STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 29, 2013
v DERRICO DEVON SEARCY, Defendant-Appellant.	No. 301751 Wayne Circuit Court LC No. 10-001495-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARRELL RASHARD EWING, Defendant-Appellant.	No. 301758 Wayne Circuit Court LC No. 10-001495-FC

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

In Docket No. 301751, defendant, Derrico Devon Searcy, appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and three counts of assault with intent to murder, MCL 750.83. Searcy was sentenced to 30 to 50 years' imprisonment for the second-degree murder conviction and 20 to 30 years' imprisonment for each of the assault with intent to murder convictions. We affirm.

In Docket No. 301758, defendant, Darrell Rashard Ewing, appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Ewing was sentenced to life in prison without parole for the first-degree murder conviction, 16 to 30 years' imprisonment for each of the three convictions for assault with intent to murder, and two years' imprisonment for the felony-firearm conviction. We affirm.

These consolidated appeals arise from a shooting at the intersection of Harper and Van Dyke, in the city of Detroit on December 29, 2009. At the time of the shooting, J.B. Watson and his girlfriend, LaRita Thomas, were in Thomas's van along with Phillip Reed and Willie Williams. The van was stopped at the intersection of Harper and Van Dyke in Detroit for a traffic signal. Raymond Love testified that while driving on Harper, a turquoise vehicle turned onto Harper and the two vehicles drove side by side for a short while. Love identified the driver of the turquoise vehicle as Searcy. In that turquoise vehicle, there were also two other black males, one of which was later identified as Ewing. When Love reached the red traffic light at the Van Dyke intersection, the turquoise car pulled to the curb, staying back about six or seven car lengths. Ewing then exited the vehicle with a handgun drawn, approached Thomas's van, and fired many shots into the rear of the van. After shooting, Ewing retreated to the turquoise car, which by that time had moved into the middle of Harper, and the car left in the opposite direction on Harper.

Watson died of injuries he received from the gunshot wounds. Reed was injured in the attack, with a bullet striking him in his left hand. Watson, Reed, and Williams are cousins and members of a gang identified as the Knock Out Boys (KOB). Searcy and Ewing were alleged to be members of a rival gang called the Hustle Boys.

I. DOCKET NO. 301751

A.

Searcy first contends that the trial court erred in refusing to sever his trial from that of his codefendant, Ewing. Searcy argued that the defenses were antagonistic because the prosecutor's theory of the case suggested the motive for the crime was gang related. Although there was evidence that Ewing was a member of the Hustle Boys gang, Searcy denied any gang membership or affiliation.

In deciding a motion to sever, the trial court must find the relevant facts and determine whether those facts demonstrate that the offenses charged are related. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). The trial court's factual findings are reviewed for clear error, with the determination whether the offenses are related reviewed de novo as a question of law. *Id.* This Court reviews a trial court's ultimate decision on a motion to sever the trials of codefendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

A defendant does not have an absolute right to a separate trial. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). Rather, there exists a strong policy that favors the conduct of joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). The "joinder of distinct criminal charges" is permissible against multiple defendants when "(1) there is a significant overlapping of issues and evidence, (2) the charges constitute a series of events, and (3) there is a substantial interconnectedness between the parties defendant, the trial proofs, and the factual and legal bases of the crimes charged." *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980).

"Moreover, even the improper joining of defendants for trial under separate offenses is not per se reversible error." *Id.* Severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Hana*, 447 Mich at 359-360 (quotation marks omitted).

In accordance with the Michigan Court Rules, a trial court is permitted to sever joined charges "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence." MCR 6.120(B). Following the receipt of a proper motion, a trial court is required to sever charges that are unrelated, as defined by MCR 6.120(B)(1). MCR 6.120(C). Specifically, MCR 6.120(B) provides, in pertinent part:

> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
>
> (2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

Severance is mandated under MCR 6.121(C) only when a defendant is able to clearly and affirmatively demonstrate, by an affidavit or offer of proof, that his substantial rights will be prejudiced by the conduct of a joint trial and that severance is the required method to rectify the potential prejudice. *Hana*, 447 Mich at 345-346.

Joinder in this matter was appropriate under MCR 6.120(B)(1) as the actions alleged all stemmed from the same incident, which was the shooting that occurred at Van Dyke and Harper on December 29, 2009. The trial involved numerous witnesses and identical evidence regarding the crime. To hold separate trials would have been duplicative and excessive. See *Etheridge*, 196 Mich App at 52.

To require severance, it must be demonstrated that the defenses are both inconsistent and mutually exclusive or irreconcilable. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). A mere allegation that a codefendant's defense is "antagonistic" is inadequate; the defenses must be so antagonistic to the codefendants that the defenses are mutually exclusive. *Hana*, 447 Mich at 350. Defenses are defined as being mutually exclusive "if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the codefendant." *Id.* (quotation marks omitted).

Searcy's contention that he was not affiliated with a gang was not irreconcilable with Ewing's defense as both defendants asserted that they were not present at the crime scene and

that their respective identifications by witnesses placing them at the intersection were mistaken. Although Searcy urges that he was prejudiced by evidence demonstrating Ewing's participation in a gang, our Supreme Court has indicated that although "[i]ncidental spillover prejudice . . . is almost inevitable in a multi-defendant trial," it concluded that such incidental prejudice does not mandate or require severance. *Id.* at 349 (internal citation and quotation marks omitted). To necessitate severance, "[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id.* (internal citation and quotation marks omitted). Searcy fails to identify how evidence of the gang membership of certain individuals involved in this incident, including the victims, would not have been relevant or necessarily excluded in a separate trial.

In addition, Searcy was charged under an aiding and abetting theory. It is recognized that the risk of prejudice is reduced when the prosecution proceeds on an aiding and abetting theory. *Id.* at 360. "Finger pointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses." *Id.* at 360-361.

Finally, any risk of prejudice in a joint trial may be reduced or eliminated by the provision of a proper cautionary instruction. *Id.* at 356. The trial court instructed the jury to consider each defendant separately on the listed charges. It is presumed that jurors will follow their instructions. *People v Dupree*, 486 Mich 693, 711; 788 NW2d 399 (2010). As such, the trial court did not abuse its discretion in denying the motion for severance.

B.

Searcy next contends that there was insufficient evidence of intent to sustain his convictions of second-degree murder and assault with intent to commit murder under an aiding and abetting theory. Searcy argues that there was no evidence to demonstrate his involvement in shooting at the van or that he had any awareness that Ewing possessed a firearm. As such, Searcy also argues that his motion for a directed verdict should have been granted.

A challenge to the sufficiency of the evidence to sustain a conviction is a question of law that is reviewed de novo on appeal. *People v Chapo*, 283 Mich App 360, 363; 770 NW2d 68 (2009). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "A challenge to the trial court's decision on a motion for a directed verdict has the same standard of review as a challenge to the sufficiency of the evidence." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 788 NW2d 461 (2010), aff'd in part and vacated in part 490 Mich 921 (2011).

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a verdict that a defendant aided and abetted a crime, the prosecutor must prove 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 [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Some of the factors that may be considered include a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *Id.*

On appeal, Searcy does not contest that there was sufficient evidence to show that the crimes of murder and assault with intent to murder were committed by the principal, Ewing. Instead, Searcy argues that there was not sufficient evidence for a jury to find that he aided and intended the commission of the crimes. We disagree.

Searcy was identified by Love as of the driver of the turquoise vehicle that brought the shooter to the scene and drove him away after the shooting. Love observed the turquoise vehicle travel along Harper behind and in the direction of the van for several blocks before pulling over before the Van Dyke intersection. When Love stopped at the red light at Van Dyke, he was in the far right lane. Love explained that the turquoise vehicle pulled over to the side of the road six or seven car lengths behind his vehicle, even though there were no other vehicles between him and it. After the vehicle pulled over, Ewing exited from the rear passenger seat, approached the van, and began discharging his weapon at close range into the occupied vehicle. When finished, Ewing returned to the vehicle, which was now in the middle of Harper after partially executing a u-turn. The vehicle then completed its u-turn and proceeded in the opposite direction on Harper. While Searcy questions the ability of Love to make the observations he made and the accuracy of those observations, "[t]he credibility of identification testimony is a question for the trier of fact that [this Court will] not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The above facts were sufficient for a jury to infer that Searcy aided Ewing in the commission of the shooting and provided this aid while aware that Ewing was going to shoot into the van. First, transporting someone so that he can commit a crime and flee the scene clearly aids that person in committing the crime. See *People v Martin*, 150 Mich App 630, 635; 389 NW2d 713 (1986). Thus, the evidence was sufficient to allow the jury to find that Searcy aided Ewing in the commission of the offenses. Second, Searcy pulled his vehicle over to the side of the road, leaving six or seven car lengths between him and the car in front of him at the stop light. The jury could infer that Searcy did this because he knew he needed room in order to execute the "get-away" u-turn. This is important because it distinguishes Searcy's behavior from someone who was merely present and truly had no idea of what was about to happen. Third, according to Love, Searcy started to execute the u-turn *before* Ewing returned back to the car; Searcy's vehicle was already in "the middle of Harper" when Ewing entered the vehicle. After Ewing entered the vehicle, Searcy then completed the u-turn and headed the opposite way down Harper. This demonstrates that Searcy was an active and engaged participant in the criminal endeavor. Circumstantial evidence and any reasonable inferences arising from it may be used to prove the elements of a crime. *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290 (2012), amended 296 Mich App 801 (2012). "Because intent may be difficult to prove, only minimal circumstantial evidence is necessary to show a defendant entertained the requisite intent." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010). Consequently, sufficient evidence existed to sustain Searcy's convictions of both second-degree murder and

assault with intent to commit murder under an aiding and abetting theory. Additionally, for the same reasons, the trial court properly denied Searcy's motion for directed verdict.

C.

Searcy also argues that he is entitled to a new trial premised on the affidavit of Kathleen Frances Byrnes, who was one of the jurors at the trial court. Following the conclusion of the trial and sentencing, Byrnes alleged that, contrary to her indication to the trial court, her vote to convict "was not [her] honest verdict." Byrnes alleged, in relevant part, that she was pressured into agreeing with the verdicts and that other jurors engaged in Internet research regarding Watson, Ewing, Searcy, and gangs.

To preserve a claim of juror misconduct, a defendant must move for a new trial or evidentiary hearing before the trial court. *People v Benberry*, 24 Mich App 188, 191-192; 180 NW2d 391 (1970). There is no indication in the lower court record of a motion for a new trial having been filed by Searcy. While Searcy did file a motion for remand with this Court, the premise of that motion was focused on the anticipated testimony and affidavits of Tyree Washington and did not reference alleged juror misconduct or coercion. Therefore, this issue is unpreserved.

Generally, this Court reviews a trial court's decision on a motion for a new trial on the basis of juror misconduct for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). "Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). But because the issue is unpreserved, we review it for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

"The rule is well established that jurors may not impeach their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict." *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945). "Once a jury has been polled and discharged, oral testimony or affidavits by its members or outside parties may only be received on 'extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.'" *People v Riemersma*, 104 Mich App 773, 785; 306 NW2d 340 (1981) (citation omitted); see also *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997).

To establish that an extrinsic influence requires reversal, a defendant is required to demonstrate (1) that the jury was exposed to extraneous influence and (2) that the extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *Budzyn*, 456 Mich at 88-89. But "[a]ny conduct, even if misguided, that is inherent in the deliberative process" is not extraneous and "is not subject to challenge or review." *People v Fletcher*, 260 Mich App 531, 540; 679 NW2d 127 (2004).

In asserting entitlement to a new trial, Searcy relies on Byrnes's post-verdict complaint that she felt pressured by other jurors and that other jurors engaged in Internet research collateral

to the evidence presented at trial. At the time the jury rendered its verdict on November 16, 2010, each member of the jury was polled. Each juror, including Byrnes, affirmed that the verdicts were accurate and consistent with their individual decision. Byrnes's affidavit is dated January 10, 2011, almost two months after the conclusion of the trial and the affirmation of the verdicts.

However, we conclude that Searcy has abandoned this issue on appeal. While Searcy alleges that there were extraneous influences introduced to the jury, he never argues or even attempts to explain how "these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Budzyn*, 456 Mich at 89. A defendant may not merely announce a position and leave it to this Court to rationalize a basis for his claim. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). Accordingly, the issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In any event, Searcy failed to establish any plain error.[1]

II. DOCKET NO. 301758

A.

Ewing first argues that the trial court erred in failing to provide the deadlocked jury instruction. To preserve an issue of instructional error, a defendant is required object or request the provision of a different instruction before the jury deliberates. MCL 768.29; MCR 2.512(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). On the second full day of deliberations, the jury inquired whether a hung jury could be declared. The trial court informed counsel of the inquiry and instructed the jury to continue its deliberations. Ewing's counsel merely indicated the existence of the "deadlock jury instruction," requesting the trial court to "take that request under advisement." Because defense counsel did not object to the trial court's refusal to provide the deadlocked jury instruction, the issue is not preserved for appellate review.

This Court reviews claims of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). Generally, this Court reviews a trial court's decision on whether a jury instruction was necessary based on the applicable facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, unpreserved issues of instructional error are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

On the second full day of deliberations, the jury inquired of the trial court whether it could "declare a hung jury" based on "a serious difference of opinion on the verdict." The trial court informed defense counsel of the inquiry and instructed the jury to continue deliberations. One day later, the jury was able to render a verdict. Ewing now contends that the failure to provide the deadlocked jury instruction constituted an "abdication" of the trial court's responsibility and permitted the jury to improperly seek to resolve its disputes through extraneous research.

---

[1] See our discussion of this issue, *infra*, in relation to defendant Ewing.

After jury deliberations have initiated, a trial court "*may* give additional instructions that are appropriate." MCR 2.513(N)(1) (emphasis added). "The extent of additional instructions to the jury is within the discretion of the trial court." *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). We note that a trial court is not required to immediately provide the deadlocked jury instruction when a jury indicates that it is at an impasse. *People v Lett*, 466 Mich 206, 222-223; 644 NW2d 743 (2002). Accordingly, Ewing cannot establish any plain error.

Ewing speculates that the failure to provide the jury with the deadlock instruction precipitated individual jurors engaging in improper outside research. Ewing comes forward with no evidence to substantiate his assertion that the areas of independent research by certain jury members encompassed topics pertaining to their initial inability to reach a consensus on a verdict. The trial court's declination to provide the deadlocked jury instruction was within its discretion and there is nothing to support Ewing's contention that the failure to provide the instruction led to improper conduct by some of the jurors.

B.

Like Searcy, Ewing also contends that he is entitled to a new trial based on the extraneous influences on the jury as noted in Byrnes's affidavit. However, unlike Searcy, Ewing preserved the issue for appeal by filing a motion for a new trial in the lower court premised on the affidavit of Byrnes.

This Court reviews a trial court's grant or denial of a motion for a new trial on the basis of juror misconduct for an abuse of discretion. *Johnson*, 245 Mich App at 250. "Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *Fetterley*, 229 Mich App at 545.

As discussed previously by this Court:

> "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice." [*Id.* at 544-545, quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960).]

"The rule is well established that jurors may not impeach their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict." *Pizzino*, 313 Mich at 105. "Once a jury has been polled and discharged, oral testimony or affidavits by its members or outside parties may only be received on 'extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.'" *Riemersma*, 104 Mich App at 785 (citation omitted); see also *Budzyn*, 456 Mich at 92 n 14.

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [*Budzyn*, 456 Mich at 88-89 (citations omitted).]

"[T]he distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence." *Id.* at 91 (citations omitted footnote added). But "[a]ny conduct, even if misguided, that is inherent in the deliberative process" is not extraneous and "is not subject to challenge or review." *Fletcher*, 260 Mich App at 540.

Nearly two months after the trial, Byrnes alleged that, contrary to her indication to the trial court, her vote to convict "was not [her] honest verdict." Byrnes alleged, in relevant part, that she was pressured into agreeing with the verdicts and that other jurors engaged in Internet research regarding Watson, Ewing, Searcy, and gangs. In analyzing the misconduct asserted by Byrnes, it is useful to distinguish between her allegations of verbal coercion by other jury members from the conduct of extraneous research. In terms of Byrnes's allegation of coercion by other jury members to reach a decision, such conduct comprises conduct that is part of the "deliberative process." *Budzyn*, 456 Mich at 91; *Fletcher*, 260 Mich App at 540. As such, that aspect of the challenge is not subject to review.

Because the external, Internet research conducted by the jurors constitutes extraneous facts or information, it must be determined whether the information obtained "is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Budzyn*, 456 Mich at 89. Any error may be deemed harmless if it is determined that "the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming." *Id.* at 89-90.

The Facebook information obtained by juror Michelle Chesney included a photograph of Ewing with a female and a eulogy for Watson. The photograph is merely duplicative, as numerous photographs of Ewing and Searcy were admitted into evidence that were also obtained from social networking websites. The photograph is relatively innocuous as it depicts Ewing with a female but is not suggestive of any improper or illegal conduct. As such, the photograph constitutes harmless error. Similarly, the eulogy simply provides repetitive information verifying Watson's death. Ewing cannot demonstrate that the eulogy "is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89. Further, Byrnes only notes that Chesney "brought to the juror's [sic] attention that she had read an [sic] eulogy online for J.B. Watson." In making this statement, Byrnes only implies that Chesney read the online eulogy and that, other than its existence, the eulogy was not discussed in any significant detail. As stated by our Supreme

Court in reviewing affidavits of this type, the focus is not on "their subjective content," but rather on "the extent to which the jurors saw or discussed the extrinsic evidence." *Id.* at 91. There is no suggestion in the affidavit that the eulogy comprised a topic of significant discourse amongst the jurors.

Byrnes also avers that a juror, Karen James, procured information on "gang codes and that gang activity involved killing people." During deliberations, James allegedly indicated "that gangs have a pecking order" based on the Internet information she obtained and went on to opine regarding the status of Ewing and Washington in terms of their gang membership. At the outset, there was considerable testimony from witnesses indicating Ewing's and Washington's membership or affiliation with various gangs. It was also fairly obvious, based on the testimony and evidence elicited at trial, that the prosecutor's theory was that this murder was gang related. Hence, James's revelation that "gang activity involved killing people" is neither novel nor outside the purview of a reasonable inference based on the admissible evidence. James's assertion that she had obtained information on "gang codes" over the Internet does not indicate that the codes were shared or discussed in any detail with other members of the jury and cannot serve to demonstrate a necessity for reversal. James also allegedly learned through her Internet research "that gangs have a pecking order." This information is duplicative of an inference to be drawn from Christopher Richardson's testimony, in which he opined that Washington's assertions that he was the perpetrator amounted to "bragging" and an attempt to prove himself. Richardson also characterized Washington as a "flunky," intimating a hierarchical relationship in gang membership. Hence, any error would be harmless because the information regarding gang structure was duplicative and Ewing failed to demonstrate that the information "is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.*

Finally, James's alleged hypotheses regarding gang hierarchies and the positions of Ewing and Washington within that structure comprised part of the deliberative process in determining witness credibility and the weight to be given to particular testimony. *Id.* As such, it cannot be used to impeach the jury's verdict.

Accordingly, Ewing has failed to establish how any extraneous influence created a real and substantial possibility that it could have affected the jury's verdict, and we conclude that the trial court did not abuse its discretion in denying Ewing's request for a new trial.

C.

Finally, Ewing asserts that he is entitled to a new trial, or an evidentiary hearing, based on the provision of an affidavit by Tyree Washington, which alleged that Washington "commited [sic] the murder of J.B. Watson" and that Searcy and Ewing were "wrongfully charged" and not present at the crime. Washington contended that the prosecutor in this matter indicated a lack of interest in having him testify at Ewing's and Searcy's trial "because they had who they wanted." Washington indicated a willingness to waive his "Fifth Amendment rights of self incrimination" and to "tak[e] full responsibility and consequences of my actions."

Typically, to preserve a claim that a new trial should be granted based on newly discovered evidence, a defendant must move for a new trial on this ground in the trial court.

People v Darden, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). A defendant may also preserve a claim of entitlement to a new trial based on newly discovered evidence for appellate review by moving for a remand to conduct an evidentiary hearing. MCR 6.431(B); *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). Ewing filed a motion to remand in this Court, which this Court denied. *People v Ewing*, unpublished order of the Court of Appeals, entered March 23, 2012 (Docket No. 301758). The motion to remand for an evidentiary hearing was premised on an affidavit received from Washington asserting Washington's role as the perpetrator and indicating his current willingness to testify regarding his culpability, thus preserving the issue for appellate review. A trial court's ruling on a motion for a new trial based on newly discovered evidence is reviewed by this Court for an abuse of discretion, while the trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005), citing *Cress*, 468 Mich at 692. "[N]ewly available evidence is not synonymous with newly discovered evidence sufficient to warrant a new trial." *People v Terrell*, 289 Mich App 553, 562; 797 NW2d 684 (2010).

In this instance, Washington's assertion that he was the perpetrator of this crime is not newly discovered. Extensive testimony was elicited at trial from Christopher Richardson and LaJoia Stevenson indicating Washington's assertions of guilt for the death of Watson. Defense counsel was informed by the prosecutor that Washington was in federal custody and had implicated himself in this murder. Defense counsel was clearly aware of Washington's proposed testimony at the time of trial and the information was used, in part, to buttress Ewing's alibi defense that he was elsewhere at the time of the homicide. As such, it cannot be construed as newly discovered. *People v Rao*, 491 Mich 271, 281; 815 NW2d 105 (2012); *Terrell*, 289 Mich App at 562.

In addition, "Michigan courts have held that a defendant's awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been 'unavailable' at the time of trial." *Rao*, 491 Mich at 282. Specifically,

> when a defendant knew or should have known that a codefendant could provide exculpatory testimony, but did not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's posttrial statements do not constitute newly discovered evidence, but are merely newly available evidence. [*Terrell*, 289 Mich App at 555.]

In the circumstances of this case, Washington's assertion of culpability cannot be construed as newly discovered evidence. Information regarding Washington's provision of exculpatory information was made available during the trial, and two witnesses even testified regarding his alleged statements. While Washington has now provided an affidavit and indicated

a willingness to testify, this evidence is only newly available and, therefore, insufficient to justify the grant of a new trial. *Id.* at 567.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder