

Evidence Benchbook (2009 Draft)

May-August 2009 Updates

Updates have been issued for the Evidence Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 1: General Matters

[1.11\(B\) Missing Evidence](#)

It is not necessary for a defendant to demonstrate a government official's bad faith in destroying or suppressing evidence if the evidence is clearly materially exculpatory, because the loss of such evidence "directly threatens the fundamental fairness of a criminal trial, and thus undoubtedly implicates the Due Process Clause." *Moldowan v City of Warren*, ___ F3d ___, ___ (CA 6, 2009).

Chapter 2: Relevancy

[2.1\(F\)\(1\) Character Evidence](#)

It is error for a court to allow character testimony that goes "beyond [the witness's] reputation for truthfulness and encompass[es] [the witness's] overall 'integrity.'" *Ykimoff v W A Foote Mem Hosp*, ___ Mich App ___, ___ (2009).

Chapter 3: Witnesses, Opinions, & Expert Testimony

[3.5\(A\) Examination & Cross-Examination](#)

Effective September 1, 2009, ADM 2007-13 amended MRE 611 to require the courts to "exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons." MRE 611(b).

Chapter 4: Hearsay

4.2(I) Declarant Unavailable—MRE 804, MCL 768.26

A victim's statements made for the primary purpose of identifying, locating, and apprehending a perpetrator after the crime has already occurred constitute testimonial evidence. *People v Bryant*, 483 Mich 132, 143 (2009).

To determine whether statements made to a Sexual Assault Nurse Examiner (SANE) or similar examiner are testimonial, the court must consider the totality of the circumstances “and determine whether the circumstances objectively indicate[] that the statements would be available for use in a later prosecution or that the primary purpose of the [examiner's] questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.” *People v Spangler*, ___ Mich App ___, ___ (2009).

An affidavit prepared by a forensic analyst is testimonial evidence under *Crawford v Washington*, 541 US 36 (2004), and the forensic analyst who prepared the affidavit is a witness for purposes of the Confrontation Clause. *Melendez-Diaz v Massachusetts*, 557 US ___, ___ (2009).

An analyst who prepares a DNA report must also be the analyst who testifies as to its contents, unless the analyst is unavailable and the defendant has had an opportunity to cross-examine the analyst. *People v Payne*, ___ Mich App ___, ___ (2009).

Chapter 5: Exhibits

5.5(A) Photographs, Videotapes, Audiotapes

Photographs of a murder victim's injuries are admissible when they are relevant to the issue of the defendant's intent to kill, and their probative value is not outweighed by the possibility of undue prejudice. *People v Gayheart*, ___ Mich App ___, ___ (2009).

v Ridge Tool Co, 213 Mich App 252, 255 (1995). See also *Johnson v Secretary of State*, 406 Mich 420, 440 (1979). This rule has been applied even when the loss of the evidence was unintentional. *Hamann, supra* at 258. It has also been applied when a party failed to preserve evidence before filing suit. *Brenner v Kolk*, 226 Mich App 149, 156-161 (1997); *MASB-SEG v Metalux*, 231 Mich App 393, 400 (1998).

A party may be sanctioned for spoliation of evidence even though the evidence was not technically lost or destroyed. *Bloemendaal v Town & Country Sports Center, Inc*, 255 Mich App 207, 212 (2002). The rule has even been applied when the party had evidence but failed to admit it into evidence. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 521 (1999). In *Lagalo, supra* at 520, the court emphasized that an adverse presumption arises from intentional conduct, while an adverse inference is permissible under SJI2d 6.01(d) (now M Civ JI 6.01d) for a failure to produce evidence with no reasonable excuse. Also see *Brenner v Kolk, supra*.

In determining whether an adverse inference should be permitted, the court should consider whether (1) the evidence was under the control of the party and could have been produced by him or her, *Isagholian v Transamerica Ins Co*, 208 Mich App 9, 15 (1994); (2) whether there is no reasonable excuse for the failure to produce the evidence, *Leeds v Masha*, 328 Mich 137, 140 (1950); (3) whether the evidence would have been material and not merely cumulative, *Barringer v Arnold*, 358 Mich 594, 605 (1960); and (4) whether the evidence was equally available to the other party, *Cavanaugh v Cardamone*, 147 Mich App 159, 163 (1985).

Dismissal is a possible sanction, but a drastic step that should be taken cautiously and only after evaluating all other available options on the record. See *Bloemendaal v Town & Country Sports Center, Inc*, 255 Mich App 207, 214 (2002).

B. Criminal Case

The suppression of material exculpatory evidence violates a defendant's due process rights. However, if the evidence is only potentially exculpatory the defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that its exculpatory value was apparent before its destruction; and (3) that the defendant would be unable to obtain comparable evidence by other reasonable available means.* *Arizona v Youngblood*, 488 US 51, 56-58 (1988). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365 (1992).

It is not necessary for a defendant to demonstrate a government official's bad faith in destroying or suppressing evidence if the evidence is clearly materially exculpatory, because the loss of such evidence "directly threatens the fundamental fairness of a criminal trial, and thus undoubtedly implicates

*See Section 4.27 for a discussion of discovery in a criminal case.

the Due Process Clause.” *Moldowan v City of Warren*, ___ F3d ___, ___ (CA 6, 2009). However, where the evidence at issue is only potentially useful, a showing of bad faith is required. *Moldowan, supra* at ___. “In other words, the critical issue in determining whether government conduct deprived a criminal defendant of a fair trial is the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence.” *Id.* at ___.

Jury instruction on missing evidence in criminal case. In *People v Hardaway*, 67 Mich App 82, 85-87 (1967), the trial judge instructed the jury that they may infer that routinely erased police broadcast tapes could have been adverse to the prosecution. The court held that the defendant was not prejudiced by the failure to produce the tapes. See also *Johnson, supra* at 365.

The destruction of a defendant’s blood sample is not a violation of MCL 780.655, the Search Warrant statute, where the defendant had a reasonable period of time within which to request further testing of the blood sample before destruction, the destruction schedule is reasonable, routine, well-established, administered in good faith, and communicated to the defendant in a manner sufficient to enable his timely and convenient objection. *People v Jagotka*, 461 Mich 274, 281 (1999), reversing in part *People v Jagotka*, 232 Mich App 346 (1998), in which the Court of Appeals found that when MCL 780.655(5) is violated the evidence is admissible if the jury is instructed that it may infer that the destroyed evidence may have favored defendant.

F. Evidence of Character of Witness—MRE 608(a) and (b)

1. Reputation or Opinion—MRE 608(a)

It is not proper to ask a witness, including the defendant, to comment or provide an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17 (1985); *People v Badour*, 167 Mich App 186, 197 (1988). Also see *People v Beckley*, 434 Mich 691, 728 (1990). *Buckey*, *supra* at 18, suggests an appropriate cautionary instruction if there is an objection.

Reputation or opinion evidence offered to support or attack credibility of a witness may only refer to the truthfulness or untruthfulness of the witness (i.e. evidence that the witness is a “bad” person is not allowed under this rule).

It is error for a court to allow character testimony that goes “beyond [the witness’s] reputation for truthfulness and encompass[s] [the witness’s] overall ‘integrity.’” *Ykimoff v WA Foote Mem Hosp.*, Mich App (2009).

Reputation or opinion evidence that a witness, other than the defendant in a criminal case, is truthful is permitted *only* when an attack has been made upon the reputation of the witness. *People v Tolewitzke*, 332 Mich 455 (1952). The attack may be by reputation or opinion evidence or “otherwise” as when cross-examination seeks to establish that the witness’s testimony is fabricated. See *People v Sylvester Smith*, 90 Mich App 20 (1979); *People v Sommerville*, 100 Mich App 470 (1980); and *People v Matthews*, 143 Mich App 45 (1985).

The Court may be called upon to make a determination whether there has been an attack on the witness’ character for truthfulness. This determination appears to rest with the Court’s discretion. See *People v Sylvester Smith*, 90 Mich App 20, 25 (1979); *People v Matthews*, 143 Mich App 45, 60 (1985); *People v Winchell*, 171 Mich App 662, 665-666 (1988); and *People v Lukity*, 460 Mich 484, 490-491 (1999). Each of these cases gives examples of a Court’s determination whether there was an attack on credibility.

2. Specific Instances of Conduct — MRE 608(b)

Except for evidence of a conviction which is allowed pursuant to MRE 609, evidence of specific instances of conduct of a witness is NOT allowed to support or attack the witness’s credibility. *People v Mitchell*, 402 Mich 506 (1978).

But on cross-examination, the trial judge has discretion to allow inquiry into specific instances of conduct, if they are probative of the truthfulness or untruthfulness of the testifying witness or another witness whom the testifying witness has given character evidence testimony about. See *People v Brownridge*, 459 Mich 456, 463 (1999). Where a witness was not called as a character witness and did not testify on direct examination about the

D. Custody

MCL 722.23 permits the Court to examine a child separately in custody proceedings, *Burghdoff v Burghdoff*, 66 Mich App 608, 612 (1976). This examination is limited to determining the child’s preference and should not cover other best interest of the child factors. *Molloy v Molloy*, 466 Mich 852 (2002); *Impullitti v Impullitti*, 163 Mich App 507, 510 (1987) and *Burghdoff v Burghdoff*, 66 Mich App 608, 612-614 (1976). In camera interviews with children need not be recorded. *Molloy v Molloy*, 466 Mich 852 (2002). Effective May 1, 2004, the Supreme Court amended MCR 3.210(C)(5) to provide that the court may interview a child privately to determine if the child is of sufficient age to express a preference regarding custody, and if he or she is of sufficient age to express his or her reasonable preference. MCR 3.210(C)(5) also requires the court to focus the interview on these determinations and the information received may only be applied to the reasonable preference factor.

The rules of evidence do not apply to in camera proceedings held by the court in child custody matters to determine a child’s custodial preference. MRE 1101(b)(6).

E. Issues of Abuse or Mistreatment

A trial court must take testimony in open court on any issues regarding a child’s abuse or mistreatment. *Surman v Surman*, 277 Mich App 287, 302 (2007). According to the *Surman* court:

“[A]lthough courts should seek to avoid subjecting children to the distress and trauma resulting from testifying in court subject to cross-examination, concerns over the child’s welfare are outweighed when balanced against the parent’s due process rights.” *Id.*

3.5 Examination & Cross-Examination

MCL 600.2161 – Cross Examination of Opposite Party or Agent

MRE 611 – Mode and Order of Interrogation and Presentation*

A. General Rule—MRE 611

MRE 611(a)–(c) state:

“(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless

*See also Section 2.9, Limits on Evidence and Testimony.

consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

“(b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.

“(c) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.”

The scope and duration of cross-examination of witnesses rests in the sound discretion of the trial court. See *Wilson v Stilwill*, 411 Mich 587, 599, 601 (1981). MRE 611(d) states:

“(d) Leading Questions.

“(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.

“(2) Ordinarily leading questions should be permitted on cross-examination.

“(3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.”

MCL 768.24 provides that within the court’s discretion, a question is not objectionable solely because it is leading. See *People v Fields*, 49 Mich App 652, 658 (1973).

B. Cross-Examination of Opposite Party

MCL 600.2161 provides a party may call the opposite party, employee or agent and cross examine such witness and not be bound to accept their answers as true. Also note MRE 611(c)(3).

C. Answer on Cross-Examination

It has long been the law of this state that a cross-examining attorney must accept the answer given by a witness regarding a collateral matter. *People v Hillhouse*, 80 Mich 580, 585 (1890). However the law in this realm has

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a “reported domestic disturbance” call at the victim’s home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy’s interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the “battery affidavit” containing Amy’s statement was testimonial evidence not admissible against the defendant absent the defendant’s opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

“Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy’s assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.” *Davis (Hammon)*, *supra* at 830 (emphasis in original).

A victim’s statements made for the primary purpose of identifying, locating, and apprehending a perpetrator after the crime has already occurred constitute testimonial evidence. *People v Bryant*, 483 Mich 132, 143 (2009). In *Bryant*, the victim was allegedly shot at the defendant’s house and drove to a gas station where he was questioned by the police and identified the shooter as the defendant shortly before the victim died from the gunshot wound. *Bryant, supra* at 135-136. The Court concluded that the police questioned the victim about past events when they questioned him about a crime that had been committed 30 minutes prior to questioning and six blocks away from where it allegedly took place. *Id.* at 143. In addition, the police officers’ actions did not indicate that they “considered the circumstances at the gas station to constitute an ‘ongoing emergency,’” as defined by the United States Supreme Court. *Id.* at 144. For these reasons, the Michigan Supreme Court concluded that the victim’s statements were testimonial in nature and should not have been admitted against the defendant at trial. *Id.* at 151.

Statements made by the neighbor of a victim during a 911 call, which statements were made for the purpose of obtaining assistance for the victim, do not constitute “testimonial statements” for purposes of the Confrontation Clause. *People v Walker (Walker II)*, 273 Mich App 56, 63-64 (2006). The neighbor’s written statement regarding the information the victim provided to her, however, as well as the victim’s written statement, do constitute “testimonial statements” for purposes of the Confrontation Clause when there is no indication that a continuing danger to the victim existed at the time these written statements were made.

In *Walker*, the defendant beat the victim and threatened to kill her. *Walker II, supra* at 59-60. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim also made a written statement to the police. The victim did not appear for trial, and all of these statements were admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant argued that pursuant to *Crawford v Washington*, 541 US 36 (2005), admission of these statements violated the Confrontation Clause because they were "testimonial statements." The Court of Appeals, however, rejected the defendant's argument. *Walker I, supra* at 533. Subsequently, however, the Michigan Supreme Court vacated the Court of Appeal's holding in *Walker I* as to the Confrontation Clause issue, and remanded the case to the Court of Appeals for reconsideration in light of the newly decided case of *Davis v Washington*, 547 US 813 (2006). *People v Walker*, 477 Mich 856, 856 (2006). On remand, the Court of Appeals found that the statements made during the 911 call were not testimonial in nature because they were made for the purpose of resolving an existing emergency. *Walker II, supra* at 63-64. However, the Court found that the neighbor's written statement to the police and the victim's own statement to the police both did constitute "testimonial statements" for purposes of the Confrontation Clause. The Court reasoned that there was no indication of continuing danger at the time these statements were made:

"[T]he victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime...'" *Walker II, supra* at 65.

On this basis the Court of Appeals reversed its prior holding in *Walker I*, and remanded the case to the trial court for further proceedings as appropriate. *Walker II, supra* at 67.

To determine whether statements made to a Sexual Assault Nurse Examiner (SANE) or similar examiner are testimonial, "the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances objectively indicate[] that the statements would be available for use in a later prosecution or that the primary purpose of the [examiner's] questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, Mich App ___, ___ (2009). In reviewing the totality of the circumstances, the Court of Appeals suggested that trial courts consider the following nonexhaustive list of factors:

“1) the reason for the victim’s presentation to the [examiner], e.g., to be checked for injuries, to be checked for signs of abuse;

“2) the length of time between the abuse and the presentation;

“3) what, if any, preliminary questions were asked of the victim or the victim’s representative, or what preliminary conversations took place, before the official interview or examination;

“4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, an off-site location;

“5) the manner in which the interview or examination was conducted;

“6) whether the [examiner] conducted a medical examination and, if so, the extent of the examination, and whether the [examiner] provided or recommended any medical treatment;

“7) whether the [examiner] took photographs or collected any other evidence;

“8) whether the victim’s statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;

“9) whether the [examiner] completed a forensic form during or after the interview or examination;

“10) whether the victim or the victim’s representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;

“11) whether individuals other than the victim and the [examiner] were involved in the interview or examination and, if so, the level of their involvement;

“12) if and when law enforcement became involved in the case, how they became involved, and the level of their involvement; and

“13) how [examiners] are utilized by the particular hospital or facility where the interview or examination took place.” *Spangler, supra* at ____.

*The victim died before trial.

The lengthy sequence of events following a 73-year-old victim’s rape and robbery qualified as an ongoing emergency during which the statements made by the victim* constituted nontestimonial evidence under *Crawford v Washington*, 541 US 36, 68 (2004). *People v Jordan*, 275 Mich App 659, 664 (2007), citing *Davis v Washington*, 547 US 813 (2006). In *Jordan*, immediately after the early morning assault, the victim ran out of her house in

her nightgown yelling for help. The owner/operator (Ferris) of a nearby service station responded to the victim's screams and called 911. The police arrived 45 minutes later and although the victim told Ferris she had been raped, she failed to tell the police detective about the rape when she was first questioned. Avery, the victim's landlord and friend, arrived at the scene after the police left but the victim did not mention the rape. After learning of the rape by talking with Ferris, Avery took the victim to the police station where she told the police about the rape. *Jordan, supra* at 661-662.

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, 405 F3d 390, 396 (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

A non-testifying serologist's notes and lab report are "testimonial statements" under *Crawford v Washington*, 541 US 36 (2004). *People v Lonsby*, 268 Mich App 375, 391-393 (2005). In *Lonsby*, a crime lab serologist who did not analyze the physical evidence testified regarding analysis that was performed by another serologist. The testimony included theories on why the non-testifying serologist conducted the tests she conducted and her notes regarding the tests. In *Crawford*, "the Court stated that pretrial statements are testimonial if the declarant would reasonably expect the statement will be used in a prosecutorial manner and if the statement is made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Lonsby, supra* at 376, quoting *Crawford, supra* at 51–52. The Court of Appeals found that because the serologist would clearly expect that her notes and lab report would be used for prosecutorial purposes, the information satisfies *Crawford's* definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the

testimony of Woodford falls squarely within *Crawford's* prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at 392-393.

An affidavit prepared by a forensic analyst is testimonial evidence under *Crawford v Washington*, 541 US 36 (2004), and the forensic analyst who prepared the affidavit is a witness for purposes of the Confrontation Clause. *Melendez-Diaz v Massachusetts*, 557 US _____, _____ (2009). In *Melendez-Diaz*, the trial court admitted into evidence affidavits that stated the substance found on the defendant during a search by police was cocaine. *Melendez-Diaz, supra* at _____. The United States Supreme Court concluded that the affidavits constituted testimonial statements because "the affidavits [were] "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," [and] under [state] law, the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance[.]'" *Id.* at _____ (internal citations omitted). As such, the defendant's Sixth Amendment right to confrontation was violated when he was not given an opportunity to cross-examine the analysts who prepared the affidavits. *Id.* at _____. See also *People v Payne*, _____ Mich App _____, _____ (2009), which used the *Melendez-Diaz* reasoning (and adopted as its own the reasoning of Judge Saad in *People v Lonsby*, 268 Mich App 375 (2005)) to conclude that the analyst who prepares a DNA report must also be the analyst who testifies as to its contents, unless the analyst is unavailable and the defendant has had an opportunity to cross-examine the analyst. To allow an analyst to testify who did not conduct the DNA test, personally examine the evidence collected, or personally reach any conclusions contained in the report, violates the defendant's Sixth Amendment right to confrontation. *Payne, supra* at _____.

Admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause where the defendant "has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *People v Jones*, 270 Mich App 208, 212-214 (2006). See MRE 804(b)(6). However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful conduct has caused a witness to be unavailable to testify at trial. *Giles v California*, 554 US _____, _____ (2008). The doctrine of forfeiture by wrongdoing applies only when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Id.* at _____.

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, 263 Mich App 124, 133-135 (2004). In

may tend to arouse the passion or prejudice of the jurors.”[Citations omitted.]

Photographs of a murder victim’s injuries are admissible when they are relevant to the issue of the defendant’s intent to kill, and their probative value is not outweighed by the possibility of undue prejudice. *People v Gayheart*, Mich App _____, _____ (2009). The Court stated, “[a]lthough certain of the pictures appear[ed] gruesome, their admission was helpful in proving that the victim had been intentionally killed and in corroborating the trial testimony.” *Gayheart, supra* at _____.

B. Videotapes

The admission of videotapes is closely analogous to the admission of photographic evidence, and the same standard should be applied as to photographic evidence, although in exercising its discretion, the trial court must take into account the differences between the two media. *People v Sharbnow*, 174 Mich App 94, 102 (1989); and *People v Barker*, 179 Mich App 702, 710 (1989). See also *Rogers v Detroit*, 457 Mich 125, 151-152 (1998) and *People v Hack*, 219 Mich App 299, 309-310 (1996).

C. Audiotapes

Transcript of audiotape. The Sixth Circuit Court of Appeals, *United States v Robinson*, 707 F2d 872 (CA 6, 1993), has set out the preferred procedures for ensuring the accuracy and fairness of audiotape transcripts. In *People v Lester*, 172 Mich App 769, 775 (1988), the Court of Appeals reiterated the *Robinson* procedure:

“The first method was by stipulation by the parties. The second method was for the trial court to make an independent determination before trial by checking the transcripts against the tape. The least preferred method was to present the jury with two transcripts, one containing the state’s version and the other defendant’s. The panel observed that, while this list was not exhaustive, each procedure entails basic safeguards to ensure reliability. *Robinson, supra* 876-877.”

The *Lester* court went on to state:

“The trial court should have taken steps to insure the accuracy of the transcript before it was shown to the jury. In order to guide courts in the future, this Court adopts prospectively the procedure set forth in *Robinson, supra* at pp 878-879:

‘We therefore reiterate our preference for using a transcript when the parties stipulate to its accuracy. But in the absence of a stipulation, we hold that the transcriber should

