indicated that she believed all defendants were guilty before the prosecution rested its case.

We review for an abuse of discretion a trial court's decision to grant or deny a motion for a mistrial. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes" *Id.* "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (quotation and citation omitted).

A mistrial is appropriate and will not bar retrial where manifest necessity exists. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002). Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). "Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification of a mistrial." *People v Hicks*, 447 Mich 819, 830; 528 NW2d 136 (1994).

A criminal defendant has a constitutional right to be tried by an impartial jury, US Const, Am VI; Const 1963, art 1, § 20, and a biased jury would constitute manifest necessity for granting a mistrial. However, "[j]urors are presumed to be impartial until the contrary is shown," and "[t]he burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008) (quotation and citation omitted). Moreover, not every instance of juror misconduct requires a new trial. *Id.* at 551, quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960). For a new trial to be necessary, the "misconduct must be such as to affect the impartiality of the jury. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial. The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had." *Id.*, quoting *Nick*, 360 Mich at 230, quoting 39 Am Jur, New Trial, § 70, p 85.

In this case, juror misconduct was brought to light at the beginning of the tenth day of trial when the trial court informed the parties that it received a note from a juror who heard a comment from Sheryl Lopez, another juror, that the reporting juror found inappropriate. The trial court explained that Lopez stated, in regard to defendants, that "they're all guilty or they all belong in jail." The trial court then noted that it also received a note from Lopez stating that she needed to talk to the judge before the trial started. Lopez was brought into the courtroom and questioned by the trial court and the attorneys in a sidebar conference not transcribed on the record. After the conference, the trial court summarized on the record what Lopez stated. Pertinently, Lopez indicated that there were five jurors smoking outside at the time she made the comment who did not hear anything. Lopez admitted to indicating that in her opinion all the defendants were guilty. She explained that she did not know why she said what she said and she just "blurted it out." Juror Lopez explained that after her statement another juror said "don't you mean that maybe they did something wrong, or they did something wrong" and then there was

no more discussion. Two other jurors were also questioned about what they heard and instructed not to talk to the other jurors about the discussion.

After questioning Lopez and the two additional jurors, the trial court invited the attorneys to make arguments regarding the appropriate course of action. All three defense attorneys moved for a mistrial, and argued that Lopez should be removed for cause. The trial court agreed to remove Lopez, and she was dismissed from the jury. However, the trial court denied defendants' motion for a mistrial. The trial court explained that it believed there were instructions that could cure any potential prejudice arising from the situation, especially in light of the fact that the commenting juror was dismissed. It noted that the fact that one of the other jurors reported the comment proved that the jurors, for the most part, were following the court's instructions. The trial court stated that it firmly believed the parties could all get a fair trial under the circumstances and that the appropriate remedy was dismissal of the commenting juror, not a mistrial.

After denying the motion for mistrial, the trial court called in all the non-smoking jurors who were not questioned one by one to determine what, if anything, was heard by each juror in order to make a record. The first juror did not hear any comment. The next juror said she heard "something along the lines of I think they are all guilty or they should all be in prison." The juror stated that despite having heard that comment, she could be fair. The next juror did not hear the comment. The next juror stated that he heard Lopez make a comment like "she was surprised that some of the defendants weren't already in jail." He admitted to talking to another juror about how the comment was not appropriate. He affirmed he could still give the parties a fair trial. The next three jurors did not hear any comment. The trial court then, at the request of one of the defense attorneys, brought the rest of the jurors in one by one so it was consistent. None of the other jurors heard anything. The parties agreed not to explain Juror Lopez's absence to the jury, and they agreed not to give any specific instruction.

On appeal, defendant Ivory primarily argues that a new trial was necessary because the juror who stated "don't you mean that maybe they did something wrong, or they did something wrong" in response to juror Lopez's statement was permitted to remain on the jury after "agreeing" with juror Lopez. We find this argument unavailing because a careful review of the record does not support Ivory's position that this juror, or any other juror, agreed with juror Lopez's statement.[4] The trial court specifically asked the juror who defendant maintains made the statement in agreement with juror Lopez, "having heard that comment made by the juror we're talking about, did that in any way affect your ability to follow my instructions on the law you're going to follow?" The juror replied "no." The trial court further asked whether the juror could give each individual defendant a fair trial and the juror said "yes." Finally, the trial court asked if the juror could give the prosecution a fair trial and the juror said "yes." All the other jurors were similarly questioned regarding their ability to give the parties a fair trial, and all the

[4] Defendant maintains that the juror who made the second statement allegedly agreeing with Lopez was a juror he identifies as "Williams." However, the record does not clearly identify which juror made that statement.

jurors affirmed that they could be fair and impartial. Further, the trial court instructed the jury that it had to return a "true and just verdict based only on the evidence."

Therefore, we conclude that the trial court did not abuse its discretion by denying the motion for a mistrial because the record supports the trial court's conclusion that the jury was fair and impartial. While juror Lopez's comment clearly constituted misconduct, she was removed from the jury and the record does not support the conclusion that Lopez's misconduct prevented the remaining jurors from providing a fair and impartial trial in light of the fact that many of the remaining jurors did not hear the comment, those who heard the comment affirmed that they could be fair and impartial, and the jury was instructed to return a fair verdict based only on the evidence. Accordingly, the trial court did not abuse its discretion by denying the motion for a mistrial.

Next, Ivory argues that he was denied a fair trial by three specific instances of prosecutorial misconduct. First, Ivory argues that Detective Diane Oppenheim, who was sitting at the prosecution's table, mouthed the word "no" while Burnette was testifying. Defendant admits that the prosecution did not appear to have anything to do with Oppenheim's conduct, but nevertheless argues that the prosecution is responsible for the detective's actions. Second, defendant maintains that the prosecution's questions about the personal reaction of the EMT who responded to the scene improperly interjected issues extraneous to defendant's guilt or innocence. Finally, defendant argues that the prosecution's reference to an altercation between Ivory and the victim several days before the victim's murder constituted misconduct because evidence regarding that altercation was plainly inadmissible.

We review de novo alleged instances of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We examine the pertinent portion of the record in order to evaluate the prosecutor's remarks in context when considering claims of prosecutorial misconduct. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Analysis of alleged prosecutorial misconduct is fact specific. *Id.* "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007), citing *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Moreover, we will find no error if a curative instruction could have alleviated any prejudicial effect. *Callon*, 256 Mich App at 329-330.

We first address defendant's claim regarding Oppenheim's reaction to Burnette's testimony.[5] At the outset, we note that this claim is not properly framed as one of prosecutorial

[5] We note that the parties dispute whether this issue is properly preserved for appellate review. We conclude that the issue is properly preserved because defense counsel for Scottie Shaver immediately objected to Oppenheim's conduct, after which the trial court held a hearing outside the jury regarding the incident, and ultimately decided to proceed without taking any action. Counsel for Scottie Shaver similarly objected to the questioning of the EMT. The parties do not dispute that the argument regarding the prosecution's opening argument was preserved. Because counsel for Scottie Shaver objected to the other two alleged instances of prosecutorial

misconduct. The detective's reaction was spontaneous and was not the result of any action by the prosecutor. The detective's reaction is more properly evaluated in the context of whether it deprived defendant of his right to due process and a fair trial. Courtroom conduct is evaluated to determine whether it affected the defendant's right to due process and a fair trial. See, e.g., *People v Rose*, 289 Mich app 499, 517; 808 NW2d 301 (2010) (considering whether the use of a witness screen violated the defendant's right to due process and a fair trial); *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) (noting that permitting a defendant to appear at a jury trial free from handcuffs or shackles is an important component of a fair trial); *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006) (considering whether the trial court's comment warning the defendant about his own outbursts violated the defendant's due process right to a fair trial).

The detective's reaction to Burnette's testimony occurred while defense counsel was cross-examining Burnette. Defense counsel for Scottie Shaver asked Burnette who she watched take the victim out of the car, and she responded that it was Ivory Shaver and Scottie Shaver. Defense counsel asked her "Ivory Shaver and Scottie Shaver?" and she stated "excuse me, Ivory Shaver and Ed Foster," consistent with her previous testimony. After Burnette clarified who she saw, defense counsel stated "I would like the record to reflect that the detective standing immediately to the witness's right said, no, and then covered up her mouth, which the jury heard." The jury was dismissed, and the trial court asked the attorneys what they heard and saw. Counsel for Scottie Shaver said he heard the detective say "no" and saw her put her hand over her mouth, the prosecutor said he did not hear anything but that he saw the detective with her hand over her mouth. He was standing on the other side of a diagram. Defense counsel for Shevolier did not hear or see anything. Defense counsel for Ivory heard the detective "make some kind of answer" but could not understand what she said, he acknowledged it was brief, but said he could see everyone "reacting" to the detective. The detective acknowledged that she reacted, admitted in was inappropriate, and covered her mouth. She said she did not even get the word "no" out completely. All four of the attorneys—the prosecutor and the three defense attorneys—agreed on the record that a curative instruction should not be given to the jury, and that the best way to proceed would be to continue questioning the witness. All the attorneys stated on the record their agreement with that course of action.

We conclude that the detective's reaction did not violate defendant's right to due process and a fair trial. First, there is no indication from the record that the jury was even aware of the

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misconduct and the trial court ruled on both objections, the issue was raised, addressed, and decided in the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). The fact that defense counsel for a different defendant raised the objections should not render the issue unpreserved because the purpose of the preservation requirement is to ensure that a defendant's constitutional and nonconstitutional rights are addressed during trial. See *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). The requirement that there be a contemporaneous objection to any alleged error provides a the trial court with "an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." *Id.* at 765 (quotation and citation omitted). In this case, there were contemporaneous objections; thus, we conclude the issue was properly preserved.

detective's reaction. Moreover, all the parties agreed that the best course of action was to proceed without calling the jury's attention to the detective's conduct. Second, the topic of cross-examination at the time of the detective's misconduct was not crucial to Ivory's guilt or innocence. Whether Burnette saw Scottie and Ivory or Ed and Ivory place the victim in the roadway is not an essential part of the charges against defendants because if the rest of the evidence against defendants is believed, they were all together in the cars and all collectively decided to make it look like the victim was run over by a car. Thus, all defendants were culpable regardless of which particular defendants physically placed the body in the roadway. Accordingly, defendant has failed to demonstrate any prejudice from the detective's inadvertent statement during Burnette's testimony and is not entitled to relief on appeal.

Next, we consider defendant's argument regarding the prosecution's questioning of the EMT who responded to the scene, Bondelyn Simmons. The exchange defendant objects to began when the prosecution elicited testimony from Simmons that she went to the bathroom and threw up the contents of her stomach after the victim was turned over to the emergency room staff. The prosecution asked Simmons why she threw up, and defense counsel objected. The trial court sustained the objection. The prosecutor then asked Simmons if she washed her hands, and defense counsel objected on the basis of relevance and the trial court sustained the objection. Then the prosecution asked Simmons if she continued to be an EMT after her experience, and this question was also objected to on relevance grounds and on the ground that it was playing on the jury's sympathy. The trial court sustained the objection, stating that what Simmons did after the incident was not relevant. The prosecutor then asked Simmons whether this had "any impact" on her, and defense counsel objected again, and the trial court sustained the objection. The prosecutor then asked if Simmons was employed after working for the Covert Township Police Department, and defense counsel objected on relevance grounds, and the trial court sustained the objection. Finally, the prosecution asked Simmons whether her reaction surprised her in light of her background, and defense counsel again objected on relevance grounds and the trial court again sustained the objection.

Even assuming the prosecutor's attempts to elicit information about Simmons's personal reaction to the victim's injuries did not constitute a good faith attempt to admit evidence, and was therefore improper, defendant cannot establish that this improper line of questioning deprived him of a fair trial. First, photographs of the victim's injuries were submitted to the jury; thus, it was aware of the extent of the victim's injuries and the possible impact those injuries would have on a first responder. Thus, the questions posed to Simmons that suggested she had an adverse reaction did not hint at anything that would have been a surprise to the jury. Moreover, Simmons was not actually permitted to answer the questions because the trial court sustained the objections. No curative instruction was requested. Finally, the jury was instructed to make its decision on the basis of the evidence alone, not any sympathy it may have, and jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Thus, we conclude that this line of questioning did not deny defendant a fair and impartial trial. *Ackerman*, 257 Mich App at 448.

Finally, in regard to defendant's argument that the prosecutor's reference to the previous assault by Ivory on the victim during opening argument was misconduct, we conclude that the reference was made in good faith on the basis of the belief that the evidence would be admitted during trial.

During the prosecution's opening statement defense counsel for Ivory objected to the prosecution's reference to the assault, and the trial court overruled the objection and allowed the prosecution to finish explaining what it intended to prove. The trial court stated that it would deal with the issue when the evidence was offered for admission. After opening arguments were complete, the trial court heard arguments regarding the admissibility of the testimony about the assault by Ivory against the victim a few days before the victim's death. Counsel for Ivory argued it was improper MRE 404(b) evidence, and noted that he was not given notice of the prosecution's intent to use it. Further, he argued that the evidence was outside the scope of the trial and not relevant. The prosecution argued that the evidence showed a "very recent incident of rancor" between the victim and Ivory, and argued the purpose of the evidence was to complete the picture of what happened the night of the murder. The trial court did not rule on the issue until the fourteenth day of trial when the prosecution called the witness and defense counsel for Ivory renewed his objection. The trial court had the parties question the witness outside the presence of the jury to provide a factual predicate for its ruling. The trial court then heard arguments from the parties again, and ultimately found that the evidence was marginally relevant and more prejudicial than probative and barred its admission.

While the trial court ultimately ruled that the evidence was not admissible, the prosecutor's attempt to admit the evidence was not made in bad faith because there is a reasonable argument to support the prosecutor's position that the evidence would be admissible in light of defendant Ivory's defense and the fact that Ivory was charged with first-degree premeditated murder. Defendant Ivory's theory at trial was that the victim's death was the result of an unfortunate accident. The fact that Ivory had recently assaulted the victim demonstrated that there was acrimony between the victim and Ivory, and tended to demonstrate that Ivory had a motive to harm the victim. This evidence tended to make the prosecution's theory that Ivory was part of a group of people who viciously attacked the victim more probable. The prior relationship of the parties is relevant to determining whether a defendant acted with premeditation and deliberation. That defendant recently assaulted the victim was therefore relevant to the crime with which he was charged and admissible for the proper purpose of demonstrating motive, intent, or absence of accident. This fact has been recognized by this Court in *People v Morris*, 139 Mich App 550, 557; 362 NW2d 830 (1984), and more recently reiterated in *People v Orr*, 275 Mich App 587, 592; 739 NW2d 385 (2007). Thus, the prosecution's reference to the prior assault in its opening statement and attempt to admit that evidence later during the trial was made in good faith. Accordingly, the reference did not constitute prosecutorial misconduct. *Dobek*, 274 Mich App at 70. Moreover, as previously noted, the jury was instructed that the statements of the attorneys do not constitute evidence, and that it must decide the case based only on evidence. Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 227. Thus, the reference in the prosecutor's opening statement to the altercation did not affect the fairness of defendant's trial.

II. DOCKET NO 305945

On appeal, Scottie first argues that there was insufficient evidence to support his conviction of first-degree murder. Specifically, he maintains that Burnette's testimony was untrustworthy, there was no evidence that he forcibly moved the victim from one place to another for the purpose of murdering her, and that the evidence showed he was merely present.

We review de novo challenges to the sufficiency of the evidence. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

Scottie Shaver was convicted of first-degree murder supported by two theories: premeditation and felony murder. MCL 750.316. To sustain a conviction of first-degree premeditated murder the prosecution must prove that the defendant killed the victim and that the killing was done with premeditation and deliberation. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Premeditation means "to think beforehand." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). There is no specific time requirement for premeditation, but "sufficient time must have elapsed to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "The previous relationship between the defendant and the victim, the defendant's actions before and after the crime, and the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted" may all be considered when determining whether the defendant acted with premeditation. *Plummer*, 229 Mich App at 300; *Unger*, 278 Mich App at 229.

To sustain a conviction of first-degree felony murder the prosecution must prove:

> (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 Seals*, 285 Mich App 1, 12; 776 NW2d 314 (2009) (citation omitted)].

Kidnapping is one of the specifically enumerated felonies. MCL 750.316(1)(b). In 1998, when the victim was allegedly kidnapped and murdered, the kidnapping statute provided, in relevant part, that:

> Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, . . . or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, . . . shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

The Michigan Supreme Court interpreted the version of the kidnapping statute that was in effect at the time of defendants' criminal acts and concluded that if an underlying crime involves murder, movement incidental to that crime is sufficient to establish a valid statutory kidnapping. *People v Wesley*, 421 Mich 375, 387-388; 365 NW2d 692 (1984).

The jury was also instructed on aiding and abetting. Michigan's aiding and abetting statute provides: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had

directly committed such offense." MCL 767.39. Aiding and abetting is a theory of prosecution that "permits the imposition of vicarious liability for accomplices;" it is not a separate substantive offense. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). Michigan law provides that "a defendant who intends to aid, abet, counsel, or procure the commission of *a* crime, is liable for that crime as well as the natural and probable consequences of that crime." *Id.* at 3 (emphasis in original).

There are three elements that must be proved beyond a reasonable doubt to convict on an aiding and abetting theory:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Robinson*, 475 Mich at 6.]

Specifically, the intent required to establish that a person aided and abetted in the commission of a crime may be inferred from circumstantial evidence. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *Id.*

Because intent is inherently difficult to prove, minimal circumstantial evidence can establish a defendant's intent. *People v Cameron*, 291 Mich App 599, 615; 806 NW2d 371 (2011). Intent can be inferred from the facts and circumstances of a case, *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011), including a defendant's acts, *Cameron*, 291 Mich App at 615.

In this case, the evidence demonstrated that Scottie was more than merely present, and that he forcibly moved the victim with the purpose of kidnapping or murder. Several witnesses testified that Scottie actively participated in the beating of the victim in the parking lot of the Blue Star Lounge, and that he assisted Ivory in picking the victim up and placing her in Shevolier's car. Burnette testified that Scottie ordered her to follow Shevolier's car. The jury could have inferred from this testimony that Scottie placed the victim in Shevolier's car for the purpose of kidnapping her or moving her to a more remote location in order to kill her. Moreover, this evidence shows that Scottie was not merely present, but rather, was actively participating in beating and moving the victim. Further, Burnette testified that once they arrived at the park, Scottie continued to beat the victim, and that after the victim appeared to be unconscious, Scottie got back into Burnette's car and ordered her to run the victim's body over to ensure the victim was dead. This evidence also demonstrates Scottie's intent and active participation in the victim's murder.

We also reject Scottie's argument that Burnette's testimony was untrustworthy and should not have been believed. It is the responsibility of the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Moreover, we must "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). Thus, Scottie's argument regarding the credibility of Burnette's testimony has no merit. Accordingly, when the evidence is viewed in the light most favorable to the prosecution, there was sufficient evidence to support Scottie's conviction beyond a reasonable doubt.

Next, Scottie argues that the trial court erred by denying his motion for a separate trial. We review for an abuse of discretion a trial court's decision regarding joinder and severance of defendants in a criminal prosecution. *People v Hana*, 447 Mich 325, 338; 524 NW2d 682 (1994). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MCR 6.121, which governs joinder and severance of multiple defendants, provides:

> **(A) Permissive Joinder.** An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when
>
> (1) each defendant is charged with accountability for each offense, or
>
> (2) the offenses are related as defined in MCR 6.120(B).
>
> When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.
>
> **(B) Right of Severance; Unrelated Offenses.** On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).
>
> **(C) Right of Severance; Related Offenses.** On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> **(D) Discretionary Severance.** 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 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.

"There is a strong policy favoring 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, 53; 492 NW2d 490 (1992). However, severance should be granted when the defenses of the jointly accused defendants are antagonistic to each other. *Hana*, 447 Mich at 339-340 (citation and quotation omitted). Moreover, a separate trial should be granted if

"necessary to avoid prejudice to substantial rights of the defendant." *Id.* at 342, quoting MCR 6.121(C). Defendant bears the burden of demonstrating any prejudice that would arise out of joinder. *Id.* at 339. "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes 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." *Id.* at 346. If a defendant fails to make this showing, a trial court's decision to grant a joint trial will not be reversed absent a "significant indication on appeal" that prejudice in fact occurred during trial. *Id.* at 346-347.

In this case, the trial court denied defendants' motions for severance. The trial court addressed each of the considerations listed in the court rule on the record. The trial court found that the motions were timely, but explained that it had not received any affidavits or other offer of proof indicating that defendants had antagonistic defenses. The trial court further found that there are several witnesses in the case that would have to testify in all three trials if the trials were held separately. Finally, the trial court found that no evidence of any prejudice that would result from a joint trial was submitted. Thus, the trial court held that there was "no substantial prejudice to anyone's right to a fair trial by joining" the trials. In regard to separate juries, the trial court found no reason to support separate juries in light of its finding that all three defendants had consistent defenses. Accordingly, it denied the request for separate trials and separate juries.

On appeal, Scottie argues that he was prejudiced by the "confusion and distraction of the allegations and actions of the other co-defendants." Specifically, he argues that the testimony that Shevolier said it was a "trip" to be present when someone was killed unfairly implicated him, and that defendants' inconsistent defenses prejudiced him. We disagree.

First, the record does not support Scottie's claim that defendants had inconsistent defenses. To the contrary, the record shows that defendants all consistently claimed that the victim was killed in a hit and run accident and that Burnette was lying when she implicated defendants in the victim's murder. Second, Shevolier's testimony did not implicate any of the other defendants in the murder, and she denied making the statement about it being a trip to be there when someone is killed. Moreover, even the testimony that Shevolier allegedly made such a statement is not prejudicial to Scottie because it does not mention him or any other defendant. Finally, review of the record demonstrates that the trial court correctly determined that if three separate trials were held it would be necessary to repeat the evidence three times resulting in an unnecessary expenditure of judicial resources. Thus, because defendant does not support his claims of prejudice with specific evidence, and because there is nothing in the record to suggest that defendant was prejudiced by the joint trial, we conclude that the trial court did not abuse its discretion by denying defendant's motion for severance.

III. DOCKET NO. 306288

On appeal, Shevolier raises two arguments raised by her co-defendants. Shevolier argues that the trial court erred by denying defendants' motion for a mistrial on the basis of juror misconduct and Shevolier argues that the trial court erred by denying her motion for a separate trial.

Regarding the mistrial issue, Shevolier specifically argues the bias demonstrated by Lopez's statement that defendants were all guilty after hearing only half of the evidence tainted the entire jury, and that removal of Lopez did not cure the jury's prejudice. We disagree. Contrary to Shevolier's argument, the record supports the trial court's conclusion that defendants received a fair trial after Lopez was removed from the jury. Each juror was specifically questioned by the trial court regarding the comment, and whether that juror could be fair and impartial. All of the jurors affirmed that the comment did not affect their ability to fairly judge the case. Moreover, the trial court's instructions to the jury included the instruction that the jury had "taken an oath to return a true and just verdict based only on the evidence" and the trial court's instructions on the law. Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 227. Therefore, we conclude that the trial court did not abuse its discretion by denying Shevolier's motion for a mistrial.

Regarding the severance issue, Shevolier specifically argues that her substantial rights were prejudiced by the joint trial because she was forced to testify in response to the testimony of Adrian Travier that was offered against Ivory. Travier's testimony constituted a compelling reason for severance because the jury was permitted to consider evidence that would not have been admissible against Shevolier if she were given a separate trial. Moreover, Shevolier argues that it was difficult for the jurors to determine what evidence was applicable to each of the defendants. Shevolier maintains that she was a "small fish" lost in a large and complex trial.

We do not find any of Shevolier's arguments persuasive. First, the trial court specifically ruled that Travier's testimony was admissible against all three defendants, and this ruling was not error, as discussed *infra*. Thus, Shevolier's argument that this evidence would not have been admissible if she had been granted a separate trial is without merit. Moreover, almost all of the witnesses who testified to the events on the night of the victim's death testified to defendants' actions as a unit, i.e., all three defendants were at the Blue Star Lounge, all three defendants were beating the victim in the parking lot, Shevolier and Ivory were seen in the car that the victim was placed in together, and Burnette testified that all three defendants were present at the second scene and were actively engaged in further beating the victim. Thus, the evidence submitted at the joint trial would have been submitted basically in its entirety at any separate trial held for Shevolier. Accordingly, the evidence presented during trial weighed in favor of a joint trial and did not support severance.

Similarly, there was no risk that Shevolier would be a "small fish" caught in the middle of a large trial. The testimony demonstrated that she was principally involved in the kidnapping and murder of the victim. Moreover, the jury was specifically instructed that it must determine each defendant's guilt individually, and must consider only evidence relevant to each particular defendant when making its determination. Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 227. Thus, Shevolier has not demonstrated any prejudice that resulted from the joint trial. Accordingly, we conclude that the trial court did not abuse its discretion by denying her motion for a separate trial.

Next, Shevolier argues that there was insufficient evidence to support her conviction of first-degree felony murder. Specifically, Shevolier maintains that the evidence shows that she was merely present, and that there was no evidence of malice because none of the evidence

showed that she participated in any plan to cause the victim's death or that she intentionally set in motion any force likely to cause the victim's death.

To sustain a conviction of first-degree felony murder the prosecution must prove:

> (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. [*Seals*, 285 Mich App at 12 (citation omitted)].

The malice required to support a conviction of first-degree felony murder is that a defendant "acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). "A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id.* at 729. Thus, when a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony, the jury may consider the nature of the underlying felony and the circumstances surrounding its commission to determine whether malice is established. *Id.* at 729-730. However, a jury may not find malice from the intent to commit the underlying felony alone. *Id.* at 730. Circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009).

In this case, the evidence demonstrated that Shevolier actively participated in two brutal beatings of the victim—the first in the parking lot of the Blue Star Lounge and the second at Covert Park, where she choked the victim while co-defendants beat her again. Several witnesses testified about Shevolier's participation in the victim's beating at the Blue Star Lounge. Moreover, many witnesses testified that Shevolier was the driver of the vehicle in which the victim was transported to Covert Park. Burnette specifically testified that Shevolier choked the victim while the others beat her at Covert Park, and that after Shevolier asked whether the victim was dead the plan was hatched to make her death look accidental. One witness testified to a comment Shevolier made sometime after the victim's death in which she admitted to being present when the victim was killed. This evidence does not support the conclusion that Shevolier was merely a follower. Shevolier's active participation in the transportation and beating of the victim supports the jury's conclusion that Shevolier possessed the requisite malice. Accordingly, we reject Shevolier's argument that there was insufficient evidence of malice to support her conviction.

Next, Shevolier argues that the trial court violated her right to due process and a fair trial by denying her motion for a change of venue in light of the extensive pre-trial publicity. Specifically, Shevolier argues that the pre-trial publicity was inflammatory, racially charged, and negative, and that this publicity prejudiced the community so that she could not receive a fair trial in the area.

We review for an abuse of discretion a trial court's decision to grant or deny a motion for change of venue. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Constitutional issues are generally reviewed de novo, *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002); however, defendant did not preserve her due process argument in the trial court. Thus, the alleged violation of defendant's due process right to a fair trial is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

A criminal defendant generally must be tried in the county where the crime occurred. *Unger*, 278 Mich App at 253. However, a trial court may change venue to another county when special circumstances demonstrate good cause to believe justice requires a change of venue or where a statute provides for change of venue. *Id.* at 254; MCL 762.7. The right to a jury trial includes the right to a fair trial by a panel of impartial and indifferent jurors. *Jendrzejewski*, 455 Mich at 501.

When a jury pool is relatively small, the initial question is whether the effect of pretrial publicity constituted "unrelenting prejudicial pretrial publicity" resulting in the necessity of presuming "that the entire community [was] both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue." *Id.* (quotation and citation omitted). "Juror exposure to information about a defendant's previous convictions or newspaper accounts of the crime for which he has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity." *Id.* at 502. To determine whether pretrial publicity deprived a defendant of a fair trial, reviewing courts "must turn to any indications in the totality of circumstances that [the trial] was not fundamentally fair." *Id.* (quotation and citation omitted). In *Jendrzejewski*, the Court considered the actual amount of pretrial publicity, the geographic scope, and the tenor of the publicity when determining whether the defendant was deprived of a fair trial. *Id.* at 503. The Court concluded that 20 articles published in the local paper on 17 separate days over a period of seven months did not constitute extensive or prejudicial pretrial publicity. *Id.* at 502-503. The Court also recognized that largely factual publicity must be distinguished from publicity that is invidious or inflammatory. *Id.* at 504. Factual reporting of news and events, including court proceedings, is not invidious or inflammatory. *Id.*

Further, this Court has recognized that "it may be appropriate to change the venue of a criminal trial when widespread media coverage and community interest have led to actual prejudice against the defendant." *Unger*, 278 Mich App at 254. A change of venue may be required where there is "extensive egregious media reporting," "a barrage of inflammatory publicity leading to a pattern of deep and bitter prejudice against the defendant," and "a carnival-like atmosphere surrounding the proceedings." *Id.* Additionally, pretrial publicity involving highly inflammatory attention to sensational details may also warrant a change of venue. *Id.*

In *Unger*, this Court recognized that there was "substantial media interest" in the case and that the county where the crime was committed was a small community that did not generally experience the degree of media coverage that was present. *Id.* at 254-255. Nevertheless, this Court found that the record showed that the media coverage was

nonsensational, factual coverage that was not invidious or inflammatory. *Id.* at 255. Because the defendant failed to show that any of the publicity was specifically adverse or that the publicity led to any bias against the defendant, this Court held that a change of venue would not have been appropriate. *Id.*

We conclude that this case is similar to *Unger*. While South Haven and Covert are small communities that are perhaps not accustomed to significant media attention, the pretrial publicity regarding this case was primarily factual and was not invidious or inflammatory. The vast majority of the articles attached to defendant's motion were factual and did not show bias. One blogger, writing at "arguewitheveryone.com," authored a racist post regarding the case in 2009, and some of the other online articles had inflammatory and/or racist comments from readers. However, there is nothing to indicate the blogger or commentators were from Van Buren County nor was there any evidence to show that potential jurors read the particular blog containing the racist and inflammatory comments. All of the local media reports and the reports from more traditional news organizations (i.e., MLive, Fox) were factual. Moreover, many of the articles defendant uses to support her argument were from 2009; defendant's trial occurred in 2011. Thus, the pretrial publicity alone does not suggest that defendant was denied a fair trial. This was not a circumstance where there was a "barrage" of inflammatory pretrial publicity or where the publicity created a "carnival-like atmosphere." Rather, there was some isolated racist commentary posted online regarding defendants, but the vast majority of the pretrial publicity was factual and non-inflammatory.

Moreover, examination of the content of the pretrial publicity alone is not sufficient to require a change of venue. Courts must consider both the "quality and quantum of pretrial publicity" and "closely examine the entire voir dire" before a change of venue may be granted. *Jendrzejewski*, 455 Mich at 517. A change of venue is not appropriate unless the quality and quantum of the pretrial publicity and the entire voir dire demonstrate that an impartial jury was not impaneled. *Id.* Generally, "if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal of a denial of a motion for a change of venue." *Id.* Moreover, the Michigan Supreme Court has recognized that newspaper reports ordinarily will not influence jurors, and that while a juror may have formed an opinion from reading newspaper reports, that juror is competent to serve on the jury if he or she states that he or she is without prejudice and can try the case impartially according to the evidence. *Jendrzejewski*, 455 Mich at 516, quoting *People v Swift*, 172 Mich 473, 480-481; 138 NW 662 (1912).

The Court has held that when there is extensive pretrial publicity, trial courts must adequately question potential jurors so that challenges can be "intelligently exercised." *Jendrzejewski*, 455 Mich at 509. In this case, the trial court complied with this directive and specifically questioned the prospective jurors regarding their exposure to pretrial publicity. The trial court asked for a show of hands from every person in the venire who had been exposed to any kind of publicity; after that, it had the potential jurors who responded positively line up and questioned the majority of them off the record. One potential juror was questioned on the record; the trial court asked him if the media coverage he was exposed to caused him to formulate any opinion about the guilt or innocence of the defendants, and he replied that it did not. Ten potential jurors responded that they had been exposed to pretrial publicity from the gold panel, and ten potential jurors responded that they had been exposed to pretrial publicity

from the silver panel. The silver panel had 108 jurors and the gold panel had 97 jurors. The trial court ultimately excused nine potential jurors. The trial court also permitted the attorneys to conduct voir dire. In light of the trial court's careful examination of the jury venire, we conclude that the trial court's investigation of the juror pool in regard to pretrial publicity refutes defendant's argument that pretrial publicity had so permeated the community so as to make it impossible for her to have a fair trial in Van Buren County. Only 20 jurors out of a total pool of 205 jurors had even been exposed to any pretrial publicity at all. Accordingly, we conclude that the trial court did not abuse its discretion by denying defendant's motion for change of venue.

Next, Shevolier argues that the trial court reversibly erred by admitting co-defendant Ivory's statement to Travier as evidence against her pursuant to MRE 804(b)(3).[6]

We review for an abuse of discretion preserved evidentiary issues. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). If an abuse of discretion is found, reversal is not required unless "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496 (quotations omitted); *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). When the admission of evidence involves a preliminary question of law such as whether a rule of evidence or statute governs admissibility of the evidence, this Court reviews the question of law de novo. *Lukity*, 460 Mich at 488.

The disputed evidence was admitted pursuant to Travier's testimony. Travier, who was incarcerated with Ivory, sent a letter to the Van Buren County Prosecutor's Office stating that he had information regarding the investigation of Deborah Boothby's death. Travier testified that he and Ivory walked almost every day together and that they often talked about parole. He testified that Ivory expressed concern about whether his parole decision was being delayed because of an investigation. Travier testified that Ivory eventually told him about a "white girl named Debbie that was beaten to death" and that her death involved Ivory, Ivory's nephew and "Ed and somebody named Shevy, a female named Shevy."[7] Travier testified that later Ivory "flat out told" him what he had done. Travier testified:

> [Ivory] said that a female, white female named Debbie was beaten to death and ran over twice to make it look like a hit and run. And he had told his nephew on numerous occasions that she shouldn't, that he should have been quit dealing with her and he kept getting into it with her. And she knew some things that she shouldn't have knew. And they had reason to get rid of her. So they tried to

[6] Shevolier concedes that under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), Ivory's statements to Travier were not testimonial; thus, the Confrontation Clause is not implicated by their admission.

[7] Shevolier testified during trial that people refer to her as Shevy.

> make it look like a hit and run. Beat her to death. Ran over the body twice and threw it out the car on the way to Kalamazoo. That's what he told me.

Travier testified that he did not ask Ivory questions because he did not want Ivory to be suspicious that he was going to tell law enforcement about what happened. Travier explained that when Ivory told him about the murder, they were having a conversation, and he asked Ivory what happened, and then Ivory told him, but that it was not as if he was trying to pull information out of Ivory. He explained that Ivory stated that "if everyone be quiet and keep they mouth shut, I could be cleared of this case," and that in response Travier asked how many people were with Ivory, and Ivory responded by saying his nephew, a female named Shevy and one other guy were with him.

The trial court permitted Travier to testify to Ivory's statements under the hearsay exception for statements against penal interest, set forth in MRE 804(b)(3), which provides in pertinent part:

> 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.

When evaluating a trial court's decision to admit or exclude an inculpatory statement against penal interest under MRE 804(b)(3), this Court should consider three factors: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true." *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996); *People v Schutte*, 240 Mich App 713, 716 n 2; 613 NW2d 370 (2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Moreover, such statements are admissible against a codefendant when "the declarant's inculpatory statement is made in narrative form, by his own initiative, and is reliable because as a whole it is against the delcarant's own interest." *Schutte*, 240 Mich App at 717, citing *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), abrogated on other grounds by *People v Taylor*, 482 Mich 368, 378-379; 759 NW2d 361 (2008). The Court in *Poole* analyzed the admissibility of a defendant's statement inculpating his codefendant under MRE 804(b)(3), noting that the exception permits the admission of hearsay statements "where the circumstances indicate that, unlike general hearsay statements, such statements may be presumed to be reliable." *Id.* at 160. It noted that the "principal concern" of the rule barring the admission of hearsay is reliability, which can be determined by considering the content of any statement and the circumstances in which it was made. *Id.* at 161. The Court explained that

> "[W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Id.*]

The Court recently affirmed this analysis in *Taylor*, 482 Mich at 379.

In this case, it is not disputed that the declarant, Ivory, was unavailable because he exercised his Fifth Amendment right not to testify. Moreover, Ivory's statement was clearly against his penal interest because he admitted to personally murdering a woman with the assistance of codefendants; he did not attempt to minimize his role in the murder. Finally, a reasonable person would recognize the incriminating nature of the statement and would believe that such a confession would be true. See *People v Ortiz-Kehoe*, 237 Mich App 508, 518; 603 NW2d 802 (1999). Thus, Ivory's statement to Travier satisfies the requirements for admission under MRE 804(b)(3), and is clearly admissible against Ivory.

In order to be admissible against all defendants, including Shevolier, the statement must satisfy the requirements set forth by *Poole*: that the statement was made in narrative form, by the declarant's own initiative, and is reliable as a whole because it was against the declarant's own interest. *Poole*, 444 Mich at 161. In this case, Travier testified that he and Ivory were friends while incarcerated together and often discussed parole. He testified that one day Ivory told him he was concerned about his parole being denied due to an investigation, and eventually that Ivory "flat out told" Travier what he had done. Ivory told Travier about the murder in a narrative form. Travier testified that he did not ask probing questions, only that he asked who was with Ivory after Ivory kept referring to "everyone." Travier explained they were just having a normal conversation and he was not trying to pull information out of Ivory. Finally, Ivory's statement was clearly incriminating. Thus, because Ivory was clearly incriminating himself in his statement, and he volunteered names when Travier asked for a number, and he clearly told the story in narrative form on his own initiative, the statements were properly admitted against both Ivory and his codefendants. Accordingly, the trial court did not abuse its discretion.

Finally, Shevolier argues that the trial court abused its discretion by refusing to allow questioning regarding the scoring of Burnette's sentencing guidelines in order to demonstrate the leniency of Burnette's sentence agreement. Shevolier further argues that this limitation violated her right to confront witnesses, to compulsory process, and to a fair trial. We review preserved evidentiary issues for an abuse of discretion. *Lukity*, 460 Mich at 488. If an abuse of discretion is found, reversal is not required unless "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* at 495-496 (quotations omitted); *Knapp*, 244 Mich App at 378. Because the constitutional issues were not raised as a basis for the objection to the trial court's limitation, we review these issues for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753.

Defendants explored or attempted to explore Burnette's plea deal and her lenient sentence agreement several times during the trial. First, Burnette's entire plea agreement was read to the jury and the written copy was submitted as evidence. The agreement acknowledged that she was charged with open murder and perjury, and that she was pleading to a lesser crime and that there was a sentence agreement of eight to 20 years imprisonment. Burnette herself acknowledged that she received a plea agreement that included a sentence deal. Oppenheim testified that the charged crimes each carried penalties of life imprisonment, and acknowledged Burnette's lesser plea and sentencing deal. Oppenheim also testified that Burnette had not yet been sentenced. On cross-examination, defense counsel asked Oppenheim whether Burnette was given a sentence bargain, and Oppenheim answered affirmatively. Counsel then asked: "And if you know, eight

to 20 does not fit with second-degree murder; is that true?" In response, Oppenheim acknowledged that eight to 20 years is not a typical second-degree murder sentence. Then defense counsel asked "so even though you called it a second-degree murder, she wasn't sentenced on a second-degree murder," and the prosecution objected, and defense counsel withdrew the question. Finally, Oppenheim acknowledged that Burnette would not have received any deal with a reduced sentence if she had not agreed to the plea deal.

After the prosecution rested, the jury was excused and the issue of whether testimony regarding the scoring of Burnette's sentencing guidelines was raised again. Defendants argued that they should be permitted to admit evidence of what Burnette's sentencing guidelines range for second-degree murder and perjury were to demonstrate how lenient her sentence agreement was. The first issue that came up was that Pamela Willoughby, Burnette's probation agent and a potential defense witness, explained that she could not disclose the scoring of Burnette's sentencing guidelines without a court order to do so or express permission from Burnette. The defense attorneys moved for the court to create an order that would permit the testimony and the prosecution objected on relevancy grounds. The prosecution argued that the testimony would be irrelevant because Burnette was not informed about the sentencing guidelines and, thus, would not have considered her sentencing guidelines range when deciding whether to accept the plea agreement. Moreover, it noted that the jury was already aware of the fact that Burnette received a lighter sentence than she would have had she not pleaded guilty because the fact that Burnette knew she was facing possible life imprisonment was presented to the jury.

After hearing testimony from Willoughby outside the presence of the jury and arguments from the parties, the trial court issued its ruling on the guidelines issue from the bench. The trial court noted that the plea agreement made no reference to the sentencing guidelines and at the plea hearing itself there was no reference to the sentencing guidelines. Further, it noted that in terms of challenging witness credibility, the focus was on what Burnette actually knew, and there was no evidence in the record that the scoring of the sentencing guidelines was ever disclosed to Burnette or considered by Burnette. The plea agreement itself explicitly stated her sentence deal in a term of years. The trial court determined that the scoring of the sentencing guidelines was a collateral issue because there was "nothing to say that that was the subject of discussion or a subject that was in Miss Burnette's mind when she accepted the plea agreement." Further, the trial court noted that Burnette had not yet been sentenced, and that because deviation from the guidelines is permitted under certain circumstances a discussion of the guidelines would simply invite the jury to speculate about a collateral matter. The trial court then stated that even if the guidelines were marginally relevant, which it believed they were not, it would exercise its discretion to prevent undue delay, waste of time, or confusing issues under MRE 403.

On appeal, defendant reiterates her argument that testimony regarding the sentencing guidelines range was necessary to adequately cross-examine Burnette and expose her clear motive to testify against defendants. Defendant argues that the fact that Burnette received a sentence deal raises questions about her credibility. Defendant also argues, for the first time on appeal, that the trial court's exclusion of this evidence constituted a constitutional violation of the right to compulsory process, which is part of her right to present a defense.

In this case, the record clearly demonstrates that the fact that Burnette was testifying in exchange for a plea and sentence deal was presented to the jury. The jury was informed that

Burnette was charged with two crimes carrying life sentences, and that in exchange for her testimony she received a much lesser sentence of eight to 20 years' imprisonment. Thus, the jury was aware of the possible motivation for Burnette to testify and could consider the effect of this deal on her credibility. The exact minimum guidelines calculation for second-degree murder may have demonstrated that her sentence deal was lenient even in comparison to a normal second-degree murder sentence, but this additional information is not likely to have affected the jury's assessment of her credibility because it was already aware that Burnette was getting a great deal. Moreover, Oppenheim acknowledged that Burnette's sentence was lenient for second-degree murder. Thus, even assuming the trial court's refusal to admit evidence of the exact guidelines calculation was an abuse of discretion, it was not outcome determinative because the jury was already informed about the fact that Burnette was given a lenient sentencing deal. Accordingly, defendant is not entitled to reversal. *Lukity*, 460 Mich at 495-496.

Further, because evidence of the lenient sentence Burnette received was already presented to the jury, defendant was not denied a fair trial, compulsory process or the right to present a defense because defendant was given the opportunity to obtain witnesses in her favor and to argue that Burnette's testimony was not credible and was motivated solely by her plea deal. Thus, defendant has not demonstrated plain error affecting her substantial rights. *Carines*, 460 Mich at 752-753.

IV. ISSUES RAISED IN SCOTTIE SHAVER'S STANDARD 4 BRIEF

Scottie first argues that the prosecution denied him his right to a fair and impartial jury because there was not at least one African American on the jury. No objection to the cross-section of the jury was raised in the trial court; accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753. Moreover, because Scottie failed to include this issue in his statement of questions, we need not address it. *Unger*, 278 Mich App at 262 (holding Court need not address issues not presented in the statement of questions); MCR 7.212(C). Nevertheless, we conclude that defendant's cross-section claim has no merit because defendant does not even allege, much less provide any evidence to support his claim, that any underrepresentation of African Americans was due to systematic exclusion of the group in the jury-selection process. In order to establish a prima facie violation of the fair cross-section requirement, defendant bears the burden of showing:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). See also *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant provides no evidence, or argument, in regard to the required showing of systematic exclusion; thus, we conclude that this unpreserved issue has no merit because defendant has failed to demonstrate any error, much less plain error affecting his substantial rights.

Next, Scottie argues that there was insufficient evidence to support his conviction because Burnette's testimony was false. We find this argument unavailing because credibility questions are for the jury and will not warrant reversal on appeal. *Wolfe*, 440 Mich at 514-515. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support Scottie's conviction, as discussed *supra*. *Ericksen*, 288 Mich App 192, 195-196.

Scottie also alleges that investigators asked two witnesses to change their testimony. However, Scottie does not support this claim and there is nothing in the record that supports this allegation.

Next, Scottie raises an apparent prosecutorial misconduct claim because he alleges that the prosecution intentionally introduced perjury when it called Burnette to testify. This issue was not raised during trial and is accordingly reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753. We conclude that the record does not support Scottie's claim. The record contains no evidence to support defendant's claim that the prosecution admitted known perjury or that any witnesses testified to events of which they had no personal knowledge, and Scottie does not cite the record to support his argument. Moreover, questions regarding the truthfulness of witnesses are questions for the finder of fact. *Wolfe*, 440 Mich at 514-515. Thus, because defendant simply fails to support his claim in any way, and because there is nothing in the record to suggest any prosecutorial misconduct, we conclude that defendant is not entitled to any relief.

Lastly, Scottie argues that he was bound over without the presence of probable cause. However, because there was sufficient evidence presented at trial to convict Scottie of first-degree murder, any bindover error is harmless. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

V. CONCLUSION

In summary, we affirm the trial court's rulings and the jury's verdict in all three cases, Docket Nos. 305944, 305945, and 306288.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck