STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY ALLEN DOLFIN,

Defendant-Appellant.

UNPUBLISHED
April 29, 2003

No. 234452
Kent Circuit Court
LC No. 00-003724-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD R. RIDDLE,

Defendant-Appellant.

No. 234453
Kent Circuit Court
LC No. 00-002954-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNA MAE KOETJE,

Defendant-Appellant.

No. 234454
Kent Circuit Court
LC No. 00-003725-FC

Before: Murphy, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, defendants Dolfin, Riddle, and Koetje appeal as of right following their jury trial convictions on crimes arising out of the murder of Gerald Koetje, who was the husband of defendant Koetje. Specifically, defendants Dolfin and Koetje were convicted

of first-degree premeditated murder, MCL 750.316, under an aiding and abetting theory, and conspiracy to commit first-degree premeditated murder, MCL 750.157a. Defendant Riddle was convicted of first-degree premeditated murder, MCL 750.316, second-degree murder (vacated), MCL 750.317, conspiracy to commit first-degree premeditated murder, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendants were tried in a joint trial before two separate juries. One jury deliberated the fate of Dolfin and Koetje, while the other jury decided the case against Riddle. Defendants were sentenced to life in prison without the possibility of parole. We affirm the convictions as to all three defendants.

I. BRIEF FACTUAL OVERVIEW

Gerald Koetje[1] was shot in the head and found dead by police on the night of October 28, 1999, in the master bedroom of his home, a condominium, which was the home he shared with Koetje. Police discovered the victim lying on a bed with a sheet pulled over his body and a pillow over his head. There was also a yellow cloth stuffed in the victim's mouth.

The prosecution's theory of the case was that defendant Riddle, a resident of Wisconsin, had entered the Koetjes' home through the garage on the night of October 28, 1999, and shot the victim while Riddle's friend Ralph Zielinski, also from Wisconsin, remained in the home's garage. The two then left the home with Zielinski driving the victim's pickup truck, which had been parked in the Koetjes' garage, and Riddle driving his own Chevy Blazer. Riddle and Zielinski rendezvoused at a nearby industrial park, abandoned the victim's truck, and then returned to their home state of Wisconsin. The prosecution further theorized that defendants Koetje and Dolfin[2] had conspired with Riddle in the preparation and planning of the murder, although neither was at the house when the victim was shot, after initially attempting to kill the victim through the use of prescription drugs. Evidence presented to the jury in support of the charges included, in part, receipts in Riddle's name found at the crime scene, papers that provided the address, floor plans, and directions to the Koetjes' home along with missing property from the Koetjes' home all found in searches of Riddle's home and vehicle, testimony from Zielinski implicating defendants, and secretly recorded statements. Additionally, the prosecution introduced motive evidence presented through the testimony of a close friend of Koetje and a representative of the victim's employer, evidence of deceit by defendants in conversations with police, forensic evidence with respect to a firearm and footwear, incriminating statements and actions by defendants, phone calls, and especially damaging, e-mail communications between defendants prior to the murder that were removed by technicians from the hard drives of defendants' computers.

II. ARGUMENTS and ANALYSIS

A. Defendant Koetje's Appellate Arguments

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[1] To avoid any confusion in this opinion between defendant Koetje and Gerald Koetje, we shall refer to Gerald Koetje as the "victim" and defendant Koetje as simply "Koetje."

[2] Koetje and Dolfin are brother and sister.

Defendant's arguments are predicated, in their entirety, on ineffective assistance of counsel. Defendant maintains that trial counsel was ineffective for failing to seek the suppression of evidence that was allegedly obtained through means of an illegal search, failing to move for the suppression of statements made by defendant that were involuntarily made, failing to investigate thoroughly and pursue defendant's alleged mental and physical infirmities, and failing to competently and vigorously defend Koetje against the prosecutor's charges. Defendant also requests that we remand the case for a *Ginther*[3] hearing in order to explore the ineffective assistance claims.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defense counsel is not obligated to make meritless or futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Our review, for purposes of this appeal, is limited to the record because no *Ginther* hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Failure to Move for Suppression of the Evidence

Defendant first argues that trial counsel was ineffective for failing to move to suppress evidence that was gathered by police in a search of the Koetje home. Defendant agreed and consented to the search shortly after police found the body. The police informed defendant that the victim had passed away and that the home was being treated as a crime scene; however, she was not told that the victim had been shot to death.[4] Defendant maintains that because she was

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[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[4] There was police testimony that it is policy not to divulge the cause of death until an autopsy is

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not fully informed as to the circumstances of the victim's death, her consent was not effective and thus the search was illegal. Defendant compares the situation to one where the police have intentionally lied to obtain consent. Defendant's argument lacks merit.

The state and federal constitutions protect persons from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). An exception to the general requirements of a search warrant and probable cause is a search conducted pursuant to consent. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). The issue whether consent to search is freely and voluntarily given involves a question of fact based on the totality of the circumstances. *Id.* The presence of coercion or duress generally militates against a finding of voluntariness. *Id.* Police questioning or conduct that is coercive, or the existence of a coercive atmosphere, are relevant in determining whether the consent was voluntary. *People v Klager*, 107 Mich App 812, 816; 310 NW2d 36 (1981). The scope of defendant's consent is measured by what a reasonable person would have understood by the exchange between the defendant and the police. *People v Frohriep*, 247 Mich App 692, 703; 637 NW2d 562 (2001).

Here, there is no indication in the record that the police used coercive measures or that they attempted to place defendant in duress in order to obtain consent to search. Several officers testified that defendant freely and voluntarily cooperated with police, and she initially was not even the focus of the investigation. It cannot be said that the action by the police in failing to specifically tell defendant that her husband had been shot to death rendered the consent involuntary or not freely given. Defendant was made aware that the victim was dead and that a crime had been committed, which would lead a reasonable person to conclude that a murder may have been committed. One would have to conclude that had defendant been specifically told that her husband was shot, she would have denied any request to search the premises. Such an unreasonable conclusion we shall not make.

Defendant fails to cite any relevant case law to support the proposition that police must fully inform an individual of all circumstances before obtaining that person's consent to a search. Defendant's reliance on *People v Mullaney*, 104 Mich App 787; 306 NW2d 347 (1981), is misplaced. The panel in *Mullaney* concluded that the police conducted an illegal warrantless search where the police obtained consent from the defendant's sister to a search of the defendant's bedroom, and where the police falsely told the sister that a search warrant was on its way; police also commenced the search before any consent was given. *Id.* at 792-793. This Court ruled that the sister's consent was not voluntary. *Id.* at 792. There is no indication in the case at bar that Koetje's consent was involuntary, that the police made false statements, or that a search was initiated without defendant's approval.

We also note that even had defendant not given consent to search the premises, the police in all likelihood would have quickly obtained a search warrant considering that a murder had taken place inside the home. Therefore, the evidence, which defendant believes should have been excluded, would have inevitably been discovered and obtained. An exception to the exclusionary rule is the inevitable discovery exception that permits admission of tainted evidence

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completed.

when the prosecution can prove that the information ultimately or inevitably would have been revealed in the absence of police misconduct. *People v Stevens (After Remand),* 460 Mich 626, 637; 597 NW2d 53 (1999).

In light of the law cited above, we find that any attempt by trial counsel to move for the suppression of the evidence obtained in a search of the Koetje home would have been fruitless and futile; therefore, there was no ineffective assistance of counsel. *Milstead, supra* at 401.

In connection with this argument, defendant asserts that the incriminating e-mails were far more prejudicial than probative, thereby requiring suppression, and trial counsel was ineffective for failing to move to suppress admission of the e-mails. This argument is not properly presented for review because it is not contained in the statement of the issues presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, defendant's claim lacks merit. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Because evidence of guilt presented by the prosecutor is always prejudicial, MRE 403 prohibits only evidence that is unfairly so. *People v Siler*, 171 Mich App 246, 253; 429 NW2d 865 (1988). Here, defendant fails to provide any reason why the e-mail evidence was *unfairly* prejudicial, and we see no reason in the record to so conclude. Once again, any motion by trial counsel would have been futile; therefore, counsel was not ineffective.

Failure to Move for the Suppression of Defendant's Inculpatory Statements

Defendant next argues that trial counsel was ineffective for failing to move for the suppression of inculpatory statements made by defendant. Defendant acknowledges that she did not make any statements that directly implicated her in the murder, but her statements, concerning whether she knew defendant Riddle, were inconsistent and used as circumstantial evidence of her guilt. Defendant argues that she was unable to voluntarily waive her constitutional rights because of her severe medical history, which required the use of pain-killers and anti-depressants, and because of a serious mental illness that has necessitated incarceration in a psychiatric hospital reserved for mental patients who are unable to live in the prison's general population.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The test for voluntariness is whether, considering the totality of the circumstances, the defendant's statements are the product of an essentially free and unconstrained choice, or whether the defendant's will has been overborne and his capacity for self-determination critically impaired. *People v Cipriano,* 431 Mich 315, 333-334; 429 NW2d 781 (1988). In *Cipriano, id.* at 334, our Supreme Court stated that "[i]n determining whether a statement is voluntary, the trial court should consider, among other things, the following factors . . . whether the accused was . . . intoxicated or drugged, or in ill health when he gave the statement[.]" The Supreme Court cited over ten different factors to be considered. *Id.* The presence of one factor, however, is not necessarily conclusive on the issue of voluntariness. *Id.*

Reviewing the record, we conclude that defendant voluntarily, knowingly, and intelligently waived her right to remain silent.[5] Police testimony clearly indicated that defendant freely spoke with officers in a coherent, calm, and understandable manner reflecting no influence from any medications or physical impairments at the time the challenged statements were made. Further, there was no evidence that defendant's will was overborne by mental illness at the time the statements were made. Once again, officers repeatedly testified that defendant answered questions in a quiet, reserved, and appropriate manner. Defendant's reference to her present mental condition while imprisoned is not relevant to her state of mind when the statements were made. More likely, defendant's statements and subsequent inconsistent statements were the result of an effort to deceive police concerning her involvement in the crime, which effort became more difficult when she was confronted with contradictory evidence. We have reviewed the e-mail correspondence between all three defendants prior to the crime, and our review leads to the conclusion that defendant Koetje could intelligently communicate with others. Moreover, trial counsel had defendant privately examined for competency by a forensic psychiatrist. Any motion by trial counsel to suppress defendant's statements would have been futile; therefore, counsel was not ineffective.

Defendant again makes a cursory argument that the evidence was more prejudicial than probative, and the argument lacks merit for the same reasons as ruled upon by us previously. Defendant fails to provide any reason why admission of her statements was *unfairly* prejudicial, and we see no reason in the record to so conclude. There was no ineffective assistance of counsel since any objection would have been futile.

Failure to Investigate Defendant's Mental and Physical Condition

This argument is made in the context of defendant's alleged inability to voluntarily, knowingly, and intelligently waive her constitutional rights. We have already addressed this argument as it relates to defendant's statements. With respect to defendant's consent to a search of her home, the record, once again, indicates that she freely and coherently provided consent without any indication that she was clouded by any physical or mental impairment. Trial counsel was not ineffective.

Failure to Adequately, Competently, and Vigorously Defend Defendant

Defendant cites eleven instances of alleged failures by trial counsel to adequately, competently, and vigorously defend Koetje. We shall address each of these claims.

Three of the instances relate to arguments previously made by defendant, and which we have rejected. One of those instances additionally included a claim that trial counsel was ineffective for failing to object to the prosecutor's selection and introduction of only 133 pages of nearly 5000 e-mail messages. This is the extent of defendant's argument; there is no explanation why trial counsel should have sought admission of more e-mail pages, or any reference to relevant e-mail evidence that was not introduced. Defendant has failed to overcome

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[5] We note that defendant's initial statements to police were not made in the context of a custodial interrogation.

the presumption that counsel's action was a matter of sound trial strategy. Moreover, as this Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

Defendant next argues that trial counsel failed to seek interlocutory appeal from the denial of the motion to quash the information against defendant, thereby barring appellate review pursuant to *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990). This is the full extent of the argument. First, *Hall* did not bar appellate review of a ruling denying a motion to quash after trial but applied harmless error analysis. *Id.* at 600-601. Second, defendant fails to enlighten us in any meaningful manner with the factual and legal basis for the claim, and thus we deem it waived. Moreover, our review of the record shows sufficient evidence presented at the preliminary examination to support the bindover.

Defendant next asserts that trial counsel was ineffective for failing to challenge the lack of randomness of the jury selection procedure in light of *People v Green (On Remand)*, 241 Mich App 40; 613 NW2d 744 (2001). The *Green* panel ruled that jury selection by a method other than a random blind draw from a container bearing the names of the prospective jurors or their corresponding juror numbers must be fair and impartial and not implicate a "struck jury method" or impair the right to exercise peremptory challenges. *Id.* at 47-48. Defendant provides no explanation how the jury selection here violated *Green.* Defendant does not cite any language from *Green* or even direct us to a page reference in the opinion. Defendant's one sentence argument is insufficient. Moreover, a review of the jury selection procedure does not indicate any improprieties.

Defendant next argues that trial counsel was ineffective for failing to object to the introduction of MRE 404(b) evidence, which resulted in highly prejudicial information being admitted against defendant, including prior attempts to poison her husband with Viagra and nitroglycerin and alleged extramarital affairs. In *People v Knapp*, 244 Mich App 361, 378-379; 624 NW2d 227 (2001), this Court stated:

> Pursuant to MRE 404(b), evidence of other crimes or wrongs "is not admissible to prove the character of a person in order to show action in conformity therewith." However, other acts evidence may 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." MRE 404(b). Other acts evidence must be offered for a proper purpose under the rule, the evidence must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. [Citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

Therefore, MRE 404(b) permits prior acts evidence to show motive (affairs) and plan or scheme (poisoning attempts). Defendant fails again to argue how the evidence at issue unfairly prejudiced her, and we see no unfair prejudice that substantially outweighed the strong probative value of the evidence. Moreover, we question whether MRE 404(b) is even implicated here where the disputed evidence was part of the conspiracy to commit murder, directly connected to the crimes charged, and required for the jury to hear the complete story. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Evidence of other acts is admissible when so blended or connected with the crime charged that its introduction is necessary to explain the circumstances surrounding the crime and paint the complete picture, or where proof of the crime charged incidentally involves the act in question. *Id.* Trial counsel was not ineffective for failing to object to the evidence because any objection would have been futile.

Defendant next argues that trial counsel was ineffective for only posing one question to defendant Dolfin at trial. Defendant fails to explain what avenues of questioning should have been explored by counsel. It is not unreasonable to conclude that detailed questioning of Dolfin would have negatively affected defendant's case. Defendant has failed to overcome the presumption that counsel's action was a matter of sound trial strategy.

Defendant further argues that trial counsel was ineffective for believing that his client's statements were objectionable as hearsay. There is no prejudice to defendant arising from this claim.

Defendant next argues that trial counsel was ineffective for stipulating to the expertise of every witness called by the prosecution. Besides simply noting the names of the experts and their area of expertise, defendant fails to explain the reasons counsel should have challenged the qualifications of the experts. We are not required to review the qualifications of each expert and make defendant's arguments for her.[6] This issue is effectively waived. Moreover, defendant fails to establish any prejudice.

Defendant next argues that trial counsel was ineffective for failing to call any witnesses in his client's defense after submitting a witness list prior to trial. This is the full extent of defendant's argument. Defendant fails to specifically identify one witness that should have been called by counsel necessary for her defense and fails to explain how the witness' testimony would have been beneficial to defendant. Defendant has failed to overcome the presumption that counsel's action was a matter of sound trial strategy.

Finally, defendant maintains that trial counsel was ineffective for suggesting to the jury during closing arguments that he did not call her to the stand because she would have had trouble keeping her story straight. This argument mischaracterizes counsel's closing argument. Counsel merely told the jury that his client did not take the stand because she had a frail demeanor and disposition and that the skillful prosecutor could cause her to make what might appear to be a misstatement out of strain, fear, or grief. We find that counsel was not ineffective where he

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[6] We would note, however, that the record reflects that the prosecutor elicited testimony regarding the experts' qualifications, which, on its face, appears to support a finding that the witnesses were properly qualified as experts.

reasonably attempted to reduce any negative impact that might have been reflected in defendant's failure to take the stand. Despite the fact that the jury could not take into consideration defendant's failure to testify in determining her fate, human nature necessarily makes this difficult.

Because defendant's appellate arguments lack merit and do not require expansion of the lower court record, there is no need to remand for purposes of a *Ginther* hearing.

We affirm defendant Koetje's convictions.

B. Defendant Dolfin's Appellate Arguments

Sixth Amendment Right to Confront Witnesses

Defendant first argues that his Sixth Amendment right to confront witnesses against him was denied where the prosecution was allowed to present extensive statements made by Riddle and Koetje. Dolfin testified at trial; however, Riddle and Koetje invoked their Fifth Amendment rights to remain silent. Defendant maintains that but for the statements of Riddle and Koetje, especially those contained in the e-mails, Dolfin would never have been convicted. According to defendant, the trial court erred in finding that the statements qualified as statements against penal interest pursuant to MRE 804(b)(3). Defendant argues that the statements constituted either vague gibberish or self-interested, dishonest comments to interrogating police officers; therefore, the statements lacked any indicia of reliability. Defendant concludes that the error in allowing admission of the statements was not harmless.

"This Court reviews for an abuse of discretion the trial court's decision to admit or exclude evidence and will reverse only where there is a clear abuse of discretion." *People v McCray*, 245 Mich App 631, 634-635; 630 NW2d 633 (2001), citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002). Similarly, because the issue implicates the Confrontation Clauses of the state and federal constitutions,[7] the issue is reviewed de novo. *Id*. at 524-525.

In *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997), this Court set forth the principle that, in order to bear "adequate indicia of reliability" so as to be properly admissible under the Sixth Amendment, hearsay testimony must either fall within a "firmly rooted hearsay exception" or occur under circumstances with "particularized guarantees of trustworthiness" considering the totality of the circumstances surrounding the making of the statement and those rendering the declarant to be worthy of belief. Further, the trustworthiness requirement serves as a surrogate for the declarant's in-court cross-examination, and thus, the requirement is satisfied if the court can conclude that cross-examination would be of marginal utility. *Id*. at 467-468.

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[7] US Const, Am VI; Const 1963, art 1, § 20.

MRE 804(b)(3) allows the introduction of hearsay statements where the declarant is unavailable, and where "[a] statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true[.]"

The trial court did not err in allowing into evidence statements made by Riddle and Koetje. The e-mail statements could clearly subject the party making the statements to criminal liability and constituted statements against interest. This is the reason defendants often referenced, in their e-mails, the need to delete the e-mails and their concern that their e-mails not be retrievable or discovered; the e-mails were meant to be secretive. By their very nature, and when considered within the setting in which they were made, the e-mail statements bore adequate indicia of reliability so as to be properly admissible under the Sixth Amendment. The statements were conspiratorial. Likewise, the e-mail statements occurred under circumstances with particularized guarantees of trustworthiness. To find otherwise would require us to reach the conclusion that defendants were attempting to deceive each other in their e-mail communications. There is no record support for that conclusion. Therefore, cross-examination would have been of marginal utility.

With respect to statements made to police officers by Riddle and Koetje, the statements did not implicate Dolfin in the murder; therefore, any error in allowing the statements without the benefit of cross-examination was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Even if the statements implicated Dolfin, there was sufficient testimony outside those statements to support his convictions, thereby rendering harmless any error. *Id.*

Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to support a conviction for first-degree premeditated murder and conspiracy to commit first-degree murder. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515.

To convict a defendant of first-degree murder, the prosecutor must show that the defendant intentionally killed the victim and the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). Premeditation and deliberation require sufficient time to take a second look and need not be established by direct evidence. *People v Hoffmeister*, 394 Mich 155, 158-159; 229 NW2d 305 (1975); *Marsack, supra* at 370-371. A person who aids and abets the commission of a crime may be convicted as if that person directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). To establish that a defendant has aided and abetted in the commission of a crime, the prosecutor must show that (1) the crime 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 knew that the principal

intended its commission when giving aid and encouragement. *Id.* at 495-496. Conspiracy is a mutual agreement between two or more persons to commit a criminal act or to accomplish a legal act through criminal means. *People v Cotton,* 191 Mich App 377, 392; 478 NW2d 681 (1991). The essence of the conspiracy is the agreement itself, and it is sufficient if the circumstances, acts, and conduct of the parties establish the agreement. *Id.* at 393. To prove conspiracy to commit murder, it must be demonstrated that each conspirator had the requisite intent to commit the murder. *People v Hamp,* 110 Mich App 92, 103; 312 NW2d 175 (1981).

Here, there was sufficient circumstantial evidence indicating that Riddle intentionally killed the victim, and that the killing was premeditated. This evidence consisted, in part, of e-mail transmissions, Zielinski's testimony, receipts, writings, recovery of missing property, evidence of deceit in conversations with police, forensic evidence, phone calls, and incriminating statements and actions. There was also evidence connecting Riddle to Dolfin and an exchange of information between the two concerning the Koetjes' home. Additionally, there was evidence of an agreement between Dolfin and his co-conspirators that could reasonably be viewed, in light of the circumstances surrounding the murder, as one to kill the victim, and there was evidence that Dolfin aided in the planning stages of the crime. This evidence was chiefly the numerous e-mails sent and received by Dolfin, Zielinski's testimony, phone calls, secretly recorded statements made by Dolfin to Zielinski, and deception on the part of defendant in talking to police. The e-mail correspondence provides overwhelming evidence of Dolfin's involvement in a criminal conspiracy. When considered in relation to all of the other evidence presented and viewing the proofs in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. There was sufficient evidence supporting the jury's verdict.

Defendant's Prior Convictions

Defendant next argues that he was denied a fair trial where, under MRE 609, the prosecutor was permitted to impeach him with convictions on three counts of delivery of controlled substances occurring in 1972.

Evidence of a prior conviction may be admissible for impeachment purposes either automatically, in the case of an offense involving dishonesty or a false statement, or after a balancing test, in a situation where the offense involved theft. MRE 609; *People v Parcha,* 227 Mich App 236, 243; 575 NW2d 316 (1997).[8]

The prosecutor argues that the issue was not properly preserved where defendant objected pursuant to MRE 404(b), not MRE 609.[9] The prosecutor also acknowledges that the evidence

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[8] If the court determines that the evidence of the theft crime has significant probative value on the issue of credibility, and if the probative value of the evidence outweighs its prejudicial effect, evidence of the theft crime can be used to attack the witness' credibility. MRE 609(a)(2)(B). In determining the probative value, the court shall consider only the age of the crime and the degree to which the crime is indicative of veracity. MRE 609(b).

[9] An objection at trial based on one ground is insufficient to preserve an appellate argument based on a different ground. *People v Herndon,* 246 Mich App 371, 413 n 90; 633 NW2d 376 (2001). For unpreserved errors, the defendant must show: (1) that an error occurred; (2) that the

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could not be admitted under MRE 609 because it was inapplicable; however, he argues that the evidence was admissible to directly rebut Dolfin's testimony painting himself as someone who would not be involved in drug activity.

We find it unnecessary to resolve whether this argument was properly preserved or whether the evidence was improperly admitted because assuming proper preservation and error, the error was harmless. MCL 769.26; *Lukity*, supra at 495. We question whether thirty-year-old convictions for offenses wholly unrelated to the charges of murder and conspiracy to commit murder affected the jury's verdict in any meaningful manner. Moreover, the incriminating e-mails and Zielinski's testimony firmly established defendant's involvement in the plot to kill the victim.

Evidence of Defendant's Constitutional Right to Remain Silent

Defendant next argues that he was denied a fair trial where the prosecutor informed the jury that he had previously invoked his right to remain silent when talking to police after first speaking to an officer. A detective testified that defendant was given his *Miranda* rights and spoke with the detective. The prosecutor then asked the detective whether defendant later decided he no longer wished to talk, and the detective indicated that this was correct. There were no other references whatsoever to defendant remaining silent, and the prosecutor never suggested that defendant's decision to terminate communications reflected guilt. This single instance without further questioning or argument with respect to defendant's silence does not require reversal; the prosecutor did not call attention to defendant's silence. *People v Dennis*, 464 Mich 567, 576-577; 628 NW2d 502 (2001).

Ineffective Assistance of Counsel

Defendant first argues, in the context of his ineffective assistance claim, that he was denied effective trial counsel where counsel failed to investigate his mental or physical condition at trial, and where defendant was administered narcotics by jail staff prior to trial. There is absolutely no record support for this argument. We find no indication in reviewing the trial transcript of defendant's testimony that he was under the influence of narcotics; he appropriately responded to questions posed to him by counsel and the prosecutor. Moreover, defendant has failed to show prejudice. *Carbin, supra* at 599-600.

Defendant next argues that trial counsel failed to competently advise defendant before trial where counsel promised, but failed, to hire a computer expert to possibly counter the e-mail evidence, promised a "not guilty" verdict, and convinced defendant not to take a favorable plea

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error was plain; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome in the trial court. *Id*. Reversal is warranted only when the plain, forfeited error results in a conviction of an innocent defendant or when the error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

agreement. These matters are purely speculative in nature and not subject to a finding that counsel was ineffective.

Defendant further argues that trial counsel failed to inform the trial court that counsel for co-defendants threatened him that, if he said anything bad about their clients, they would "turn into prosecutors" against him. Defendant fails to explain if and how these alleged threats affected his trial testimony. Moreover, it would not be improper for co-counsel to vigorously examine defendant on the stand if he testified unfavorably with respect to their clients. Defendant fails to establish that counsel was ineffective.

Finally, defendant presents a vague list of alleged instances of ineffective assistance of counsel that mimics those raised by defendant Koetje and addressed by us above. Defendant Dolfin's arguments similarly fail. There is no valid claim for ineffective assistance of counsel, nor do we see any need to remand the case for a *Ginther* hearing.

Pro Se Argument

Defendant, proceeding *pro se*, also argues in his Standard 11 brief that he was denied effective assistance of counsel where counsel failed to appeal the trial court's ruling denying defendant's motion to sever trials or for separate juries. Defendant's argument is baseless, where an appeal would have been by application for leave, MCR 7.203(B), thus making it speculative whether this Court would have heard the appeal, let alone rule in defendant's favor, and where the issue can be raised now on appeal. Defendant has failed to establish ineffective assistance of counsel or prejudice. *Carbin, supra* at 599-600.

Irrespective of the ill-formed statement of the issue, defendant maintains, in part, that the trial court erred in denying defendant's motion to sever.

We review a trial court's decision regarding joinder for an abuse of discretion. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). MCR 6.121 provides in relevant part:

> (B) On a defendant's motion, the court must sever offenses that are not related . . . .
>
> (C) 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) 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.

Defendant essentially argues that he is innocent, that there was no credible evidence of defendant's guilt, and that the evidence against Koetje was overwhelming. The jury found defendant guilty, and we have already determined that there was sufficient evidence of defendant's guilt. Defendant does not present a valid argument as to why the trial court erred in denying the motion to sever. The trial court denied the motion because there would be no prejudice to Dolfin's substantial rights if the cases were not severed, in that the evidence was admissible to both Dolfin and Koetje. Taking into consideration that defendants were charged with conspiracy, we fail to see how defendant Dolfin was prejudiced where a separate trial would essentially require and permit the same presentation of evidence. The trial court did not abuse its discretion in denying the motion to sever.

C. Defendant Riddle's Appellate Arguments

Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to sustain a conviction on the charges presented. We disagree.

There was sufficient circumstantial evidence indicating that Riddle intentionally killed the victim, that the killing was deliberate and premeditated, that the killing was part of a conspiracy, and that Riddle used a firearm in the commission of the murder. As noted above, this evidence consisted, in part, of e-mail communications, phone calls, Zielinski's testimony, receipts, writings, recovery of missing property in Riddle's possession, evidence of deceit in conversations with police, forensic evidence, and incriminating statements and actions by Riddle and the other defendants. Regarding Zielinski's credibility in light of his questionable background, it was for the jury to weigh credibility, not this Court. *Wolfe, supra* at 514-515. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. *Wolfe, supra* at 515-516.

Legality of Wisconsin Search

Defendant next argues that he was denied his right against unlawful search and seizure where Wisconsin police only obtained a search warrant of defendant's cottage, not his home or his Chevy Blazer, yet evidence from his home and the Blazer was presented to the jury. Defendant argues that police refused to produce the search warrant for the home, refused to verify the accuracy of the inventory of the seized property, and entered his residence without knocking and announcing before entry. These issues were not raised in the trial court below; therefore, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763. We also note that because the issue was not raised below, there is no record support for many of defendant's assertions.

Defendant's claim that no search warrant was issued for his home at 4867 Hahn Road in Wisconsin or for his Blazer lacks merit. The record contains, along with a search warrant for defendant's cottage, a Wisconsin search warrant that specifically permits and directs the search of defendant's home at 4867 Hahn Road and defendant's Chevy Blazer. There is also an accompanying complaint and affidavit for the search warrant, along with an order sealing the search warrant, sealing the complaint and affidavit for search warrant, and sealing the search

warrant return. Therefore, the arguments that the search of defendant's residence and Blazer was made without a warrant and that police should have shown the warrant fail. Defendant's argument that Riddle's wife was entitled to view the property taken is not supported with authority and lacks merit.

With regard to the knock and announce argument, it is not properly presented for review because the argument is not contained in the statement of the issues presented. *Brown, supra* at 748. Additionally, under Michigan law, failure to properly knock and announce does not require suppression of the evidence where the discovery of the evidence was inevitable pursuant to a valid warrant and not related to the means and timing of entry. *Stevens, supra* at 646-647 ("The timing of the police officers' entry into the home in no way affected the inevitability of the discovery of the evidence.").[10] Defendant fails to argue that the timing of the entry affected the discovery of the evidence, fails to cite Wisconsin law on the subject, and fails to address any choice of law issue. Therefore, we shall not reverse the convictions on this issue.

Pretrial Publicity

Defendant next argues that the trial court erred in failing to *sua sponte* change venue in light of the pervasive pretrial publicity.

Because defendant did not request a change of venue, we review for plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). Even had defendant requested a change of venue, a change would not have been warranted. In *People v Jendrzejewski,* 455 Mich 495, 501-502, 504; 566 NW2d 530 (1997), our Supreme Court, holding that the trial court did not err in denying the defendant's motion for a change of venue because of pretrial publicity, stated:

> "The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors." *Irvin v Dowd,* 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961). Thus, the initial question is whether the effect of pretrial publicity on a relatively small jury pool, all of Gogebic County, like all of Gibson County in *Irwin,* was such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue." *Mu'Min v Virginia,* 500 US 415, 442, n 3; 111 S Ct 1899; 114 L Ed 2d 493 (1991), citing *Irvin, supra* at 727-728.
>
> 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. "To resolve [such a] case," a reviewing court "must turn . . . to any indications in the totality of circumstances that petitioner's trial was not

[10] The *Stevens* Court noted that the knock and announce rule is meant to allow a defendant the opportunity to put his personal affairs in order, not to destroy evidence. *Stevens, supra* at 646-647.

> fundamentally fair." *Murphy v Florida*, 421 US 794, 799; 95 S Ct 2031; 44 L Ed 2d 589 (1975).
>
> * * *
>
> As the Supreme Court observed in *Murphy, supra* at 800, n 4, "we . . . distinguish between . . . largely factual publicity from that which is invidious or inflammatory." The news accounts in the present case were not inflammatory. In both tone and content, *The Ironwood Daily Globe* coverage was basically factual reporting of news events, including court proceedings. There is no suggestion of appeal to a "lynch mob" mentality. [Omissions in original; alterations in original.]

Here, defendant attaches to his appellate brief not a single newspaper story from Kent County regarding the case, although stories from the Detroit News are attached. This does not constitute unrelenting prejudicial pretrial publicity in Kent County that is invidious or inflammatory. The prosecutor concedes that there were in fact stories about the case covered by the Grand Rapids media. However, we do not have any evidence before us concerning those media accounts. Regardless, the existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). Whether the jury was actually prejudiced by the publicity or whether there was an atmosphere that created a probability of prejudice must be considered. *Id.* A review of the jury voir dire shows that the jurors, save one, had not even heard of the parties or case prior to trial, and the single juror's exposure was minimal without recollection of anything specific. Thus, defendant has failed to establish that his trial was fundamentally unfair.

Ineffective Assistance of Counsel

Finally, defendant argues that he was denied effective assistance of counsel because of trial counsel's failure to move for a change of venue and to suppress the evidence. We have already determined that a change of venue was not warranted nor that defendant was entitled to suppression of the evidence; therefore, trial counsel was not ineffective in failing to file futile motions. There is no need for a *Ginther* hearing.

III. CONCLUSION

All arguments presented by defendants in these consolidated appeals lack merit and are rejected; therefore, we affirm the convictions as to all three defendants.

Affirmed.

/s/ William B. Murphy
/s/ Donald S. Owens
/s/ Bill Schuette