STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2009
v	No. 284100 Macomb Circuit Court
STEPHEN C. GRANT, Defendant-Appellant.	LC No. 2007-002480-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317.[1] He was sentenced to 50 to 80 years' imprisonment. Because the trial court did not err in denying defendant's motions for change of venue and to suppress his custodial statements to police, or in requiring defendant to repay court-appointed counsel costs without conducting an ability-to-pay analysis, and because the trial court articulated substantial and compelling reasons for the extent of the upward departure of defendant's minimum sentence from the sentencing guidelines' range, we affirm.

Defendant was charged with and convicted of the murder of his wife, Tara Grant. Defendant and Tara were involved in an argument in early February 2007 at their Macomb County home. Apparently, the couple's argument escalated to the point where it became physical and defendant strangled Tara causing her death. Defendant then took her body to his place of employment and dismembered her. Defendant scattered Tara's body parts throughout a public park near the couple's home, and hid her torso in a large plastic container in the family's garage. Defendant reported Tara missing several days later.

Several weeks later, police executed search warrants at defendant's home and business, and discovered a portion of Tara's body in the couple's garage. By then, defendant had fled the area in a borrowed vehicle. A search conducted by various law enforcement agencies resulted in the apprehension of defendant at a remote park in northern Michigan. At the time of his arrest,

[1] Prior to trial, defendant pled guilty to one count of disinterment or mutilation of a dead body contrary to MCL 750.160. He was sentenced to six to ten years' imprisonment on this conviction. Defendant raises no issues on appeal concerning this conviction or sentence.

defendant had been wandering through the park for several hours and suffered from mild frostbite and hypothermia. Defendant was immediately transported to a local hospital where he fully recovered within two days. During his stay in the hospital, defendant confessed the details of the crime to police. Defendant was charged with first-degree murder.

On appeal, defendant first contends that, given the vast amount of pretrial publicity his case generated, particularly in Macomb County, the trial court's denial of his motion for change of venue deprived him of his right to an impartial jury, due process of law, and a fair trial. We disagree.

We review the denial of a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Generally, a defendant must be tried in the county where the crime was committed. MCL 600.8312. The trial court may change venue to another county in special circumstances, where justice demands or where our statute so provides. MCL 762.7.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *People v Unger*, 278 Mich App 210, 254; 749 NW2d 272 (2008), quoting *Irvin v Dowd*, 366 US 717, 722, 81 S Ct 1639, 6 L Ed 2d 751 (1961). To that end, it may be appropriate, for example, to change the venue of a criminal trial when "widespread media coverage and community interest have led to actual prejudice against the defendant." *People v Unger, supra*, at 254.

"Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzejewski, supra* at 500-501. In determining whether a defendant has been deprived of a fair trial by virtue of pretrial publicity, the reviewing court must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501-502. The court must also distinguish between largely factual publicity and that which was invidious or inflammatory. *Id.* at 504.

Before delving into defendant's argument, we first address the prosecution's assertion that defendant waived any claim of error with respect to the jury because he expressed satisfaction with the jury impaneled. Defense counsel did, in fact, express satisfaction with the jury as impaneled. Generally, an expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn. *People v Hubbard*, 217 Mich App 459, 466; 552 NW2d 493 (1996). However, in *Leslie v Allen-Bradley Co, Inc*, 203 Mich App 490, 493; 513 NW2d 179 (1994), this Court concluded that an expression of satisfaction with the jury on the record, in the jury's presence, did not constitute a waiver where the complete record demonstrated that the party was not satisfied with the jury and where the party's expression of satisfaction was "a necessary part of trial strategy, designed to avoid alienating prospective jurors."

In the present matter, defense counsel on several occasions indicated dissatisfaction with having to select a jury from Macomb County residents, given the unprecedented amount of publicity the case had received. He moved for a change of venue prior to the start of trial and again during jury selection. As in *Leslie, supra*, there is nothing in the trial court record to support a conclusion that defendant's expression of satisfaction with the jury "was intended as a relinquishment of his belief that the venire was selected in an unconstitutional manner or that such expression was anything more than an exercise in practicality, given the trial court's earlier adverse ruling and the potential for jury alienation." We are satisfied that defendant did not waive his challenge by expressing satisfaction with the jury as impaneled.

Addressing defendant's claim of error, we note that this case, as claimed by defendant, received an unprecedented amount of pretrial publicity. There were in excess of fifty written news articles concerning the crime published between February 2007 and the December 2007 trial, with a large number of the articles appearing on the front page of local newspapers. Specific details of the case were regularly broadcast on television, including video testimony from defendant's preliminary examination. Both the Macomb County Sheriff and the Macomb County Prosecutor regularly appeared on television and news radio programs, providing a significant amount of very specific information to the public concerning the case and the impending trial. There was, indisputably, no information spared from public exposure throughout the entire course of this case. While the numerous press-conferences held and the release to the media of police reports and other documents containing details of the case by the prosecution and the Sheriff's Department appear unprecedented, we cannot find that either pretrial publicity or statistical analysis supports defendant's claim that he was denied a fair trial under *People v Jendrzejewski, supra.*

In determining whether a change of venue was required due to pretrial publicity, the reviewing court should consider the "quality and quantum of pretrial publicity," and then it must "closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski, supra* at 517. When we consider the quality and quantum of the pretrial publicity in the instant matter, while the media coverage of this case was extensive, the coverage provided was primarily factual, detailing the status of the case, testimony elicited during preliminary examination, and other facts that were later admitted as evidence at the trial. The tone and content of the reports could certainly have been perceived as inflammatory--but that was essentially due to the nature of the crime. There may have been no neutral way to report on this case. Moreover, "[c]onsideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." We must also consider the entire voir dire. *Jendrzejewski, supra* at 517.

Our Supreme Court has suggested three possible approaches to voir dire to avoid the danger of prejudice from pretrial publicity: "1) questionnaires prepared by the parties and approved by the court, 2) participation of attorneys in the voir dire, and 3) sequestered questioning of each potential juror." *Jendrzejewski, supra* at 509. The trial court in the instant matter employed all three methods.

The initial jury pool numbered over 350. The potential jurors were all required to complete a probing 25-page questionnaire employed to determine their knowledge of the case and whether they had formed any opinions concerning defendant's guilt or innocence. Approximately 50 potential jurors were excused for cause (by stipulation of the parties) based

solely upon their questionnaire answers. The prosecution and defendant (and occasionally, the court) then questioned the remaining potential jurors, outside the presence of other potential jurors, over a seven-day period. Over 100 individuals were then excused due to their expressions of potential bias, while others were excused for various reasons unrelated to their knowledge and/or opinions concerning the case. The remaining pool of potential jurors was then subjected to group questioning, on the record. During this second round of questioning, several additional potential jurors were excused for cause and both sides utilized peremptory challenges. The pool continued to narrow until both the prosecution and the defense expressed satisfaction with the jury. Sixteen jurors were administered an oath and heard the evidence.

There was no impediment to discovery of actual or potential biases, and the voir dire was sufficiently probing to uncover any biases. While essentially all of the jurors indicated being aware of the case, the vast majority of those impaneled had only a passing knowledge of the case and had little exposure to the details. In addition, all those impaneled swore, under oath, that they could be impartial, notwithstanding any 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." *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). Indeed, "[t]he value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." *Jendrzejewski, supra* at 519. Given that the impaneled jurors knew little about the case and swore they would be impartial, despite the pervasive media coverage, defendant has not demonstrated that the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Jendrzejewski, supra* at 501.

This conclusion does not change, even with the relatively high percentage of the potential jurors in this matter acknowledging personal biases against defendant, based upon the information they had concerning the case. As previously indicated, community bias has been implied, albeit rarely, from a high percentage of the venire who admit to a disqualifying prejudice. *Jendrzejewski, supra* at 500-501. In *Irvin v Dowd*, 366 US 717, 727; 81 S Ct 1639, 1645 (1961), for example, 90% of the potential jurors examined entertained some opinion as to the defendant's guilt. The Supreme Court found that:

> the 'pattern of deep and bitter prejudice' shown to be present throughout the community was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.

Here, in contrast, slightly less than 50% of potential jurors were excused due to preexisting notions as to defendant's guilt. More importantly, of the actual jurors seated, the vast majority had only a passing knowledge of the case and only one juror initially expressed a preconceived notion regarding defendant's guilt.

While there is no specific rule detailing what percentage of potential jurors must be excused for cause before the scale tips toward a demonstrated pattern of deep and bitter prejudice present throughout the community, this case appears to be similar to *People v DeLisle*, 202 Mich App 658; 509 NW2d 885 (1993). In *DeLisle*, 31% of the jury venire (21 out of 68) was excused

because of bias, and all of the 14 seated jurors admitted having heard the general facts of the case, with five having heard of the defendant's confession, and one having heard of a purported prior attempt by the defendant to murder his family. *Id.* at 667-668. The *DeLisle* Court concluded that "the number of jurors excused for bias during voir dire was not sufficiently high to presume that the jurors chosen were part of a community deeply hostile to defendant." This was true even though the case (where a father deliberately drove the family vehicle into a lake, killing his four children and attempting to kill his wife) received substantial media attention and where the media attention was found to be inflammatory.

While almost 50% of the potential jurors in this case were excused due to preconceived notions regarding defendant's guilt, the fact remains that these jurors were excused and jury selection continued with a careful and studied questioning of the remaining jurors. Again, of the actual jurors seated, the vast majority had only a passing knowledge of the case and only one juror initially expressed (and then swore she could set aside) a preconceived notion regarding defendant's guilt.

As was the case in *DeLisle, supra*, we find no showing of the kind of improper proceedings that may sometimes lead to automatic reversal. The careful and exhaustive voir dire procedures employed by the trial court demonstrated that the jurors chosen, although familiar with the case, were not biased against defendant.

A consideration in our analysis and ultimate conclusion that defendant's due process rights were not violated by the trial court's denial of his motion for a change of venue is the nature of the defense. Defendant never claimed to be innocent. He pled guilty to the mutilation of a corpse just after the jury was impaneled and, in opening statements, defense counsel affirmatively stated:

> First of all, simply said, Mr. Grant killed his wife. He did. That killing occurred on February 9, 2007. Your job is to determine what happened. What degree or lesser charge of a homicide occurred that day. What happened? Was it premeditated? We think the evidence will show that it is not a premeditated murder.

We question where the harm in allowing the trial to proceed in Macomb County can be found. The defense claim was that the killing was not premeditated—there was no claim that defendant did not kill his wife. Arguably, a fair trial would end in the result defendant sought and ultimately obtained--a homicide conviction that did not involve premeditation.[2]

Under the totality of the circumstances, defendant's trial was fundamentally fair and decided by a panel of impartial jurors.

[2] Defendant argues that the result actually sought was a voluntary manslaughter conviction, MCL 750.321. The trial court instructed the jury on the charged offense, second- degree murder and voluntary manslaughter.

Defendant next contends that the trial court erred in denying his motion to suppress his custodial statements made to police, given that the police violated an agreement with his defense counsel to contact counsel as soon as defendant was arrested, and to not speak to defendant without counsel present. According to defendant, because the agreement was violated, the purported waiver of his right to counsel at the custodial interrogation was invalid. We disagree.

A trial court's ultimate decision on a motion to suppress evidence is reviewed by this Court de novo. *People v Dunbar* (After Remand), 264 Mich App 240, 243; 690 NW2d 476 (2004). The trial court's findings of fact in a suppression hearing are reviewed for clear error. *Id.* "A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake had been made." *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005), quoting *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Defendant concedes that he had no Sixth Amendment right to counsel on March 4, 2007, the date he confessed to police, as he had not yet appeared in court for any judicial proceeding. He instead asserts a Fifth Amendment right, and a right to counsel under the Michigan Constitution, during his custodial interrogation.

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Custodial interrogation involves "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v Arizona*, *supra*, at 444. There is no dispute that defendant was in custody at the time he made the now-challenged statements to police.

Whether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152, 158-159 (2000). Determining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior. *Id.* However, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him. *Id*.

The evidence at the *Walker*[3] hearing established that when defendant was apprehended he was transported to the hospital where he was placed in custody. After receiving medical attention, when defendant was asked if he wanted to speak to the police, defendant stated that he first wished to speak to his attorney, Mr. Griem. Defendant had retained Mr. Griem shortly after his wife's disappearance. Mr. Griem had many contacts with the Macomb County Sheriff's Department during the investigation into Tara Grant's reported disappearance. During several of

[3] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

these contacts, representatives of the department agreed that all contact with defendant would be directed through his counsel, to advise counsel if defendant was apprehended, and to not question defendant. Several officers affirmatively acknowledged at the *Walker* hearing that this agreement was in place. Despite the agreement, it is undisputed that Mr. Griem was not immediately notified when defendant was apprehended at approximately 6:30 a.m. on March 4, 2007. Mr. Griem, unaware that defendant had been located and was in custody, terminated his representation of defendant via a live news broadcast several hours later.

When he asked to speak to Mr. Griem, the Macomb County Sheriff's Department advised defendant that Mr. Griem had terminated their attorney-client relationship on television that morning. Defendant was then asked if he wanted to look for a local attorney. He declined the offer. Defendant indicated that he wanted to speak with the officer in charge of the case. Defendant then advised the officer in charge, by telephone, that he wished to speak to him about the matter. When the officer arrived at the hospital several hours later, defendant waived his *Miranda* rights and made a verbal and written confession.

Defendant admittedly can provide no authority to suggest that where an agreement not to speak to a suspect is in place between police and defense counsel, the agreement survives counsel's resignation or that a purported violation of the agreement requires the suppression of any statement made in contravention of the agreement. Defendant nevertheless claims that the department's failure to advise Mr. Griem of defendant's apprehension interfered with the attorney-client relationship in the same manner as the refusal to notify a defendant of the availability of his counsel as in *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996). In *Bender*, two defendants were arrested for several counts of breaking and entering. Apparently, simultaneous with the first defendant's arrest, defendant's mother retained the services of a lawyer to represent him, but was not permitted access to her son to pass along retained counsel's message that defendant was not to talk to anyone until he first spoke with counsel. Similarly, following the second defendant's arrest, his family retained counsel. The retained counsel called the police station to speak with her client and was denied contact. Without informing either defendant that they had retained counsel or of counsel's attempted contact, officers questioned both defendants. Each defendant affirmatively waived his Miranda rights and thereafter gave full confessions. Our Supreme Court, recognizing that the police failed to inform defendants that they had retained counsel and that each counsel wished to speak with their clients before a statement was made, held that, on the basis of Const. 1963, art. 1, § 17, defendants did not make knowing and intelligent waivers of their right to remain silent and their right to counsel. *Id.* at 614.

The instant matter differs in that defendant did not have retained or appointed counsel at the time of his confession. His retained counsel had publicly and unequivocally terminated their attorney-client relationship. Defendant was afforded the opportunity to secure new counsel, before making a statement, and declined. Furthermore, there is no indication that the Sheriff's Department's failure to immediately advise Mr. Griem of defendant's capture was a deliberate attempt to interfere with the attorney-client relationship.

There was a relatively short period of time between defendant's capture (6:30 a.m.) and Mr. Griem's public announcement of his resignation (approximately 9:00 a.m.). Moreover, there is no indication that the police anticipated or had knowledge of the impending resignation at the time defendant was apprehended, or that they were deliberately withholding information

regarding defendant's capture in hopes that counsel would resign. Notably, at the time of Mr. Griem's resignation, no one from the Sheriff's Department had spoken to defendant or attempted to question him. It was not until that afternoon, following the resignation, that defendant indicated he wished to speak to Mr. Griem, and many hours later that officers actually questioned defendant. There is also no indication that defendant was precluded from attempting to contact Mr. Griem on his own.

Given Mr. Griem's public, unequivocal statements, it was reasonable to conclude that the police no longer had to advise or consult with him before speaking with defendant. When they were able to speak to defendant, several hours after his apprehension, the police accurately advised defendant that his retained counsel had resigned. Again, the officers offered defendant the option of retaining substitute counsel, which he declined. Defendant, having previously retained counsel, clearly understood the importance of obtaining legal advice. The fact that he declined to obtain substitute counsel, and then spoke to police, suggests that he did so with full knowledge of the right he was waiving.

Finally, when advised that Mr. Griem had resigned, defendant himself initiated contact with the officer in charge. The undisputed testimony at the *Walker* hearing indicates that defendant attempted to speak to two different Macomb County Sheriff's Deputies and a nurse about his circumstances. All terminated any discussion. The deputies advised defendant that if he wanted to speak to anyone about the case he should speak to the officer in charge. Defendant was given a telephone and spoke to the officer in charge. Defendant asked the officer to come to the hospital so he could make a statement. The officer drove four hours to reach the hospital. Only after Mirandizing defendant did the questioning begin. As stated in *Edwards v Arizona*, 451 US 477, 484-485 101 S Ct 1880, 1885 (US Ariz, 1981), "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*" (emphasis added). There was no clear error in the trial court's determination that defendant's confession was freely and voluntarily given, and that the statements were not subject to suppression.

Defendant contends that had Mr. Griem been immediately advised of defendant's apprehension, it is likely that Mr. Griem would have spoken to defendant, and defendant would not have waived his right to counsel. This contention is pure speculation. Mr. Griem testified at the *Walker* hearing that although he had advised defendant not speak to the media or to law enforcement, defendant did, nevertheless, speak to the media and to law enforcement officials while Mr. Griem actively served as defendant's retained counsel. Mr. Griem also testified that he had made his decision to withdraw as defendant's counsel on Friday, March 2, 2007, but had been unable to discuss the decision with defendant. Mr. Griem stated that his intention in making the public announcement was to let defendant know he was no longer representing him. He testified that he knew at the time he made his public statement that the police were looking for defendant and that defendant would be taken into custody if found. Mr. Griem did not testify that he would have continued on as defendant's retained counsel if he had been advised of defendant's apprehension prior to his media statement.

Defendant also contends that his statement should have been suppressed because of alleged ethical violations by the prosecution in advising the police that they could speak with defendant without notice to Mr. Griem, and due to Mr. Griem's alleged improper action of

withdrawing from representation through the media. Acknowledging that the remedy for the commission of ethical violations is generally disciplinary actions against the attorneys rather than suppression of a statement, defendant encourages this Court to follow at least one other jurisdiction's holding that where the ethical violation is egregious, suppression in a possible remedy. We decline to do so.

As was observed in *People v Green*, 405 Mich 273, 293-294; 274 NW2d 448 (1979):

> The provisions of the code [of professional responsibility] are not constitutional or statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar. Although it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary action against the offending attorney.
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> The admissibility of evidence in a court of law, on the other hand, is normally determined by reference to relevant constitutional and statutory provisions, applicable court rules and pertinent common-law doctrines. Codes of professional conduct play no part in such decisions.

Even if we were to accept defendant's contention that a prosecutor's and/or Mr. Griem's conduct constituted an ethical violation, the remedy would be an attorney disciplinary action — not suppression of defendant's confession.

Defendant next argues that the trial court failed to articulate a substantial and compelling rationale for the extent of the upward departure of his minimum sentence from the sentencing guidelines' range, and that resentencing is required. We disagree.

A trial court must impose a minimum sentence within the sentencing guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). The sentencing court may only depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and it states the reason on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b). Additionally, the trial court's reasons for departing from the guidelines must be objective and verifiable. *People v Abramski, supra.* "They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008).

A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion occurs when a trial court chooses a minimum sentence that is outside the range of reasonable and principled outcomes. *Id.* The existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines is reviewed for clear error, *Id.* at 264, and the conclusion of whether a reason is objective and verifiable is reviewed de novo. *Id.*

It is agreed that the appropriately scored guidelines for defendant's second-degree murder conviction resulted in a recommended minimum sentence range of 225 to 375 months or life. The trial court significantly departed upward from this guideline range, sentencing defendant to a term of 600 to 900 months imprisonment on the conviction. In departing from the guidelines, the trial court engaged in an extraordinarily detailed and thorough analysis, making it abundantly clear that it based the specific upward departure on the failure of the sentencing guidelines to fully consider the severity and permanence of the victim's children's and other family members' psychological injuries, and the intense, proactive actions undertaken by defendant to avoid detection and arrest. Both of the above considerations were based upon readily verifiable facts, were clearly supported, and represented substantial and compelling reasons for departure. Defendant does not really assert otherwise, but instead relies almost exclusively on *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008) to support his position that the trial court failed to articulate why his particular sentence was *proportionate* to this specific offense and offender.

Smith involved the digital penetration of a nine year-old female by a man she looked to as a quasi-father figure. The adult male was charged with three counts of criminal sexual conduct. The defendant's recommended minimum sentence range under the sentencing guidelines was 9 to 15 years' imprisonment. The trial court, however, sentenced the defendant to three concurrent terms of 30 to 50 years' imprisonment. The Supreme Court found that the trial court adequately articulated substantial and compelling reasons for an upward departure, but noting that the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made, addressed whether the "off the charts" minimum was adequately explained:

> . . . if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. . . Hence, to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review. . .

The *Smith* court noted that one potential means of offering such a justification is to place the specific facts of a defendant's crimes in the appropriate sentencing grid. While defendant states that his guidelines score of 110 OV points does not reflect that this was the most outrageous or heinous example of second degree murder that can be imagined, we are hard pressed to think of more disturbing circumstances. Defendant scored in the highest level for purposes of OV scoring. Moreover, while the *Smith* court did suggest that a proportionality analysis might be undertaken by looking to the sentencing grid, it also affirmatively stated that a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid. *Id*. at 309.

As acknowledged in *Smith, supra* at 310, there are no precise words necessary for a trial court to justify a particular departure. In the instant matter, the trial court specifically acknowledged that an upward departure must be proportionate to the defendant and his offenses.

The trial court also specifically stated at the end of her departure analysis, "For all of the foregoing reasons the Court is satisfied that the upward departure in this case is more proportionate to the Defendant's demonic, manipulative, barbaric, and dishonest actions in this case, and the seriousness of his offense than the sentencing guideline range would otherwise require." The "foregoing reasons" were the trial court's analysis concerning the severity and permanence of the victim's children's and other family members' psychological injuries and the intense, proactive actions undertaken by defendant to avoid detection and arrest.

In terms of the psychological injury to the children, the court considered a letter submitted by the children's therapist indicating that the children suffered significant emotional harm as a result of the crime. Letters and statements from Tara Grant's sister and brother-in-law, who took care of the children after her disappearance, made it clear that the children may have witnessed part of the crime, were now afraid of their father, and were immensely traumatized by the murder. Not only were the children forced to move out of state to start a new life surrounded by strangers, the pervasive and unrelenting media attention this case garnered created a detailed, permanent record of the crime, ensuring that the children may at some point know every graphic and lurid detail of their mother's murder and dismemberment. It is also a simple matter of common sense that children whose mother was brutally murdered and mutilated by their father, having effectively lost both parents, would be psychologically damaged in a way and to such an extent that is almost incomprehensible. We find no error in the trial court's determination that the available offense variable points inadequately measured the psychological injury to the Grant children.

With respect to defendant's efforts to conceal the murder, the evidence established that defendant methodically and precisely dismembered Tara Grant's body and distributed the parts in a public park. Defendant then attempted to mislead police by filing a missing person's report, making calls to the victim's cell phone after her death, and appearing in the media tearfully begging for his wife's return. Finally, the defendant's actions immediately before his capture resulted in the search efforts of multi-jurisdictional law enforcement departments, his hospitalization and his medical treatment.

Unlike the *Smith* case, the connection between the reasons given for departure and the extent of the departure in this matter is clear. The trial court's meticulous analysis of the facts and the circumstances that she found to justify an upward departure clearly justify the *specific* departure. Given the totality of the facts and circumstances, we find the sentence proportionate to the offense and the offender.

Defendant lastly argues that where the trial judge failed to take into account his ability to repay the costs of his appointed trial counsel, the matter should be remanded to the trial court for consideration of his present and future ability to pay that cost. We disagree.

Defendant relies upon *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004) in asserting his argument. In that case, a panel of this Court held that a court must consider a defendant's ability to pay before ordering the reimbursement of court-appointed attorney fees and provide some indication of such consideration. *Id*. at 254-255. However, subsequent to the briefing in the instant matter, our Supreme Court, in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009) overruled *Dunbar, supra.*

In *Jackson*, the Supreme Court determined that the presentence determination of a defendant's ability to pay court-appointed attorney fees is not required and that *Dunbar* wrongly held otherwise. Noting that Michigan's recoupment procedure for court-appointed attorney fees is governed by MCL 769.1k, and that the statute allows for the imposition of a fee for a court-appointed attorney irrespective of a defendant's ability to pay, the *Jackson* court held that *Dunbar's* presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. That is not to say that an ability-to-pay analysis is never required. Indeed, the *Jackson* court, recognizing that there is a substantive difference between the imposition of a fee and the enforcement of that fee, affirmatively held that an ability-to-pay analysis is required when the imposition of the fee is *enforced* and the defendant contests his ability to pay.

> Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. Even *Dunbar* recognized that these pre-enforcement challenges would be premature. Nonetheless, once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant's ability to pay. The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time.* *Id.* at 292.

Given the holding in *Jackson*, the trial court did not err in ordering defendant to repay court-appointed counsel's costs without conducting an ability-to-pay analysis at sentencing.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher