

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN THOMAS WOLFENBARGER,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2005

No. 250430

Wayne Circuit Court

LC No. 03-000689-01

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of five counts of first-degree premeditated murder, MCL 750.316(1)(a), five counts of felony murder, MCL 750.316(1)(b), five counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a mandatory sentence of imprisonment for life without parole for the first-degree murder convictions, imprisonment for life for the felon in possession of a firearm conviction, and imprisonment for two years for the felony-firearm conviction. Defendant appeals as of right. We affirm, but remand for modification of defendant's judgment of sentence to reflect five counts of first-degree murder supported by two theories: premeditated murder and felony murder, vacation of defendant's armed robbery convictions, and rearticulation of the reason or reasons justifying the trial court's departure from the guidelines in sentencing defendant to imprisonment for life for the felon in possession of a firearm conviction.

I. Facts

This case arose out of the murders of five family members shortly before Christmas in 2002. On the afternoon of December 21, 2002, Marco Pesce, an Italian immigrant who owned Italia Jewelry in Livonia, drove his three young children, Carlo, Sabrina, and Melissa, to visit their mother, Diane Pesce,<sup>1</sup> who was in a residential drug treatment facility in Ann Arbor. After Marco picked up the children from their visit, he dropped them off at his home and returned to

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<sup>1</sup> Marco was divorced from Diane Pesce.

work. Marco's mother, Maria Vergati, who was visiting the family from Italy, was at the Pesce home at the time. Shortly after Marco arrived back at work, Carlo called him and told him to come home because Melissa had fallen and chipped her tooth. Marco left work immediately and returned home. The next day Marco, his three children, and his mother were discovered dead in the Pesce home. They had each been shot to death on December 21, 2002. The house had been ransacked and the family safe had been emptied of jewelry and cash.

## II. Voir Dire

Relying on our Supreme Court's decision in *People v Tyburnski*, 445 Mich 606; 518 NW2d 441 (1994), defendant argues that the trial court failed to ask sufficiently probing questions during voir dire to determine whether the extensive pretrial media coverage of the case biased the prospective jurors. "A defendant who chooses a jury trial has an absolute right to a fair and impartial jury." *Id.* at 618. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *Id.* "The trial court has discretion in both the scope and the conduct of voir dire." *Id.* at 619. "The propriety of the voir dire in this case turns on whether potential jurors who have been exposed to pervasive and sensationalized media coverage can 'speak the truth' about their own bias, or whether a trial court must elicit more than mere self-assessment in order to safeguard a defendant's right to an impartial jury." *Id.* at 618.

In *Tyburnski*, the Supreme Court held that when pretrial publicity creates a danger of prejudice, the trial court has several options to uncover potential juror bias and achieve the goal of impaneling an impartial jury. *Id.* at 623. First, the trial court can submit a questionnaire to potential jurors that is prepared by the parties and approved by the court. *Id.* Second, the trial court can permit the attorneys to participate in the voir dire. *Id.* at 624. Third, the trial court can question individual potential jurors or small groups away from the remaining veniremen. *Id.* Whatever option the lower court selects, it must "elicit enough information for the court to make its own assessment of bias." *Id.* at 623. However, the Supreme Court recognized that "[t]his area of the law does not lend itself to hard and fast rules regarding what is acceptable and what is unacceptable practice." *Id.* Therefore, the Supreme Court opined that trial courts "should be allowed wide discretion in the *manner* they employ to achieve the goal of an impartial jury." *Id.* (emphasis in original).

In this case, the record simply does not support defendant's claim that the trial court failed to ensure that the jury was impartial. The trial court was aware of the issue of pretrial publicity and took appropriate steps to impanel an impartial jury. Specifically, the trial court conducted individual, sequestered voir dire of the prospective jurors to determine how much the potential jurors had heard or seen from the media and what impact that information would have on the jurors' ability to remain unbiased. In addition, apparently mindful of the fact that the "attorneys are more familiar with the complexities and nuances of the case" and "are in a better position than the trial court to ask in-depth questions designed to uncover hidden bias," the trial court also permitted the prosecutor and defense counsel to participate in the voir dire. *Id.* at 624.

We reject defendant's contention that the facts of this case are similar to the facts in *Tyburnski*, where the trial court did not sequester the prospective jurors to conduct individual voir dire and did not permit the attorneys to participate in the voir dire. *Id.* at 625-626. Moreover, we reject defendant's isolation of certain questions posed by the trial court to the prospective jurors

to support his contention that the trial court's questions were superficial and inadequate to expose juror bias because they "lead the jurors to the conclusion that they could be impartial." *Id.* at 627. As we observed above, the trial court has wide discretion in the manner it uses to achieve the goal of an impartial jury. *Id.* at 623. Defendant's reliance on isolated questions posed by the trial court is unpersuasive when the trial court's and the attorneys' questions to the venire as a whole were probing, thoughtful questions that were designed to uncover any potential bias caused by the jurors' exposure to pretrial publicity.

We conclude that the trial court, which was on notice of the likelihood of juror bias as a result of pretrial publicity, exercised caution in the manner it conducted voir dire. By conducting individual, sequestered voir dire and permitting the attorneys to ask questions about bias as a result of media exposure, the trial court's conduct went above and beyond what our Supreme Court required in *Tyburski*. In other words, the trial court satisfied its duty "to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias." *Id.* The record simply does not support defendant's contention that the trial court merely relied on the jurors' self-assessment of bias. Therefore, the trial court did not abuse its discretion in failing to conduct a sufficiently probing voir dire, and defendant was not denied a fair trial.

## II. Peremptory Challenges and Challenges for Cause

Defendant next argues that the trial court erred in failing to excuse seven prospective jurors for cause based on pretrial publicity. Defendant challenged for cause six of these prospective jurors, and the trial court denied defendant's request. Defendant did not challenge for cause the seventh prospective juror, but exercised a peremptory challenge to excuse him.

This Court defers to the trial court's superior ability to assess a prospective juror's demeanor to determine whether the person would be impartial and reviews for abuse of discretion a trial court's rulings on challenges for cause based on bias. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). There is a four-part test to determine whether a trial court's error in refusing a challenge for cause merits reversal. *People v Legrone*, 205 Mich App 77, 81; 517 NW2d 270 (1994). There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. *Id.*

In this case, defendant concedes, and the record supports, that the six jurors defendant challenged for cause all indicated that they could be impartial despite their exposure to pretrial publicity. The trial court was in the best position to judge, on the basis of their credibility and demeanor, whether the members of the venire could render a fair and impartial verdict. *People v Lee*, 212 Mich App 228, 251; 537 NW2d 233 (1995). Because the six jurors all indicated that they could be fair and impartial, there were not grounds for excusing the jurors under MCR 2.511(D)(3) or (4). Therefore, the trial court did not err in denying defendant's challenge for cause, and defendant cannot establish the first prong of *Legrone*. Additionally, we observe that our review of the record reveals that defendant is also unable to satisfy the third prong of *Legrone* because he did not demonstrate the desire to excuse another subsequently summoned juror after he exhausted all of his peremptory challenges.

Regarding the prospective juror that defendant did not challenge for cause, we agree with defendant's contention that there were grounds to challenge him under MCR 2.511(D)(3) and (4) because the prospective juror indicated that he had been exposed to media publicity about the crimes, that he had already made up his mind about the case, and that he did not think he could keep an open mind. However, the fact that defendant was required to exercise a peremptory challenge to excuse this prospective juror did not violate his right to a fair and impartial jury. In *Ross v Oklahoma*, 487 US 81; 108 S Ct 2273; 101 L Ed 2d 80 (1988), the United States Supreme Court considered the Sixth Amendment implications of a trial court's erroneous refusal to remove a prospective juror for cause, which caused the defendant to exercise a peremptory challenge, and held:

Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. [*Ross, supra* 487 US at 88 (footnote and citations omitted).]

In this case, every member of the jury indicated that they could be fair and impartial. Therefore, defendant's constitutional right to a fair and impartial jury was preserved.

Defendant next argues that the trial court erred in denying his request for additional peremptory challenges. This Court reviews a denial of a motion for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997).

In denying defendant's request for additional peremptory challenges, the trial court stated that it was "satisfied that through the process of individual voir dire relative to media coverage, that a sufficient opportunity has been—been afforded not only to the prosecution as well as the defense to determine and flush out any people who could not be fair and impartial based upon media coverage." The trial court noted that it had been liberal in granting defendant's challenges for cause so that defendant did not have to use peremptory challenges to excuse potential jurors who had formed opinions because of their exposure to media publicity about the case. The trial court asserted that, based on the response of the potential jurors to questioning about media exposure during the individual voir dire, there was no need to grant defendant additional peremptory challenges.

MCR 6.412(E)(2) permits the trial court to grant a party additional peremptory challenges "[o]n a showing of good cause." Defendant alleges that there was good cause because "[v]irtually every juror questioned had heard about this case." Defendant is correct that most of the jurors were aware of the case. However, this Court has previously held that widespread publicity of a case is not good cause for granting additional peremptory challenges, especially where the trial court excused for cause any prospective jurors who expressed an opinion regarding the defendant's guilt or real knowledge of the case. *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996). Our review of the jury voir dire indicates that the trial court took appropriate steps to ascertain whether the prospective jurors' awareness of the crimes would

affect their ability to render a verdict in defendant's case based on the evidence. None of the prospective jurors who expressed a bias or prejudice based on their exposure to media reports regarding the case ultimately sat on defendant's jury, and all of the jurors who ultimately sat on defendant's jury indicated that they could be fair and impartial despite their exposure to pretrial publicity. Defendant has not shown that any of the jury members were actually biased or prejudiced against defendant. Therefore, defendant did not establish good cause to warrant additional peremptory challenges, and the trial court did not abuse its discretion in denying defendant's request for additional peremptory challenges.

### III. Change of Venue

Defendant next argues that the trial court erred in denying his motion for a change of venue. The general rule is that a defendant must be tried in the county where the crime is committed. MCL 600.8312. However, the court may, in special circumstances where justice demands or statute provides, change venue to another county. MCL 762.7. This Court reviews the denial of a motion for change of venue under an abuse of discretion standard. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). However, it is the preferable practice to deny such a motion before jury selection. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992), overruled on other grounds by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

The existence of pretrial publicity alone does not necessitate a change of venue. *Id.* "Rather, to be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it . . . or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." *Id.* In this case, defendant contends that community bias must be presumed because of the high percentage of prospective jurors who were aware of the Pesce family murders. See *Jendrzejewski*, *supra* at 501. We disagree.

"Juror exposure to . . . newspaper accounts of the crime for which [a defendant] has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity." *Id.* at 502. According to defendant, the media coverage of defendant's case "reached an unprecedented level" because of technology and the ease of broadcasting such information. Defendant asserts that the Detroit newspapers printed more than one hundred articles covering the murders, that local television stations reported on the murders for more than a month, and that the murders were "often the subject of investigative reports and editorial commentary." The number of articles alone does not result in a presumption of impartiality in all jurors. In *People v DeLisle*, 202 Mich App 658, 668-669; 509 NW2d 885 (1993), we 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 one hundred newspaper articles published over a period of ten months and all the jurors promised to be fair and decide the case solely on the basis of the evidence introduced at trial.

Moreover, while the media coverage of the case was extensive, the newspaper articles were based on the facts of the case and the ensuing investigation and the status of the case after defendant and his codefendant were arrested. There were also some newspaper articles about the victims' funerals. The potential for prejudice is much greater if the publicity is invidious or

inflammatory than when the publicity is largely factual. See *Jendrzewski, supra* at 504. We have carefully reviewed the media reports in this case and conclude that the publicity was largely factual and was not invidious and inflammatory. Moreover, “[t]here is no suggestion of appeal to a ‘lunch mob’ mentality.” *Id.* We observe that the shocking and cold-blooded nature of the crimes in which five people were killed, four of them execution-style, coupled with the fact that three of the victims were innocent children and one was an elderly woman, renders it nearly impossible for even a factually based written or television news account of the details of the crime not to evoke passion in anyone who reads such an article or views such a news segment. However, the fact that there is no neutral way to report on the murders of five innocent persons is a function of the heinous nature of the crimes themselves, not the result of inflammatory or invidious media reporting. The news reports were based on the facts of the brutal crimes, the investigation, and the status of the case against defendant and his codefendant. We therefore conclude that the media coverage did not amount to “a barrage of inflammatory publicity” that resulted and prejudice against defendant. *Id.* at 506-507.

Defendant contends that nearly every juror on the case was aware of the case because of pretrial publicity. The record supports defendant’s assertion that most of the venire were at least somewhat familiar with the facts of the case. However, exposure to media reports about the defendant and the alleged crime does not automatically establish that the jury was not impartial. “Consideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue. The reviewing court must also closely examine the entire voir dire to determine if an impartial jury was impaneled.” *Id.* at 517. Our review of the jury voir dire reveals that the trial court impaneled an impartial jury. Each of the fourteen jurors who were ultimately selected to sit on defendant’s jury asserted that they would be able to judge defendant’s case fairly or impartially, notwithstanding their exposure to media reports about the case. 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. We conclude that while most of the venire had been exposed to some pretrial publicity, there was not, as defendant contends, a high percentage of members of the venire who admitted to disqualifying prejudice in this case. *Id.* at 669. Under the totality of the circumstances, the trial court’s denial of defendant’s motion for a change of venue did not violate defendant’s due process rights. His trial was held before an impartial jury.

#### IV. Evidentiary Issue

Defendant next argues that the trial court abused its discretion in precluding the admission of the prior sworn statement of Edward Jameel,<sup>2</sup> which was made in response to an investigative subpoena<sup>3</sup> issued by the prosecutor. At trial, Jameel asserted his Fifth Amendment privilege against self-incrimination and refused to testify. Thereafter, defendant sought to admit a statement that Jameel made in response to the prosecutor’s investigative subpoena in which Jameel asserted that on the night of the victims’ murders, he was in the parking lot of the Copa

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<sup>2</sup> Jameel is Diane Pesce’s brother.

<sup>3</sup> A prosecutor is permitted to petition the district or circuit court for authorization to issue subpoenas to investigate the commission of a felony. MCL 767A.2.

Bar buying crack cocaine. The trial court ruled that Jameel's statement was inadmissible under MRE 804(b)(1) because Jameel's statements were obtained through an investigative subpoena when the prosecutor was gathering facts for the case, and the motive to develop the testimony would not be the same in an investigative subpoena as it would be after the defendant had been arrested and charged. Therefore, the trial court ruled that while Jameel was unavailable, the testimony did not satisfy MRE 804(b)(1).

We review a trial court's interpretation of a rule of evidence de novo and review the trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

We hold that even if the trial court erred in precluding the admission of Jameel's responsive statement to the prosecutor's investigative subpoena under MRE 804(b)(1), the error was harmless. MCL 769.26; MRE 103(a). Defendant is correct that a defendant in a criminal case has a right to present a defense. *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002). However, contrary to defendant's argument on appeal, the trial court's exclusion of Jameel's testimony did not preclude him from presenting a defense because Jameel's testimony did not establish a defense for defendant. Defendant asserts that Jameel's statement that on the night of the murders, he was in the parking lot of the Copa Bar buying crack cocaine "was critical to the defense . . . that Billy Smith was somehow involved in this crime" because Smith owned the Copa Bar.<sup>4</sup> We fail to discern how Jameel's statement establishes Smith's involvement in the crimes or a defense for defendant. Moreover, Jameel's statement does not exculpate defendant and therefore would have had no impact on defendant's guilt even if it did tend to inculpate Smith. Jameel's statement would not have diminished the overwhelming evidence that defendant committed the crimes and therefore would not establish a defense for defendant. We hold that any error that the trial court may have made in excluding Jameel's statement under MRE 804(b)(1) was harmless.

## V. Right to Counsel

Defendant next argues that the trial court violated his Sixth Amendment right to have counsel present at all critical stages of the proceedings when it failed to appoint temporary or substitute counsel for defendant before it instructed the jury and adjourned defendant's trial after defense counsel suffered a heart attack during trial outside of the jury's presence. We disagree.

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution the right to the assistance of counsel for his defense and applies to the states through the Fourteenth Amendment. US Const, Am VI; *People v Crusoe*, 433 Mich 666, 684 n 27; 449 NW2d 641 (1989). A defendant "is entitled to counsel not only at trial, but at all 'critical stages' of the prosecution, *i.e.*, those stages 'where counsel's absence might derogate from the accused's right to a fair trial.'" *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984), *aff'd sub nom Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), quoting *United States v Wade*, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

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<sup>4</sup> In fact, it appears from the lower court that Smith's wife owned the Copa Bar.

The complete denial of counsel at a critical stage of a criminal proceeding is structural error rendering the result unreliable and requiring automatic reversal. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

In this case, the day after defense counsel suffered his heart attack, the trial court informed defendant's jury that it intended to proceed with defendant's codefendant's trial, but that defendant's jury was "on standby" regarding defendant's trial. The trial court told the jurors to go back to work and resume their normal lives for the next couple of days and that the trial court would give them twenty-four hours' notice when they needed to return for defendant's trial. Before adjourning defendant's trial, the trial court instructed the jurors not to discuss the case with anyone or let anyone discuss the case in their presence and not to read or listen to any media coverage of defendant's trial or defendant's codefendant's trial.

Defendant contends that the trial court's communication with the jury amounted to a jury instruction and that jury instructions constitute a critical stage of the proceedings requiring the presence of counsel. We hold that the trial court's communication with the jury following defense counsel's heart attack was not a critical stage in the sense that the absence of counsel "might derogate from the accused's right to a fair trial" because there was no evidence presented and no circumstance that required the presence of counsel. *Bladel, supra* at 52, quoting *Wade, supra*, 388 US at 226-227. The trial court's communication with the jury in this case after defense counsel suffered a heart attack was de minimus and did not include substantive jury instructions. Rather, the communication was more of a housekeeping type of communication, in which the trial court informed the jury that it was adjourning defendant's trial and instructed the jurors not to read any media coverage regarding the trial. See *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990).<sup>5</sup> In light of the nature of the trial court's communication with the jury, there was no circumstance that required the presence of counsel immediately after defense counsel suffered his heart attack. Defense counsel's heart attack during trial was an unfortunate and unusual occurrence, and the trial court responded appropriately under the circumstances. The trial court's communication with defendant's jury following defense counsel's heart attack was not a critical stage of the proceeding requiring the presence of counsel.

## VI. Double Jeopardy

Defendant next argues that his convictions for both first-degree premeditated murder and felony murder violate his constitutional right to be free from double jeopardy and that his armed robbery convictions, which formed the basis for the felony murder convictions, also violate principles of double jeopardy. We agree.

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<sup>5</sup> We recognize that *France* is distinguishable from the instant case because it involved an analysis of an alleged error that did not involve a denial of counsel claim based on ex parte communication between the court and the jury. However, we find its analysis regarding the significance of the nature of the communication between a trial court and a jury to be instructive for the instant case.

A double jeopardy issue involves a question of law, which this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Defendant's judgment of sentence indicates that defendant was convicted of five counts of first-degree premeditated murder, five counts of felony murder, and five counts of armed robbery (as well as felon in possession of a firearm and felony-firearm). According to the judgment of sentence, the felony murder and armed robbery convictions were "[m]erged into" defendant's first-degree premeditated murder convictions. Defendant is correct that his convictions of both five counts of first-degree premeditated murder and five counts of felony murder violate his constitutional right to be free from double jeopardy. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). In *Bigelow*, this Court held that a defendant's convictions of both first-degree murder and felony murder arising from the death of a single victim violate double jeopardy. *Id.* at 220-222. The appropriate remedy to protect a defendant's rights in such a situation is to modify the defendant's judgment of conviction and sentence to specify that the defendant's conviction is for first-degree murder, which is supported by two alternate theories: premeditated murder and felony murder. *Id.* at 220. In light of *Bigelow*, defendant is correct that his judgment of conviction and sentence must be modified to specify that defendant's convictions are for five counts of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.*

We also agree with defendant's contention that his armed robbery convictions, which formed the basis for the felony murder convictions, must be vacated. Defendant's convictions for both felony murder and the underlying felony of armed robbery violate principles of double jeopardy. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). The appropriate remedy for such a violation is to vacate the conviction and sentence for the underlying felony. *Id.* Defendant's felony murder convictions were predicated on the armed robbery convictions. Therefore, we vacate defendant's armed robbery convictions. *Id.*

## VII. Sentence

Defendant finally argues that the trial court's imposition of a life sentence for his felon in possession of a firearm conviction constituted a departure from the sentencing guidelines that was not supported by substantial and compelling reasons. Because we are constrained to do so by our Supreme Court's holding in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), we remand for the trial court to rearticulate the reasons for the departure.

The trial court sentenced defendant as a fourth habitual offender. MCL 769.12. A trial court's decision to impose an increased sentence as authorized by the habitual offender act is reviewed for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). Because the offenses of which defendant was convicted occurred after January 1, 1999, the Legislative sentencing guidelines apply. MCL 769.34(2). Under the statutory sentencing guidelines, a departure is only allowed by the Legislature if there is "a substantial and compelling reason" for the departure and the sentencing court "states on the record the reasons for departure." MCL 769.34(3). A substantial and compelling reason for departure must be objective and verifiable, must be a reason that "keenly" or "irresistibly" grabs a court's attention, and must be of "considerable worth" in deciding the length of a sentence. *Babcock, supra* at 257, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). Substantial and compelling reasons exist only in exceptional cases. *Id.*

In sentencing defendant, the trial court observed that the guidelines range was twenty-four to seventy-six months. Nevertheless, the trial court stated that it had discretion, under the fourth habitual offender statute, MCL 769.12, to sentence defendant to imprisonment for life. The fourth habitual offender statute authorizes the imposition of a life sentence “[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life.” MCL 769.12(1)(a). In sentencing defendant on the felon in possession of a firearm conviction, the trial court stated:

On the Felon in Possession, guidelines are technically 24 to 76 months. Under Habitual Fourth, based upon the record that I’ve just read into the record, the court has the discretion, if the underlying offense carries a penalty of five years or more, to impose a term of life in prison or a term of years.

Based upon the defendant’s past criminal record, the court finds that life in prison for Felon in Possession of a Firearm is appropriate. To the extent that that may constitute a departure, I don’t believe it does because of the fact that the legislature indicates that it is a life offense on one hand, they indicate there are guidelines to another. But to the extent it may constitute a departure, it’s based upon statute.

In departing from the guidelines, the trial court cited the fourth habitual offender statute and “defendant’s past criminal record,” but did not articulate any substantial and compelling reasons to justify the departure. We observe that there are clearly substantial and compelling reasons to justify the departure from the guidelines in this case. The nature of the offense was particularly violent. Defendant murdered five people in cold blood. Three of the victims were children and one was an elderly woman. Defendant lured Marco Pesce home to his death by forcing Marco’s son to call Marco at work and tell him to return home because of an emergency with one of Marco’s daughters. These factors are objective and verifiable and keenly and irresistibly grab this Court’s attention. We believe that this is the sort of exceptional case that satisfies the substantial and compelling reason test.

Nevertheless, our Supreme Court has held that it is not enough if substantial and compelling reasons exist to support a departure; the trial court must articulate those reasons in departing from the guidelines:

The statutory sentencing guidelines, MCL 769.34(3), require the trial court to ‘state[] on the record the reasons for departure.’ Therefore, it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court’s sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. [*Babcock, supra* at 258-259 (emphasis in original).]

We do not doubt that there are objective and verifiable substantial and compelling reasons to justify the trial court’s departure from the guidelines range in this case. It is hard to

overstate the heinousness of defendant's offenses. Moreover, we believe that defendant's life sentence for felon in possession of a firearm is proportionate to the seriousness of defendant's conduct, his criminal history, and his clear inability to reform. *Id.* at 264. Nevertheless, because this Court cannot affirm a sentence on the basis that a substantial and compelling reason exists, absent the trial court's articulation of a substantial and compelling reason, we remand for rearticulation of the reasons for the departure under *Babcock*.

Affirmed, but remanded for modification of defendant's judgment of sentence to reflect five convictions of first-degree murder, supported by alternate theories of premeditated murder and felony murder, vacation of defendant's armed robbery convictions, and rearticulation of the reasons the trial court departed from the guidelines in imposing the life sentence for defendant's felon in possession of a firearm conviction. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello