STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 288175 Grand Traverse Circuit Court
JUSTIN SCOTT STAIR, Defendant-Appellant.	LC No. 07-010394-FC

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and assault of a pregnant individual causing a miscarriage or death of a fetus, MCL 750.90a. He was sentenced to life imprisonment for the murder conviction and 18 to 50 years' imprisonment for the assault conviction. He appeals as of right. We affirm.

I. UNDERLYING FACTS

Defendant was convicted of murdering a coworker (hereafter the "victim"), with whom he had been involved in a brief sexual relationship while the victim was estranged from her husband. In February or March 2006, the victim discovered that she was pregnant and believed that defendant was the father of her unborn child. According to testimony at trial, defendant wanted the victim to have an abortion because he planned to move away and join the military, but the victim was opposed to an abortion. It is undisputed that the victim met with defendant on April 1, 2006, and that she disappeared after that date. More than a year later, in May 2007, her deceased body was discovered in a shallow grave on property near the home of defendant's parents, where defendant had been living at the time the victim disappeared. An autopsy revealed that the victim died from a single gunshot wound to the head. During a search of defendant's residence, a .32-caliber handgun and the victim's purse were found in a trash bag that was hidden in a dropped ceiling in defendant's bedroom. Defendant's fingerprints were on the trash bag. The keys to the victim's car were found under some other ceiling tiles in an adjacent area of the house. A firearm's expert later determined that a bullet recovered from the victim's head during the autopsy was fired from the same handgun that was discovered in defendant's bedroom. The prosecution's theory at trial was that defendant lured the victim to his home on the night of April 1, 2006, by assuring her that he had changed his mind and wanted to be a father to her child, but instead shot her with his father's handgun.

The defense theory at trial was that the victim was killed by her estranged husband, Timothy Harrell, who had a previous history of domestic violence and was upset that the victim had become pregnant by another man. Defendant argued that Harrell planted the evidence that was found in defendant's home and buried the victim's body in a place where defendant would be blamed for her death. Defendant admitted meeting with the victim shortly before she disappeared, but claimed that she left a note in his home in which she wrote that defendant was not the father of her child and that she was running away to Mexico with the real father.[1]

II. APPELLATE COUNSEL'S ISSUES

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he is entitled to a new trial because trial counsel was ineffective. Defendant did not raise this issue in an appropriate motion in the trial court and this Court denied his motion to remand. Therefore, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant argues that defense counsel was ineffective for not timely requesting that the victim's remains be preserved so that a defense expert could examine them. The record discloses that defense counsel was retained on or about May 23, 2007. On June 1, 2007, defense counsel contacted the prosecutor's office to request that the victim's remains be preserved, but the remains had been cremated two days earlier, on May 30, 2007. Even if we were to credit defendant's argument that counsel erred by not making an earlier request to preserve the victim's remains, defendant has failed to show that he was prejudiced. Defendant did not dispute that the victim died from a gunshot wound to the head. His principal theory at trial was that Harrell was the shooter, and that Harrell had planted evidence to focus suspicion onto defendant. These theories were not dependent upon an examination of the victim's remains. Defendant also theorizes that if a defense expert had been able to examine the victim's remains, he possibly could have determined whether the victim was pregnant when she died, or discovered further evidence regarding the angle and trajectory of the gunshot. Defendant has not provided any factual support for these arguments. Further, the pathologist who performed the autopsy testified

[1] The victim's mother agreed that the note appeared to be written in the victim's handwriting, but explained that the content of the message contained information that the victim would not have written. For example, the victim stated that she was going to Mexico to bask in the sun and drink, but the victim could not be in the sun for more than 15 minutes because of her fair skin and she did not drink.

that the victim's remains were so severely decomposed that he was unable to identify any internal organs, so he could not determine if there was any embryonic material that could be examined. The brain tissue was also severely decomposed, preventing him from determining the precise path of the bullet. Given this testimony, there is no reasonable probability that an examination of the victim's remains by a defense expert would have produced a different result.

Defendant also argues that defense counsel was ineffective because it was defendant's family members, not defense counsel, who arranged for various friends and family members to testify as character witnesses at defendant's trial. Regardless of who arranged for the witnesses to testify, because they ultimately did testify at trial, defendant cannot establish that he was prejudiced by counsel's alleged deficiency.

Defendant also argues that defense counsel was ineffective for failing to emphasize the lack of physical evidence that the victim was pregnant at the time of her death, and for not moving for dismissal or a directed verdict of the assault charge on this basis. As previously indicated, the pathologist testified that he was not able to detect physical evidence of the victim's pregnancy during the autopsy because of the severely decomposed condition of the victim's remains. But as explained in section II(D), *infra*, there was other circumstantial evidence that the victim was pregnant at the time she was killed. Therefore, any motion for dismissal or a directed verdict would not have been successful. Counsel is not ineffective for failing to make a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant also argues that defense counsel was ineffective for failing to subpoena the victim's medical records, but he does not identify any medical records that could have aided his case. Although defendant suggests that the records would have been relevant to the charge that he assaulted a pregnant individual causing a miscarriage, testimony was presented at trial that the victim's pregnancy was confirmed during an ultrasound procedure just two days before she disappeared. Thus, there is no basis for concluding that defendant was prejudiced by counsel's failure to obtain the victim's medical records.

Defendant also asserts that defense counsel was ineffective for agreeing to the trial court's decision to limit his family's access to the courtroom during jury voir dire. As discussed in section II(E), *infra*, the trial court's decision did not violate defendant's right to a public trial. Further, defendant has not explained how he was prejudiced by his family's limited access to the courtroom during voir dire. Therefore, this ineffective assistance of counsel claim cannot succeed.

B. EVIDENCE OF HARRELL'S THREATS

Defendant argues that the trial court erred by excluding the testimony of the victim's manager at work, Penny Larcom, regarding the victim's disclosure of alleged threats made by the victim's estranged husband, Timothy Harrell. On a separate record, Larcom testified that shortly before the victim's disappearance, the victim disclosed that after she had informed Harrell that she was pregnant with another man's child, Harrell threatened to kill the victim, her baby, and the baby's father. The trial court determined that the victim's statements regarding the alleged threats were inadmissible hearsay. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009).

Defendant argues that the trial court erroneously determined that the victim's statements regarding the alleged threats were not admissible under the excited utterance exception to the hearsay rule. We disagree. MRE 803(2) provides that a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Thus, for a statement to be admissible under this rule, there must be (1) a startling event, and (2) the statement at issue must have resulted from the startling event while the declarant was still acting under the excitement caused by the event. *People v Larry Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Initially, we agree with defendant that the trial court erred to the extent that it determined that there must be evidence of the startling event, here the alleged threats, independent of the statements being considered for admission. After defendant's trial ended, the independent evidence requirement adopted in *People v Burton*, 433 Mich 268; 445 NW2d 133 (1989), was overruled in *People v Barrett*, 480 Mich 125, 127-128; 747 NW2d 797 (2008). In *Barrett*, the Supreme Court held that a trial court may consider the statement in question, along with any other non-privileged evidence, to prove the existence of a startling event or condition. *Id.* In this case, however, the trial court also determined that defendant failed to establish that the victim was acting under the influence of the excitement caused by the startling event when she made the statements, and we find no error in that determination.

For a statement to be admissible under MRE 803(2), it must have been made while the declarant was still under the influence of the excitement caused by the startling event. *Smith*, 456 Mich at 550-551. The amount of time that passes between a statement and the startling event is not the sole consideration in deciding the admissibility of the statement. *Id*. at 551. Rather, the focus of the rule is the lack of capacity to fabricate, not the lack of time to fabricate. *Id.* If there is a delay between the startling event and the statement, it is necessary to consider whether there was a plausible explanation for the delay. *Id*. A period of delay may be affected by physical factors, such as pain, shock, or unconsciousness. *Id*. Again, the inquiry "is not strictly one of time, but of the possibility for conscious reflection." *Id.* Similarly, a statement made in response to questioning is not automatically excluded. *Id.* at 553. It is necessary to consider the circumstances of the questioning and whether it appears that the statement was the result of reflective thought. *Id.* "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id*. at 552.

In this case, Larcom testified that approximately a week before the victim disappeared, she arrived for work and was upset and crying. Larcom asked the victim what was wrong, and the victim recounted that when she told Harrell that she was pregnant with another man's child, Harrell became upset and threatened to kill the victim, her baby, and the baby's father. Although Larcom's testimony established that the victim was emotionally upset when she made the statements, the trial court did not abuse its discretion in determining that the evidence failed to show that the victim was acting under the influence of Harrell's threats when she made the statements.

The mere fact that the victim was emotional and crying when she made the statements is not dispositive of whether she was acting under the influence of the excitement caused by Harrell's alleged threats. The victim was discussing an inherently emotional subject matter, during a confused and troubling time in her life, so it is not surprising that she was emotional. The victim did not indicate, nor did Larcom know, when Harrell's alleged threats were made.

However, Larcom testified that a few days before the victim revealed Harrell's alleged threats, she related that Harrell had threatened to take the baby. Because the victim's statements suggested that Harrell's threats were made when the victim first revealed her pregnancy to him, and the evidence showed that Harrell was aware of the pregnancy at least a few days before, it appears that the alleged threats were also made at least a few days, if not more, before the victim recounted the threats to Larcom. Also, the victim's statements were made after she reported for work, outside the presence of Harrell, and the statements were made in response to Larcom's question. These facts, along with the other circumstances, support the trial court's determination that Harrell was not acting under the influence of the stress caused by Harrell's threats when she made the statements to Larcom. Accordingly, the trial court did not abuse its discretion in determining that the victim's statements to Larcom were not admissible under MRE 803(2).

Defendant also argues that the victim's statements to Larcom were admissible under MRE 803(3), as statements of the victim's "then existing state of mind, emotion, sensation, or physical condition." However, the victim's statements were not offered to explain why the victim was crying or may have been afraid of Harrell. See *In re Utrera,* 281 Mich App 1, 18-19; 761 NW2d 253 (2008). Rather, they were offered for the purpose of showing Harrell's alleged motive and intent to kill the victim. Because the statements were not offered for a purpose relevant to the victim's state of mind, the trial court did not abuse its discretion by refusing to admit the statements under MRE 803(3).

Defendant also briefly asserts that Harrell's threats were admissible under MRE 804(b)(3), as statements against Harrell's penal interests. However, that rule applies only if the declarant (i.e., Harrell) is unavailable, which was not established in this case. Further, that exception applies only to Harrell's threats to the victim; it does not apply to the victim's statements to Larcom.

For these reasons, the trial court did not abuse its discretion by excluding the evidence of the victim's hearsay statements to Larcom.

C. CHANGE OF VENUE

Defendant next argues that the trial court erred by denying his motion for a change of venue. A motion for change of venue is addressed to the discretion of the trial judge and will not be disturbed on appeal absent there clearly being a palpable abuse of discretion. *People v Jendrzejewski,* 455 Mich 495, 499-500; 566 NW2d 530 (1997) (citation omitted).

Defendant argues that a change of venue was required because of pretrial publicity, which hindered his ability to obtain a fair and impartial jury in Grand Traverse County. In *Jendrzejewski,* 455 Mich at 500-501, the Court explained:

> Federal precedent has used two approaches to determine whether the failure to grant a change of venue is an abuse of discretion. 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.

The facts of this case are similar to those in *People v Unger*, 278 Mich App 210, 254-255; 749 NW2d 272 (2008), which also involved a publicized murder case in a small community in the northern lower peninsula, just west of Grand Traverse County. In *Unger*, this Court stated:

> "[T]he right to 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). Therefore, it may be appropriate to change the venue of a criminal trial when widespread media coverage and community interest have led to actual prejudice against the defendant. "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. Changes of venue might be required in cases involving "extensive egregious media reporting," "a barrage of inflammatory publicity leading to a 'pattern of deep and bitter prejudice' against the defendant," and "a carnival-like atmosphere surrounding the proceedings." *Id.* at 506-507 (citations omitted). Changes of venue might also be required in cases involving "highly inflammatory attention to sensational details . . . ." *Id.* at 508.
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> We recognize that there was substantial media interest in this case. We also recognize that Benzie County is a small community that does not generally experience the degree of media coverage exhibited here. However, defendant has failed to show that the media coverage was anything other than nonsensational, factual coverage. There is no evidence that the coverage was invidious or inflammatory, as opposed to simple factual news reporting. *Id.* at 504. There is simply no indication in the present case that the community was inundated with *adverse* publicity or that this publicity resulted in actual bias against defendant. In sum, the media attention in this case was neither prejudicial nor inflammatory. Therefore, even if a motion had been filed, the trial court would have been under no obligation to change the venue of defendant's trial. Trial counsel was not ineffective for failing to file a meritless motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). [*Unger*, 278 Mich App at 254-255.]

In this case, defendant did not meet his burden of showing that a change of venue was necessary because of prejudicial or sensational media coverage. Although the case received television, radio, and newspaper coverage, defendant did not show that the coverage involved sensational publicity or prejudicial information that could have biased the community against him.

Defendant focuses much of his argument on the voir dire questioning. The trial court asked the prospective jurors if they had heard about the case and many admitted hearing or reading about it from television, radio, newspapers, or online. It appears that 52 jurors were questioned, and only 27 stated that they had heard about the case. Of those 27, only four were unable to set aside previously formed opinions, and those jurors were dismissed. The trial court also asked any jurors who had heard about the case if they could set aside any information they

may have heard, and the overwhelming majority indicated that they could be fair and impartial and decide the case based on the evidence presented at trial. A juror who has previously formed an opinion about a case need not be dismissed for cause if the juror is able to set aside any previous opinion formed about the case and can decide the case with an open mind at the time of trial. MCR 2.511(D)(1); MCR 6.412(D)(1); *People v Lee*, 212 Mich App 228, 251; 537 NW2d 233 (1995) The few jurors who were not sure whether they could be fair, or whether they could set aside information they had previously heard or opinions they had previously formed, were excused for cause. The trial court also excused for cause any jurors who had discussed the case with others. Ultimately, the court was able to select a jury in one day.

The trial court refused to question any of the jurors individually outside the presence of the venire as suggested in *People v Tyburski*, 445 Mich 606, 621-624; 518 NW2d 441 (1994).[2] However, the court did not elicit factual details about the case before the entire venire; it only questioned the jurors to determine if they had previously formed opinions about the case. Thus, other members of the venire who had not seen or heard any media reports were not exposed to factual details about the case, or to opinions others may have formed, before hearing the evidence. The court otherwise generally complied with the guidelines set forth in *Tyburski*, 445 Mich at 621-624, by asking the jurors about the type of publicity they had seen or heard, when they had seen or heard anything, whether they had formed any opinions, and whether they could remain impartial. See *Lee*, 212 Mich App at 248. The record discloses that the trial court's questioning of jurors, supplemented by questions from counsel, was adequate to allow defendant to intelligently exercise his challenges. *Jendrzejewski*, 455 Mich at 509.

In sum, the record does not disclose the type of prejudicial or inflammatory media coverage resulting in actual prejudice against defendant. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a change of venue.

D. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence to support his conviction of assault of a pregnant individual causing a miscarriage or death of a fetus. We disagree.

In determining whether sufficient evidence was presented to sustain a conviction, an appellate court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant was convicted of violating MCL 750.90a, which provides:

> If a person intentionally commits conduct proscribed under sections 81 to 89 [MCL 750.81 to MCL 750.89] against a pregnant individual, the person is

[2] In *Jendrzejewski*, 455 Mich at 509, the Court noted that the sequestering of jurors during voir dire is not required as a matter of law.

guilty of a felony punishable by imprisonment for life or any term of years if all of the following apply:

(a) The person intended to cause a miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person's conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus.

(b) The person's conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus.

Defendant argues that he could not be convicted of assaulting a pregnant individual because there was insufficient evidence that the victim was pregnant at the time she was killed. We disagree.

Defendant relies solely on the fact that the pathologist was unable to confirm the presence of an embryo or fetus during the autopsy. According to the pathologist, the victim's remains were too decomposed to identify any internal organs, so he was unable to detect any embryonic material that could be examined. Contrary to what defendant argues, however, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). At trial, a doctor who treated the victim testified that an ultrasound procedure conducted just two days before she disappeared confirmed that she was almost five weeks pregnant. There was no evidence suggesting that the victim's pregnancy was terminated before she disappeared. On the contrary, the evidence indicated that the victim had planned on meeting defendant to discuss her pregnancy on the night she disappeared, and was happy because she believed that defendant wanted to be a father to her child. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find, as it did, that the victim was pregnant when she was killed, resulting in the death of the fetus.

E. PARTIAL CLOSING OF THE COURTROOM DURING JURY VOIR DIRE

Defendant argues that the trial court's restriction on the number of spectators who could be present during jury voir dire violated his constitutional right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. Because defendant did not object to the trial court's restrictions, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Pipes,* 475 Mich 267, 274; 715 NW2d 290 (2006).

The Sixth Amendment provides that a defendant has a right to a "public trial." *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). "Although the right to an open trial is not absolute, that right will only rarely give way to other interests." *Id.* In this case, the trial court anticipated that it would need approximately 150 jurors to select a jury. Because of space limitations, however, the courtroom could not accommodate many more than 50 jurors at a time. Therefore, the court intended to conduct voir dire in three groups of approximately 50 jurors each. In addition, because of the space limitations, the court proposed to limit the number of spectators to only two people from each side. Neither the prosecutor nor defendant objected to this procedure.

In *In re Closure of Jury Voir Dire*, 204 Mich App 592; 516 NW2d 514 (1994), this Court addressed a trial court's decision to close a courtroom during voir dire because of space limitations. The Court stated:

> A First Amendment right of access applies to criminal trials, including jury voir dire proceedings. *Richmond Newspapers, Inc v Virginia*, 448 US 555; 100 S Ct 2814; 65 L Ed 2d 973 (1980); *Press-Enterprise Co v Superior Court*, 464 US 501; 104 S Ct 819; 78 L Ed 2d 629 (1984). In *Press-Enterprise*, the Court said that the presumption of open criminal trials can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.*, p 510. That is the test to be applied where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information. *Globe Newspaper Co v Superior Court*, 457 US 596; 102 S Ct 2613; 73 L Ed 2d 248 (1982).
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> In the present case, access was denied for a reason not related to disclosure of sensitive information. The reason given by the trial court was simply lack of space. Our Supreme Court has observed that the size of the courtroom may justifiably limit attendance. *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 386-387; 294 NW2d 827 (1980). However, even where the reason offered is space limitations, the court must still narrowly tailor the closure order. *In re Times-World Corp*, 7 Va App 317, 327; 373 SE2d 474 (1988).
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> The court in this case did not narrowly tailor the order. The concern over lack of space did not necessarily mandate closing the entire proceeding to all members of the press. Because there were not enough permanent seats in the courtroom, the court brought in twenty additional chairs to accommodate the prospective jurors. It seems that space for a limited number of journalists, or at least one, could also have been found. The court's concern regarding the reporters mingling with the prospective jurors could have been addressed by an order requiring the reporters to be segregated from the prospective jurors or by informing the prospective jurors about the presence of the journalists and warning both prospective jurors and journalists not to talk about the case. Further, the court gave no reason why every member of the jury pool had to be in the courtroom at one time. The court apparently did not even consider keeping some of the prospective jurors in jury rooms or other parts of the courthouse until it was determined that they were needed in the courtroom.
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> It is clear that any number of simple solutions might have been considered to accommodate the legitimate concerns of the press with regard to the right of access to the jury selection process. Because the trial court's closure order did not evidence an attempt to do so, and was not narrowly tailored to the particular circumstances of the case, we reverse it. [*In re Closure of Voir Dire*, 204 Mich App at 594-596.]

This case is clearly distinguishable from *In re Closure of Voir Dire*. First, there was no objection to the trial court's decision in this case. Second, the trial court's decision was directed only at the number of spectators from each side. There is no indication in the record that the trial court's restrictions extended to the media, or that the media was otherwise denied access to the courtroom. Third, while a defendant has a compelling interest in having members of his family present during trial, *Johnson v Sherry*, 586 F3d 439, 446 (CA 6, 2009), the trial court's decision involved only a partial closure, not a total one. Thus, the court did not completely preclude members of defendant's family from being present. It appears that the trial court narrowly tailored its restriction on access by limiting the restriction to the voir dire proceedings, where space was an issue due to the large number of jurors, while at the same time allowing for the limited presence of spectators from each side. Accordingly, defendant has failed to show a plain error.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. THE DESTRUCTION OR WITHHOLDING OF EVIDENCE

Defendant first argues that the prosecutor violated his due process rights by withholding exculpatory evidence. Although defendant raised the issue of the premature cremation of the victim's remains below, he did not argue that it involved the intentional destruction or withholding of exculpatory evidence, and he did not raise any other claim below that evidence was improperly withheld by the prosecution. Therefore, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Pipes*, 475 Mich at 274.

Defendant relies on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in which the Supreme Court recognized a defendant's due process right of access to certain information possessed by the prosecution. This disclosure requirement applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The disclosure requirements of *Brady* apply to evidence within the prosecutor's possession, regardless of a request by the defendant. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a *Brady* violation, a defendant must prove the following:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester*, 232 Mich App at 281-282.]

Defendant argues that the prosecution violated his due process rights under *Brady* when it prematurely allowed the victim's remains to be cremated, without providing him with an opportunity to have the remains reviewed by his own expert. In section II(A), *supra*, we concluded that, given the evidence of the severe decomposition of the victim's body and the fact

that defendant's principal theory of defense at trial was not dependent upon an examination of the victim's remains, there was no reasonable probability that an examination of the victim's remains by a defense expert would have produced a different result. Thus, even assuming that the prosecution prematurely released the victim's remains for cremation, defendant cannot satisfy the fourth element necessary to establish a *Brady* violation. Thus, there was no plain error.

Although defendant also asserts that the prosecution withheld other exculpatory evidence, nothing in the record suggests that any exculpatory evidence was withheld. Absent record support for this claim, defendant cannot establish a plain error.

B. DEFENDANT'S RIGHT TO A PUBLIC TRIAL

In addition to repeating appellate counsel's argument that the trial court violated defendant's right to a public trial by limiting his family members' access to the courtroom during voir dire, a claim we rejected in section II(E), *supra*, defendant also asserts here that the trial court closed the courtroom at times during the trial. Because defendant did not preserve this issue by raising it below, our review is limited to plain error affecting defendant's substantial rights. *Pipes*, 475 Mich at 274.

The record does not support defendant's claims that the courtroom was closed during other portions of the trial. At most, defendant has submitted evidence suggesting that the number of his supporters who were allowed to be present at any given time during trial was limited to 12, due to the limited space available in the courtroom. As previously explained, however, a trial court does not violate a defendant's right to a public trial by imposing reasonable limitations on access to the courtroom during trial based on space limitations. See *In re Closure of Jury Voir Dire*, 204 Mich App at 594-596. Given the information in the record concerning the limited size of the courtroom, we are not persuaded that a restriction limiting defendant to 12 supporters at any given time is unreasonable. Further, nothing in the record suggests that the courtroom was closed to the media or general members of the public. To the extent that defendant asserts that some family members or supporters were at times denied access to the courtroom, those instances appear to involve situations in which the court restricted the movement of spectators while trial was in progress, to avoid disrupting the proceeding. Such restrictions do not implicate defendant's right to a public trial.

In sum, there is no basis in the record for concluding that defendant's right to a public trial was violated. Therefore, defendant also cannot succeed on his related claim that defense counsel was ineffective for not objecting or raising this issue below. On the basis of the record presented, any objection would have been futile. Counsel is not required to make a futile objection. *Darden*, 230 Mich App at 605.

C. JURY INSTRUCTIONS

Defendant argues that the trial court erroneously instructed the jury on first- and second-degree murder when it stated that, to convict defendant of murder, the jury was required to find

> that the defendant caused the death of [the victim]. *That is, that [the victim] died as a result of a gunshot wound to her head*. [Emphasis added.]

Because defendant did not object to the court's jury instructions, we review this issue for plain error affecting defendant's substantial rights.[3] *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

The trial court instructed the jury in accordance with CJI2d 16.1 and 16.5. Although defendant argues that the court's instructions improperly permitted the jury to convict him if it merely found that the victim died from a gunshot wound, without finding that he inflicted the wound, defendant's argument improperly ignores the first part of the trial court's instruction. Jury instructions must be reviewed in their entirety to determine if there is error requiring reversal. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Immediately preceding the challenged instruction, the trial court clearly stated that the jury was required to find that "the defendant caused the death of [the victim]." Thus, viewed as a whole, we find no error, plain or otherwise. Because there was no error, defense counsel was not ineffective for failing to object. *Darden*, 230 Mich App at 605.

D. FAILURE TO PRODUCE AN ENDORSED WITNESS

Defendant argues that he was deprived of a fair trial by the prosecutor's failure to produce William Ball, an endorsed witness. Because defendant did not request Ball's production at trial or object to the prosecutor's failure to produce Ball, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Pipes*, 475 Mich at 274.

MCL 767.40a does not require the prosecution to produce all res gestae witnesses, but only to reveal known res gestae witnesses and produce those witnesses named on its witness list. See *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). A prosecutor who endorses a witness under MCL 767.40a(3) is required to exercise due diligence to produce that witness for trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). But a prosecutor may add or delete from the list of witnesses he intends to call at trial at any time upon leave of the court for good cause shown or by stipulation of the parties. MCL 767.40a(4). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). Where a prosecutor fails to secure the presence of an endorsed witness without proper excuse, an instruction based on CJI2d 5.12 may be appropriate. *Perez*, 469 Mich at 420. Whether CJI2d 5.12 is appropriate depends on the facts of each particular case. *Id.* at 420-421.

[3] We note that the trial court instructed the jury consistent with the prosecutor's proposed jury instructions, which defendant expressly approved. A defendant's express approval of jury instructions waives appellate review of any claimed error with the instructions. *Matuszak*, 263 Mich App at 57; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). But because defendant also argues that defense counsel was ineffective for not objecting to the instructions, we will address the issue.

Because defendant did not request Ball's presence at trial, or object to the prosecution's failure to produce Ball, a due diligence hearing was not held.[4] Accordingly, defendant must demonstrate that the failure to produce Ball was a plain error. A "plain error" is one that is "clear or obvious." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Here, it is not clear or obvious from the existing record that the prosecution failed to exercise due diligence to attempt to produce Ball for trial. The record discloses that Ball was living in Arizona, where he was facing other criminal charges, and that he also had outstanding warrants in Michigan. The prosecutor had previously requested an adjournment of trial in order to locate and attempt to secure Ball's presence at trial in Michigan. Ball apparently was not willing to voluntarily submit to Michigan's jurisdiction. In November 2007, the prosecutor obtained a certificate for attendance of an out-of-state witness. Despite these efforts, Ball was not produced as a witness at trial. On this record, there is no clear basis for concluding that the prosecutor failed to exercise due diligence to attempt to produce Ball for trial. Thus, it is not clear that good cause for failing to produce Ball was lacking. And without a clear showing that good cause for deleting Ball from the witness list did not exist, an instruction based on CJI2d 5.12 was not appropriate.

For these reasons, defendant has not shown that the prosecution's failure to produce Ball at trial was plain error.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that trial counsel was ineffective. Because defendant did not raise his claims in an appropriate motion in the trial court and this Court denied his motions to remand, our review is limited to errors apparent from the record. *Matuszak*, 263 Mich App at 48.

Although defendant asserts that defense counsel was experiencing personal legal problems at the time of defendant's trial, counsel's personal affairs do not themselves provide a basis for concluding that defendant was denied the effective assistance of counsel. It is still necessary for defendant to demonstrate that counsel's performance at defendant's trial was constitutionally deficient and that the deficient performance prejudiced defendant by denying him a fair trial. *Pickens*, 446 Mich at 338.

Defendant suggests that counsel may not have done all that he could have to prepare for trial or to present the best possible defense. A defendant is entitled to have his counsel prepare,

[4] On appeal, defendant asserts that Ball was a material witness because he possibly could have identified someone who fit the description of an Hispanic male described in the note that the victim allegedly left at defendant's home. However, because defendant never requested Ball's production, or objected to the prosecutor's failure to produce Ball, his materiality to the defense was never addressed. The record indicates that only the prosecutor expressed a desire to call Ball at trial, for the limited purpose of establishing a foundation for the admission of photographs of the victim that Ball apparently took on the day the victim disappeared. The prosecutor ultimately was able to establish a foundation for the admission of the photographs through another witness, and defendant has not challenged that ruling on appeal. In sum, the record does not support defendant's claim that he considered Ball to be a material witness at the time of trial.

investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Failure of counsel to conduct a reasonable investigation can also constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Although this Court will not substitute its judgment for that of trial counsel with respect to matters of sound trial strategy, *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987), a sound strategy is one based on investigation and supported by reasonable professional judgments. *People v Grant*, 470 Mich 477, 486-487, 498; 684 NW2d 686 (2004). It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter and to pursue all leads relevant to the issues. *Id.*

Defendant argues that defense counsel did not properly investigate the circumstances of the victim's death. He suggests that the angle of the gunshot wound might have supported possible defenses of accident or self-defense, or supported an argument that the wound was self-inflicted. The fact that defense counsel did not pursue these theories at trial does not mean that he did not investigate or consider them. The record indicates that defense counsel provided the autopsy results to Dr. Ljubisa Dragovic, the Oakland County medical examiner, for his review. Thus, the record does not support defendant's claim that defense counsel failed to investigate these matters. Furthermore, defendant has not presented any expert opinion suggesting that an analysis of the physical evidence could have supported a theory of accident or self-defense, or a theory that the wound was self-inflicted. Thus, he has not established that counsel's failure to pursue these theories at trial deprived him of a substantial defense.

Defendant also argues that unidentified prints found on the gun used in this crime should have been compared to the victim's fingerprints or palm prints to determine if she had handled that weapon. However, defendant has not shown that the victim's fingerprints or palm prints were available for comparison, or that it was even possible to obtain the victim's prints posthumously given the severely decomposed condition of her remains.

Defendant also complains that defense counsel failed to investigate the victim's mental health history. He contends that the victim had a history of depression and had attempted suicide in the past. Again, the record does not indicate to what extent counsel may have investigated these matters. And while defendant apparently believes that an investigation of the victim's mental health history might have produced evidence to support a theory that the victim may have committed suicide, defendant has not identified any such evidence on appeal and, therefore, cannot establish prejudice. Moreover, given the victim's disappearance for approximately 13 months, the discovery of her body in a shallow grave, and the discovery of the gun at another location, there is no reasonable basis for concluding that a suicide theory would have been viable.

Defendant also argues that defense counsel was ineffective for not challenging whether the victim was pregnant at the time of her death. To the extent defendant suggests that defense counsel should have requested a chemical or hormone test to determine whether the victim was

pregnant at the time of her death, he has not shown that any such test could have been performed, or would have been effective, given the severely decomposed condition of the victim's remains. Furthermore, as previously explained, there was strong circumstantial evidence that the victim was pregnant at the time she disappeared. Thus, this claim cannot succeed.

Defendant also complains that defense counsel called only two defense witnesses, whose testimony took only 30 minutes to present. However, the mere number of witnesses called or the length of their testimony does not establish the requisite deficient performance or prejudice necessary to succeed on a claim of ineffective assistance of counsel. Also, defendant cannot show that he was prejudiced by counsel's failure to subpoena the character witnesses where those witnesses were contacted by other family members and ultimately testified at defendant's trial.

Although defendant also claims that defense counsel was ineffective for not challenging the prosecutor's failure to produce allegedly exculpatory evidence, he does not indicate what evidence was not produced.

For these reasons, defendant has not established that he was denied the effective assistance of counsel.

F. DEFENDANT'S MOTION TO EXCLUDE EVIDENCE

Defendant argues that the trial court erred by not adjourning the hearing on his motion to exclude evidence related to the autopsy. A trial court's ruling on a motion for a continuance is reviewed for an abuse of discretion. *Steele*, 283 Mich App at 484. Defendant argues that the trial court should have afforded him more time to allow his defense expert to review the autopsy results to determine whether he might have been prejudiced by the premature destruction of the victim's remains. However, the trial court's ruling did not prevent defendant from still having an expert review the autopsy results. Defendant never subsequently came forward with evidence to support his position that he was prejudiced by the destruction of the victim's remains, and he has not presented any such evidence on appeal. Thus, even if it would have been appropriate for the trial court to delay deciding defendant's motion, defendant has not established that he was prejudiced. Accordingly, any error was harmless. *Id.* at 485.

G. DEFENDANT'S RIGHT TO BE PRESENT

Defendant next argues that his statutory and constitutional right to be present at trial was violated because he was not present at pretrial conferences held in November 2007. As defendant concedes, he did not preserve this issue by raising it below. Therefore, defendant must establish a plain error affecting his substantial rights. *Pipes*, 475 Mich at 274.

MCL 768.3 provides that "[n]o person indicted for a felony shall be tried unless personally present during the trial." *People v Mallory*, 421 Mich 229, 246; 365 NW2d 673 (1984). The right to be present for trial is also impliedly guaranteed by both the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Mallory*, *supra* at 246 n 10. In *People v Clyburn*, 55 Mich App 454, 460; 222 NW2d 775 (1974), this Court observed:

> An in-chambers conference to discuss matters of procedure or law attended by his counsel to which the defendant raises no objection, does not violate defendant's right to be present during his trial and does not constitute reversible error.

Here, defendant was absent, without objection, from in-chambers pretrial conferences at which the court and the attorneys discussed matters of procedure and law. Accordingly, defendant has not established a plain error affecting his substantial rights.

H. CUMULATIVE ERROR

In his final issue, defendant argues that the cumulative effect of several errors deprived him of a fair trial such that reversal is required. We disagree. In determining whether reversal is required under a cumulative error theory, only actual errors may be aggregated to determine their cumulative effect. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). In this case, defendant has failed to establish that multiple errors were committed below. Thus, there is no basis for finding that the cumulative effect of multiple errors denied him a fair trial. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990).

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello