STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 30, 2002
v MONTEZ MOORE, Defendant-Appellant.	No. 224084 Wayne Circuit Court LC No. 99-000610

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v THOMAS CULBREATH, Defendant-Appellant.	No. 224085 Wayne Circuit Court LC No. 99-000610

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v D'ANDRE COFFEE, Defendant-Appellant.	No. 224086 Wayne Circuit Court LC No. 99-000610

Before: Whitbeck, C.J., Hoekstra, P.J., and Talbot, J.

PER CURIAM.

In these consolidated appeals, defendants Montez Moore, Thomas Culbreath, and D'Andre Coffee appeal as of right their jury trial convictions of two counts of first-degree felony murder, MCL 750.316; four counts of assault with intent to murder, MCL 750.83; two counts of

armed robbery, MCL 750.529; extortion, MCL 750.213; kidnapping, MCL 750.349; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Moore was sentenced to life imprisonment for the murder, thirty to sixty years' imprisonment for each of the assaults with intent to murder, and two years' imprisonment for the felony-firearm conviction. Defendant Culbreath was sentenced to life imprisonment for the murder, twenty to forty years for each of the assaults with intent to murder, and two years for the felony-firearm conviction. Defendant Coffee was sentenced to life imprisonment for the murder, thirty to sixty years for each of the assaults with intent to murder, and two years for the felony-firearm conviction. We affirm.

The events giving rise to these cases occurred on December 5, 1998. That evening began with the kidnapping of Athena Akins and her son, Leroy Akins, and culminated in the shooting death of Detroit Police Officer Shawn Bandy and injuries to other officers who were in pursuit of the suspects.

I. Defendant Moore

A. Separate Juries

Defendant Moore first argues that the trial court erred in denying his motion for separate juries which denied him a fair trial. We disagree. We review a trial court's ruling on a motion for separate juries for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682, amended 447 Mich 1203 (1994); *People v Kramer*, 108 Mich App 240, 257; 310 NW2d 347 (1981).

"The use of separate juries is a partial form of severance to be evaluated under the standard [ ] applicable to motions for separate trials." *Hana*, *supra* at 331. "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is required only where a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana*, *supra* at 331, 346; MCR 6.121(C). In order to make this showing, a defendant must provide the court with a supporting affidavit, or make an offer of proof, that the defenses are so inconsistent, mutually exclusive, and irreconcilable that it "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, *supra* at 346. Our Supreme Court in *Hana* stressed that "'[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.' Rather, the 'tension between defense must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Hana*, *supra* at 346-347.

We find no abuse of discretion. Moore failed to make the requisite showing of potential prejudice when he brought his motion for severance or separate juries. His motion was void of any reference to Culbreath or Coffee. Nor did Moore attach an affidavit or make an offer of proof as required to show that his defense was mutually exclusive of those of Culbreath or Coffee. The argument he made before trial was speculation about potential defenses of the other

occupants of the van, and was primarily focused on Langford, who was not tried with Moore. Although Moore mentioned the possible defenses of Culbreath and Coffee during argument on the motion, he did not raise it in the motion he filed and did not support it with an affidavit. Moore's argument was conclusory, and, as in *Hana*, it "lacked sufficient specificity to enable the trial court to accurately determine what the defenses would be, how the defenses would affect each other, and whether [ ] defendants' respective positions were indeed mutually exclusive or merely inconsistent." *Hana*, *supra* at 355. We conclude that the trial court properly denied Moore's motion for separate juries.

Further, the record does not show "significant indication" that the requisite prejudice in fact occurred at trial. *Hana*, *supra* at 346-347. Because none of the defendants testified at trial, "there were no express cross-accusations." *Id.* at 355. No statements by Culbreath or Coffee were admitted into evidence, nor was there evidence presented that anyone other than Moore was the shooter. The defenses were not mutually exclusive or irreconcilable. *People v Perez-DeLeon*, 224 Mich App 43, 59-60; 568 NW2d 324 (1997); see *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995).

Moore also argues that jury confusion prejudiced him because of the many limiting instructions that were given. He also contends that the trial court's limiting instructions, for the benefit of Culbreath and Coffee who were not in Pennsylvania, prejudiced Moore because the limiting instructions placed more emphasis on Moore's involvement. Moore has not demonstrated prejudice. Although Moore argues that he was prejudiced by the evidence of out-of-state events, the events in Pennsylvania directly pertained to Moore because he was apprehended there. Moore's general allegations that jury confusion resulted from the trial court's refusal to allow the jury to take notes, the many witnesses called, and the high profile nature of the case, are unpersuasive. The length and complexity of the trial is not the test for whether separate juries are warranted. Further, the trial court instructed the jury on numerous occasions about the proper use of evidence and gave limiting instructions. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Rodgers*, 248 Mich App 702, 717; ___ NW2d ___ (2001). Moore has not demonstrated error requiring reversal.

B. Closing Argument of Codefendant

Moore also argues that the trial court erred in denying his motion for mistrial on the basis of codefendant's counsel's closing argument, which Moore alleges denigrated codefendants. "We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion." *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Ortiz-Kehoe*, *supra* at 514.

Moore first argues that he was prejudiced by the closing argument of Coffee's counsel because the victims were visibly upset and forced to leave the courtroom. We find no impropriety in counsel's argument. The record indicates that counsel focused on the testimony and demeanor of Athena Akins and argued that her attitude on cross-examination was important

as it related to her credibility. Counsel stated at the beginning of her argument that her closing related only to her client, defendant Coffee. Further, the court instructed the jury to consider each defendant separately and that the arguments of counsel are not evidence.

Moore also argues that Coffee's counsel's closing argument improperly blamed Moore. Moore refers to counsel's comment that Officer Bonner wanted "whoever did this to fry." Moore argues that the implied suggestion is that if the jury were to believe that Coffee was not involved, then implicitly the jury would have to convict one of the other defendants. We disagree. The record suggests that counsel was challenging the credibility of Officer Bonner, or was offering an explanation why Coffee was charged. Counsel did not make any reference to Moore, nor did she suggest that Culbreath or Moore was the shooter. In making her closing argument on behalf of Coffee, counsel stated that Coffee did not go to Pennsylvania. She did not refer to Moore or suggest that his presence there was indicative of guilt. Accordingly, Moore has not demonstrated error.

C. Prosecutorial Misconduct

Moore next argues that the trial court erred in denying his motion for mistrial on the basis of improper remarks by the prosecution during closing argument. "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id*.

"Generally, prosecutors are accorded great latitude regarding their arguments and conduct. Further, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001), citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). "Prosecutors, however, should not resort to civic duty arguments that appeal to the fears and prejudices of jurors." *People v Bass (On Rehearing)*, 223 Mich App 241, 251; 581 NW2d 1 (1997). Also, appeals to the jury to sympathize with the victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). "The prosecutor's comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Moore first claims that the prosecutor's rebuttal argument shifted the burden of proof by observing that the defense did not question Officer Rice about his agreement with Eugene Childrey, thereby implying that defendants were required to do so. Moore also maintains that the prosecutor vouched for Childrey's credibility by suggesting that the defense's failure to question Officer Rice about the deal with Childrey meant that the deal was valid, and therefore Childrey's testimony was truthful.

We disagree. The prosecutor did not vouch for Childrey's credibility. He merely observed that although defense counsel questioned Childrey extensively about the agreement, defense counsel did not question Officer Rice when he testified. This argument was responsive

to Culbreath's closing argument in which Culbreath's counsel speculated about what Officer Rice had said to Childrey to induce him to make the deal. Viewing the prosecutor's argument in context, the remark did not suggest that the defense was required to disprove the agreement. The prosecutor's comment was not improper.

Moore next contends that the prosecutor appealed to the jurors' sympathies by telling them that time was valuable and that the deceased would not see another minute of it. Moore also argues that the prosecutor improperly referred to defendants as "killers," and asked the jury for justice.

We find no impropriety. The prosecutor began his rebuttal argument at about 4:00 p.m. on the Friday before the Fourth of July weekend, after the jury had heard lengthy closing argument from all the attorneys. The prosecution prefaced his rebuttal argument by commenting on the late hour. The remark that "Officer Bandy will never see another minute" was an isolated remark that served to stress the importance and seriousness of the case and to focus the jury's attention on the argument. Viewed in context, the prosecution was not appealing to the jury's sympathy.

We also reject Moore's challenges to the prosecutor's reference to defendants as "killers." Defendants were charged with first-degree murder and assault with intent to murder. The prosecution was arguing that the evidence proved that defendants killed Officer Bandy and assaulted the other officers with the intent to kill them. We conclude that the prosecutor was arguing the evidence and drawing reasonable inferences from the testimony, which is allowed during closing arguments. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998), citing *Bahoda*, *supra* at 282.

With regard to the prosecutor's plea for justice, the argument was not improper. When read in its entirety, it is clear that the prosecutor was not appealing to sympathy, but was seeking a verdict based on the evidence. The prosecutor stated: "I'm begging you for justice on the evidence, on all the evidence that's before you." See *Bass*, *supra* at 251. The prosecutor also told the jury that it was "not supposed to base this case on sympathy[.]" We find no misconduct.

Moore also claims that the prosecutor appealed to the jurors' sympathy by mentioning the victims' mothers. We disagree. The prosecutor was responding to the defense arguments, and he told the jury that it should not base its verdict on sympathy. In her closing argument, defense counsel for Coffee had questioned why Leroy did not console his mother during their ordeal in the van, and also questioned why Athena did not present herself as a sympathetic victim in court. Also in closing argument, Moore's attorney referred to the testimony of Officer Bandy's father, and stated "just like Mr. Bandy has a son, and sympathy is not supposed to enter into this. Mr. Moore has a son, and you're supposed to decide this case on the evidence." Viewed in light of defense counsels' arguments, the prosecutor's argument was not improper.

Moore also claims that the prosecutor made a civic duty argument by stating:

> And we talked about colors, dark, brown, medium, light. Okay, there's three colors in this case, green for the money they wanted; blue for the uniforms these officers had; red for the blood they spilled protecting us, protecting Athena Akins and her son.

We do not agree that this is a civic duty argument. The fact that it involved police officers was relevant because defendants were charged with first-degree murder for killing a peace officer during the performance of his duties. The prosecutor's remark was not a civic-duty argument "because it neither injected issues broader than [defendants'] guilt or innocence of the charges nor encouraged the jurors to suspend their powers of judgment." *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996).

Additionally, Moore argues that the prosecutor misstated the evidence when he stated that Culbreath was in Pennsylvania. Culbreath's counsel immediately objected and the prosecutor corrected the misstatement. We find no misconduct. Also, the trial court instructed the jury to disregard the statement.

Moore further claims that the prosecutor disparaged the defense by attacking each defense counsel and by telling the jury that the defense was not being "fair and square" in its argument. The record does not support Moore's claim that the prosecutor attacked defense counsels personally. It appears from the record that the prosecutor was merely arguing a different interpretation of the evidence. The prosecutor argued that defense counsels were not giving a complete picture of the evidence by attacking Childrey's credibility but failing to address the portions of his testimony that were corroborated by other witnesses.

Moore next argues that the prosecutor denigrated the defense for asserting alternate theories. Moore does not provide record support for this claim, nor does he specify the objectionable argument. Accordingly, we need not address this claim further. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Moore also argues that the prosecutor injected his personal opinion into his closing argument by telling the jury that he resented "the implication that the police are using people and telling them what to say[.]" It is improper for a prosecutor to give his opinion about the credibility of witnesses or to express his personal opinion about a defendant's guilt. *Bahoda, supra* at 282-283. Nor may the prosecutor ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of the office or that of the police. *Id.*.

In the instant case, the prosecutor's rebuttal argument was responsive to the defense's suggestion that the police would use Childrey to manufacture a case against defendants. The prosecutor did not give his personal opinion of defendants' guilt or of the credibility of witnesses. He merely observed that if the police were intent upon manufacturing a case, they already had Darryl Bogen and Jamal Randall who were named as possible suspects. We conclude that none of the challenged remarks amount to prosecutorial misconduct.

D. Admission of Hearsay Statements

Defendant next argues that the trial court abused its discretion in admitting as substantive evidence the hearsay statements of James Langford to Antonio Barnett, which inculpated Moore. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Bahoda*, *supra* at 289; *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). "An abuse of discretion is found when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *Id.* We review for clear error the trial court's findings of fact regarding the trustworthiness of the statement. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

The statements at issue were made at Barnett's sister's house shortly after the shooting. Barnett saw the van on the television news in a report, and he asked Langford about it. Langford told Barnett that a weapon had been "passed around" inside the van, and that Moore had gone to the back of the van and started shooting. Langford also commented on the weapon and the ammunition that were used, stating that they "wasn't no joke." He also said that they did not kidnap anybody.

The prosecution sought to admit these hearsay statements under MRE 804(b)(3) as statements made against the declarant's penal interest. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). MRE 804(b)(3) provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

"Our Supreme Court in *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996), stated that review of the admission of a statement against penal interest presents three subissues: '(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, [and] (3) whether a reasonable person in the declarant's position would have believed the statement to be true.'" *Schutte*, *supra* at 715-716.

The trial court determined that Langford was unavailable as a witness because he had been charged in the shootings and therefore could not be compelled to testify. *Poole*, *supra* at 163. The court also found that the statements were clearly against Langford's penal interest because his statements placed him at the scene of the shooting. By his own statements, Langford placed himself inside the van and in a position to see that a weapon was passed around and that Moore went to the back of the van and started shooting. The court concluded that a person in Langford's position would believe the statements to be true because he was placing himself in a position to have seen the activity in the van.

Further, the circumstances surrounding the making of the statements give them sufficient indicia of reliability. *Schutte*, *supra* at 717-718; *Poole*, *supra* at 163-165. Langford made the statements at issue soon after the incident. Also, Barnett's question to Langford asked about the van; there is no indication that Barnett asked Langford about the shooting. The statements were made in a non-custodial environment and the substance of the statements did not minimize Langford's role in the incident. Nor is there any suggestion that Langford would have had a motive to lie to Barnett in that situation. It is a fair inference that in that situation Langford would likely speak truthfully about the matter to Barnett.

In view of the totality of the circumstances surrounding the making of the statements, we are satisfied that the trial court correctly found that the statements were contrary to Langford's penal interest and contained sufficient indicia of reliability for admission. *Schutte*, *supra* at 717-719; *Poole*, *supra* at 165. Therefore, the trial court did not abuse its discretion in admitting Langford's statements to Barnett.

E. Jury Instructions

Moore next argues that the trial court erred in failing to give the requested jury instructions on the defenses of claim of right and duress, as well as the requested instructions on the lesser included offenses of intentional discharge of a firearm without malice, careless and reckless discharge of a firearm with injury resulting, and felonious assault. We disagree.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *Canales*, *supra* at 574. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Piper*, *supra* at 648.

The trial court did not err in denying defendant's request for a claim of right instruction. A defendant's "good faith claim of right or honest appropriation [is] an absolute defense to the crime of robbery because robbery involves a felonious intent to take properties to which a defendant has no title." *People v Martin*, 75 Mich App 6, 22; 254 NW2d 628 (1977), citing *People v Karasek*, 63 Mich App 706, 711-712; 234 NW2d 761 (1975); see *People v Cain*, 238 Mich App 95, 118-119; 605 NW2d 28 (1999). If defendants in good faith believed that the money which they demanded was their own or that they were entitled to it they could not be guilty of the crime of robbery. *Martin*, *supra* at 22; *Karasek*, *supra* at 711-712.

The evidence adduced at trial did not support the theory that defendants took money from Athena Akins to recoup a debt owed by her boyfriend, Eric Anthony. The record is void of any evidence that defendants had an honest belief that they took her money on the basis of a claim of right. Although there was some evidence that Anthony owed a gambling debt to Randall or Bogen, Randall and Bogen were not defendants in this case and no evidence was offered to suggest an agency relationship between them and defendants. The trial court properly denied the defense's request for a claim of right instruction.

Nor did the evidence adduced at trial support a defense of duress. "Duress is a common-law affirmative defense." *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). MCR 2.111(F)(3)(a). "It is applicable in situations where the crime committed avoids a greater harm." *Lemons*, *supra* at 246. "In order to properly raise the defense, the defendant has the burden of producing some evidence from which the jury can conclude that the essential elements of duress are present." *Id*.; *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998). The elements of a duress defense are:

> (1) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> (2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> (3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> (4) The defendant committed the act to avoid the threatened harm. [*Lemons, supra* at 246-247.]

"A mere threat of future injury is insufficient to support a defense of duress." *Ramsdell*, *supra* at 401, citing *Lemons*, *supra* at 247. "[T]he threatened danger must be present, imminent, and impending." *Ramsdell*, *supra*; *Lemons*, *supra*. Duress is not a valid defense to homicide. *Ramsdell*, *supra*; *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). The defendant is required to produce some evidence on all of the elements of the defense of duress before he is entitled to a duress instruction. *Lemons*, *supra* at 248. "Unless a defendant submits sufficient evidence to warrant a finding of duress, the trial court is not required to instruct the jury on that defense." *Id.* (citation omitted).

On appeal, Moore does not brief this issue with specificity. Moore argues generally that "there was evidence of threatening conduct," which "suggested defendant was acting out of fear of retaliation." Moore does not cite the record or support his argument with any record evidence. Nor does Moore specify the source of the alleged threatening conduct. *Traylor*, *supra* at 464. In the argument he made before the trial court, Moore claimed that it was evidence of duress that Langford threatened to kill the person who went through Athena's purse and gave Langford less than the total amount taken from her purse. Moore also relied below on Barnett's testimony that the others in the van wanted to be let out before the shooting started and that Langford would have "flipped the script," meaning he would have killed anyone who tried to leave the van. Moore also noted the testimony from witnesses that Langford was in control of the situation.

The evidence does not support a duress defense. With respect to the underlying felonies, there was no evidence that defendants acted under threats from Langford. As the trial court correctly observed, Langford's threat to kill the person who did not give him the full amount of money taken from Athena's purse was not evidence that the others participated in the underlying felonies due to duress. With respect to the shooting, duress is not a defense to homicide, and therefore Barnett's testimony that Langford told him that the others in the van wanted to be let out before the shooting is not germane. Further, Barnett clarified his testimony by explaining that his belief that Langford would have "flipped the script" was his interpretation of Langford's

statements. Because the evidence did not support a duress defense he was not entitled to a duress instruction.

Moore argues that the trial court erred in refusing his request for jury instructions on the lesser offenses of careless or reckless discharge of a firearm with injury resulting, intentionally aiming a firearm without malice, discharge of a firearm aimed intentionally without malice, and felonious assault. We disagree.

"[T]he statutory offense of killing or injuring a person by careless, reckless, or negligent discharge of a firearm [is] a cognate lesser included offense to murder." *People v Heflin*, 434 Mich 482, 496 n 10; 456 NW2d 10 (1990) (Riley, C.J.,), citing *People v Beach*, 429 Mich 450, 462-463; 418 NW2d 861 (1988). "It is the evidence presented at trial in each case which determines whether the court has a duty to instruct on cognate lesser included offenses." *Id.* at 463-464.

In this case, the evidence did not support a finding that the firing of the weapon was unintentional. See *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998); MCL 752.861. Childrey testified that Moore fired the rifle "numerous times" and the police found nineteen shell casings inside the van. Moore shot out of the back of the van at the police vehicles pursuing the van. Further, Langford had told Athena Akins that they would get into a shootout with the police if necessary, because they were not going to go to jail for her. Also, Childrey testified that there was discussion inside the van regarding who would shoot. We conclude that the evidence did not support giving the instruction of careless, reckless, or negligent discharge of a firearm resulting in death.

Moore also argues that he was entitled to have the jury instructed on intentionally aiming a firearm without malice and discharge of a firearm aimed intentionally but without malice, MCL 750.233 and MCL 750.234. Moore argues that the evidence supported a finding that the spraying motion of the shots indicated that it was not done to injure, but merely to scare the police into abandoning the chase. Moore argues that by refusing to give this instruction the trial court implicitly made a finding of malice. We disagree. The evidence adduced at trial does not support a finding that the gun was aimed or discharged without malice. As discussed previously, the number of times the gun was shot, as well as the remarks by Langford to Athena Akins and the discussion inside the van, all militate against a finding that the shooting was done without malice. Additionally, the windshield of the squad car in which Officer Bandy was riding had five bullet holes in it and the shell casings found in the van indicated that nineteen shots were fired. We find no error in the trial court's refusal to give the requested instructions.

Moore also contends that the trial court erred in failing to instruct the jury on felonious assault. We conclude that even if such an instruction should have been given, the failure to do so was harmless. Felonious assault is a lesser included offense of assault with intent to commit murder. *People v Hendricks*, 446 Mich 435, 440; 521 NW2d 546 (1994). "Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given." *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990), citing *Beach*, *supra* at 491. Here, the trial court instructed the

jury on both assault with intent to murder and assault with intent to do great bodily harm less than murder. We conclude that the jury's rejection of assault with intent to do great bodily harm reflects an unwillingness by the jury to convict on felonious assault. *Id.*. Therefore, because the jury found Moore guilty of the greater offense of assault with intent to murder, and rejected the lesser offense of assault with intent to do great bodily harm, any error in failing to instruct on the even lesser offense of felonious assault was harmless. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1995); *Zak*, *supra* at 16.

F. Admission of Weapons

Finally, Moore argues that the trial court abused its discretion in admitting the weapons seized in Pennsylvania because there was no indication that these weapons were used to commit the charged offenses. Moore maintains that the weapons were not probative of any issue before the court and served only to show Moore's propensity for bad acts under MRE 404(b).

A trial court's decision to admit evidence is subject to review for abuse of discretion. *Ortiz-Kehoe*, *supra* at 516. Generally, all relevant evidence is admissible at trial. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001); MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Aldrich*, *supra*. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001).

The prosecution made an offer of proof to show that the guns seized in Pennsylvania were used in the commission of the charged offenses. Outside the presence of the jury, Childrey testified that when they left the van after the shooting, Moore disposed of the rifle, and others dumped one .40 caliber handgun and one .45 caliber handgun near a garbage can. Ten minutes later, in the basement of the Roxbury house, Childrey saw Coffee and Langford with guns, a .40 caliber and a .45 caliber. Childrey saw them again with the guns at Eastland Village. There, Childrey saw Coffee and Langford give their guns to Moore. Childrey testified that these guns he saw were not the same ones that were dumped. At the police station, Childrey was shown the guns that were confiscated in Pennsylvania. He examined them and indicated that those were the guns he saw in the van. At trial, Childrey testified that the guns looked like the ones that Coffee and Langford had in the van.

Contrary to defendant's claim, this is not a MRE 404(b) issue. The guns are not "other acts" evidence to show character and action in conformity therewith, because the prosecution maintained that these guns were the guns used to commit the instant offenses. See *Watson*, *supra* at 576; *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (2001). In light of the prosecution's offer of proof that the guns were involved in the charged offenses, their probative value was not outweighed by their prejudicial effect. The trial court did not abuse its discretion in admitting the evidence.

II. Defendant Culbreath

A. Reinstatement of Charges

Defendant Culbreath first argues that the circuit court erred in reinstating charges of first-degree murder and assault with intent to murder. The district court dismissed these charges on the basis of its assessment of Childrey's credibility, and also on the evidence that Culbreath refused to shoot at the police. Culbreath argues that the circuit court erred in failing to defer to the district court's credibility assessment.

> A magistrate's decision to bind a defendant over for trial is afforded great discretion and will not be disturbed absent an abuse of discretion. In reviewing the district court's decision to bind a defendant over for trial, a circuit court must consider the entire record of the preliminary examination, but may not substitute its judgment for that of the magistrate. Reversal is appropriate only if it appears on the record that the district court abused its discretion. Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. [*People v Crippen*, 242 Mich App 278, 281-282; 617 NW2d 760 (2000) (citations omitted).]

See *People v Goecke*, 457 Mich 442, 462-463; 579 NW2d 868 (1998).

"To bind a defendant over for trial, the magistrate must be satisfied that there is sufficient evidence that an offense has been committed and that there is probable cause to believe that the defendant committed it." *Crippen, supra* at 282; MCL 766.13; MCR 6.110(E); *Goecke, supra* at 469. "The magistrate has the duty to pass judgment on the credibility of witnesses as well as the weight and competency of the evidence, but the magistrate should not engage in fact finding or discharge a defendant when the evidence raises a reasonable doubt regarding the defendant's guilt." *Crippen, supra*. "The district court's inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence." *Id.*, citing *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

The elements of first-degree murder for the murder of a peace officer during the performance of his duties, MCL 750.316(1)(c), are: (1) that the defendant committed a murder; (2) that the victim was a peace officer; (3) that the victim was "lawfully engaged in the performance of any of his or her duties as a peace officer;" and (4) that the defendant knew the victim was a peace officer performing lawful duties at the time of the murder. *People v Herndon*, 246 Mich App 371, 385-386; 633 NW2d 376 (2001). "The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995), citing *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993); MCL 750.83. Lastly, Culbreath was also charged with first-degree felony murder for a murder

occurring during the commission of a felony. "The elements of first-degree felony murder are (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b)." *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001), citing *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999); MCL 750.316(1); MCL 750.316(1)(b) includes the offenses of robbery, kidnapping, and extortion, with which Culbreath was also charged.

> With respect to these charges, the prosecution pursued an aiding and abetting theory.
>
> . . . To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Carines*, *supra* at 757-758 (citation omitted.).]

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, *supra* at 757; see *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

At the conclusion of the preliminary examination, the district court dismissed the charges of first-degree murder and assault with intent to murder. The court found that Childrey lacked credibility and noted the attractive deal offered to him by the prosecution. The district court ruled with respect to the murder and assault with intent to murder charges against Culbreath:

> Mr. Culbreath's case was the more difficult to analyze. And it may seem contradictory, but I'm not going to bind him over on either of the homicides or the AWIMs. Despite the fact that he had prepared himself for the kidnapping, that is he had on the skull cap, he tried to hide his face, he supplied the weapon that ended up eventually killing Officer Bandy. He refused, when directed to buy [sic] Mr. Langford, to shoot at the police that were following him – and I believe that's the only thing standing between him and the two murder charges as well as the assault with intent to murder. So Mr. Culbreth [sic] is bound over on all charges except the homicides and assault with intent to murder.

We agree with the prosecution and the circuit court that probable cause existed to bind over Culbreath on these charges. The evidence presented at the preliminary examination supported a finding that Culbreath acted with the intent to kill or with intent to do great bodily harm, or created a high risk of death or great bodily harm knowing that death or such harm was a likely result of his actions. The testimony showed that Culbreath wore a mask and was armed. The dawoo rifle used to kill Officer Bandy was obtained from Culbreath's home. Athena Akins testified to statements by Langford that foreshadowed the shooting. Langford told Athena Akins

that they would get into a shootout with police, and the others in the van indicated their agreement with that statement. Culbreath's statement inside the van refusing to shoot but telling some else to shoot, "Naw, you shoot them," could be interpreted as showing his complicity in the shooting. A fair interpretation of the evidence was that Culbreath, by his statement, "Naw, you shoot them," was not distancing himself from the offense or indicating a reluctance to participate, but rather was offering encouragement to Moore who was holding the rifle. The interpretation of this statement is a question of fact, and it was sufficient to establish probable cause to believe that Culbreath aided and abetted the shooting.

Culbreath also argued that the felony murder rule does not apply because forty-five minutes elapsed between the time the kidnapping victims were released and the shooting of the police. We disagree. The trial court noted Childrey's testimony that within two minutes of releasing Athena and Leroy, the police were upon them. Also, independent of Childrey's testimony on this point, the short period of time between the victims' release and the police chase was established through the testimony of Athena and Officer Bonner. On the basis of this evidence, defendants had not reached a place of temporary safety. See *People v Davenport*, 122 Mich App 159, 165; 332 NW2d 443 (1982). The evidence that Culbreath participated in the underlying felonies supported the charge of felony murder because the felonies were not complete at the time of the shooting.

In light of this evidence, we conclude that the district court abused its discretion in dismissing the charges against Culbreath. The evidence offered at the preliminary examination supported a finding of probable cause to believe that Culbreath aided and abetted the first-degree murder of Officer Bandy and the assaults with intent to murder against the other officers. Additionally, with respect to the felony-murder charge, the district court abused its discretion in dismissing the charge against Culbreath, especially in light of its conclusion that the underlying felonies had not been completed at the time that the police came upon defendants, and therefore defendants were still engaged in the commission of a felony at the time of the shooting. Therefore, the trial court properly reinstated first-degree murder and assault with intent to murder charges against Culbreath.

B. Sufficiency of Evidence

Next, Culbreath challenges the sufficiency of the evidence supporting his convictions of murder and assault with intent to murder on the ground that there was insufficient evidence that he acted with malice. We disagree.

To determine whether evidence was sufficient to establish an element of a crime, we "view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the element of the crime was proven beyond a reasonable doubt." *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial." *People v Nowa*ck, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute

satisfactory proof of the elements of a crime." *Carines*, *supra* at 757. "The intent to kill may be proven by inference from any facts in evidence." *Barclay*, *supra*.

> The elements of murder of a peace officer in the performance of his duties are:
>
> > First, that the defendant committed a murder. Second, that the victim was a "peace officer or corrections officer." Third, that the victim was "lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer." Fourth, that the defendant knew the victim was a peace officer or corrections officer performing lawful duties at the time of the murder.
> >
> > The first element under MCL 750.316(1)(c) incorporates the proof necessary to sustain a conviction for murder. The crime of murder is defined by statute in Michigan and may be first-degree deliberate and premeditated murder, second-degree murder, or felony-murder. All three of these forms of murder require proof of some form of criminal intent. First-degree murder is a specific intent crime, which requires proof that the defendant had an intent to kill. Second-degree murder is a general intent crime, which mandates proof that the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. Felony-murder is also a general intent crime, requiring evidence of one of the three intents necessary to prove second-degree murder. [*Herndon*, *supra* at 385-386 (footnotes omitted).]

Felony murder is defined as:

> > Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, *robbery*, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, *extortion*, or *kidnapping*. [MCL 750.316(1)(b); MSA 28.548(1)(b) (emphasis added).]
> >
> > Felony murder consists of the following elements: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony-murder statute. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000); *Carines*, *supra* at 758-759. [*People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000) (emphasis added).]

We conclude that the prosecution presented sufficient evidence of malice to support Culbreath's convictions of murder and assault with intent to murder. Childrey testified that the rifle, which was obtained from Culbreath's home, was passed around inside the van. Coffee said, "Bang at 'em," and Culbreath instructed someone else, "Naw, you shoot them." The evidence showed that Moore shot the rifle out of the back window, firing the weapon "numerous times," and that nineteen empty shell casings were found inside the van. Further, Langford had alluded to the

possibility of a shootout with the police. Athena Akins testified that when she was released from the van, the driver warned her that "if the police got behind the van, that they were going to have a shoot out with the police, because they were not going to jail for [her]." She testified that the others in the van indicated their agreement, "yeah," and acted "as if it was a joke or something." Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient for the jury to find that Culbreath aided and abetted Moore in the shooting, and that they acted with intent to kill, with an intent to inflict great bodily harm, or with an intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. *Herdon*, *supra* at 486.

Contrary to Culbreath's contention that the underlying felonies had been completed at the time of the shooting, the prosecution offered evidence through the testimonies of Childrey, Athena Akins, and the police officers involved in the chase to establish that within minutes of the release of Athena and Leroy Akins from the van, the police were in pursuit of the van. Therefore, the underlying felonies had not been completed and the felony murder rule applies. See *Davenport*, *supra* at 165. Viewing the evidence in the light most favorable to the prosecution, the jury could have found Culbreath guilty beyond a reasonable doubt of first-degree murder of a peace officer and felony murder.

The evidence adduced at trial also supported Culbreath's convictions of assault with intent to murder. On the basis of the evidence previously discussed, the jury could infer that Culbreath acted with intent to kill. *Barclay*, *supra* at 670, citing *Warren (After Remand)*, *supra* at 588.

C. Severance

Culbreath also argues that the trial court abused its discretion in denying his motion for severance which denied him a fair trial. We disagree.

The affidavit submitted in support of the motion for severance failed to demonstrate that Culbreath's substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice. *Hana*, *supra* at 346; MCR 6.121(C). In his affidavit, Culbreath indicated that his theory would be that he "did not commit or aid and abet in the commission of the alleged offenses." Culbreath "anticipated that each defendant will vigorously contend that the other codefendant committed the offenses" and Culbreath's theory of defense was that codefendants coerced him into going along with their plan to extort money, and that Culbreath felt that his life was in danger if he did not do so.

Culbreath's offer of proof was insufficient to warrant severance. The affidavit offered in support of his motion for severance merely speculated about possible defenses of codefendants that could arise, and was not specific regarding which defenses would be employed by which defendants. There was no indication that Culbreath or any of the other defendants would testify at trial, nor did he offer a basis for anticipating the intended defenses of codefendants. Culbreath's argument for severance was speculative and conclusory, and did not establish that Culbreath's defense would be irreconcilable with and mutually exclusive of those of codefendants such that his substantial rights would be prejudiced and that severance was the

necessary means of rectifying the potential prejudice. *Hana*, *supra* at 346. We conclude that the trial court did not abuse its discretion in denying the motion for severance. *Id.* at 331, 355; *Cadle*, *supra* at 468.

Further, the record does not show "significant indication" that the denial of severance prejudiced Culbreath at trial. *Hana*, *supra* at 346-347. Because none of the defendants testified at trial, "there were no express cross-accusations." *Id.* at 355. Nor was there evidence presented that anyone other than Moore was the shooter. Defendants' defenses were not mutually exclusive or irreconcilable. Therefore, severance was not required. *Perez-DeLeon*, *supra* at 59-60; see *Cadle*, *supra* at 469.

Culbreath has failed to make the requisite showing of prejudice. Culbreath argues that the joint trial prejudiced him because of the large amount of evidence that was admissible against only defendant Moore, as well as all evidence pertaining to events in Pennsylvania, which prevented the jury from considering Culbreath's culpability, if any, separately from the other defendants. Culbreath maintains that the trial court failed to give limiting instructions, and that the limiting instructions that were given were ineffective and confused the jury.

The record shows that although the trial court did not caution the jury after the testimony of each witness concerning Pennsylvania, the court did instruct the jury that it should consider evidence only as it pertains to each defendant. The record indicates that the trial court instructed the jury on numerous occasions about the proper use of evidence and gave limiting instructions. The trial court also instructed the jury many times that defendants are to be considered separately. Juries are presumed to follow their instructions. *Graves*, *supra* at 486. There is no indication from the record that the jury did not understand, did not retain, or did not follow the trial court's instructions.

Finally, for the reasons discussed previously, we also reject Culbreath's claim that counsel for codefendant Coffee made improper remarks during her closing argument that prejudiced codefendants.

D. Prosecutorial Misconduct

Culbreath also alleges that prosecutorial misconduct deprived him of a fair trial. We disagree.

Culbreath's first allegation of prosecutorial misconduct occurred during the direct examination of Childrey by the prosecution:

Mr Simowski [The Prosecutor]: Were there any other guns that you saw?

Mr. Cripps [Defense Counsel for Culbreath]: Objection, Your Honor, Objection.

THE COURT: What's the objection?

Mr. Simowski: Doesn't want it in, I guess.

Mr. DuBose [Codefendant's Counsel]: I object to that. The objection is –

Mr. Simowski: Well what?

Mr. Cripps: It's not a matter of whether I want it in. As a lawyer, I follow the Rules of Evidence, and I'm going to object. [Emphasis added.]

A bench conference was held, after which the prosecution proceeded to a different line of questioning. Culbreath fails to explain how this remark, "Doesn't want it in, I guess," albeit arguably facetious and uncalled for, was a denigration of defense counsel or how it deprived him of a fair trial. This claim of prosecutorial misconduct is without merit.

Next, Culbreath alleges that the prosecutor denigrated defense counsel during Childrey's cross-examination by Culbreath's attorney. When the prosecution objected to the form of defense counsel's question attempting to impeach Childrey with a prior statement, the following exchange occurred:

Mr. Simowski [The Prosecutor]: Judge, I'm going to object to the form of the question, because if you're impeaching – it didn't say somebody else had the rifle, it was "Monte had the rifle, I didn't see any other guns. I seen a Glock in there and JT had it." That's what you got to do when you impeach. You can't paraphrase the impeaching answer.

Mr. Cripps [Defense Counsel]: Fine, I appreciate the interruption, but Judge, that's not my point.

Mr. Simowski: Well, that's what – see, that's deception, Judge.

THE COURT: Okay—

Mr. Cripps: That's not deception. I don't appreciate it, Mr. Simowski.

Viewed in context, the prosecutor's remark does not constitute misconduct. The prosecutor was objecting to defense counsel's characterization of Childrey's prior testimony. The objection was prompted by defense counsel asking Childrey, referring to Childrey's prior statement, "You come right out and say that you saw somebody else with the rifle, and the [sic] you say I didn't see any other guns, right?" The prosecutor objected because the complete statement was, "Monte had the rifle, I didn't see any other guns. I seen a Glock in there and JT had it." The record reveals that defense counsel's question was deceptive inasmuch as it misstated the testimony. We find no misconduct. Further, even if the prosecutor's remark could be construed as suggesting that defense counsel was engaging in deception, this isolated remark over the course of a lengthy trial did not deny defendant a fair trial.

Culbreath also contends that the prosecutor engaged in misconduct by making improper comments in his rebuttal argument that Culbreath's counsel was trying to mislead the jury and was not being forthright. Specifically, Culbreath cites the prosecutor's argument in which he states: "And Mr. Cripps indicated with Sergeant Danny Reed, that's what I'm talking about not being totally forthright." We disagree. The record indicates that the prosecutor then proceeded

to refer to the evidence and dispute defense counsel's interpretation of the evidence as given in his closing argument:

> He[Mr. Cripps] said well nothing matched in this case, nothing matched. That matched. The nineteen 223's matched. Do you see all the questions are framed to mislead a little bit, and when Mr. Cripps talked about Coffee filters in it's the same, it's not the same, it's a Remington .45 caliber metal jacket bullet.

The prosecution was arguing the evidence and responding the defense's closing argument, which is proper in rebuttal. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Next, Culbreath challenges the prosecutor's comments in rebuttal that "there were some things said by the defense that weren't necessarily fair and square," and about defense counsel's theory that Childrey fabricated his testimony in order to secure the deal with the prosecution. The prosecutor also attacked Culbreath's counsel's theory that this incident involved Randall and Bogen and a drug deal. The record reveals that the prosecution's argument was proper. The prosecution was responding to arguments made during the defense's closing argument, and continually focused on the evidence, or lack thereof, to refute defense counsel's theory. *Messenger*, *supra* at 181. The prosecutor's rebuttal argument was proper.

Culbreath also cites the prosecutor's reference to "part three of Mr. Cripps' master plan" regarding the unidentified fingerprints found in the van, as well as the following sarcasm:

> So, whose [sic] being forthright? And the one thing I am thankful for is that Mr. Cripps did admit that his client touched the door handle. For a minute there I thought he was going to say Bogen and Randall carried Mr. Culbreath in his sleep and put his thumbprint there or something, but at least he admitted that.

Culbreath maintains that such remarks improperly suggested that the defense was attempting to mislead the jury. We disagree. The remarks must be viewed in the context of defense counsel's closing argument. The prosecutor's argument merely commented on the implausibility of the defense's interpretation of the evidence, and was not improper.

Culbreath also argues that the prosecutor improperly appealed to the jury's fear of crime in the community by remarking during the direct examination of Investigator Johnson: "Unfortunately, there's way too many homicides occurring in the city of Detroit every year, right". The defense objected immediately, and the prosecution stated, "I'll move on." Although the editorial remark was not appropriate, it does not rise to the level of misconduct that denied Culbreath a fair trial.

Culbreath's remaining allegations of prosecutorial misconduct reiterate those raised by defendant Moore. We have previously addressed these claims and concluded that they lack merit.

E. Jury Request for Testimony

Culbreath contends that the trial court abused its discretion in refusing the jury's request for a transcript or to have testimony read. "In response to a deliberating jury's request to have testimony reread, the rereading and extent of rereading are within the trial court's discretion." *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). We review decisions regarding the rereading of testimony for an abuse of discretion. *Id.*.

The jury's request for transcripts came just over an hour after deliberations had begun. The trial court denied the request and instructed the jurors to rely on their collective memories. Contrary to Culbreath's interpretation of the trial court's remarks, the court did not foreclose the possibility of the jury receiving transcripts in the future if it became necessary. The court told the jury:

> . . . But now if it becomes absolutely necessary, okay, that you have to have some type of testimony read, then the Court will reconsider its ruling, but at this time I'm not going to do it. I want you to go back and think about it, but now if you come back and you say Judge, listen we have spent ten hours on this and we need a certain part or certain testimony or all the test – then the court will reconsider its decision, but not right now.

On the basis of this record, we conclude that the trial court did not abuse its discretion in denying the jury's request.

F. Cumulative Error

We find no merit to Culbreath's claim that the cumulative effect of errors at trial requires reversal.

III. Defendant Coffee

A. Severance

Defendant Coffee first argues that the trial court abused its discretion in denying his motion for severance and that the joinder of his trial with codefendants' denied him a fair trial. We disagree.

In his motion for severance, Coffee anticipated that he would assert a defense of duress. He planned to testify that Langford prevented him from leaving the van and that Langford threatened his life. Coffee argued that his defense would give rise to inculpatory statements against Langford, which would compel Langford to challenge Coffee's testimony.

Coffee's argument fails for several reasons. First, Coffee did not allege in his motion that his defense is mutually exclusive of and irreconcilable with the defenses of codefendants. He alleges merely that the defenses are antagonistic, which is insufficient to require severance.

Hana, *supra* at 348-349. Second, Coffee's motion argued that his defense is antagonistic to Langford and addressed severance only from Langford, not from Culbreath and Moore. Langford was not tried with Coffee, and therefore Coffee has no viable argument on this issue. Third, to the extent that Coffee later joined Culbreath's motion for severance, he failed to demonstrate grounds for severance. As discussed previously, Culbreath's motion, which also anticipated a duress defense, did not specifically address how defendants' respective defenses would be mutually exclusive of and irreconcilable with one another. We find no abuse of discretion in the trial court's denial of the motion for severance. *Hana*, *supra* 346, 355; MCR 6.121(C). Nor has Coffee demonstrated prejudice at trial resulting from evidence admissible against codefendants, for the reasons discussed in our resolution of defendant Culbreath's issues on appeal.

B. Prosecutorial Misconduct

Coffee also argues that the prosecutor engaged in misconduct by denigrating defense counsel and improperly appealing to the jurors' fears and sympathies, which denied him a fair trial. Coffee advances the same arguments as Culbreath on this issue. For the reasons given denying Culbreath's request for appellate relief on this issue, we likewise reject Coffee's claims of error.

C. Jury Instructions

Next, Coffee argues that the trial court gave incomplete jury instructions on aiding and abetting, which violated *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980) and diminished the prosecution's burden of proving the element of intent beyond a reasonable doubt. Coffee also claims that the trial court erred in refusing his request for a duress instruction. We find no error.

With regard to the aiding and abetting instruction, Coffee does not specify the alleged inadequacy. After reviewing the record, we conclude that the trial court's aiding and abetting instruction to the jury accurately stated the law. *Mass*, *supra* at 627-628.

We also find no merit to Coffee's claim that the trial court's instructions to the jury diminished the prosecution's burden of proving Coffee's intent. Coffee claims that "the instructions allowed the jury to convict for murder and assault even if they thought that Coffee only intended to participate in the kidnapping, robbery, and extortion." Contrary to Coffee's argument, the court instructed the jury to consider each defendant separately with regard to whether each had the requisite intent for the murder and assault with intent to murder charges:

> Mr. Moore and Mr. Culbreath and Mr. Coffee are also charged with First Degree Felony Murder. The defendant is charged with First Degree Felony Murder. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant caused the death of Shawn Bandy. That is that Shawn Bandy died as a result of multiple gunshot

> wounds. Second, that the defendant had one of these three states of mind, he intended to kill or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm was the likely result of his actions. . . . Third, that when he did the act that caused the death of Police Officer Shawn Bandy, the defendant was helping someone else commit in the perpetration or attempted perpetration of an Armed Robbery and or Extortion, and or kidnapping.
>
> * * *
>
> You should consider each defendant separately. Each one is entitled to have his case decided on the evidence and the law that applies to him. It is not enough merely to find that the defendant agreed to commit the crime of Armed Robbery, Extortion and Kidnapping. *Instead, you must determine as to each defendant separately whether he intended to kill, whether he intended to do great bodily harm, or whether he created a very high risk of death or great bodily harm, knowing that death or such harm was the probable result of what he did*. [Emphasis added.]

The jury instructions adequately stated the law and did not allow the jury to convict Coffee of murder without determining his intent. *Nowack, supra* at 408; *Herndon, supra* at 386.

Also, Coffee argues that "[t]he abandonment instruction was inadequate to cover [the] aspect of his defense" that "he lacked the intent necessary to be guilty." Our review of the record indicates that the trial court's instruction to the jury on abandonment fairly presented the issues for trial and sufficiently protected defendant's rights. *Piper, supra* at 648; *People v Cross*, 187 Mich App 204, 206-207; 466 NW2d 368 (1991).

Lastly, for the reasons given previously in our resolution of Moore's issues on appeal, we reject Coffee's claim that the trial court erred in refusing to give a duress instruction.

D. Sufficiency of Evidence

Next, Coffee contends that the evidence was insufficient as a matter of law to support his convictions of murder and assault with intent to murder because there was no evidence that he acted with malice. We disagree.

The evidence showed that Coffee wore a mask and was armed. He told the others that the police were following them. After Langford told Moore to shoot the police, and Moore moved from the front seat of the van to the back seat with the rifle, Coffee said, "Bang at 'em. Bang at 'em." Although Childrey explained that "bang at 'em" meant to get away, the jury could have rejected Childrey's testimony on this point and could have concluded that Coffee was urging someone to shoot at the police. This is a reasonable conclusion, especially in light of Culbreath's statement, "Naw, you shoot them," which indicates that they were discussing shooting the police, and not bailing out of the van. Further, Athena testified that when Langford had alluded to the possibility of a shootout with the police, the others in the van indicated their agreement, "yeah," and acted "as if it was a joke or something." Viewing the evidence in the

light most favorable to the prosecution, we conclude that there was sufficient evidence to support a finding that Coffee had the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *Herndon*, *supra* at 385-386.

E. Cumulative Error

Lastly, Coffee argues that the cumulative effect of trial errors deprived him of a fair trial. Because Coffee's individual allegations of error lack merit, we reject his claim that the cumulative effect of errors denied him a fair trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot