STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2003
v	No. 233018 Genesee Circuit Court
SHAREE PAULETTE MILLER, Defendant-Appellant.	LC No. 00-006086-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

I. Nature of the Case

Defendant, Sharee Miller, conspired with her recently-acquired lover to kill her new husband. Miller's lover, former police officer Jerry Cassaday, killed Miller's husband and, months later, killed himself. Before his suicide, Cassaday memorialized in writing and on computer disks, his affair with Miller, his conspiracy with Miller to kill Miller's husband, his murder of Miller's husband and Miller's romantic betrayal of him.

Miller appeals her convictions and sentences for conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, and second-degree murder as an aider and abettor, MCL 750.317. Regarding the jury verdict, Miller says this Court should reverse her convictions and grant her a new trial based on the trial court's erroneous evidentiary rulings[1] and its conduct of voir dire. Miller also avers that the trial court erred by imposing a sentence above the minimum sentencing guidelines range. Because the evidentiary and voir dire rulings were correct and, if erroneous in part, harmless, we affirm the jury's verdict. Furthermore, because the trial court articulated substantial and compelling reasons for sentencing Miller above the statutory guidelines range, we affirm Miller's sentence.

II. Facts and Proceedings

[1] The evidentiary rulings include the admission of Cassaday's suicide note and photographs of the suicide scene, copies of America On Line instant messages and other email communications, and a sexually explicit videotape and photographs of Miller.

On November 9, 1999, defendant's husband was shot and killed at work. Three months later, Miller's lover, Cassaday, committed suicide. Cassaday left a suicide note that described how Miller and Cassaday had planned to kill the victim, and it also described how Cassaday followed through with the plan and killed Miller's husband. Cassaday also left a copy of America On Line ("AOL") "instant messages" he exchanged with Miller on November 7, 1999, and November 8, 1999, which detailed their scheme to kill Miller's husband. Also, numerous e-mail communications between Miller and Cassaday were recovered from Cassaday's computer hard drive. Cassaday and Miller wrote the e-mails between August and November 1999 and they reveal the extent of their relationship, their future plans to marry, Miller's false claim that she was pregnant, and her desire to kill her husband.

At trial, Miller denied any involvement in her husband's murder. However, based on the above evidence, prosecutors argued that Miller manipulated Cassaday into killing her husband by claiming that her husband abused her. Prosecutors also presented evidence that, on two occasions, Miller falsely told Cassaday that she was pregnant with his children, but that the unborn babies died from her husband's abuse. The jury convicted Miller of conspiracy to commit first-degree murder and second-degree murder. Miller appeals, and we affirm.

III. Evidentiary Rulings

A. Standard of Review

Defendant challenges several evidentiary rulings by the trial court. Three standards of review apply to the various evidentiary rulings at issue here. First, we review a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). However, "[w]hen the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002). Similarly, where an evidentiary issue implicates the Confrontation Clause of the federal and state constitutions,[2] we review the constitutional issue de novo. *Id*. at 524-525. Finally, we review for clear error a trial court's findings of fact regarding the trustworthiness of a hearsay statement. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

B. Suicide Note

We hold that the trial court properly admitted the suicide note under the catch-all exception to the hearsay rule, MRE 804(b)(7).[3] The rule states that, if the declarant is unavailable:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the

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[2] US Const, Am VI; Const 1963, art 1, § 20.

[3] At the time of trial, MRE 804(b)(7) ("Other Exceptions"), was codified as MRE 804(b)(6).

> statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In interpreting the identical "catchall" exception, MRE 803(24), this Court explained that the requisite circumstantial guarantees of trustworthiness must exist to satisfy a defendant's constitutional right to confront the witnesses against him or her. *People v Lee*, 243 Mich App 163, 171-173; 622 NW2d 71 (2000). In determining whether a statement possesses adequate indicia of reliability, the trial court must consider "the totality of the circumstances surrounding the making of the statement," including the following factors:

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e. whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g. a police officer who was likely to investigate further and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Id.* at 178 (citations omitted).]

Here, the totality of the circumstances surrounding the making of the suicide note indicate that the statements possessed sufficient guarantees of trustworthiness to satisfy defendant's constitutional right of confrontation. See *id.* at 178-180; *People v Welch*, 226 Mich App 461, 467-468; 574 NW2d 682 (1997). As noted by the trial court, Cassaday's statements were (1) spontaneous and voluntary because he made them without prompting or inquiry, (2) consistent, (3) made fairly contemporaneously to his impending death, and (4) made from personal knowledge. In addition, Cassaday directed the statements to family members, i.e., his mother and father, people to whom Cassaday would likely speak the truth. Also, the reason Cassaday could not testify, because he had committed suicide, militates in favor of admissibility and supports a lack of motive to fabricate.

In addition, the suicide note was clearly relevant to prove conspiracy because it detailed both his and Miller's participation in the planning and execution of the victim's murder. MRE 804(b)(7)(A). Moreover, because Cassaday is dead, the statements were also more probative on the point for which they were offered than any other evidence the prosecution could have procured with reasonable effort. MRE 804(b)(7)(B). Finally, in our view, admission of the suicide note served the general purposes of the court rules and the interests of justice. MRE 804(b)(7)(C). Accordingly, we conclude that the trial court did not abuse its discretion by admitting Cassaday's suicide note under MRE 804(b)(7).

C. AOL Instant Messages

With regard to the AOL instant messages, we hold that the trial court did not abuse its discretion by determining that the portions of the message attributable to defendant were not hearsay declarations. See MRE 801(d)(2); *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). We also agree with the trial court that Cassaday's statements in the AOL

instant messages, although hearsay, were admissible as statements against penal interest under MRE 804(b)(3). Whether a statement is admissible under MRE 804(b)(3) depends on: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera, supra*; see also *People v Schutte*, 240 Mich App 713, 715-716; 613 NW2d 370 (2000).

A declarant's hearsay statement against penal interest that also implicates another person may also be admissible as substantive evidence against the other person (1) if the statement is admissible as a matter of the law of evidence, and, (2) if its admission would not violate the defendant's right of confrontation. *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993). The first inquiry focuses on the reliability of the hearsay statement and takes into consideration its content and the circumstances under which the statement was made. *Id*. at 160-161. With regard to the second inquiry, the statement must be examined (considering the totality of the circumstances), to determine whether it contains "particularized guarantees of trustworthiness" to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. *Schutte, supra* at 717-718, quoting *Poole, supra* at 165. In this regard, our Supreme Court has stated:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
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> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Poole, supra* (citation omitted).]

Here, Cassaday's statements to Miller, in which he implicated himself in the plot to murder the victim, were clearly against his penal interest. Also, a reasonable person in Cassaday's position would not have made the incriminating statements unless he believed they were true, given that Cassaday essentially admitted that he and Miller were equally culpable in the crime. Further, considering the totality of the circumstances in this sordid case, Cassaday's statements possessed sufficient indicia of reliability to be admitted against Miller. Cassaday made the statements voluntarily, without prompting, to his lover, who was the wife of the

intended victim. The statements did not minimize Cassaday's role in the crime or shift the blame to Miller, and there is nothing in the record suggesting that they were made to avenge Cassaday or to curry favor, or that Cassaday had a motive to lie or distort the truth. Also, the conspiratorial statements were made within twenty-four hours of the victim's murder. To hold that the statements were not sufficiently trustworthy would require this Court to conclude that Cassaday was attempting to deceive Miller, a conclusion for which there is no factual support. Accordingly, we hold that the trial court did not abuse its discretion by concluding that Cassaday's statements to defendant in the AOL instant messages were within the scope of MRE 804(b)(3), and contained "particularized guarantees of trustworthiness" considering the totality of the circumstances to allow their admission as substantive evidence against defendant. See *Schutte, supra*.

D. E-mail Communications

Defendant does not specifically challenge the admissibility of the numerous e-mail messages on hearsay grounds, but only argues on appeal that they were unduly prejudicial because of their "highly prejudicial sexual graphic content." We disagree.

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. Pursuant to MRE 402, all relevant evidence is admissible except when the federal or state constitutions, the court rules, or the rules of evidence provide otherwise. Relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403.

The e-mail messages were unquestionably relevant. Relevance and materiality are governed by the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Miller was charged with conspiring with Cassaday to kill her husband, and the prosecution theorized that Miller manipulated Cassaday into performing the actual shooting. To constitute conspiracy, two or more persons must have voluntarily agreed to effectuate commission of a criminal offense. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993). Identifying the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. As such, direct proof of the conspiracy is not essential; rather, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the coconspirators' intentions. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Here, the nature of the relationship between Miller and Cassaday, as well as the circumstances surrounding Cassaday's reasons and motivation for coming to Michigan to kill the victim, were clearly relevant to proving a conspiracy between Miller and Cassaday. The e-mail messages between them were significantly probative of the relationship between Miller and Cassaday, and Cassaday's motivation for killing the victim. In particular, the e-mail messages revealed the level of intimacy between Miller and Cassaday from August 1999 through the days after the victim's death. Several e-mail messages demonstrated that Miller attempted to enrage Cassaday by claiming that the victim had abused her, and by claiming that she miscarried Cassaday's babies because of her husband's abuse. There were also e-mail communications

demonstrating that Miller, while impersonating the victim, wrote Cassaday taunting messages. Further, given Miller's general denial of guilt, all elements of the crime of conspiracy were in issue. *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *People v VanderVliet*, 444 Mich 52, 78; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In addition, contrary to Miller's assertion, the e-mail messages were not unfairly prejudicial simply because some were sexually explicit. "[U]nfair prejudice" does not mean "damaging," as any relevant evidence will be damaging to some extent. *Mills*, *supra* at 75. Although several of the e-mail transmissions contained sexually explicit content, those characteristics formed the crux of the underlying issues in the crime for which Miller was accused. Accordingly, the trial court did not abuse its discretion by admitting the challenged e-mail messages.

E. Photographs and Videotape

Also, defendant says that the trial court abused its discretion by admitting sexually explicit photographs of her, and a "pornographic" video. Defendant asserts, erroneously, that this evidence was irrelevant and unduly prejudicial.

The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Mills*, *supra* at 76; *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

In a related, albeit different context, Michigan courts have consistently held that the admission of gruesome or shocking photographs solely to arouse the sympathies, passions or prejudices of the jury is improper. *Ho*, *supra* at 188. However, photographs that are necessary or instructive to show material facts or conditions, or which are admissible for some other proper purpose, are not rendered inadmissible because of their gruesome details or the shocking nature of the crimes. See, e.g., *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973), *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997), and *People v Alexander*, 104 Mich App 545; 305 NW2d 262 (1981). With all photographic evidence, the proper inquiry is whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Mills*, *supra* at 67-68, 76.

Here, the sexually provocative photographs and video were relevant to the issues in the case. Miller was charged with conspiring with Cassaday to kill the victim, and it was the prosecution's theory that Miller manipulated Cassaday to perform the killing. The photographs and video that Miller sent to Cassaday were significantly probative of the relationship between them, and of Cassaday's motivation for killing the victim. Also, as noted, given Miller's general denial of guilt, all elements of the crime of conspiracy were in issue. *Mills*, *supra* at 61, 69-70; *VanderVliet*, *supra* at 78. Further, Miller has not demonstrated that the photographs or the video were unduly prejudicial. Indeed, a review of the photographs discloses that they are not overly shocking or inflammatory on account of their sexual nature. Moreover, contrary to Miller's

claim, the photographs were not required to be excluded simply because a witness could testify orally about the information contained in them. *Mills*, *supra*.[4]

Miller also argues that the trial court denied her a fair trial when it told the jury that a portion of the video was not shown because it was "pornographic." Because Miller did not timely object to the trial court's comment, this Court reviews this unpreserved claim for plain error affecting Miller's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court's characterization of the edited portion of the video as "pornographic" clearly did not affect the outcome of the case. Apart from the trial court's statement, the jury was informed, through trial testimony, that the excluded portion of the video showed Miller masturbating. In addition, as noted by the trial court, from the inception of the case both attorneys conveyed that "pornographic" and sexually explicit material would be presented during trial. Moreover, to the extent that the "pornographic" comment could be viewed as improper, the trial court's instructions that its comments, rulings or instructions are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court were sufficient to cure any prejudice and juries are presumed to follow their instructions. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281; *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendant has failed to show a plain error affecting her substantial rights, reversal is not warranted. *Carines*, *supra*.

F. Suicide Photographs

Miller also challenges the trial court's admission of two photographs from Cassaday's suicide scene: one showed Cassaday slumped over in a chair with an unidentified book in his hand and one showed only that an opened Bible was in Cassaday's lap. Miller argues that, because both photographs were irrelevant and unduly prejudicial, she is entailed to a new trial. We disagree.

As noted above, the pertinent inquiry here is whether the photographs were relevant under MRE 401 and, if so, whether their probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 66. Here, we conclude that the photograph showing Cassaday slumped over in a chair with an unidentified book is his lap was relevant to show the suicide scene, and was also instructive in depicting the nature of Cassaday's self-inflicted injuries. See *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The fact that Cassaday

[4] We reject Miller's attempt to draw an analogy to the rule barring certain evidence of sexual conduct of a sexual assault victim as set forth in the rape-shield statute, MCL 750.520j(1). First, this is not a criminal sexual conduct case, but a murder case. Second, Miller is not a sexual assault victim, but a criminal defendant. Third, the rape-shield statute was designed to protect and shield the sexual privacy of an alleged *victim of a sexual assault*, as opposed to a criminal defendant. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982); *People v Khan*, 80 Mich App 605; 264 NW2d 360 (1978). As such, Miller's argument in this regard is misplaced.

committed suicide was clearly relevant and material to this case, particularly where there was evidence that he chose to commit suicide as a result of his negative feelings regarding his involvement with Miller and the murder of her husband. Contrary to Miller's suggestion, the mere fact that she did not dispute the suicide does not render the photograph inadmissible. See *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Moreover, Miller has not demonstrated that the photograph was unduly prejudicial. See *Mills*, *supra* at 75-76. We therefore conclude that the trial court did not abuse its discretion by admitting this photograph.

With regard to the photograph showing an open Bible on Cassaday's lap, were we to find that its admission was erroneous, defendant has not established that it was more probable than not that the alleged error was outcome determinative. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Not only did the prosecutor present overwhelming circumstantial evidence of Miller's guilt, other admissible evidence established that there was a Bible in Cassaday's lap. Accordingly, Miller is not entitled to relief on this issue.

Miller also asserts that the prosecutor denied her a fair trial by deliberately eliciting from a detective that a Bible was in Cassaday's lap, and by failing to request a sidebar, contrary to the court's previous ruling at a pretrial hearing, before seeking to introduce the photograph of the Bible. Because Miller did not raise a claim of prosecutorial misconduct below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, *supra*; *Schutte*, *supra* at 720.

As an initial matter, nothing in the record suggests that the prosecutor's request to admit the photograph of the Bible was improper or was part of a scheme to inject inadmissible evidence. In fact, our review of the record reveals that, after a discussion concerning the admission of photographs on the first day of trial, it was not clear that the prosecutor was obligated to request a sidebar before seeking to admit any photographs. Moreover, had the prosecutor requested a sidebar, the outcome would have been the same. Specifically, outside the presence of the jury, defense counsel objected to the admission of the photograph of the Bible and the fact that a sidebar was not held, and the trial court judge stated that she allowed the photograph because a "proper foundation was laid." Additionally, the record clearly indicates that the trial court ruled that testimony regarding a Bible in Cassaday's lap was admissible. Accordingly, because Miller has failed to show a plain error affecting her substantial rights, reversal is not warranted on this basis. *Carines*, *supra*.

IV. Voir Dire

Miller argues that the trial court erred when it denied her request for individual, sequestered voir dire of the prospective jurors regarding the extent and content of anything they may have heard or seen in the media about this "highly publicized" case, and by denying her motion for a new trial on this basis. To this end, Miller maintains that reversal is required under our Supreme Court's decision in *People v Tyburski*, 445 Mich 606; 518 NW2d 441 (1994). We disagree.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). The underlying claim challenging the trial court's decision concerning the scope and conduct of voir dire is also

reviewed for an abuse of discretion. MCR 6.412(C); *Tyburski, supra* at 619; *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).

A defendant tried by a jury has a right to a fair and impartial jury. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *Tyburski, supra* at 618; see also *Sawyer, supra*. A court is "to allow the elicitation of enough information so that the court itself can make an independent determination of a juror's ability to be impartial." *Tyburski, supra* at 620. When reviewing the scope and conduct of voir dire, "this Court must determine whether the trial court conducted a voir dire 'sufficiently probing . . . to uncover potential juror bias.' " *Sawyer, supra* at 187 (citations omitted). Further, "a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges." *People v Tyburski*, 196 Mich App 576, 581; 494 NW2d 20 (1992). There are no "hard and fast rules" regarding what constitutes acceptable voir dire; rather, the trial court is granted wide discretion in manner employed to achieve an impartial jury. *Sawyer, supra* at 186-187. Mere exposure to media reports about the defendant and the alleged crime does not automatically establish that a defendant was denied a fair trial. Rather, a reviewing court must closely examine the entire voir dire to determine if an impartial jury was impaneled. *People v Jendrzejewski*, 455 Mich 495, 516-517; 566 NW2d 530 (1997). Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id*. at 519.

Here, a review of the record discloses that the trial court did not abuse its discretion in conducting voir dire. Clearly, the facts of this case are distinguishable from those in *Tyburski, supra*, in several respects. First, as the trial court noted, the record does not indicate that this case received pretrial publicity similar in scope to that which occurred in *Tyburski, supra* at 619. In *Tyburski*, thirty-five of the thirty-seven prospective jurors acknowledged that they were aware of the case because of media coverage, and eleven of the twelve jurors who ultimately decided the case admitted to such exposure. *Id*. at 611 n 1. In contrast, of the thirty-two individuals who were called as prospective jurors in this case, only eight acknowledged that they might have been exposed to media reports concerning the case. The other prospective jurors had not heard of the case. Further, only four of the jurors ultimately selected to decide the case (including the alternates) had been exposed to media coverage concerning the crime.

Moreover, the manner in which the trial court conducted the voir dire differed significantly from the procedure utilized in *Tyburski*. In *Tyburski*, the trial court denied defense counsel's request to directly question the prospective jurors during voir dire. *Id*. at 611. Here, defense counsel was permitted to freely participate in the voir dire process. Also, as noted by the trial court, the parties agreed to an initial prescreen, written jury questionnaire, using a form that the parties and the court prepared. The questionnaire contained questions concerning the prospective jurors' knowledge about the case, and the answers were provided to the parties to assist them during voir dire. In addition to distributing the questionnaire, the court asked the potential jurors its own preliminary questions concerning exposure to publicity, and gave the attorneys an opportunity to pose additional questions, without interruption or time constraints. Miller did in fact exercise that opportunity, and questioned several jurors regarding pretrial media exposure to the case. Defense counsel also questioned prospective jurors who had heard about the case concerning the particular source of their exposure. Contrary to Miller's

suggestion, there is no right to individual, sequestered voir dire or to any other specific procedure for voir dire. *Sawyer, supra* at 191.

In sum, the manner in which the trial court conducted voir dire provided Miller with a reasonable opportunity to ascertain whether any of the potential jurors were subject to peremptory challenge or challenge for cause, and also provided the trial court with sufficient information to make an independent assessment of bias and to guard against potential bias resulting from media exposure. Although four jurors ultimately selected to sit on the jury had some pretrial media exposure to the case, there is nothing in the record to suggest that they were incapable of being impartial. Each juror individually stated that their ability to fairly decide the case would not be affected by anything they had read or seen. "Knowledge of publicity concerning a case does not automatically make a prospective juror unfit to serve, if that juror does not have a preconceived notion concerning the defendant's guilt or innocence which cannot be set aside." *Sawyer, supra* at 188. Because the trial court did not abuse its discretion in the manner in which it conducted voir dire, the court correctly denied Miller's motion for a new trial on this basis.

V. Sentence

Finally, Miller contends that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 13-1/2 to 22-1/2 years and sentenced her to 54 to 81 years' imprisonment for her second-degree murder conviction. We disagree.

Under the sentencing guidelines statute,[5] the trial court, in most instances, must impose a minimum sentence in accordance with the calculated guidelines range. MCL 769.34(2); *People v Babcock (After Remand)*, 250 Mich App 463, 465; 648 NW2d 221 (2002). A court may depart from the appropriate sentence range if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A court may not depart from the sentencing guidelines range based on certain specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts of the case, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b). This Court has explained the terms "substantial and compelling" as constituting strong language intended only to exist in "exceptional cases." *Babcock (After Remand), supra* at 466. The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Id.* at 466-467.

Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines.

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[5] Because defendant committed the offenses after January 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Babcock (After Remand), *supra* at 467. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). Whether a factor is objective and verifiable is subject to review de novo on appeal. *Id*. The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the recommended minimum sentence range is reviewed for an abuse of discretion. *Id*.; see also *Armstrong*, *supra* at 424.

Here, we conclude that the factors on which the trial court relied are objective and verifiable, and that the court did not abuse its discretion by finding that they provided substantial and compelling reasons to depart from the sentencing guidelines range. The court's stated reasons for departure included that Miller was significantly involved in the planning and execution of her husband's murder, the fact that the victim was killed by a gunshot, and the very nature of the crime. These factors were both objective and verifiable. Further, we agree that the offense and offender characteristics that were unique to this second-degree murder case were not adequately reflected in the scoring of the guidelines. Although Miller received twenty-five points under offense variable ("OV") 6 (intent to kill) for an unpremeditated intent to kill, MCL 777.36, fifteen points under OV 10 (exploitation of a vulnerable victim) for "[p]redatory conduct," MCL 777.40, and ten points under OV 14 (offender's role) for being a leader in a multiple offender situation, MCL 777. 44, these factors did not adequately account for the devious, calculating, and detestable nature of the offense, i.e., a spouse purposefully, deceitfully and meticulously misleading, manipulating and conspiring with a lover to brutally murder her spouse. In brief, the reasons justifying departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of Miller's sentence. For the same reasons, we also conclude that the extent of the departure is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock (After Remand)*, *supra* at 468-469. Accordingly, resentencing is not warranted.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder