

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

MARSHA ANNE SPRINGER,
Defendant-Appellant.

No. 298385
St. Joseph Circuit Court
LC No. 09-015639-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ANTHONY JOHN SPRINGER,
Defendant-Appellant.

No. 298386
St. Joseph Circuit Court
LC No. 09-015638-FC

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Following a joint trial in which defendants Marsha Springer and Anthony Springer were tried before a single jury, defendants were convicted of torture, MCL 750.85, and first-degree child abuse, MCL 750.136b(2). The jury acquitted defendants of felony murder, MCL 750.316(1)(b). The trial court sentenced Marsha to concurrent sentences of 95 months to 15 years' imprisonment for the child abuse conviction and 18 years, 9 months to 50 years' imprisonment for the torture conviction. The trial court sentenced Anthony to concurrent sentences of 10 to 15 years' imprisonment for the child abuse conviction and 25 to 50 years' imprisonment for the torture conviction. Defendants appeal as of right. We affirm in both cases.

Defendants' 16-year-old daughter, Calista, died in a house fire on February 27, 2008. At the time of the fire, Calista was secured to her bed by a dog choke chain around her waist that was attached to the bed frame with zip ties.

I. DOCKET NO. 298385

On appeal, Marsha Springer argues that the trial court violated her due process right to a fair and impartial jury when it permitted the jurors to ask witnesses more than 200 questions during trial and when it instructed the jurors that they could discuss the evidence during trial recesses. We review these unpreserved claims of error for plain error affecting Marsha's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendants' trial was conducted in accordance with Supreme Court Administrative Order No. 2008-2, which authorized several trial courts to implement a pilot project to study the effects of a jury-reform proposal. One aspect of AO 2008-2 provided for juror questions:

The court may permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside the hearing of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.

In addition, at the time of defendants' trial, MCR 6.414(E) permitted jurors to ask questions of witnesses.¹

Marsha recognizes that our Supreme Court, in *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), permitted trial courts, in their discretion, to allow jurors to ask questions of witnesses. But, relying on *State v Costello*, 646 NW2d 204 (Minn, 2002), where the Minnesota Supreme Court prohibited the practice of allowing jurors to question witnesses in a criminal trial, Marsha asserts that the practice of allowing jurors to submit questions to witnesses should stop. However, we are bound by our Supreme Court's statement in *Heard*, 388 Mich at 187-188, that the questioning of witnesses by jurors is within the sound discretion of the trial court. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007) ("It is the duty of the Supreme Court to overrule or modify caselaw . . . and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action."). Because Marsha does not claim that the trial court failed to utilize a procedure, as required by AO 2008-2, that ensured inappropriate questions would not be asked and because she does not claim that any question submitted by a juror and actually asked was improper, she has not established plain error affecting her substantial rights. *Carines*, 460 Mich at 763. Accordingly, we reject Marsha's claim that the trial court violated her due process right to a fair and impartial jury when it allowed the jurors to submit questions to be asked of witnesses.

Another aspect of AO 2008-2 allowed jurors to discuss the evidence during trial recesses:

After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the

¹ MCR 6.414(E) has since been repealed, and the provision from AO 2008-2 allowing jurors to ask questions of witnesses is found in MCR 2.513(I).

court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

We acknowledge that the trial court's instruction to the jurors, pursuant to AO 2008-2, that they could discuss the evidence during trial recesses, was contrary to Michigan legal precedent. See *People v Hunter*, 370 Mich 262, 269; 121 NW2d 442 (1963) ("It seems to us clear beyond any doubt that jurors should not be encouraged to discuss evidence they have heard and seen during the course of trial until all of the evidence has been introduced, the arguments to the jury made and the jury charged by the court . . ."). However, pursuant to AO 2008-2, the trial court was authorized to instruct the jury as it did.

While the trial court instructed the jurors that they could discuss the evidence during trial recesses if they were all present, it also emphasized that such discussions were "to be considered tentative pending final presentation of all evidence, instructions, and arguments," and that the jurors were to keep "an open mind" and not to "decide the case until [they had] heard all the evidence, instructions of law, and arguments of Counsel." The trial court further instructed the jurors that defendants did not have to prove their innocence and that the prosecutor was required to prove the elements of the charged crimes beyond a reasonable doubt. Marsha claims that because the jurors submitted more than 200 questions to be asked of witnesses during trial, it is "highly likely" that the jurors failed to keep their pre-deliberation discussions tentative. However, jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and there is no indication on the record that the jurors failed to heed their instructions. Accordingly, we hold that the trial court's instructions were sufficient to protect Marsha's right to a fair and impartial jury. There was no plain error affecting Marsha's substantial rights. *Carines*, 460 Mich at 763.

Marsha next argues that the trial court abused its discretion in admitting a photograph of Calista's clothed, burned body on an autopsy table. We review a trial court's evidentiary rulings for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). Marsha claims that the trial court should have excluded the photograph of Calista's clothed, burned body because the photograph did not help resolve whether she intended to cause Calista cruel or extreme physical or mental pain and suffering. However, because Marsha pleaded not guilty, all the elements of the charged offenses, including those of felony murder, were at issue. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). The elements of felony murder require the death of a person. *People v Hunter*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The forensic pathologist testified concerning the manner and cause of Calista's death, as well as the injuries that Calista sustained. The photograph of Calista's body corroborated the forensic pathologist's testimony concerning some

of the injuries suffered by Calista. Photographs may be used to corroborate a witness's testimony. *Mills*, 450 Mich at 76.

The photograph was gruesome. But, gruesomeness alone does not require exclusion. *Gayheart*, 285 Mich App at 228. Numerous photographs of Calista's bedroom that were admitted into evidence by the stipulation of the parties depicted Calista's burned body as it was chained to the bed. Because the jury had already seen photographs of Calista's burned body, the trial court did not err in its conclusion that the prejudicial value of the photograph did not substantially outweigh its probative value. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting the photograph of Calista's clothed, burned body on the autopsy table.

Marsha argues that the trial court erred in excluding a September 7, 2000, email from Dr. Kaylor, a psychologist who evaluated Calista, as a sanction for her failure to disclose the email during discovery. We review a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010). Here, however, we need not determine whether the trial court abused its discretion by excluding the email, because even if the exclusion of the email was erroneous, the error would not warrant reversal of Marsha's convictions.

"[A] preserved nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (quotation omitted). The burden is on the defendant to demonstrate prejudice. *Id.* at 495. Marsha claims that the September 7, 2000, email was important to prove her defense that she actually believed it was necessary to restrain Calista to prevent Calista from injuring herself and others. The pertinent portion of the email was a statement that Calista almost needed to be in an institution to receive the amount of supervision that she required to keep from killing herself. However, in a 2000 report, Dr. Kaylor indicated that Calista needed to be supervised 24 hours a day. In addition, Dr. Carter, defendants' expert in child psychology, testified regarding the common characteristics of Pervasive Developmental Disorder (PDD), a diagnosis that Dr. Kaylor had given Calista. Based on the testimony of several defense witnesses, Calista had many of PDD characteristics. Dr. Carter also testified that children with PDD needed to be supervised 24 hours a day because they are a danger to themselves and others. Where there was already evidence that suggested Calista needed 24-hour supervision, it does not affirmatively appear that it is more probable than not that any error in excluding the September 7, 2000, email was outcome determinative. Accordingly, the exclusion of the email does not require reversal of Marsha's convictions.

Marsha also claims that the exclusion of the September 7, 2000, email violated her right to present a defense. Because Marsha did not argue below that the exclusion of the email violated her right to present a defense, the claim of error is unpreserved. *Metamora Water Serv, Inc*, 276 Mich App at 382. We review the unpreserved claim for plain error affecting Marsha's substantial rights. *Carines*, 460 Mich at 763-764.

A criminal defendant has a constitutional right to present a defense. *Unger*, 278 Mich App at 249-250. However, the exclusion of evidence does not result in a constitutional deprivation of the right to present a defense when the defendant is able to present the defense

with other evidence. *People v Steele*, 283 Mich App 472, 489; 769 NW2d 256 (2009). Even without the September 7, 2000 email, Marsha was able to present the defense that she restrained Calista in order to prevent Calista from harming herself and others. Marsha presented several witnesses that testified to the harmful and dangerous behaviors of Calista. She also presented the testimony of Dr. Carter regarding the common characteristics of children who suffer from PDD and the need for those children to have supervision 24 hours a day. With this evidence, Marsha argued that she and Anthony restrained Calista as a means of protection. Accordingly, the exclusion of the September 7, 2000, email did not result in a deprivation of Marsha's right to present a defense.

Finally, Marsha argues that the trial court erred in excluding extrinsic evidence of Dr. Kaylor's alleged prior statement that Calista was a child from hell and that Marsha was a saint for taking care of her. We review the trial court's evidentiary decision for an abuse of discretion. *Unger*, 278 Mich App at 261.

Dr. Kaylor testified that after the fire Marsha came to his house with two women. While he remembered speaking with the women, he could not recall what was specifically said. Marsha offered extrinsic evidence—the testimony of the two women—of Kaylor's statements to the women that Calista was a child from hell and that Marsha was a saint for caring for her.

MRE 613(b) provides:

Extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. The provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

A determination whether a prior statement by a witness is inconsistent with the witness's testimony is within the trial court's discretion. *People v Graham*, 386 Mich 452, 457; 192 NW2d 255 (1971).

“When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement.” *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Dr. Kaylor did not remember his prior statement to the women. However, he acknowledged that he may have told the women that Calista was a child from hell and that Marsha was a saint for caring for Calista. He just did not recall whether he had actually made those statements. Thus, the prior statements of Dr. Kaylor were not inconsistent with his trial testimony. Accordingly, the trial court did not abuse its discretion in determining that Dr. Kaylor's prior statements were not inconsistent with his trial testimony and in precluding Marsha from presenting extrinsic evidence of those statements.

II. DOCKET NO. 298386

On appeal, Anthony Springer argues that the trial court erred in admitting the photograph of Calista's clothed, burned body on an autopsy table. He also argues that the trial court erred in admitting an autopsy photograph of Calista's airway. We review a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216.

For the reasons set forth in Marsha's appeal, *supra*, we conclude that the trial court did not abuse its discretion in admitting the photograph of Calista's clothed, burned body on the autopsy table. We also conclude that the trial court did not abuse its discretion in admitting the photograph of Calista's airway. The forensic pathologist testified that Calista died from asphyxia by products of combustion, and he was certain that Calista was alive during the fire because Calista's airway was "black with soot all the way down." He stated that the photograph of Calista's airway was an accurate depiction of the airway when he conducted the autopsy. Photographic evidence may be used to corroborate a witness's testimony. *Mills*, 450 Mich at 76. In addition, although the photograph of Calista's airway may be gruesome, gruesomeness alone does not require exclusion. *Gayheart*, 285 Mich App at 228. Before admitting the photograph, the trial court viewed it and heard Anthony's argument about its gruesomeness. The trial court found that the prejudicial value of the photograph did not substantially outweigh its probative value. Because the trial court was in the best position to make the MRE 403 determination, *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010), we conclude that the trial court's decision to admit the photograph fell within the range of reasonable and principled outcomes.

Anthony also argues that defense counsel was ineffective for stipulating to the admission of an autopsy photograph of Calista's abdomen that showed indentations caused by the chain and of photographs of Calista's bedroom that included Calista's burned body. Because no *Ginther*² hearing has been held, our review of Anthony's claim is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Counsel is given wide discretion in matters of trial strategy and is presumed to be effective in those matters. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Matters of trial strategy include decisions concerning what evidence to present. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Nothing in the record indicates that defense counsel's decision to stipulate to the admission of the autopsy photograph of Calista's abdomen, and of the bedroom photographs, was not sound trial strategy. Anthony did not contest that Calista was secured to her bed by a dog choke chain and zip ties and that she died in the fire. Moreover, the record does not establish that an objection to the photographs would have been sustained. The photographs showed how Calista was chained to the bed, as well as the tightness of the chain around her waist. The photographs corroborated the testimony of two law enforcement professionals, both of whom testified about how Calista was chained to the bed. Photographic evidence may be used to corroborate a witness's testimony. *Gayheart*, 285 Mich App at 227. And, the jurors were not required to rely solely on the testimony of the law enforcement professionals; the jurors were entitled to view for themselves how Calista was restrained. See *id.* Counsel was not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, Anthony has not

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

established that defense counsel's decision to stipulate to the admission of the autopsy photograph of Calista's abdomen and of the bedroom photographs fell below an objective standard of reasonableness.

Anthony next argues that his right of confrontation was violated when testimonial statements by Marsha to law enforcement officials were admitted into evidence, and he did not have the opportunity to cross-examine her. Although Anthony requested that the jury be instructed that Marsha's statements could not be used against him, he never objected to Marsha's statements on the basis that admission of the statements violated his right of confrontation. Accordingly, the issue whether Marsha's statements to the officials violated Anthony's right of confrontation is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764.

The Confrontation Clause, US Const, Am VI, bars the admission of testimonial statements of a witness who does not testify at trial unless the witness was unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, the United States Supreme Court declined to provide a comprehensive definition of "testimonial," but stated that whatever else the term covered, at a minimum, it applied to police interrogations and to prior testimony given at a preliminary hearing, before a grand jury, or at a former trial. *Id.* at 68. The Court later clarified that not all statements given in response to police interrogation are testimonial. *Michigan v Bryant*, ___ US ___; 131 S Ct 1143, 1153; 179 L Ed 2d 93 (2011). Statements given in response to police interrogation are testimonial only if the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution. *Id.* at 1154-1155; *Davis v Washington*, 547 US 813, 822; 125 S Ct 2266; 165 L Ed 2d 224 (2006).

The first contact that Marsha had with the law enforcement officials was when the first official arrived at defendants' house. The official testified that when he first arrived and began to look for a way to get to the second floor, Marsha told him that her daughter was upstairs in a bedroom restrained to the bed because of special needs. Thus, Marsha's first statement to the official does not appear to be in response to any police interrogation. Regardless, the circumstances indicate that any possible questioning that elicited Marsha's statement was for the primary purpose of meeting an ongoing emergency. *Davis*, 547 US at 822. Defendants' house was on fire, Calista was chained to a bed in an upstairs bedroom, and the official was the first emergency responder to arrive. Marsha's statement was a cry for help and was necessary to resolve the present emergency. *Id.* at 827. Because Marsha's statement was non-testimonial, its admission at defendants' trial did not implicate Anthony's right of confrontation. See *People v Taylor*, 482 Mich 368, 374; 759 NW2d 361 (2008).

The prosecutor concedes that Marsha's statement while she was being treated in the ambulance and Marsha's statement the day after the fire were testimonial statements.

Generally, for purposes of the Confrontation Clause, a witness whose testimony is introduced at a joint trial is not a "witness" against a defendant if the jury is instructed that it is

only to consider the witness's testimony against the codefendant. *Richardson v Marsh*, 481 US 200, 206; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Here, the jury was instructed that it was not to use any statement by Marsha in determining Anthony's guilt. Jurors are presumed to follow their instructions. *Id.* However, in *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court recognized "a narrow exception" to the principal that jurors are presumed to follow their instructions. *Richardson*, 481 US at 207. In *Bruton*, the Court held that a defendant is deprived of his right of confrontation when the confession of a codefendant inculcating the defendant is introduced at a joint trial, even if the jury was instructed to consider the confession only against the codefendant. *Bruton*, 391 US at 126, 137; *People v Pipes*, 475 Mich 267, 274-275; 715 NW2d 290 (2006). The Court later clarified that the narrow exception of *Bruton* only applies to "facially incriminating" confessions that "powerfully incriminat[e]" the defendant. *Richardson*, 481 US at 207-208.

The admission of Marsha's statement in the ambulance does not fall within the "narrow exception" of *Bruton*. In the ambulance, Marsha told the law enforcement official that Calista was in an upstairs bedroom restrained in her bed because of a special needs requirement, and that the fire started after she had been vacuuming and a burning smell emanated from the vacuum cleaner. The statement contained no reference to Anthony. The statement, therefore, did not identify Anthony and did not inculcate him in the charged crimes. Accordingly, there was no plain error in the admission of Marsha's statement in the ambulance. *Carines*, 460 Mich at 763.

In her subsequent statement to a different law enforcement official, Marsha never identified Anthony as the person who actually chained Calista to the bed. Marsha stated to the official that she secured the chain with cable ties and that she was the person who disconnected the chain from Calista in the morning. Marsha also stated that "they" had used the chain to restrain Calista for approximately two nights before the fire. Marsha further stated that "they" had previously used a lock on Calista's bedroom door, that "they" had used an alarm system, and that "they" concluded that the cables ties would be the only thing that would work to secure the chain. While Marsha's statement did not directly refer to Anthony, the term "they" obviously refers directly to Marsha and Anthony. The statement identified Anthony.

However, "[a] statement is not facially incriminating merely because it identifies a defendant; the statement must also have a sufficiently devastating or powerful inculpatory impact to be incriminatory on its face." *United States v Angwin*, 271 F3d 786, 796 (CA 9, 2001), overruled in part on other grounds *United States v Lopez*, 484 F3d 1186 (CA 9, 2007). Marsha said that Calista was only chained to her bed for two or three nights before the fire. Thus, the statement did not inculcate Anthony in the crimes of torture and child abuse as those crimes were described by the prosecutor. The prosecutor claimed that defendants chained Calista to her bed for several years before the fire. In addition, Marsha offered an explanation for the chaining of Calista to her bed and the earlier locking of Calista's bedroom door that suggested she and Anthony did those acts, not with the intent to cause any mental or physical harm to Calista, but with the intent to prevent Calista from hurting herself and others. Marsha told the official that Calista was a child with special needs who required 24-hour supervision. She explained that Calista engaged in self-mutilating behavior and harmed animals. She further said that Calista could not be trusted at night because she rarely slept and would get out of bed and into dangerous objects, such as razors, knives, and medications. Under these circumstances, Marsha's statement did not have a sufficiently devastating or powerful inculpatory impact against Anthony such that

admission of the statement constituted plain error, *Carines*, 460 Mich at 763. Thus, because the jury was instructed that Marsha's statement was not to be used against Anthony, the admission of the statement did not violate Anthony's right of confrontation. *Richardson*, 481 US at 206.

Anthony next argues that the trial court should have *sua sponte* ordered that defendants be tried by separate juries, or that they have separate trials. In the alternative, Anthony argues that his counsel was ineffective for failing to move for separate juries or for severance.

As Anthony recognizes, these issues are unpreserved. The failure to move for a separate trial precludes appellate review of that issue. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Moreover, "[s]everance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). Similarly, the use of separate juries is a form of severance that this Court evaluates under the same standard as the severance issue. See *id.* at 351-352. The lack of any motion for separate juries precludes appellate review of the issue.³

To establish that his counsel was ineffective for failing to request some form of severance, Anthony must overcome the presumption that counsel's actions were based on reasonable trial strategy. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Anthony has not overcome this presumption. Anthony and Marsha presented the same defense: they argued that they loved Calista, who was a special needs child and needed 24-hour supervision, and that any actions they took to restrain Calista's movement were to protect Calista from herself. Counsel may have reasonably surmised that a joint trial, where Anthony presented the same defense as Marsha, gave him the best opportunity to cast reasonable doubt on whether Anthony had the specific intent to cause Calista serious or extreme mental or physical pain or harm. In addition, Anthony has not established that defense counsel could have presented the trial court with an offer of proof that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced in a joint trial with Marsha, *Hana*, 447 Mich at 346, such that the trial court would have been mandated to grant a severance. Counsel is not ineffective for failing to make a futile motion. *Fike*, 228 Mich App at 182. Accordingly, counsel's failure to move for severance did not fall below objective standards of reasonableness.

Anthony argues that the admission of the preliminary examination testimony of Gustavo Pop, one of the firemen who responded to the fire, violated his right of confrontation because he never had an adequate opportunity to cross-examine Pop. Defense counsel, however, stipulated to the admission of Pop's preliminary examination testimony. A "[d]efendant may not assign error on appeal to something that his own counsel deemed proper at trial." *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Accordingly, Anthony is precluded from

³ Even if we were to review these unpreserved issues, Anthony has not established on appeal that severance was necessary to protect his substantial rights. See *Hana*, 447 Mich at 346-347.

arguing on appeal that the admission of Pop's preliminary examination testimony violated his right of confrontation.

However, Anthony claims that defense counsel was ineffective for stipulating to the admission of Pop's preliminary examination testimony. The Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness was unavailable to testify, and the defendant had a prior and adequate opportunity to cross-examine the witness. *Crawford*, 541 US at 57, 68. Testimonial statements include testimony given at a preliminary examination. *Id.* at 68. Anthony does not dispute that Pop was unavailable for trial and that he had an opportunity to cross-examine Pop at the preliminary examination. He claims that because the preliminary examination occurred more than one year before trial and because a different standard of proof is employed at a preliminary examination than at trial, he did not have an adequate opportunity to cross-examine Pop. The purpose of a preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed the crime. *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). Admittedly, the standard of proof at a preliminary examination is lower than the standard of proof at trial. See *id.* However, because the purpose of the preliminary examination was to establish whether there was evidence that Anthony committed the charged offenses, Anthony had an adequate opportunity to confront Pop at the preliminary examination. Accordingly, any objection by defense counsel to the preliminary examination testimony of Pop would have been futile. Counsel was not ineffective for failing to make a futile objection. *Fike*, 228 Mich App at 182. Defense counsel's performance in stipulating to the admission of Pop's preliminary examination testimony did not fall below objective standards of reasonableness.

Anthony next argues that the trial court erred when it departed from the guidelines range and imposed a sentence of 25 to 50 years' imprisonment for his torture conviction. We review for clear error a trial court's determination regarding the existence of a factor to depart from the recommended minimum sentence range. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). We review de novo whether a factor is objective and verifiable. *Id.* We then review for an abuse of discretion whether the factor constitutes a substantial and compelling reason to depart from the guidelines range. *Id.*

Generally, a trial court must impose a minimum sentence that falls within the recommended minimum sentence range under the legislative guidelines. MCL 769.34(2). A trial court may, however, depart from the guidelines range if it has a "substantial and compelling" reason for the departure. MCL 769.34(3). A "substantial and compelling" reason is "an objective and verifiable reason that keenly or irresistibly grabs [a court's] attention; is of considerable worth in deciding the length of a sentence; and exists only in exceptional cases." *Babcock*, 469 Mich at 257-258 (quotations omitted).

In its written sentencing departure evaluation, the trial court identified its reason for the departure: Anthony's offense variable (OV) score was more than double the maximum reflected

under the applicable sentencing grid.⁴ Anthony claims that the trial court’s reason was not objective and verifiable and was not substantial and compelling. We disagree.

Anthony’s OV score was objective and verifiable. The score was external to the mind of the trial court and was capable of being confirmed. See *Horn*, 279 Mich App at 43 n 6 (“To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.”). Further, the trial court did not abuse its discretion in determining that Anthony’s OV score provided a substantial and compelling reason to depart from the guidelines. Anthony received an OV score of 210 points. Torture is a class A crime, MCL 777.16d, and the highest OV score contemplated by the sentencing grid for class A crimes is 100+ points, MCL 777.62. Accordingly, Anthony’s OV score is attention grabbing, is of considerable worth, and does not exist in many criminal cases. *Babcock*, 469 Mich at 258.

Anthony also argues that the trial court failed to articulate any reason for the extent of the departure. A sentence, even when it constitutes a departure from the recommended minimum sentence range, must be proportionate to the seriousness of the defendant’s conduct. *Smith*, 482 Mich at 305. Thus, when a trial court departs from the recommended minimum sentence range, it “must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* at 304. Here, the trial court’s written departure evaluation indicated that the “goal of punishment” supported the extent of departure.

Moreover, on the record the trial court cited *Smith*, and quoted the *Smith* summary of proportionality, as follows:

It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting

⁴ The articulation in the sentencing transcript differs slightly from the trial court’s written articulation of the departure sentence. In the written articulation (the Departure Evaluation Form), the court identified a single reason for departing from the guidelines: “On the offense of Torture, defendant’s Offense Variables totaled 210 points, which was more than double the offense variable points that the guideline range of 135 to 225 [months] reflected.” The written articulation then identified the reason for the extent of the departure: “[t]he Court felt that the sentencing goal of punishment was a substantial and compelling reason to depart from the guidelines. The Court, on the Torture offense, sentenced the defendant to a term of 300 months to 50 years with the Department of Corrections.” By comparison, the hearing transcript indicates that the trial court introduced its articulation by stating “reasons” (plural) for the departure. Having reviewed both versions of the trial court’s articulation, we conclude that the trial court’s reason for the departure was Anthony’s extraordinarily high offense variable score, and that the court’s other comments supported the court’s reasoning for the departure and the extent of the departure. Cf. *People v Smith*, 482 Mich 292, 313; 754 NW2d 284 (2008) (trial court must explain both the reason for the departure and the reason for the extent of the particular departure).

the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.” [Quoting *Smith*, 482 Mich at 318.]

The trial court did not recite the specific OV and PRV (prior record variable) levels that would produce the sentence imposed on Anthony, but those levels are obvious from the statutes and the record. The recommended minimum sentence range on Anthony’s torture conviction was 135 to 225 months, which corresponded to his PRV level C and OV level VI. But, Anthony had an OV score of 210 points, which was more than double the maximum OV score the Legislature contemplated. MCL 777.62. A minimum sentence of 25 years’ imprisonment falls within the recommended minimum sentence range for a defendant who receives PRV and OV scores that correspond to PRV level E and OV level VI. MCL 777.62. As the *Smith* Court explained, “If a defendant has a low PRV score but an OV score over 100, the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score. This is because the Legislature did not contemplate a defendant with such a high OV score” *Id.* at 308-309.

In this case, placement of the specific facts of Anthony’s crime into the sentencing grid demonstrates that Anthony’s sentence is proportionate. Given the evidence that Anthony tortured Calista over the course of several years, it is readily apparent that the extent of the departure, which did not greatly exceed the recommended range, was warranted.

Docket No. 298385 is affirmed, and Docket No. 298386 is affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly