STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 215240 Gratiot Circuit Court
GARRY LEE STEFFENHAGEN, Defendant-Appellant.	LC No. 96-003611-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life without parole. Defendant appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in denying his motion for change of venue based on claims of extensive pretrial publicity and community prejudice. We disagree. "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); *People v Jendrzejewski,* 455 Mich 495, 501; 566 NW2d 530 (1997). As a general rule, a defendant must be tried in the county where the crime is committed. MCL 600.8312; MSA 27A.8312; *Jendrzejewski, supra* at 499. However, a court may, in special circumstances where justice demands or statute provides, change venue to another county. MCL 762.7; MSA 28.850; *Jendrzejewski, supra* at 499-500. The trial court's decision regarding a motion for change of venue will not be disturbed on appeal absent a palpable abuse of discretion. *Jendrzejewski, supra* at 500.

The existence of pretrial publicity alone does not require a change of venue. *People v Jancar,* 140 Mich App 222, 229-230; 363 NW2d 455 (1985). The "defendant has the burden of proving either (1) strong community feelings against him and that the publicity is so extensive that jurors could not remain impartial when exposed to it, or (2) that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." *People v Hack,* 219 Mich App 299, 311; 556 NW2d 187 (1996). Two approaches have been used to determine whether the failure to grant a change of venue is an abuse of discretion. See *Jendrzejewski, supra* at 500-501.

"Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Id.*

A. Pretrial publicity

This Court must determine whether the effect of pretrial publicity on a relatively small jury pool was such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it." *Jendrzejewski, supra* at 501. Moreover, we must distinguish between largely factual publicity and that which was invidious or inflammatory. *Id.* at 504.

Our review of the record shows that defendant presented no demonstrative evidence to support his motion for change of venue. Rather, defendant merely relied on general allegations that media coverage was "extensive" and that "most potential jurors in Gratiot County [were] aware of this case and the case [was] widely discussed." The trial court noted the extent of the press coverage. However, it characterized the coverage as "a repetition of the facts that are alleged to have occurred." The record fails to show that the actual amount, geographic scope, and tenor of the publicity was extensive, intensive, or potentially inflammatory when compared to federal and state cases in which the right to a fair trial was a concern. See *Jendrzejewski, supra* at 503-504; see also *People v DeLisle*, 202 Mich App 658, 668; 509 NW2d 885 (1993) (one hundred newspaper articles published over a period of nine months); *Irvin, supra* at 725-726 (a barrage of newspaper headlines, articles, cartoons, and photographs published in newspapers regularly delivered to ninety-five percent of the county residents as well as extensive local radio and television newscasts scrutinizing the defendant and the crime committed). Moreover, the record does not reflect extensive egregious media reporting, see e.g., *Rideau v Louisiana*, 373 US 723, 725-726; 83 S Ct 1417; 10 L Ed 2d 663 (1963) (due process required change of venue after repeated television broadcast of a "confession" made by defendant in small Louisiana parish). We conclude defendant failed to meet his burden of showing that the claimed pretrial publicity was so unrelenting that the entire community could be presumed to be both exposed to the publicity and prejudiced by it. See *Jendrzejewski, supra* at 501.

B. Statistical analysis indicating an unfair jury

"Consideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." *Jendrzejewski, supra* at 517. This Court "must also closely examine the entire voir dire to determine if an impartial jury was impaneled." *Id.* "[W]hen citizens have been sworn to tell the truth, and testify under oath that they can be impartial, the initial presumption is that they are honoring their oath and are being truthful." *DeLisle, supra* at 663. To hold that the existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would establish an impossible standard. See *Jendrzejewski, supra* at 517. It is sufficient if the jurors can lay aside their impression or opinion and render a verdict based on the evidence presented at trial. *Id.* "The value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Id.* at 519. A brief study of the cases noted

above illustrates the way in which this Court and our Supreme Court have conducted statistical analyses in resolving issues concerning motions for change of venue.

In *DeLisle, supra,* almost one-third of the panel of potential jurors were excused because of a bias against the defendant. This Court, however, determined that the defendant's trial was "fundamentally fair and held before a panel of impartial jurors." *Id.* at 669. Our Supreme Court in *Jendrzejweski, supra*, concluded that the trial court did not abuse its discretion in denying the defendant's motion for change of venue, stating:

> [T]wenty-eight persons were excused for lack of impartiality or approximately twenty-five percent of the entire jury pool. We find no case in which any court in the country has assumed from such a statistic that the jurors seated, all of whom disclaimed partiality, were presumptively prejudiced against the defendant. . . . [W]e decline to find that community sentiment impeached the indifference of jurors who displayed no animus of their own. [*Id.* at 514.]

Our review of the record in the present case does not show that a substantial percentage of potential jurors were excused because they admitted prejudice against defendant or were otherwise affected by pretrial publicity. Sixty-nine jurors were called from the venire, out of which forty-one were removed by the trial court for cause and fifteen on peremptory challenges. Of the forty-one potential jurors removed for cause, only eleven, or approximately sixteen percent of those called from the venire, were removed because of the effects of pretrial publicity. As in *Jendrzejewski, supra*, other array members were excused because of their relationship to trial participants, because they were influenced by the age of defendant, for reasons of health, for personal and employment reasons, and for family-related concerns.

The approximately sixteen percent of the potential jurors dismissed because of the effects of pretrial publicity was a smaller percentage than the twenty-five percent that occurred in *Jendrzejewski, supra*, or the approximate thirty-three percent in *DeLisle, supra*. We will not presume that because sixteen percent of the potential jurors were dismissed for cause due to the effects of pretrial publicity, the jurors seated, all of whom disclaimed partiality, were prejudiced against defendant. See *Jendrzejewski, supra* at 514. Although it may be true that the seated jurors did not have "empty minds," the presumption of their impartiality was not sufficiently rebutted by defendant. See *Jendrzejewski, supra* at 514; *DeLisle, supra* at 663. The trial court did not abuse its discretion.

Defendant next argues that comments made by the prosecutor in his closing argument and rebuttal effectively precluded the jury from convicting defendant of the lesser included offense of statutory involuntary manslaughter. Unpreserved claims of error in a prosecutor's closing arguments are not subject to review unless a curative instruction could have eliminated the prejudicial effects of the remarks or where failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

The prosecutor articulated the elements of statutory involuntary manslaughter, then characterized involuntary manslaughter as a case involving an accidental discharge of a weapon. While there is some

authority for the proposition that involuntary manslaughter may result from an accident when the defendant was criminally negligent, the shooting need not be accidental to justify conviction of this charge. See *People v Hess*, 214 Mich App 33, 39; 543 NW2d 332 (1995). Thus, the prosecutor's argument could be seen as misleading. However, the trial court's instruction to the jury regarding the essential elements of statutory involuntary manslaughter was a proper statement of the law. See CJI2d 16.11. It can be presumed that the jury followed this instruction in deliberating defendant's guilt regarding this offense. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We conclude that this instruction alleviated any prejudicial effect that may have been caused by the prosecutor's statements regarding "accident" in relation to this offense.

Further, even if we assume, as defendant argues, that the trial court should have given a more extensive instruction on involuntary manslaughter, any error was harmless because the jury convicted defendant of the greater offense and rejected the intermediate lesser offense of second-degree murder. See *People v Beach*, 429 Mich 450, 490-491; 418 NW2d 861 (1988) (failure to instruct on lesser offense harmless when jury convicted of greater offense and rejected intermediate lesser offense on which it had been instructed). Because a miscarriage of justice would not result from our failure to further review this unpreserved issue, we decline to do so. *Messenger, supra* at 179-180.

Defendant has filed a pro se supplemental brief in which he contends that (1) the jury should not have been instructed on its duty to follow the law as given it by the trial court, and (2) the jury should have been instructed on its "right" not to follow the court's instructions. We disagree on both counts. In its preliminary instructions to the jury, the court informed it that it had the responsibility to accept the law as given it by the court. In its instructions before the jury retired to deliberate, the court informed the jury it was their duty to accept the law as the court gave it to the jury. The instructions substantially followed the instructions required by CJI2d 2.4, 2.24, and 3.1.

Defendant argues that the trial court improperly instructed the jury that it had a duty to follow the court's instructions. However, this duty has been recognized by our Supreme Court. *People v Ward*, 381 Mich 624, 628; 166 NW2d 451 (1969). Defendant contends that in fact, the jury has the right not to follow the court's instructions. We disagree. It has been recognized that juries have the power, but not the right, to disregard instructions in order to acquit a criminal defendant; this power is derived from the power to bring in a general verdict of not guilty, which is not reviewable by the trial court. See *United States v Dougherty*, 473 F2d 1113, 1130 (CA DC 1972). To paraphrase the relevant authority, juries have no right not to follow the court's instructions. *People v St Cyr*, 129 Mich App 471, 474; 341 NW2d 533 (1983). However, if the jury chooses not to follow the court's instructions and thereby acquit a defendant, its decision is unreviewable and irreversible. *Dougherty, supra* at 1132; *St Cyr, supra* at 473.

In the present case, the instructions given by the trial court were those called for by CJI2d 2.4, 2.24, and 3.1. These instructions do no more than inform the jury of its duty to follow the court's instructions, as recognized in *Ward, supra* at 628. We find no error in the instructions. Similarly, we find no error in the court not giving the jury an instruction on its "right" to disregard

the court's instructions. No such "right" exists, and the court has neither the obligation nor the right to give such an instruction. *Ward*, *supra* at 627; *St Cyr*, *supra* at 474.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra