FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	**CRIM. CASE NO. 13-0049**
Plaintiff,	**ORDER DENYING DEFENDANT'S MOTION TO CHANGE VENUE**
v.	
JOSEPH A. CRISOSTOMO,	
Defendant.	

I. INTRODUCTION

THIS MATTER came before the Court on September 4, 2013 on Defendant's motion to change venue and for an additional evidentiary hearing on the matter. The Commonwealth was represented by Chief Prosecutor Shelli Neal and Assistant Attorney General Brian Flaherty. Defendant Joseph A. Crisostomo was present and represented by Janet King. Based on a review of the filings, oral argument and applicable law, the Court denies Defendant's motion.

Defendant Crisostomo has been charged with First Degree Murder in violation of 6 CMC §§ 1101(a)(1) and (3); Kidnapping, in violation of 6 CMC § 1421(a)(2)(B); Sexual Assault in the First Degree, in violation of 6 CMC § 1301(a)(1); Robbery, in violation of 6 CMC § 1411(a); Theft, in violation of § 1601(a); Assault and Battery, in violation of 6 CMC § 1202(a); and Disturbing the Peace, in violation of 6 CMC § 3101(a). The jury trial for this matter is set for October 15, 2013.

Defendant argues that pretrial publicity has created prejudice against him on Saipan, making the selection of a fair and impartial jury impossible. Therefore, Defendant moves the Court for a change of venue. At oral argument defense counsel clarified that Defendant is requesting that the trial proceed on Saipan, but that the jury pool should be comprised of residents of Tinian and/or Rota. Defense counsel suggests that jurors chosen from Tinian and/or Rota travel to Saipan for the trial. Alternatively, Defendant requests that the trial proceed on Tinian or Rota. Defendant has also requested a separate hearing on this matter.

The Court will address an issue of first impression in the Commonwealth: whether the quantity and nature of pre-trial publicity in this case raises a presumption of prejudice in the community, necessitating a change of venue in order to protect the Defendant's right to trial by a fair and impartial jury.

II. LEGAL STANDARD

Criminal defendants are guaranteed the right to trial by an impartial jury. U.S. Const. amend. VI. Section 501 of the Covenant[1] extends this right to citizens of the Commonwealth. 48 U.S.C. § 1801 note. Similarly, due process requires that an impartial jury be "free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Jurors are not required to be "totally ignorant of the facts and issues involved" in the case. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). As such, juror exposure to news reports about the crime does not automatically deprive the accused of due process. *Skilling v. U.S.* 130 S. Ct. 2896, 2915 (2010). It is the defendant's burden to demonstrate that the pretrial publicity is so pervasive and inflammatory that juror prejudice should be presumed, requiring a venue change to secure jurors who are not prejudiced, and to preserve the defendant's procedural rights. *See Murphy v. Florida*, 421 U.S. 794, 800 (1975) (explaining that

[1] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

defendant bears burden of demonstrating the presumption of prejudice); *and U.S. v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996) ("Prejudice is presumed when the record demonstrates that the community where the trial was held was *saturated* with *prejudicial and inflammatory* media publicity about the crime.") (emphasis in original). A finding of presumed prejudice rare and is reserved for the most extreme cases in which it is practically impossible to empanel an impartial jury. *See Skilling*, 130 S. Ct. at 2915; *Gallego v. McDaniel*, 124 F.3d 1065, 1070 (9th Cir. 1997) (quoting *U.S. v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996)). When there is a finding of presumed prejudice, the accused is entitled to a change of venue or continuation of trial to avoid the prejudicial media attention. *Sheppard*, 384 U.S. at 363.

The U.S. Supreme Court has found a presumption of prejudice in three cases. In *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963), the Court found that the defendant's televised confession was a "spectacle" that created such a presumption of guilt in the community that it neutralized the effectiveness of any subsequent proceedings. In *Estes v. Texas*, 381 U.S. 532, 536, 538 (1965), the Court found that the extensive television coverage of pretrial proceedings, where reporters attempted to take photos of documents the defendant was reviewing as he sat at the counsel table, "bombard[ed]" the community and deprived the defendant of "judicial serenity and calm." Finally, in *Sheppard v. Maxwell*, 384 U.S. 333, 353-54, 358 (1966), the Court reversed defendant's conviction, based on both the pervasive pretrial publicity and the "carnival atmosphere" at trial. During the *Sheppard* trial, the press had its own table set up inside the bar. *Id.* at 343.

In its most recent case on the topic, *Skilling v. U.S.*, the U.S. Supreme Court found that pretrial publicity did not result in a presumption of community prejudice or deprive Enron executive Jeffrey Skilling of a fair trial. *Skilling v. U.S.*, 130 S. Ct. 2896, 2907 (2010). The *Skilling* Court weighed the following factors in making its determination: (1) "the size and characteristics of the community in which the crime occurred;" (2) the nature of the publicity and whether it

contained information such as a confession "or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight;" and (3) the time elapsed between the time of crime and the trial. *Skilling*, 130 S. Ct. at 2915-16.

III. PRESUMPTION OF PREJUDICE ANALYSIS

Defendant Crisostomo provided one sample news article in his motion to change venue along with several additional news articles, blog postings, and public comment excerpts in his reply to the Commonwealth's opposition. The Court reviewed all of the articles cited by Defendant, and after applying the factors outlined in *Skilling*, finds that the cited pretrial publicity does not call for a finding of presumed prejudice.

A. Size and Characteristics of the Community

Defendant argues that the pretrial publicity creates a high risk of juror prejudice because Saipan is a "small community" and homicide here is rare. Def.'s Reply at 3; Def.'s Motion at 4. Defendant raises the concern that many people on Saipan are likely related or connected to people involved in the case. The Court acknowledges that Saipan is a relatively small community, and that the U.S. Supreme Court has found juror prejudice more likely in smaller communities. *Compare Rideau v. Louisiana*, 373 U.S. 723 (1963) (150,000 residents) *with Skilling*, 130 S. Ct. at 2915 (4.5 million residents). While this factor may weigh in favor of a finding of prejudice in this case, homicide in a small community does not always necessitate a venue change. For example, in *Goss v. Nelson*, the underlying crime was the murder of a member of a well-known farming family in a rural community where no murders had occurred for 70 years. *Goss v. Nelson*, 439 F.3d 621, 630 (10th Cir. 2006). Still, the Tenth Circuit affirmed the lower court's finding that pretrial publicity did not deny the defendant a fair trial in that case. *Id.* at 624.

B. Nature of the Publicity

Defendant argues that the pre-trial publicity has created a prejudice in the community because it is pervasive and implies the Defendant's guilt. Upon review of the exhibits provided by Defendant and articles cited in his filings, the Court finds that the publicity includes details about the crime; information about the subsequent investigation, including statements about DNA, hair and fiber lab results implying that those results link Defendant to the crime; Defendant's pretrial appearances, and Defendant's prior arrests. Of note, two of the articles refer to a press conference on this case held by the Office of the Attorney General (OAG) in February 2013 and quote now Chief Prosecutor Shelli Neal. *See* Exs. B, D to Def.'s Reply.

In its review of the articles provided by Defendant, the Court does not see any information that is of such a nature that it would be "imprinted indelibly in the mind of anyone who watched [or read] it." *See Skilling*, 130 S. Ct. at 2916. The news accounts in this case do not include a confession or any other information of the "smoking-gun variety." *See id; Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963) (finding defendant's due process rights were violated when video of defendant's confession was aired on television before trial, resulting in "kangaroo court proceedings"); *and Sheppard*, 384 U.S. at 340 (pretrial publicity involved articles detailing discrepancies in the defendant's statements to police, defendant's own statements to the press, proclamations by a police officer urging defendant's arrest and citing "definitive" scientific tests that were never introduced at trial).

As a comparison, the Eighth Circuit affirmed the District Court's finding that pretrial publicity did not establish a presumption of prejudice in *United States v. Blom*, where the publicity included information about the defendant's "criminal record, the discovery of human remains on his property, and speculation that he might be involved in a series of unsolved kidnappings and murders." *United States v. Blom*, 242 F.3d 799, 802-03 (8th Cir. 2001). And in *Goss v. Nelson*, the

publicity included articles that mentioned the defendant's "criminal record, concerns about the parole process evidenced by [defendant's] release from prison only eleven days before the crime," and a quote from the presiding judge implying the defendant's guilt. *Goss*, 439 F.3d at 630-31.

In this case, Defendant argues that to OAG has compromised his ability to have a fair trial by holding a press conference and making misleading statements to the press. The comments made by the OAG include statements concerning the investigation process, the credibility of the evidence that the Commonwealth intends to introduce at trial, the reasons for the timing of bringing charges against Defendant, and references to DNA and other forensic evidence. The articles reflecting these statements were published February 25, 2013. *See* Exs. B, D to Def.'s Reply. While the public may place more weight on statements by the prosecution, such statements still do not rise to the degree of blatant prejudice required for a finding of presumed prejudice. Comments by prosecutors are more easily disregarded than statements of the accused, such as a confession. *See United States v. Chagra*, 669 F.2d 241, 251-52, n.11 (5th Cir. 1982) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.").

While the Court does not find that the publicity encouraged by the OAG thus far is enough to create an impression that "readers or viewers could not reasonably be expected to shut from sight," similar comments made by the OAG closer to trial could be problematic. *See Skilling*, 130 S. Ct. at 2916. To prevent that from happening, the Court orders the OAG to review Rule 3.6 of the Model Rules of Professional Conduct, and the accompanying comments, and to make no statements in violation of that rule. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2013).

Defendant also points to the Commonwealth's filing of a notice of intent to introduce evidence of other bad acts was prejudicial, and cites to a newspaper article published about that notice, entitled "Prosecution says Crisostomo is also a suspect in a 2006 murder case." Defendant

argues that this notice and its contents will be inadmissible at trial, and are unduly prejudicial. The Court finds that this article appears to quote directly from the public court filing and reports on that filing in a neutral and dispassionate manner. There is no indication that the OAG's notice was frivolous or offered in bad faith to stir up community prejudice. This article, like the others, lacks information such as a confession that jurors could not reasonably be expected to ignore. *See Skilling*, 130 S. Ct. at 2916.

Finally, the Defendant argues that comments made online in response to blog posts and news articles evidence community prejudice. The Court finds that a presumption of prejudice may not be predicated on a small sample of online comments made anonymously or pseudonymously. The voices of a few individuals do not stand for the entire community.

On the whole, the nature of the publicity about this case is what one would expect to accompany a high-profile criminal prosecution. The Court finds, after reviewing all of the articles provided and cited by Defendant, that there is no information therein that is so blatantly prejudicial, such as a televised confession or smoking gun, that jurors could not leave what they had read or seen in the media behind and give Defendant a fair and impartial trial. Accordingly, this factor weighs against a finding of presumed prejudice.

C. Timing of Publicity

The U.S. Supreme Court has found that where the trial quickly follows the crime, a finding of presumed prejudice is more likely. *Skilling* 130 S. Ct. at 2916. The underlying crimes in this case occurred in February 2012, more than twenty months before the trial. And most of the publicity cited by Defendant occurred on or before February 2013. Defendant cited three recent newspaper articles about the pretrial motions. These articles, as discussed above, appear to quote directly from public court filings and to report the contents of those filings in a dispassionate manner. Thus, this factor weighs against a finding of presumed prejudice.

D. Conclusion

Balancing the factors outlined in *Skilling*, the Court holds that there is not a presumption of prejudice based on pretrial publicity. Further, the Court need not conduct an evidentiary hearing on the pretrial publicity if there is no presumption of prejudice. *U.S. v. Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir. 1991); *see also U.S. v. Campa*, 459 F.3d 1121, 1146 (11th Cir. 2006) ("When a defendant alleges prejudicial pretrial publicity would prevent him from receiving a fair trial, it is within in the district court's broad discretion to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.") Accordingly, the Court denies Defendant's request for an additional evidentiary hearing at this stage, and denies Defendant's motion to change venue.

IV. PREVENTATIVE MEASURES

Because pretrial publicity is likely to continue, Defendant is granted leave to renew his motion at a later time if necessary. However, a change of venue may not alleviate Defendant's concerns about juror prejudice caused by pretrial publicity because all three possible venues in the Commonwealth are serviced by the same news outlets, so there is no other place to go.

In *Sheppard v. Maxwell*, the U.S. Supreme Court found that the defendant did not receive a fair trial due to the combination of pervasive prejudicial pretrial publicity and a trial characterized by "bedlam." *Sheppard*, 384 U.S. at 355, 363. There, the Court provided instructions on what the trial court could have and should have done to protect the rights of the accused, noting that reversals on appeal are "but palliatives; the cure lies in those remedial measures that will prevent prejudice at its inception." *Id.* at 333-35, 355-63. The *Sheppard* Court found that the trial court erred by failing to control the press at trial and by failing to restrain the dispersal of prejudicial information by police officers, witnesses, and counsel and the prosecutors. *Id.* at 359-62. The Court noted that the trial court should have raised the issue of jury sequestration *sua sponte*. *Id.* at 363.

The Court orders the following precautionary measures to protect Defendant's right to a fair and impartial trial:

1. Any comments to the press made by the OAG before or during trial must comply with Rule 3.6 of the American Bar Association's Model Rules of Professional Conduct. The Court directs the OAG to carefully review the list of subjects that are more likely than not to have a material prejudicial effect on these proceedings.[2]
2. The Court will create a larger jury pool by issuing three times the usual number of jury summons.
3. The Court will allow extra time for voir dire and, if necessary, will institute bench conference screening to prevent contamination of the jury pool.

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[2]Comment 5 to Model Rule 3.6 states:

> There are [. . .] certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 5 (2013).

4. The Court grants two additional preemptory challenges each to the Defendant and the Commonwealth.

V. CONCLUSION

Based on the foregoing, Defendant's motion for a venue change and motion for an additional evidentiary hearing is **DENIED**.

IT IS SO ORDERED this 11th day of September, 2013.

JOSEPH N. CAMACHO
Associate Judge