

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOWELL EDWIN AMOS,

Defendant-Appellant.

UNPUBLISHED

August 18, 1998

No. 200898

Recorder's Court

LC No. 96-001975

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of two counts of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a). The trial court sentenced defendant to two terms of life imprisonment without the possibility of parole and ordered \$13,000 in restitution. We affirm defendant's convictions, but remand for preparation of an amended judgment of sentence and reconsideration of the order of restitution after a hearing on defendant's ability to pay.

I. Factual Background

The prosecution charged defendant with murdering his wife, Roberta Mowrey Amos, at the Atheneum Suite Hotel in Detroit on December 10, 1994. The night before, defendant and the victim had attended a Christmas party hosted by defendant's company, Preferred Personnel. Defendant and the victim socialized with defendant's business colleagues and their guests until the early morning hours and eventually retired to their hotel room at 4:00 or 4:30 a.m. Some four hours later, defendant phoned his business partner, Bert Crabtree, who had likewise rented a room at the hotel, to request that Crabtree come to his room. Crabtree and Daniel Porcasi, a Preferred Personnel employee whom Crabtree had requested accompany him, arrived at defendant's room at 9:30 a.m. On entering the room, defendant told Crabtree and Porcasi that he and the victim had been using cocaine and the victim had died. Defendant requested that Porcasi remove three items from the room—a syringe, a sport jacket, and a washcloth. Porcasi complied with the request. Porcasi, Crabtree, and Crabtree's girlfriend then hastily packed their belongings and left the hotel.

Defendant called the hotel front desk after Crabtree and Porcasi departed and, at approximately 10:00 a.m., a hotel security officer visited defendant's room. The security officer

subsequently notified the police of the victim's death. Defendant told the police that he and the victim had used cocaine during the previous night, claiming that he snorted the drug, while the victim inserted it in her anus and vagina. Defendant maintained that he awoke to discover the victim dead. He admitted that he disposed of the contraband before calling security.

Defendant returned to the hotel during the afternoon on the day of the victim's death to retrieve property stored in the hotel safe. Security Officer Stanley Cann testified that after he handed defendant the victim's jewelry, defendant stated, while holding a female's Rolex watch, that "this is the bulk of the money." That evening, defendant drove to Crabtree's house. He and Crabtree then drove to Porcasi's home, where defendant retrieved the washcloth, syringe, and sport jacket.

Dr. Sawait Kanluen, the Wayne County Chief Medical Examiner, observed no signs that the victim suffered internal or external injuries, except for an abrasion on the victim's forehead and two small bruises on her body. Blood testing, however, demonstrated that the victim's blood cocaine level was 3.7, about fourteen or fifteen times the average level in deaths caused by overdose. Dr. Kanluen opined that the victim died of acute cocaine poisoning "very soon" after the cocaine was introduced and, as of 11:00 a.m., she had been dead between four and eight hours. He further opined on the basis of the police investigation that someone other than the victim had introduced the cocaine into her body.

Dr. Kanluen observed no needle marks on the victim's body and no evidence of prior drug use. Phyllis Good, a state police forensic chemist, testified that a vaginal swab taken from the victim revealed trace amounts of cocaine, but rectal and oral swabs tested negative for cocaine. The bed sheet removed from the hotel room, however, was covered with cocaine residue, with a higher concentration of cocaine in the location where the victim's body was found. Good opined that the stain on the sheet was consistent with the introduction of cocaine into the victim's body in liquid form and a subsequent attempt to remove the substance from the body. She further opined that a syringe without a needle could be used to inject a strong concentration of cocaine solution into someone's throat, vagina, or anus. Another expert, Amy Michaud, testified that a pillow case from defendant's hotel room had blood, cosmetics, and lip impressions on it. She discovered both potassium and chlorine (in the form of chloride) on the pillow case but declined to opine that the chemicals were from potassium chloride, a substance commonly used in medicinal solutions, because cocaine could also explain the presence of chloride.

Defendant denied murdering the victim. He maintained that he and the victim used cocaine during the night before her death, with the victim administering the cocaine to herself vaginally. Defendant claimed that he discovered that the victim was dead when he awoke the next morning. He further explained that he cleaned up the room to remove cocaine residue, the syringe, and the sport jacket because he did not want the police to charge him with cocaine possession.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor's comments, questions, and remarks throughout trial denied him a fair trial. We disagree. We accord prosecutors great latitude in their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). This Court reviews questions of prosecutorial misconduct on a case by case basis to determine whether the conduct denied

the defendant a fair and impartial trial. *Id.* at 267 n 7; *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

A. Introduction of Evidence

Defendant first argues that the prosecutor engaged in misconduct by introducing (1) the testimony of Mary Zellinger and Martha Ross regarding defendant's extramarital affairs and sexual relationships while unmarried, (2) impeachment evidence consisting of testimony by the victim's aunt that defendant's former secretary, Carol Simpson, told her that Simpson was surprised that the victim would marry defendant because defendant had killed Carolyn Amos, and (3) evidence regarding defendant's numerous false representations about his military record, including his contention that he served in Vietnam. We reject defendant's argument as wholly without merit. The trial court, over defendant's objections, admitted the evidence.¹ A prosecutor does not commit misconduct by introducing evidence permitted by the trial court. *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989). Further, the prosecutor properly limited her argument regarding the impeachment evidence to the subject of witness credibility. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

B. Questioning of Witnesses

Defendant next contends that the prosecutor improperly questioned him about (1) dating his second wife while married to his first wife, (2) his sexual relationship with a woman before he married the victim, (3) whether widowers "get special attention from society." We disagree. We are precluded from reviewing defendant's first assertion of improper questioning because he did not object below. *People v Bass*, 223 Mich App 241, 246; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865 (1998). A curative instruction could have eliminated the prejudicial effect of the question in this case and no miscarriage of justice would result from our failure to review. *Id.* Further, we conclude that the latter two questions did not deny defendant a fair trial because the trial court's instruction that the attorneys' questions and remarks were not evidence and admonishment that the jury not convict defendant because of his infidelity dispelled any prejudice. See *Bahoda*, *supra* at 281; *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

C. Remarks

We reject defendant's argument that the prosecutor improperly argued facts not in evidence during closing argument when she suggested that defendant smothered his second wife, Carolyn Amos, but managed to avoid prosecution in Indiana. This Court considers the prosecutor's remarks during closing argument as a whole in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). We examine the pertinent portion of the record and evaluate the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *Legrone*, *supra* at 82-83.

Defendant correctly notes that neither the county coroner in Indiana nor the assistant Wayne County Medical Examiner could determine a cause of death for Carolyn Amos. Contrary to

defendant's assertion, however, evidence existed to support the prosecutor's theory that Carolyn Amos was smothered. Dr. Calvin Steussy, the Indiana pathologist who performed the autopsy, found "intense pulmonary congestion with slight edema bilateral" and "passive congestion, brain, liver and kidney." He stated his conclusion as follows:

[I]ntense pulmonary congestion, slight pulmonary edema, and frothing at the mouth suggest terminal blockage of the respiratory system. However, the signs of asphyxia and (sic) minimal and inconclusive . . . The pulmonary congestion and slight edema indicates that the patient did not die of sudden cardiac arrest as there was a functioning pump terminally to produce these changes.

The prosecutor properly argued a permissible inference arising from this evidence. *Lee, supra* at 255.

Defendant further argues that the prosecutor improperly remarked in response to his statement that one does not look at a clock after finding his spouse dead that "[t]hat's an experience you've already had once." Upon defendant's objection, the trial court directed that the prosecutor rephrase the final remark as a question. We conclude that the prosecutor's remark, even if improper, did not deny defendant a fair trial because the trial court instructed the jury that the attorneys' questions and remarks were not evidence. See *McElhaney, supra* at 284.

Defendant additionally argues in propria persona that numerous other allegedly improper remarks during the prosecutor's opening statement, questioning of witnesses, and closing argument denied him a fair trial. Because defendant failed to preserve these issues by objecting below, we will review them only if the failure to do so would result in a miscarriage of justice or a curative instruction could not have eliminated the prejudicial effect of the improper remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Our failure to review would not result in a miscarriage of justice in this case because, even if improper, the remarks were unlikely to divert the jury's attention from the evidence and the trial court instructed the jury that the attorneys' questions and remarks were not evidence. *McElhaney, supra* at 284.

D. Other Alleged Misconduct

We reject defendant's argument that the prosecutor engaged in misconduct by urging the trial court to reconsider its decision to exclude evidence regarding the deaths of defendant's first wife and mother. In denying the prosecutor's request for relief regarding the trial court's pretrial order excluding the evidence, the Michigan Supreme Court explicitly encouraged the trial court to follow a "wait and see" approach to the evidence:

As to the remaining evidentiary items, we deny relief at this time while encouraging the trial court to follow the flexible approach of *People v VanderVliet*, 444 Mich 52, 90-91; [508 NW2d 114] (1993), at the stage of rebuttal or on a motion to reopen after the conclusion of all proofs:

The probative value of other acts evidence and its true potential for prejudice is often unclear until the proofs are actually presented. . . .

The prosecutor should not be allowed to introduce other acts evidence only because it is technically relevant, nor should the defendant be allowed to interdict proofs that are highly probative of a truly contested issue. By waiting to determine the admissibility of other acts evidence . . . the trial court is able to forestall gamesmanship by the parties and insure the admission of evidence that possesses significant probative value. [*People v Amos*, 453 Mich 885; 552 NW2d 917 (1996).]

The prosecutor clearly did not commit misconduct by moving to admit the evidence in accordance with our Supreme Court's directive.

We next decline defendant's invitation to reconsider the prior panel's decision reversing the trial court's grant of a mistrial. Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). We recognize that this Court need not apply the law of the case doctrine in criminal proceedings if it would create an injustice, *People v Phillips (After Second Remand)*, 227 Mich App 28, 33; 575 NW2d 784 (1997), but conclude that no such injustice will result from our adherence to the prior panel's decision in this case.² *Kozyra, supra* at 433.

Defendant next argues that the prosecutor improperly intimidated witness Scott Robinett, a former Marion (Indiana) County Sheriff's Department detective who testified regarding Ruth Loftus' credibility. We conclude that the alleged misconduct, even if substantiated, did not deprive defendant of a fair trial because the witness did not change his testimony. Robinett testified before the jury that, during a break in the trial, the prosecutor and officer-in-charge of the case attempted to intimidate him into changing his testimony regarding Loftus' lack of credibility. The jury properly weighed this evidence in evaluating the credibility of the witness. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Finally, we decline to review defendant's remaining argument that the prosecutor's remarks reported in the media tainted the jury pool. Although the media covered this case, defendant has failed to develop an adequate record to facilitate our review of whether the pretrial publicity was so prejudicial that we will presume that the entire community was both exposed to the publicity and prejudiced by it. See *People v Jendrzewski*, 455 Mich 495, 501; 566 NW2d 530 (1997). Moreover, we note that defense counsel stated that he was satisfied with the jury.

III. Evidentiary Issues

A. Evidence Regarding the Death of Carolyn Amos

Defendant first argues that the trial court abused its discretion in admitting evidence regarding the death of defendant's second wife, Carolyn Amos, under MRE 404b. We disagree. This Court reviews the trial court's evidentiary decisions for an abuse of discretion. *Howard, supra* at 551.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). The evidence is, however, admissible under MRE 404(b) for other purposes, such as to show motive, intent, or absence of mistake or accident. *Id.* MRE 404(b) is a rule of inclusion that “permits the admission of evidence on any ground that does not risk impermissible inference of character to conduct.” *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998).

The Michigan Supreme Court has established a four-prong standard for admission of other acts evidence. *VanderVliet*, *supra*, amended 445 Mich 1205 (1994). The trial court must first discern whether the prosecutor is offering the evidence under something other than a character to conduct theory. *Id.* at 74. If the prosecutor offers the evidence for another purpose, the trial court must determine whether the evidence is relevant, *i.e.* whether the evidence is logically relevant to an issue or fact of consequence at trial and has a tendency to make that fact more or less probable than it would be without the evidence. *Starr*, *supra* at 497-498; MRE 401-402. If the evidence is relevant, the trial court must employ a balancing process under MRE 403 to determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Starr*, *supra* at 498; *VanderVliet*, *supra* at 74-75. If the trial court admits the evidence, the court may, upon request, give a limiting instruction. *Id.* at 75.

In this case, the trial court admitted the evidence regarding Carolyn Amos’ death, reasoning as follows:

In this case, I do believe that Mr. Amos puts the issue of accident in issue by telling various people, Mr. Crabtree I think it was, as well as the security personnel, and the person who came to the suite with Mr. Crabtree, I think his name is Portia (sic), and also his statements to police that, basically, he and his wife, Roberta Amos, were doing drugs and that she overdosed, and that Mr. Amos later fell asleep. When he woke up, that she was dead. He appears to be fashioning a defense of accident or mistake and his intent is in issue.

In Vandervliet at page seventy, it states that 404 (b) does not require a high level of similarity between the other acts and the act charged. It does require on page eighty of that case that the charged crime in the other act must be of the same general category. That is the language from Vandervliet.

And with regard to the death of Carolyn Amos, it does appear to be very consisten (sic) or of the same general category of the death regarding Roberta Amos. The similarities are striking in that it is Mr. Amos who was the last one to see both of them alive. They are (sic) both, Carolyn Amos, as well as Roberta Amos, is (sic) in relatively good health prior to their death. It’s this defendant who finds the body of both. There is delay and delay in calling for help to get medical assistance for them. When medical help does arrive the body is cold in both cases.

And with regard to Carolyn Amos, he tells people that there was an electrocution, that there was a hair dryer involved. And that even in the Carolyn Amos

case, or the Carolyn Amos death, he is also fashioning a theory or defense of accident with regard to the electrocution, and that defense or theory or explanation, I should say, appeared to be inconsistent with the physical evidence which was found there at the scene, and the dryer was ruled out as playing a part in that death.

Also, there's a similarity in that the scene looking at the evidence could arguably (sic) been tampered with. There was a wine glass in the Carolyn Amos case which defendant said he took to her. By the time the police arrived, that wine glass had been washed, rinsed, and was in the dishwasher. With the guarded case of Roberta Amos, this defendant, according to the testimony at the exam, gave Mr. Portia (sic) a coat, with a syringe, and there was a rag which had a smell coming from it which was similar to the smell in the case of Carolyn Amos.

Granted, there are differences between the two. The Carolyn Amos case was not a death regarding poison by way of cocaine. It does not appear to be the same financial motive in this case, allegedly, as it was in the Roberta or in the Carolyn Amos case as well. But I do think they are the same general category, and that would meet the requirements under Vandervliet, number one, that's (sic) offered for a proper purpose which would show absence of – accident absent (sic) of mistake. It is logically relevant. It makes it more unlikely that there is one accidental death regarding his wife, and then another accidental death regarding Roberta Amos. I think that makes it logically relevant as relates to this case, and it's not more prejudicial than probative.

* * *

In this case, I do think there is at least a predicate showing to allow the admissibility of the Carolyn Amos case, the scene with the wine glass, the defendant's explanation of the electrocution, the circumstantial evidence (sic) him being the last one seeing her alive, the delay in calling for help, I think is a sufficient foundational showing to allow the Carolyn Amos case to be admitted at this trial, and the People's motion to allow the admissibility of that case regarding Carolyn Amos is hereby admitted.

We agree with the trial court that the evidence was relevant to the critical issue at trial--whether the victim died of her own hand by accidental overdose or died of acute cocaine poisoning as the result of cocaine administered by defendant with the intent to kill. Defendant vigorously advocated a theory of accidental death in both the victim's and Carolyn Amos' death. Defendant was the person who discovered both bodies and reported the deaths to the authorities. As the trial court correctly noted, it appears that defendant tampered with, or destroyed, evidence at both crime scenes. In the present case, defendant cleaned the hotel room, flushed cocaine down the toilet, and had Porcasi remove a syringe, sport jacket, and washcloth from the room. He later retrieved these items from Porcasi. Regarding the death of Carolyn Amos, the coroner suggested that the body had been moved because Carolyn Amos would not have fallen in the position she was discovered. Further, although defendant did not reap the financial windfall from the victim's death that he did from the death of his second wife, substantial evidence existed that defendant was experiencing financial difficulties and that the victim intended to divorce him. The trial court correctly determined on the basis of this evidence that the

deaths were of the same general category so as to render evidence regarding Carolyn Amos' death relevant to the issue of whether the victim's death was an accident.

We recognize that the evidence pointing to defendant's involvement in Carolyn Amos' death was not as strong as that in the instant case. The prosecution need not, however, have proven defendant's guilt in murdering Carolyn Amos beyond a reasonable doubt. Rather, the prosecution only had to prove this foundational element of fact by a preponderance of the evidence. *People v Burton*, 433 Mich 268, 295; 445 NW2d 133 (1989). The Indiana County Coroner, the pathologist who performed the autopsy, and the assistant medical examiner who reviewed the autopsy results agreed that Carolyn Amos' death was "unnatural" but they could not pinpoint a cause of death. Other evidence, however, linked defendant to the crime. Ruth Loftus testified that defendant admitted killing Carolyn Amos. Further, defendant's guest, John Matthews, while maintaining that defendant did not have time to kill Carolyn Amos, admitted that defendant could have left the room without his knowledge. The trial court could properly conclude on the basis of this evidence that the prosecution established by a preponderance of the evidence that defendant killed his second wife.

We likewise reject defendant's argument that the danger of unfair prejudice substantially outweighed the probative value of the evidence. That determination is generally "best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony by the trial judge." *Ullah, supra* at 675. Here, although the prosecutor presented overwhelming evidence that the victim died as the result of the ingestion of a massive amount of cocaine, the prosecutor possessed less evidence that the overdose was not accidental. Although blood testing revealed that the victim's blood cocaine level was 3.7, an amount that Dr. Kanluen testified was about fourteen or fifteen times the average level in deaths caused by overdose, the jury could have interpreted the evidence as consistent with defendant's contention that the victim was an inexperienced cocaine-user who accidentally overdosed. The evidence regarding Carolyn Amos' death refuted defendant's claim that the victim's death was accidental. Given the probative force of the evidence and the court's limiting instruction, we conclude that the evidence "did not stir the jurors to 'such passion . . . as to [be swept] beyond rational consideration of [the defendant's] guilt or innocence of the crime on trial.'" *Starr, supra* at 503, quoting McCormick, *Evidence* (2d ed), § 190, p 454. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

B. Remaining Evidentiary Issues

Defendant argues that the trial court abused its discretion in admitting the testimony of Ruth Loftus that defendant stated that he killed Carolyn Amos and probably would kill his next wife. We cannot consider defendant's argument. The trial court originally excluded the testimony, but our Supreme Court reversed the trial court's ruling. *Amos, supra*. This Court is bound by the Supreme Court's decision. See *People v Russell*, 149 Mich App 110, 114-116; 385 NW2d 613 (1985).

Defendant further contends that the trial court abused its discretion in qualifying witness Phyllis Good as an expert in the "area of crime scene evaluation." Contrary to defendant's assertion, he did not preserve this issue by objecting below. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Rather, defense counsel expressly declined to object after engaging in a lengthy voir dire regarding the witness' qualifications. Consequently, we will review this issue only if manifest injustice

would result from our failure to review. *Id.* No manifest injustice would result in this case because the trial court properly qualified Good as an expert in the use and distribution of cocaine and related crime scene evaluation on the basis of her extensive education and work experience in all aspects of drug use, distribution, and analysis. See *People v Haywood*, 209 Mich App 217, 225; 530 NW2d 497 (1995).

We likewise reject defendant's argument that the trial court abused its discretion in permitting Good to testify regarding matters allegedly outside of her expertise. The trial court properly admitted the evidence. An expert may testify in the form of an opinion on the basis of hearsay information and may opine regarding the ultimate issue to be decided by the jury. MRE 702-704. The jury, not this Court, must weigh the evidence. See *People v Drossart*, 99 Mich App 66, 81; 297 NW2d 863 (1980).

Defendant additionally argues that the trial court abused its discretion in admitting evidence regarding defendant's attempts to "pick up" women at a bar two days after the victim's death. We disagree. The trial court correctly concluded that the evidence was relevant. The defendant's alleged conduct and demeanor shortly after the death of the victim is generally admissible. See *People v Savage*, 225 Mich 84, 87; 195 NW 669 (1923); *People v Burke*, 38 Mich App 617, 621; 196 NW2d 830 (1972). Moreover, evidence of the defendant's conduct after a homicide is relevant to the issues of premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The trial court correctly determined that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence in this case. Defendant's argument that the witness' testimony was not true is not pertinent to this Court's inquiry, but rather, is an issue for the jury. See *Lemmon*, *supra* at 646-647.

IV. Sufficiency of the Evidence and Post Trial Motions

Defendant argues that the prosecution failed to prove beyond a reasonable doubt that he caused the victim's death and, further, that the trial court erred in denying his motion for judgment notwithstanding a verdict (JNOV) on this ground. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). We review a motion for JNOV, which in a criminal case is actually a motion for directed verdict of acquittal under MCR 6.419(B), under the same standard. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993), overruled in part on other grounds 456 Mich 625 (1998).

The jury convicted defendant on two theories of first-degree murder—murder by poisoning and murder with premeditation and deliberation. MCL 750.316(1)(a); MSA 28.548(1)(a). Both theories require the intent to kill. *People v Austin*, 221 Mich 635, 644; 192 NW 590 (1923); *Anderson*, *supra* at 537. To support a conviction of first-degree murder under a murder by means of poison theory, the prosecution must prove that the defendant intentionally administered the poison with the intent to kill. *Austin*, *supra* at 644. "Poison" for purposes of the statute includes narcotics. *People v Brown*, 37 Mich App 192, 193; 194 NW2d 560 (1971). To support a conviction of first-degree premeditated murder, the prosecutor must prove that the act of killing was premeditated and deliberate. *Anderson*, *supra* at 537.

Premeditation and deliberation require sufficient time to allow the defendant to take a second look. [*People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).] The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*Anderson, supra* at 537.]

The prosecution presented sufficient evidence to support convictions under both theories of first-degree murder. The victim learned of defendant's affair with Mary Zellinger shortly before the victim's death and, according to her aunt, intended to divorce defendant. Zellinger testified that defendant admitted that he was financially "broke" during this period. Lab tests revealed that the victim died of cocaine poisoning and had an amount of cocaine in her blood fourteen or fifteen times that normally found in overdose cases. A crime scene expert testified that stains on the sheet upon which the victim's body was discovered were consistent with someone's attempt to clean her body and remove evidence of cocaine. Defendant and the victim were the only people in the hotel room, and defendant admittedly orchestrated the removal of two potentially important pieces of evidence, the syringe and washcloth. Defendant also allegedly expressed his intent to murder his "next wife" before marrying the victim. A rational jury could find beyond a reasonable doubt on the basis of this evidence that defendant caused the victim's death by poisoning her with cocaine, intended to kill her, and acted with premeditation and deliberation. Accordingly, the trial court properly denied defendant's motion.

We likewise reject, as having absolutely no merit, defendant's argument that the prosecutor failed to establish the corpus delicti of murder. The corpus delicti of murder requires proof, independent of a confession, of both a death and some criminal agency that caused the death. *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996). In this case, defendant never confessed to the murder, but rather stated to the police, and maintained throughout these proceedings, that the victim used cocaine and he awoke to discover her dead body. In any event, the prosecutor presented evidence that the victim died as the result of ingesting a massive amount of cocaine some fifteen times the amount normally found in overdose cases. This evidence alone would have established the corpus delicti of murder. See *id.* at 550 & 551, n 13.

Defendant additionally argues that the jury's verdict was against the great weight of the evidence. Defendant, however, did not preserve this issue by moving for a new trial on this ground. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990). Even assuming that defendant intended his oral motion for JNOV as a motion for new trial, the trial court did not abuse its discretion in denying the motion. The trial court does not act as the thirteenth juror when deciding such a motion. *Lemmon, supra* at 647. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* The instant case primarily turned on defendant's credibility, for the jury had to weigh the evidence of guilt against defendant's testimony that he did not kill the victim, but rather, simply awoke to find her dead.

V. Double Jeopardy

We agree that defendant's conviction and sentence on two counts of first-degree murder violates double jeopardy. "Multiple convictions and sentences for a single crime violate the constitutional guarantees against double jeopardy." *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). In *Austin*, *supra* at 644; the Michigan Supreme Court explained that murder "by means of poison" is included in the first-degree murder statute because "it results from a wilful, deliberate and premeditated act." Nevertheless, the prosecution does not have to prove deliberation and premeditation to support a conviction, but need only prove that defendant intentionally administered poison. See *Id.* Therefore, as is the case with convictions of both first-degree premeditated murder and first-degree felony murder for one death, the two convictions under different theories in the instant case violate double jeopardy. *Zeitler*, *supra* at 71.

This Court recently held in *People v Bigelow*, __ Mich App __, __; __ NW2d __ (1998), slip op pp 1-2, that the appropriate remedy to protect a defendant's rights against double jeopardy where he has been convicted of both first-degree felony murder and first-degree premeditated murder is to modify the judgment of sentence to reflect one conviction and sentence for first-degree murder supported by two theories. Following the rationale of *Bigelow*, we remand this case to the trial court for entry of an amended judgment of sentence specifying that defendant's conviction and sentence is for one count of first-degree murder supported by two theories: premeditated murder and murder by poisoning.

VI. Restitution

We agree with defendant that the sentencing court erred in ordering that he pay \$13,000 in restitution to the victim's estate for burial expenses without first holding a hearing to consider his objections and ability to pay.

The payment of restitution is governed by the Crime Victim's Rights Act. MCL 780.751 et seq.; MSA 28.1287(751) et seq. At the time of defendant's conviction, § 16(2) of the act mandated that the court order that the defendant make full restitution to his victims or his victims' estates. MCL 780.766(2); MSA 28.1287(766)(2). Section 16(6) provided that if the underlying crime involving bodily injury also resulted in death, the trial court could include the cost of the funeral and related services in the order of restitution. See MCL 780.766(5); MSA 28.1287(766)(5). Under § 16(13), the court had to consider "the defendant's earning ability, financial resources, and any other special circumstances that may have a bearing on the defendant's ability to pay" when determining the amount of restitution. Under § 17(1), the court had to consider "the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate."³ See also *People v Guajardo*, 213 Mich App 198, 200-201; 539 NW2d 570 (1995).

In this case, the trial court erred in failing to conduct a hearing to resolve defendant's objections to restitution and to consider his assertion that he is unable to pay. *People v Law*, 223 Mich App 585, 590-592; 568 NW2d 90 (1997), lv gtd 457 Mich 853 (1998); *People v Avignone*, 198 Mich App 419, 424-425; 499 NW2d 376 (1993). The record reflects that defendant had less than \$1,500 in

assets and received court-appointed representation on appeal. Under the pre-amendment version of the act, the trial court must hold a separate hearing to resolve defendant's objections under these circumstances. Compare *People v Grant*, 455 Mich 221, 243-244; 565 NW2d 389 (1997). Accordingly, we remand for reconsideration of the order of restitution after a hearing at which defendant bears the burden of demonstrating his inability to pay. *Grant, supra* at 243.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

¹ Defendant's argument that the trial court erred in admitting evidence for purposes of impeaching Simpson's testimony is not preserved for review because defendant did not identify the issue in his statement of questions involved. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

² Defendant also argues that the law of the case doctrine does not bar this Court from considering Detective Patrick Henahan's references to the deaths of defendant's mother and first wife because this Court did not explicitly rule on that testimony in its prior decision. This issue, however, is not preserved for review because defendant did not identify it in his statement of questions involved. *Hartsuff, supra* at 351.

³ The Legislature eliminated the references to ability to pay in 1997 and directed that the court order restitution without regard to the defendant's ability to pay. *People v Grant*, 455 Mich 221, 239 n 24; 565 NW2d 389 (1997). We apply the prior version of the act to this case because the trial court sentenced defendant before the effective date of the amendment.