STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2009
v SAMANTHA BACHYNSKI, Defendant-Appellant.	No. 281550 Macomb Circuit Court LC No. 06-002568-FC

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant Samantha Bachynski appeals by leave granted her convictions of two counts of first-degree premeditated murder, MCL 750.316, first-degree home invasion, MCL 750.110, felony firearm, MCL 750.227B, unlawful driving away of a motor vehicle, MCL 750.413, kidnapping, MCL 750.349, assault of a pregnant woman intentionally causing miscarriage or stillbirth, MCL 750.90, and obtaining, possessing, or transferring personal identifying information with the intent to commit identity theft, MCL 445.67. The trial court sentenced defendant to life in prison for the premeditated murder convictions, the kidnapping conviction, and the assault conviction, and prison terms of ten to 20 years for the home invasion conviction, two years for the felony firearm conviction, two to five years for the unlawful driving conviction, and two to five years for the identity theft conviction. We affirm.

I. Factual Background

This case arises out of the February 16, 2006 murder of Scott Berels and his wife Melissa Berels, who was pregnant at the time of her death. Defendant and her boyfriend, Patrick Selepak, were convicted of murdering the Berels and committing several related offenses.[1] Defendant met Selepak over the Internet in August 2005 when she was 19 years old. They began a dating relationship in September 2005. Defendant was aware that Selepak served time in prison before they met and in November 2005, Selepak returned to prison. He was released in January 2006.

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[1] Selepak plead guilty.

On January 31, 2006, defendant accompanied Selepak to a Mr. Pita restaurant in Chesterfield, Michigan. Two witnesses testified that Selepak entered the restaurant just before closing time that night. After ordering food, Selepak pointed a handgun at the employees, forced them to lie on the floor, and took the security tape and $400-$600 in cash. Defendant testified that she waited outside the restaurant in her grandmother's van, at Selepak's instruction, but that she had no idea Selepak intended to commit a robbery. According to defendant, she did not suspect that Selepak had robbed Mr. Pita until later that night when they went out for an expensive dinner and she saw the cash.

On February 13, defendant accompanied Selepak to a Dunham's Sports store in Flint, Michigan. According to store employees, Selepak entered the store and looked at the firearms and ammunition at least twice that day. That evening, defendant entered the store and approached employee Jason Ovick, who was working near the firearms counter. Ovick walked with defendant to a different part of the store and remained with her there for several minutes while she asked him a series of questions about treadmills and other equipment. During that time, Selepak entered the office of store manager Erin Tester, held a gun to her back, and announced that the store was being robbed. He had Tester give him approximately $800 in cash from the safe, two guns from the firearms case, and ammunition. Selepak then called Ovick into the office and forced him to remove the guns' trigger locks. Defendant testified that she went inside the store with Selepak and then talked to an employee about treadmills, but that she did not know Selepak had robbed the store until later. Defendant initially told police officers that Selepak had asked her to distract the employee, but she testified at trial that she only talked to the employee because she believed Selepak planned to buy her a treadmill.

On February 15, defendant dropped Selepak off at the Berels' house in New Baltimore, Michigan. Melissa was a friend of Selepak's. Defendant returned to the house later that day. That night, defendant and Selepak were alone in the house with Scott and Melissa. Defendant initially told police officers that Selepak led Scott and Melissa into the bathroom and then told her that he was holding the couple hostage. Selepak pulled Melissa out of the bathroom and choked her until her face turned blue. He laid Melissa on the floor and told defendant to "take care of it" or "finish it." Defendant put her hand on Melissa's throat and felt her pulse, but tried not to squeeze her throat. Selepak then placed a bag over Melissa's head and a belt around her neck. He told defendant to pull the belt. Defendant held the belt, but tried not to pull hard. At some point after that, defendant could no longer feel Melissa's pulse. After Melissa died, Selepak had defendant retrieve a roll of duct tape from his bag and smoke a cigarette.

As Melissa was dying, Scott yelled for her from the bathroom. Selepak reentered the bathroom, bound Scott's limbs with the duct tape, put a sock in his mouth, and then covered his mouth with the tape. Selepak beat Scott with a rifle until there was blood everywhere. He then had defendant retrieve a knife and told her to cut Scott's throat. Defendant moved the knife across Scott's neck, but tried not to cut him. Later, Selepak told defendant to sit in the house and wait while he went to the store. Selepak returned from the store with beer and syringes. He then told defendant to inject Scott with bleach. She injected Scott at the ankle, but did not inject the bleach into his veins. Selepak tied Scott with an extension cord and put a bag over his head and a belt around his neck. He had defendant put her foot on Scott's head and pull the belt, while he was on Scott's chest. Defendant barely pulled the belt, but at some point she realized that Scott was dead. Defendant smoked another cigarette and at approximately 3:30 a.m. on February 16,

drove to a CVS store and bought more duct tape. A CVS employee testified that defendant seemed very calm and said that she needed the tape for painting. When defendant returned from the store, she and Selepak cleaned, wrapped the bodies in plastic and tape and hid them in the house, took several items from the house including money and the Berels' identification, and then left in the Berels' vehicle.

After leaving the Berels' house, defendant and Selepak stopped for food. Selepak drove defendant home and she fell asleep in her mother's car. Later, defendant entered the house. According to her mother's boyfriend Carlos Casillas, defendant seemed "out of it." She said that she had been babysitting all night long. Defendant ate, took medicine, and slept until 1:00 p.m. Later that day, defendant and Selepak left the Berels' vehicle on a side street in Detroit, Michigan. At around midnight, they went to Club Triangle in Flint. Defendant's friend Tara Beacham testified that she saw defendant at the bar. Beacham thought that defendant seemed completely normal. Defendant was smiling, seemed happy to see her, and danced on the dance floor. Defendant and Selepak planned to "befriend" an older, homosexual man at the bar and then stay with the man. Selepak pretended that he was homosexual and befriended Frederick Johnson. Defendant and Selepak spent the rest of the night in a hotel room with Johnson.

On February 17, defendant and Selepak spent the day eating and shopping with Johnson in Frankenmuth, Michigan. That afternoon, defendant and Selepak discovered that they were suspects in the Berels' deaths. They moved into Johnson's house near Clio, Michigan and attempted to change their appearances. Defendant cut and dyed her hair and Selepak shaved his head. That night, they went back to Club Triangle. Another friend of defendant's saw her at the bar that night. He testified that both defendant and Selepak had changed their appearances, and defendant told him that they "needed to change fast." Defendant was happy, confident, and had a good time dancing. On February 18, she and Selepak returned to Club Triangle with Johnson's son-in-law. On February 19 and 20, they ate and watched movies with Johnson at his house.

At approximately 1:00 a.m. on February 21, defendant awoke to Selepak yelling and pointing a rifle at Johnson. When Johnson ran, Selepak shot him twice. Johnson fell into the front yard. Defendant helped Selepak drag him back into the house. Selepak then put a plastic bag around Johnson's head and a belt around his neck. When defendant refused to help, Selepak strangled him. When Selepak told defendant to get a knife, she got a butter knife from the kitchen and poked Johnson with it several times. After Johnson died, Selepak drank beer and defendant smoked a cigarette. They wrapped the body in a tarp and put it in the back of Johnson's truck, cleaned the house, and then left in the truck.

Later that day, defendant and Selepak visited Beacham and agreed to drive her to a job interview at a hotel in Owosso, Michigan. During their time together, Beacham became suspicious of defendant and Selepak. After they dropped her off at the hotel, Beacham called the police. Shortly thereafter, police surrounded Johnson's truck in the hotel parking lot and arrested defendant and Selepak. Following her arrest, defendant waived her right against self-incrimination and her right to counsel and confessed her involvement in the crimes at issue. Defendant was first interviewed on February 21 by Detective Kenneth Stevens and Detective Sergeant Charles Esser. Defendant was interviewed again on February 22 by Lieutenant Michael Tocarchick and Sergeant David Dwyer.

When she was first interviewed by the police, defendant said that she loved Selepak so much that she was willing to do "just about" anything for him. She said that she never believed Selepak would harm her until she saw him choking Melissa on the night of the Berels' deaths. When the officers asked her why she stayed with Selepak and followed his instructions, even when she had the opportunity to escape, she said that she did not want to upset him and she was afraid he might hurt her. During her trial testimony, defendant said that on the night of the Berels' deaths, Selepak repeatedly snorted cocaine and pointed a gun at her, took her car keys, grabbed, pushed, and hit her, and threatened the lives of she and her entire family. She said that after the Berels' deaths, Selepak continued to threaten her life, that she hardly ate and tried to forget what had happened by going dancing, and that she only stayed with Selepak and followed his instructions to protect her own life and the lives of her family members. Defendant claimed that she omitted certain things and lied about other things during her taped police interview and the preliminary examination because the officers said that they could not help her unless she said exactly what they told her to say. Defendant cooperated to avoid going to prison.

II. Venue

Defendant first argues that she was denied her due process right to an impartial jury on the basis of pretrial publicity and that her trial counsel was ineffective for failing to move for a change of venue. We disagree. A change of venue was not warranted in this case and counsel cannot be deemed ineffective for failing to make a futile motion.

We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error exists if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant's innocence. *Id*. at 763.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant filed a motion to remand for a *Ginther* hearing and this Court denied the motion. *People v Bachynksi*, unpublished order of the Court of Appeals, entered May 12, 2008 (Docket No. 281550). Therefore, review of this issue is limited to the existing record. *Rodriguez*, *supra* at 38.

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied her a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Generally, a defendant must be tried in the county where the crime is committed. MCL 600.8312; *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997). The trial court may, however, change venue to another county in special circumstances where justice demands or a statute provides. MCL 762.7; *Jendrzejewski*, *supra* at 499-500. "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." *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008). "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski*, *supra* at 500-501.

In this case, defendant argues that a change of venue was warranted on the basis of pretrial publicity. The existence of pretrial publicity alone does not necessitate a change of venue. *Id*. at 502. In determining whether a defendant has been deprived of a fair trial by virtue of pretrial publicity, the reviewing court must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id*. at 501-502 (internal quotations and citation omitted). The court must also distinguish between largely factual publicity and that which was invidious or inflammatory. *Id*. at 504. The 2005 edition of Random House Webster's College Dictionary defines the word "invidious" as "1. calculated to create ill will; causing resentment or envy. 2. offensively or unfairly discriminating; injurious," and the word "inflammatory" as "tending to arouse anger, hostility, passion, etc."

In her brief on appeal, defendant asserts that approximately 245 newspaper articles relating to this case were published in the local area before trial, along with a number of television broadcasts and "blogs" related to the case. But, even assuming that her assertions are true, the amount of publicity alone does not result in a presumption of community prejudice. In *People v DeLisle*, 202 Mich App 658, 668-669; 509 NW2d 885 (1993), this Court rejected the defendant's argument that the trial court erred in denying his motion for a change of venue based on pretrial publicity when there were more than 100 newspaper articles published about the case. The defendant in *DeLisle* was convicted of four counts of first-degree premeditated murder following the highly publicized drowning deaths of his four young children and the near death of his wife when the family's station wagon plunged into the Detroit River. *Id*. at 659.

While the media coverage of this case was extensive, the newspaper articles provided to us were primarily factual, rather than invidious or inflammatory. Defendant points out that many of the articles mentioned Selepak's guilty plea and her confessions to police, while others labeled her a "cohort," an "alleged accomplice," a "killer," or the "Bonnie" of "Bonnie and Clyde." But like the facts in *DeLisle*, the facts of this case were gruesome and shocking. Defendant admitted to police that she was aware Selepak had committed at least two armed robberies; that she then watched as Selepak kidnapped and brutally murdered a young married couple by strangulation and other forms of torture; that several days later, she watched as Selepak shot and strangled an older man who had taken them in; that at Selepak's request, she participated in all three murders and in hiding the bodies; and that she did not attempt to escape or get help even when she had the opportunity to do so. That there may be no neutral way to report on this case is not the result of invidious or inflammatory media reporting, but rather, the facts of the case itself.

In cases where publicity has created a presumption of prejudice, the media either turned the proceedings into a veritable circus resulting in a "kangaroo court;" covered particularly inflammatory topics such as the defendant's numerous prior convictions or notorious reputation; repeatedly broadcast a videotape of the defendant's detailed confession, all but solidifying a consensus of guilt before the trial began; relayed the details of a confession or other evidence

that was deemed inadmissible at trial; or actively solicited the public to weigh in on the defendant's guilt or innocence and the punishment he or she deserved. See, e.g., *Sheppard v Maxwell*, 384 US 333, 338-342; 86 S Ct 1507; 16 L Ed 2d 600 (1966); *Rideau v Louisiana*, 373 US 723, 724, 727; 83 S Ct 1417; 10 L Ed 2d 663 (1963); *Irvin v Dowd*, 366 US 717, 725; 81 S Ct 1639; 6 L Ed 2d 751 (1961), superseded by statute as stated in *Moffat v Gilmore*, 113 F3d 698 (CA 7, 1997); *Marshall v United States*, 360 US 310, 312-313; 79 S Ct 1171; 3 L Ed 2d 1250 (1959); *DeLisle*, *supra* at 664-665. The media coverage in this case, however, primarily covered the status of the case, testimony elicited during the preliminary hearing, and other facts that were later admitted as evidence at trial. The coverage did not rise to the level of invidious or inflammatory publicity mandating a presumption that the entire jury pool, drawn from a population of approximately 832,000 people, was tainted.[2]

In determining whether a change of venue was required due to pretrial publicity, the reviewing court should consider the "quality and quantum of pretrial publicity," and then it must "closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski*, *supra* at 517. Our Supreme Court has suggested three possible approaches to determine if a potential juror's impartiality has been destroyed by exposure to pretrial publicity: "1) questionnaires prepared by the parties and approved by the court, 2) participation of attorneys in the voir dire, and 3) sequestered questioning of each potential juror." *Id*. at 509; *People v Tyburski*, 445 Mich 606, 619, 623-624; 518 NW2d 441 (1994).

As indicated, defendant did not move for a change of venue based on pretrial publicity. Nor did she request the use of questionnaires. Both parties did, however, raise the issue of pretrial publicity at trial, asking the trial court judge how he planned to conduct voir dire. The court acknowledged that most of the potential jurors would have heard of the case, but found it unnecessary to conduct sequestered questioning. The court allowed all of the attorneys to participate in voir dire.

The trial court started voir dire by excusing six potential jurors for reasons other than bias. Next, the court asked whether any of the 14 potential jurors seated in the jury box knew nothing about the case. Three potential jurors raised their hands. The court then asked whether anyone had preconceived notions about the case on the basis of pretrial publicity. Three potential jurors responded that they did. After the trial court provided further instruction on the duties of the jury, only one potential juror stated that it would be impossible to set aside her preconceived notions. She was immediately excused for cause due to bias. For the remainder of voir dire, the trial court and the attorneys asked all of the potential jurors–either through questions for the jury pool as a whole or through questions for individual potential jurors–about their exposure to the case, whether they had any preconceived notions or opinions about the case, and if so, whether they could set those aside and be impartial. Based on our review of the record, out of the 44 potential jurors questioned, one was excused for cause due to bias, nine were excused for reasons other than bias, nine were dismissed based on the prosecutor's exercise of

[2] According to the United States Census Bureau, Macomb County's estimated population in 2006 was 832,861. See U.S. Census Bureau, State & County QuickFacts <http://quickfacts.census.gov/qfd/states/26/26099.html> (accessed February 2, 2009).

peremptory challenges, 11 were dismissed based on defendant's exercise of peremptory challenges, and 14 were empanelled. Defendant did not exhaust all of her peremptory challenges before expressing satisfaction with the panel. See MCR 6.412(E)(1).

Out of the 14 members of the panel, two said they knew nothing about the case, three said they knew very little about the case and had not heard about it for months, three indicated they were aware of the case, but they were not specifically asked about the level of their exposure to the case, and six said they were familiar with the facts of the case through media exposure or conversations with acquaintances. Out of the 14 members, only two initially expressed having any opinions or notions about the case, and after further instruction by the trial court and questioning by the attorneys, they both stated that they could set their opinions aside and be fair and impartial. Defendant argues that the trial court "steamrolled" the potential jurors and discouraged them from telling the truth by repeatedly instructing them on the duties of the jury. We disagree. It is apparent from the record that in the beginning of voir dire, potential jurors were stating any preconceived ideas they had about the case as a reason to be disqualified. After the trial court reiterated its instructions and asked whether they could set their ideas aside, all of the potential jurors, with the exception of one, said that they could. Furthermore, out of a two-day voir dire, the trial court stated its instructions only a few times.

Defendant also argues that a change of venue was warranted based on the number of potential jurors admitting to disqualifying prejudice. "'As an indirect means of determining whether community prejudice resulting from publicity may have unconsciously infected the jurors who were seated, the Court has sometimes noted how many non-seated members of the venire admitted to a disqualifying prejudice.'" *Jendrzejewski*, *supra* at 511, quoting *United States v Morales*, 815 F2d 725, 734 (CA 1, 1987). In this case, however, only one person, or two percent of the jury pool, was excused for disqualifying prejudice. This Court recently declined to order a change of venue where 36 percent of the pool was excused for bias. *People v Cline*, 276 Mich App 634, 641; 741 NW2d 563 (2007). Further, while some members of the jury pool in this case indicated having knowledge of the case or even preconceived opinions about it, "where potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue." *DeLisle*, *supra* at 662. Indeed, "[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Jendrzejewski*, *supra* at 519. Defendant has not established that she was deprived of a fair and impartial jury.

Considering that a change of venue was not warranted in this case, defendant's claim of ineffective assistance of counsel must fail. Counsel cannot be deemed ineffective for failing to make a futile motion. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). A new trial is not warranted.

III. Defendant's Leg Restraints

Defendant argues that she was denied her due process right to a fair trial because she was required to wear leg restraints during the trial, and that her trial counsel was ineffective for failing to object to the restraints more strenuously. We find that while the trial court abused its discretion in requiring defendant to wear leg restraints, defendant has not established that she suffered any prejudice as a result of the restraints. Therefore, a new trial is not warranted.

As defendant states in her brief on appeal, "defense counsel lodged what can only be characterized as a 'timid' objection to the shackling of his client" in leg restraints. But, because defense counsel did, in fact, question the use of the restraints at trial, we will treat the issue as preserved. A trial court's decision to handcuff or shackle a witness is reviewed for an abuse of discretion. *People v Banks*, 249 Mich App 247, 257; 642 NW2d 351 (2002). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Permitting a defendant to appear at a jury trial free from handcuffs or shackles is an important component of a fair trial because having a defendant appear . . . handcuffed or shackled negatively affects the defendant's constitutionally guaranteed presumption of innocence." *Banks*, *supra* at 256 (citation omitted). But, "the right of a defendant to appear at trial without any physical restraints is not absolute." *Id*. The decision whether to restrain a defendant during trial is within the discretion of the trial court. *Id*. Restraints are permitted when necessary to prevent escape, prevent injury to persons in the courtroom, or maintain order. *Id*. at 257. See also *People v Dunn*, 446 Mich 409, 425-426; 521 NW2d 255 (1994).

In this case, the trial court provided no explanation for requiring defendant to wear leg restraints other than "the sheriff's policy to keep [inmates] shackled at [foot] level during trial." Nor is there any record evidence that it was necessary to restrain defendant. To the extent that Macomb County may have a general policy of restraining all inmates during their trials, such a policy is clearly overbroad. "A court must not handcuff or shackle a witness simply because someone, even a law enforcement officer, is so inclined." *Banks*, *supra* at 258. Indeed, "the law has long forbidden routine use of visible shackles during the guilt phase [of trial]; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v Missouri*, 544 US 622, 626; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Accordingly, we find that the trial court abused its discretion by requiring defendant to wear leg restraints during the trial.

Nonetheless, defendant has failed to establish that she suffered any prejudice as a result of the leg restraints. In order to warrant reversal because of the use of handcuffs or shackles during trial, a defendant must establish prejudice. *People v Horn*, 279 Mich App 31, 36-37; 755 NW2d 212 (2008), citing *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988) and *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). In this case, efforts were made to conceal the leg restraints from the jury and there is no evidence that the jury was aware of them. The trial court determined that the jurors would not be able to hear the restraints when defendant was seated; a curtain surrounded the area where she was seated; she did not walk in front of the jury wearing the restraints; and she was not wearing the restraints during her testimony. On appeal, defendant contends that it is possible a juror saw or heard the leg restraints during trial. But, without some evidence that a juror was actually exposed to the restraints, it is impossible to make a finding of prejudice. See *Horn*, *supra* at 37; *People v Colbert*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2008 (Docket No. 277621) (Zahra, J., dissenting), rev'd in part and remanded by 482 Mich 996 (2008) (adopting Judge Zahra's dissenting opinion). Therefore, because there is no basis on which to conclude that defendant was denied a fair trial, we find that the trial court's error was harmless and that reversal is not warranted. Furthermore, because defendant cannot establish that the use

of the leg restraints had any affect on the outcome of the case, her ineffective assistance of counsel claim must also fail. *Henry*, *supra* at 146.

IV. Defendant's Motion to Suppress

Defendant argues that the trial court erred in denying her motion to suppress her confessions to police. We disagree.

This issue was raised before the trial court by way of a pretrial motion to suppress. Following an evidentiary hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), the trial court denied the motion to suppress, finding that defendant had voluntarily waived her right against self-incrimination and her right to counsel. In reviewing a trial court's ultimate decision on a motion to suppress, we conduct de novo review of the entire record. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We will not disturb a trial court's factual findings with respect to a motion to suppress unless those findings are clearly erroneous. *Id*. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id*. at 564.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. The right protects an accused from being compelled to testify against herself or provide incriminating evidence of a testimonial nature. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). Generally, statements of an accused made during custodial interrogation are inadmissible unless, prior to any questioning, the accused was warned that she had a right to remain silent, that her statements could be used against her, and that she had the right to counsel, and that the accused voluntarily, knowingly and intelligently waived her rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Harris*, *supra* at 55.

The right to counsel is also guaranteed by both the United States and Michigan Constitutions. US Const, Ams V, VI; Const 1963, art 1, §§ 17, 20. "The Sixth Amendment directly guarantees the right to counsel" after adversarial proceedings have been initiated against the accused, "while the Fifth Amendment right to counsel is a corollary to the . . . right against self-incrimination and to due process." *People v Marsack*, 231 Mich App 364, 372-373, 376-377; 586 NW2d 234 (1998). An advice of rights that satisfies the Fifth Amendment warning requirements of *Miranda*, *supra*, can also sufficiently apprise the accused of her Sixth Amendment rights and the consequences of waiver of those rights. *People v McElhaney*, 215 Mich App 269, 276-277; 545 NW2d 18 (1996).

At the *Walker* hearing, Detectives Stevens and Esser testified that on the afternoon of February 21, they learned that defendant and Selepak had been arrested and taken into custody. When they arrived at the police station, officers informed the detectives that defendant had been read her *Miranda* rights and requested the presence of counsel. Detective Esser believed that because he was from a different jurisdiction, he could read defendant her *Miranda* rights again and attempt to question her. He later learned that his belief was incorrect. The detective brought defendant into an interview room and reread her rights. At that point, defendant again requested the presence of counsel. The conversation ceased, defendant was allowed to smoke a cigarette,

and was returned to her cell. Thereafter, Detective Stevens asked the officers who had been present at the police station whether they had given defendant "the tools to get a hold of her attorney." When they responded in the negative, Detectives Stevens and Esser entered defendant's holding cell. Detective Stevens asked defendant if "she had been given an opportunity to use a phone to contact her attorney." Defendant responded that she did not have an attorney. The detective then offered her the use of a phone to find out whether her family had an attorney. When defendant said that they did not have an attorney, he offered her a phone book. Defendant then said that, "She was 19 years old. She did not want to spend the rest of her life in prison, and she asked if she really needed an attorney." Detective Esser advised defendant that she had requested an attorney and that they could not discuss anything further with her until her attorney was present. Defendant asked if she could change her mind, and then pointed at Detective Stevens and said, "I want to talk to you." At that point, the detectives took defendant to an interview room. They reviewed defendant's *Miranda* rights with her and she signed a waiver of those rights. She reiterated that she wanted to talk to the detectives. After defendant signed the waiver, the detectives interviewed her. The following day, after signing another waiver of rights, defendant was interviewed by Lieutenant Tocarchick and Sergeant Dwyer.

On appeal, defendant argues that her confessions should have been suppressed because the police did not honor her request for counsel. During a custodial interrogation, the police must immediately cease questioning a suspect who has clearly asserted her right to have counsel present until counsel has been made available, unless the accused herself initiates further communication, exchanges, or conversations with the police. *People v Tierney*, 266 Mich App 687, 710-711; 703 NW2d 204 (2005). If the accused initiates further communication, she may validly waive her previously invoked right to counsel. See *People v Kowalski*, 230 Mich App 464, 478-482; 584 NW2d 613 (1998). The accused's request for counsel does not terminate all communication between the police and the accused; rather, it prohibits "police-initiated custodial interrogation." *Id*. at 478.

The testimony at the *Walker* hearing established that after being advised of her *Miranda* rights, defendant initially declined to make a statement and requested the presence of counsel. It also established that the police discontinued their interrogation at that time, which they were required to do. The issue is whether Detective Stevens' communication with defendant in her holding cell constituted "police-initiated custodial interrogation." "Interrogation refers to express questioning or its 'functional equivalent'" which includes "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id*. at 479 (citations omitted). Generally, a mere inquiry whether the accused has changed her mind about wanting the presence of counsel is not an interrogation initiated by the police; nor is informing the accused that a codefendant has given a statement, ninety minutes after the accused has invoked her *Miranda* rights. *Id*. at 479, 482.

Based on the evidence presented at the *Walker* hearing, Detective Stevens' communication with defendant in her holding cell was not an interrogation or the functional equivalent of an interrogation. The detective's questions were solely focused on whether defendant had an attorney and if he could assist her in obtaining one. It cannot be said that his questions or statements were "reasonably likely to elicit an incriminating response" from defendant. Even after defendant indicated that she wanted to talk to Detective Stevens, the

detectives informed her that they could not discuss anything further with her until her attorney was present and then reread her *Miranda* rights. The only incriminating statements made by defendant were made after she insisted on speaking to the detectives and signed a waiver of rights. The trial court's findings were not clearly erroneous and it properly denied defendant's motion to suppress.

V. Exclusion of Selepak's Confessions

Defendant argues that the trial court abused its discretion in excluding Selepak's confessions as inadmissible hearsay. We disagree.

At trial, defense counsel attempted to call Selepak as a witness. When Selepak was called to the stand, he refused to take an oath or testify. Thereafter, the following exchange occurred:

> *Prosecutor*. Everyone in this courtroom saw what happened when Mr. Selepak came in here, said he wasn't going to take an oath and laughed. Obviously there were no facts that have been brought into evidence. He was not sworn in. Basically what he did is akin to evoking his 5th Amendment rights.
>
> * * *
>
> *Defense Counsel*. Judge, I would say that he didn't invoke his right against self incrimination, he just refused to take an oath.
>
> * * *
>
> *The Court*. I would tend to agree with that. He didn't specifically invoke that right.
>
> * * *
>
> *Defense Counsel*. That would bring up another point that I believe Mr. Markowski and I should explore with our client, the possibility of calling an officer to the stand and playing Mr. Selepak's confession.
>
> *Prosecutor*. Which would be hearsay, your Honor.
>
> *The Court*. That is exactly right.
>
> *Defense Counsel*. I think it would be, it would go to his state of mind. He's the declarant. It would go to his state of mind or that, at the time he is making the statements.
>
> *The Court*. That request is denied. It is clearly hearsay. It is beyond an 11th hour request.
>
> The Court would note for the record that every effort was made to accommodate your request to have Mr. Selepak here. He was brought back

> from Ionia. He was made available to you for conferences at the jail and, in fact, was here in the flesh this morning. So every effort was made and that request is denied.
>
> * * *
>
> The Court is intimately familiar with all of the hearsay exceptions and hearsay prohibitions.
>
> Clearly in the Court's mind there is no scenario in which Mr. Selepak['s] confession can be played. That request is denied.

Defendant asserts that Selepak's confessions were admissible as statements against interest under MRE 804(b)(3). Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). To the extent that this issue implicates defendant's constitutional right to present a defense, it must be reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). See *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006) (stating that a defendant has a due process right to present a defense). Additionally, we review the trial court's findings of fact regarding the trustworthiness of a hearsay statement for clear error. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802. MRE 804(b)(3) provides that when a declarant is unavailable, the declarant's out-of-court statement against interest may avoid the hearsay rule if certain thresholds are met. Whether a statement is admissible under MRE 804(b)(3) depends on: "(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, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera*, *supra* at 268.

"'Unavailability as a witness' includes situations in which the declarant . . . persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). In this case, Selepak was physically present at trial, but repeatedly refused to take an oath or testify, even after the trial court and defense counsel questioned him about his unwillingness to do so. Although the trial court did not make a specific finding of unavailability under MRE 804, the trial court stated that Selepak was "unable to testify." Furthermore, a trial court is not required to threaten a witness with contempt before finding him unavailable to testify. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980).[3] On appeal, defendant argues that Selepak was unavailable as a witness because in

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[3] In this case, Selepak was already incarcerated at the time of trial, and thus, the trial court's power to incarcerate him for contempt until he would agree to testify was of no value.

refusing to testify, he essentially invoked his constitutional right against self-incrimination. See US Const, Am V. Our Supreme Court has held that a witness who asserts a Fifth Amendment privilege is unavailable to testify for purposes of MRE 804. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). But, Selepak never specifically invoked the Fifth Amendment, defense counsel argued at trial that he had not done so, and the trial court agreed. Nonetheless, we find that Selepak was "unavailable" for purposes of MRE 804 on the basis of his refusal to testify despite the prodding of the court.

Clearly, Selepak's confessions to police were against penal interest. He implicated himself in the crimes at issue. We further find, however, that his confessions lacked sufficient indicia of trustworthiness to be admissible under MRE 804(b)(3). To determine whether "corroborating circumstances clearly indicate the trustworthiness of the statement" within the meaning of MRE 804(b)(3), a court must consider the totality of the circumstances, including the credibility of the declarant. *Barrera*, *supra* at 273, 275. Factors favoring admission of a statement include that the statement was voluntarily or spontaneously made, was made contemporaneously with the referenced events, or was made "to someone to whom the declarant would likely speak the truth," such as friends or family. *Id*. at 274 (citation omitted). In contrast, that a statement was made to law enforcement officers or at the prompting of the listener generally favors a finding of inadmissibility. *Id*. at 274-275. Where the declarant was in custody at the time the statement was made, a court should also consider any relationship between the declarant and the exculpated party, and whether there is any evidence that the statement was made in order to curry favor with the authorities. *Id*. at 275.

Selepak made his confessions several days after the Berels' deaths, during in-custody interviews with police. Although he implicated himself in the crimes at issue and stated that defendant was not an active participant, he also admitted that he was romantically involved with defendant. This suggests that Selepak may have minimized defendant's role in the crimes in order to protect her. In fact, when police questioned Selepak about defendant's involvement in the Berels' deaths, he repeatedly made statements such as, "It wasn't her, it was me," "she's not like that," "this is my fault," "I'm taking responsibility," "I can't help you," "I'm not gonna say it," and "she might get off a little bit won't she?" Further, Selepak's statements that defendant was present at the Berels' home, but had no involvement in their deaths, does not comport with the evidence presented at trial. Law enforcement officers found bleach and bloodstains on the clothing defendant wore the night of the murders, and defendant herself testified that Selepak forced her to participate in the murders. Selepak's statements that defendant had nothing to do with the Berels' deaths completely contradicts her entire theory of the case. Therefore, based on the totality of the circumstances, we find that Selepak's confessions were inadmissible under MRE 804(b)(3) based on a lack of trustworthiness.

VI. Exclusion of Expert Testimony

Defendant argues that the trial court abused its discretion in excluding defendant's proposed expert witness testimony on the defense of duress. We disagree.

Before trial, Dr. Michael Abramsky conducted a psychological evaluation of defendant. He concluded that defendant was a passive dependent individual suffering from something akin to Stockholm Syndrome.[4] On the first day of trial, the prosecution requested an offer of proof regarding Dr. Abramsky's proposed testimony. Defense counsel responded, in part:

> It is not in the area of diminished capacity. However, Judge, part and partial [sic] of the interview process, the testing and the conversation that Dr. Abramsky had with Samantha at the Macomb County jail, he did relay some insight into the person of Samantha Bachynski.
>
> What I'm asking, not by way of any type of diminished capacity. I think it's important for the jury to hear and to kind of get a feeling of who Samantha is as far as what her character was because that, in essence, sum and substance is the nature of our case.
>
> Why would an individual of such tender years be associated, number one, with an individual by the name of Patrick Selepak?
>
> Number two, why if she was involved, why did she stick around for so long, etcetera, etcetera.
>
> It is more in the nature of a character opinion testimony.

Later at trial, defense counsel stated that defendant would be requesting a jury instruction on the defense of duress and that Dr. Abramsky's testimony was relevant to that defense. Defense counsel conceded that diminished capacity is not an available defense and that duress is not a defense to homicide. The next day, the trial court ruled:

> The Court is of the opinion that expert testimony with regard to the duress defense with respect to the non-homicide count would not be appropriate.
>
> The Court agrees with the argument of the prosecutor that in effect it would be a thinly veiled effort at introducing diminished capacity.
>
> While the Court doesn't fault the defense for seeking to introduce the expert testimony and ascribes no intent to mislead, the Court does believe it would result in juror confusion with respect to that issue.
>
> The law of the State of Michigan is clear that diminished capacity is not a defense. The Court believes that the proffered testimony could result in confusion, not only with respect [to] the count to which the duress defense applies, the non-homicide count, with respect to the homicide counts as well.

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[4] Stockholm Syndrome has been described as "a psychological phenomenon whereby a hostage develops positive feelings for his or her captor." *United States v Peralta*, 941 F2d 1003, 1009 n 1 (CA 9, 1991) (internal quotation marks and citation omitted).

> The Court also believes that the duress defense does not lend itself in any event to the admission of expert testimony to support it. The fact that [it] would be somewhat in the area of new science and it would be questionable whether it could pass muster at a *Dalbert* [sic] hearing in any event.

On appeal, defendant asserts that Dr. Abramsky's testimony was highly relevant to her duress defense and that the trial court deprived her of her constitutional right to present a defense by excluding the testimony. Defendant does not dispute that diminished capacity is not a viable defense in Michigan. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Therefore, to the extent that the trial court excluded the proposed testimony on that basis, it did so correctly. Further, we agree with the prosecution that the record in this case is insufficient to determine whether Dr. Abramsky's testimony would be admissible under MRE 702, and even on appeal, defendant makes no effort to demonstrate that it would be admissible.

The pivotal issue here is whether the proposed expert testimony is relevant to the defense of duress. To establish a prima facie case of duress, a defendant must present sufficient evidence from which a jury could find that: (1) the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; (2) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; (3) the fear or duress was operating on the mind of the defendant at the time of the alleged act or acts; and (4) the defendant committed the act or acts to avoid the threatened harm. *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). A defendant forfeits the defense of duress where the defendant "does not take advantage of a reasonable opportunity to escape, where that can be done without exposing himself unduly to death or serious bodily injury, and where the defendant fails to terminate his conduct as soon as the claimed duress . . . has lost its coercive force." *People v Lemons*, 454 Mich 234, 247 n 18; 562 NW2d 447 (1997) (internal quotation marks and citations omitted). Duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996).

Dr. Abramsky's proposed testimony was neither relevant nor helpful in this case. Defendant compares the proposed testimony to expert testimony about battered woman syndrome or other syndrome evidence. In *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995), our Supreme Court held that expert testimony about battered woman syndrome is only admissible "where relevant and helpful to the factfinder." The Court explained that generally, expert testimony is needed when a witness's actions or responses are incomprehensible to the average person, such as a prolonged tolerance of physical abuse accompanied by attempts at hiding or minimizing the effect of the abuse, delays in reporting the abuse to the police or friends, or denying or recanting allegations of abuse. *Id*. at 592-596. The Court held that only when the aforementioned or similar facts are in issue and expert testimony would be helpful in evaluating a witness's testimony is evidence of battered woman syndrome permitted. *Id*. at 593, 597. In this case, jurors needed no expert testimony to determine whether defendant was forced, under duress, to assist Selepak in murdering the Berels or whether she had a reasonable opportunity to escape. In establishing a prima facie case of duress, defendant had to establish that a *reasonable person* in her position would have felt such fear of death or harm as to justify her actions, and defendant was provided the opportunity to describe the situation and her feelings of fear to the jury. Dr. Abramsky's proposed testimony was inapplicable and unnecessary to the

jury's determination. Therefore, the trial court committed no abuse of discretion in excluding the testimony.

Additionally, even if there had been an abuse of discretion, there is no basis on which to conclude that the outcome of the case would have been different but for the exclusion of Dr. Abramsky's testimony. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *People v Anderson*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). As indicated, duress is not a defense to homicide. Therefore, Dr. Abramsky's testimony, if relevant, would only have been relevant to the non-homicide counts with which defendant was charged. Moreover, defendant was not denied her opportunity to present the defense of duress. She testified that she only followed Selepak's instructions and did not attempt to escape or seek help because Selepak threatened her life and the lives of her family members. Defendant's behavior following the Berels' deaths, however, tended to negate her testimony. Immediately after their deaths, defendant went alone to CVS and appeared completely normal. She then returned to the Berels' house. For several days after their deaths, defendant went shopping, out to eat, and to dance clubs with Selepak. Her friends testified that she seemed completely normal, and did not seem afraid or under any stress. The trial court instructed the jury on the defense of duress, but based on all of the evidence presented, the jury convicted defendant as charged. Reversal is not warranted.

VII. "Other-Acts" Evidence

Defendant argues that the trial court abused its discretion by admitting evidence of other acts committed by her and Selepak. We disagree.

Before trial, the prosecution moved to admit evidence that Selepak committed armed robbery at Mr. Pita and Dunham's Sports before the Berels' deaths and murdered Johnson after their deaths, and that defendant was either aware of or participated in all three events. The trial court admitted the evidence under MRE 404(b) over defendant's objection. We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *Watson*, *supra* at 575.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our courts use three factors to determine the admissibility of "other-acts" evidence. These factors are (1) whether the evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Additionally, our courts may admit evidence of other acts as part of the res gestae of the offense, without regard to MRE 404(b), if the alleged acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978) (quotation marks and citation omitted). This rule, termed the "res gestae exception to 404(b)," has also been defined as allowing those "'facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978). "The principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of [res gestae] evidence." *Delgado*, *supra* at 83. See also *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981) (stating that the "res gestae has been referred to as the 'complete story'"). Res gestae evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

Defendant first argues that the trial court abused its discretion in admitting the armed robbery evidence because it was not admitted for a proper purpose and was irrelevant. Evidence of other acts, however, may be admissible for purposes "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." MRE 404(b). We agree with the prosecution that the evidence was relevant to establishing defendant's knowledge and intent and to refuting her claim of duress. The question of intent was an issue at trial because a general denial of guilt puts all of the elements of the charged offense at issue. *People v Sabin*, 463 Mich 43, 60; 614 NW2d 888 (2000). Defendant testified that she did not know Selepak had a gun until she arrived at the Berels' house on the night of the murders, that she never believed Selepak could be violent or that he would hurt her until she saw him strangling Melissa, that she had no idea Selepak planned to harm the Berels' or steal anything from them before that night, that she only participated because Selepak threatened her life and the lives of her family members, and that even while she was participating in the murders, she never intended to harm Scott or Melissa. But, the evidence of the two prior armed robberies contradicts defendant's testimony. It demonstrates that defendant assisted Selepak in committing at least two violent crimes–by essentially waiting in the "getaway car" at Mr. Pita and distracting the employee at Dunham's Sports–before he had ever threatened her life, and that she was aware he had very recently stolen money and guns.

The evidence was also admissible as part of the res gestae of the offense. The armed robbery evidence, along with the evidence of Johnson's murder, helped to give the jury the "complete story." The armed robberies occurred within two weeks of the Berels' murders, and Johnson's murder occurred only days later. Viewing this evidence together, it becomes clear that defendant did not simply engage in a one-time violent offense out of an imminent fear of death or serious bodily harm. Defendant and Selepak engaged in a series of offenses that escalated over time. After each offense, they escaped with money, guns, or other stolen property, and spent their time between offenses eating out and partying.

Defendant concedes that the evidence of Johnson's death was admitted for a proper purpose and was relevant. She argues, however, that all of the "other-acts" evidence, including the armed robbery evidence and the evidence of Johnson's death, was unfairly prejudicial.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403. Although the challenged evidence was most likely damaging to defendant's position, it was highly probative because it was relevant to issues of consequence at trial and there is no evidence that the jury gave it preemptive weight. Therefore, defendant has not established that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

The trial court properly exercised its discretion in admitting the challenged "other-acts" evidence. But even if the trial court had erred in admitting the evidence, defendant cannot establish that its admission constituted outcome-determinative error warranting reversal. See *Lukity*, *supra* at 495-496. The evidence presented at trial establishing defendant's guilt was overwhelming. Among a variety of other evidence, defendant admitted, in her confessions to police and during her trial testimony, to participating in all of the charged offenses, and the jury rejected defendant's claim of duress.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering