STATE OF IDAHO)
County of BOUNDARY)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BOUNDARY

STATE OF IDAHO,

Plaintiff,

vs.

JOHN AUGUST FUNKHOUSER,

Defendant.

Case No. **CRF 2011 1691**

MEMORANDUM DECISION AND ORDER ON PRETRIAL MOTIONS

I. FACTUAL BACKGROUND.

This matter is before the Court on multiple pretrial motions filed by both the State and Defendant. Oral argument on these motions was held August 14, 2012.

The State's Pretrial motion, filed August 2, 2012, requests: 1) that the State be allowed to set up a reconstruction of the scene in the courtroom, 2) that the jury be allowed to dry fire the gun to feel the trigger pull or, in the alternative, to allow Idaho Forensic Services to demonstrate how a trigger pull poundage is determined, and 3) that attached autopsy photographs of the alleged victim be allowed into evidence. State's Pretrial Motion and Notice of Hearing, pp. 1-2. The State filed no brief or memorandum in support on any of these three issues. On August 13, 2012, the day before oral argument on the State's motions, the Defendant filed his Response to State's Pretrial Motion. Following the Court's staff attorney's inquiry to counsel for the

State, the State had no intention to file any briefing in support of its motions or in response to the Defendant's objections to the State's motions prior to oral argument on August 14, 2012.

On August 7, 2012, Defendant filed three pretrial motions: 1) Motion to Continue Trial, 2) Motion for Change of Venue and 3) Motion in Limine.

Defendant's Motion to Continue Trial requests the trial be continued until after the November 6, 2012, election, due to the fact that Tevis Hull, the deputy prosecuting attorney assigned to this case, is running for Prosecutor in Bonner County. Motion to Continue Trial, p. 1; Affidavit of John A. Funkhouser, pp. 1-2, ¶¶ 3, 5. Defendant believes that Hull will use this trial as a campaign boost in the upcoming election. Defendant's Motion to Continue, pp. 1-2; Affidavit of John A. Funkhouser, p. 2, ¶ 5.

Defendant's Motion for Change of Venue requests the trial venue be changed due to pretrial publicity, specifically articles that have been published in local Bonner County newspapers. Authority in Support of Motion for Change of Venue, pp. 1-2; Affidavit of John A. Funkouser, p. 2, ¶ 4. Defendant claims that one article in particular, printed on July 5, 2012, in the Bonners Ferry Herald and printed July 8, 2012, in the Bonner County Daily Bee was written in a highly prejudicial and inflammatory manner toward the defendant. Authority in Support of Motion for Change of Venue, p. 2.

Defendant's Motion in Limine requests counsel and all witnesses be prohibited from referring to the homicide as a "murder," the weapon as a "murder weapon," and Defendant as "murderer" during the trial. Motion in Limine-Use of Word Murder/Murderer, p. 1. Defendant claims that using such words will deny him the right to a fair trial and deny him the right to the presumption of innocence because the use of

such words will allow the prosecutor to imply expression of a personal belief as to the Defendant's guilt. Motion in Limine-Use of Word Murder/Murderer, pp. 2-3.

As to all three motions by Defendant, the State has not supplied any briefing, and, following the Court's staff attorney's inquiry to counsel, the State had no intention to file briefing prior to oral argument on August 14, 2012.

II. ANALYSIS OF STATE'S PRETRIAL MOTIONS.

As mentioned above, the State's Pretrial motion requests: 1) that the State be allowed to set up a reconstruction of the scene in the courtroom, 2) that the jury be allowed to dry fire the gun to feel the trigger pull or, in the alternative, to allow Idaho Forensic Services to demonstrate how a trigger pull poundage is determined, and 3) that attached autopsy photographs of the alleged victim be allowed into evidence. State's Pretrial Motion and Notice of Hearing, pp. 1-2. The State has filed no brief or memorandum in support on any of these three issues.

A. Reconstruction of the Scene in the Courtroom.

According to defense counsel, "Defendant has only limited objection to the State's request to set up a reconstruction of the scene." Response to State's Pretrial Motion, p. 1. Those objections are that the scene be considered for demonstrative purposes only and not as evidence, that the scene be set up only during the time the demonstration is needed and not be set up the entire time of trial in full view of the jury, or be set up in a different unoccupied room at the courthouse. *Id.* Defense counsel states the reconstruction would be more akin to a view of the scene permitted by I.C. § 19-2124. *Id.,* p. 2.

Given no real objection to the reconstruction, such will be allowed. Counsel for the State will need to find a separate room at the Boundary County Courthouse for the

viewing of the reconstruction by the jury to take place. The reconstruction may remain set up during the entire trial, but the timing of any view(s) will be up to the Court following motion by counsel. Counsel for Defendant will have an opportunity to inspect the reconstruction prior to any showing to the jury. Counsel will need to either agree as to how this reconstruction is to be set up, or schedule a time for a determination by the Court. A limiting instruction that what is observed in the reconstruction is not evidence and is not to be taken into consideration in arriving at any verdict is certainly proper (*State v. McClurg,* 50 Idaho 762, 300 P. 898 (1931)), and each counsel are ordered to prepare a proposed jury instruction, or submit one agreed-upon instruction.

B. Jury Experiments.

Idaho has not yet encountered a case directly involving jury experiments performed in the trial during a parties' case-in-chief. The Idaho Supreme Court has made some mention of experiment standards for juries during jury deliberations. *State v. Foell*, 37 Idaho 722, 217 P. 608 (1923). In *Foell*, the Court held that tests to determine whether or not an exhibit was an intoxicating liquor should be made in the presence of the court and the parties. *Foell*, 37 Idaho 727-28, 217 P. 609. The Court clarified, however, by stating that, "the law-making department of this state has said that it is permissible for the jury to take such an exhibit to the jury room, and this court is not going to say that the jury cannot examine and make ordinary tests of an exhibit which the law permits them to take with them for examination." *Foell*, 37 Idaho 727-28, 217 P. 609. The Court went on further to state that in that case, there was no improper test of the exhibit or that the defendant was *prejudiced* by such tests. *Foell*, 37 Idaho 727-28, 217 P. 609. (emphasis added).

Furthermore, the Court addressed a jury inspection of sheep not admitted into evidence outside of the courtroom in *State v. Main*, 37 Idaho 449, 458-59, 216 P. 731, 734 (1923). The Court held that a juryman's physical inspection of the sheep *influenced* the jury and so was error. *Main*, 37 Idaho 458-59, 216 P. 734 (Emphasis added).

Essentially, the standard of review appears to be the same for general evidence under IRE 401, 402 and 403. IRE 401 states: "'Relevant Evidence' means 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." I.R.E. 401. If the evidence is determined to be relevant, then the evidence must undergo the IRE 403 test, which states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. I.R.E. 403.

Idaho appellate courts seem to have never encountered a case in which jury experiments during trial were addressed, much less jury experiments conducted during a party's case-in-chief.

Other jurisdictions have addressed the issue of jury experimentation directly, but usually in the context of either jury deliberations or jury conduct outside of trial. In the federal courts, the law is well settled that a case must be decided upon evidence submitted in court during the trial and not upon private experiments of the jurors. *U.S. v. Beach*, 296 F.2d 153,158 (4th Cir. 1961). Furthermore, the focus of federal cases involving experiments and jury misconduct has been the receipt of extrinsic evidence or outside influences. *People v. Cumpian*, 1 Cal.App. 4th 307, 313 1 Cal.Rptr. 2d 861, 865

(1991). Most of these experimentation cases involve expert testimony by witnesses that lead to the jury experiments. In *Krause Inc. v. Little*, the Nevada Supreme Court acknowledged that it is well established that "jurors may not receive evidence out of court." 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). The Court clarified in stating that "insofar as tests or experiments carried out by the jury during deliberations have the effect of introducing new evidence out of the presence of the court and parties, such tests and experiments are improper and, if the new evidence . . . has a substantial effect on the verdict, prejudicial." *Krause*, 117 Nev. 936, 34 P.3d 570. *Krause* further states that when the jury reconstructs an expert's experiment, the jury is merely testing the veracity of the expert's testimony. *Krause*, 117 Nev. 936, 34 P.3d 570-71. In *Krause*, the Nevada Supreme Court held that there was no abuse of discretion when the trial court allowed the jury to take the accident ladder, which was admitted into evidence, and reenact the expert's experiments. *Krause*, 117 Nev. 936, 34 P.3d 571. The South Dakota Supreme Court held that the fundamental rule governing the use of exhibits by the jury is that they may use the exhibit "according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter." *State v. Best*, 89 S.D. 227, 244, 232 N.W.2d 447 457 (1975). In that case, the South Dakota Supreme Court held that the jurors lifting a phone, properly admitted into evidence, during deliberations, in order to determine whether a twenty-seven-month-old child could have hurled the phone with sufficient force to injure victim, was proper. *Best*, 89 S.D. 244, 232 N.W.2d 457. Another example is the use of binoculars in the jury room to gauge the validity of the State's position. *U.S. v. Hawkins*, 595 F.2d 751, 753, 183 U.S. App. D.C. 366, 368 (1978). In *Hawkins*, the United States Court of Appeals for the District of Columbia Circuit held the jury's

experimentation with police binoculars during deliberations, when the binoculars had been received into evidence, and when the purpose of the experiment was to gauge the validity of the State's position was permissible because it was "only an evaluation of evidence properly before the jury." *Hawkins*, 595 F.2d 753, 193 U.S. App. D.C. 368.

The Tennessee Supreme Court case of *State v. Coulter*, 67 S.W.3d 3 (2001), appears to be the closest case on point. In that case, an expert testified at the defendant's trial concerning the steps required to fire the defendant's gun and specifically the amount of pressure required to pull the trigger on the gun. *Coulter*, 67, S.W.3d 55. The State then requested that the jury members be allowed to stand down and each pull the trigger so that they could "find out for themselves how easy or difficult" it was, which the judge allowed. *Coulter*, 67 S.W.3d 55. The criminal appellate court addressed only the issue of whether the probative value of the demonstration was substantially outweighed by the consideration of "waste of time," as that was the only objection made by defense counsel. *Coulter*, 67 S.W.3d 56. The Court held that due to the fact that the defendant was claiming that the gun accidentally discharged, the State needed to eliminate any reasonable doubt stemming from that possibility and therefore the amount of pressure required to pull the trigger of the gun was relevant. *Coulter*, 67 S.W. 3d 56. Furthermore, the Court held that permitting each jury member to pull the trigger assisted each jury member in understanding the expert's testimony. *Coulter*, 67 S.W.3d 56. The Court concluded by quoting another case which stated that "demonstrating the working of machinery is an accepted part of evidence." *Coulter*, 67 S.W.3d 56 (quoting *Bowlin v. State*, 823 P.2d 676, 678 (Alaska Ct. App. 1991)).

In this case, the State is requesting that the jury be allowed to dry fire the gun to feel the trigger pull or, in the alternative, to allow Idaho Forensic Services to

demonstrate how trigger pull poundage is determined. Pretrial Motion and Notice of Hearing, pp. 1-2. This case appears to be very similar to the case in *Coulter* regarding the dry-firing of the gun in order to allow the jury to find out for themselves how easy or difficult it was to pull the trigger. The requisite force is obviously going to be a pivotal issue in both the State's case on intent and the defense case of accident. The Tennessee Supreme Court in *Coulter* determined the amount of pressure required to discharge the gun was relevant in determining whether a discharge was accidental and, furthermore, that permitting the jury members to pull the trigger assisted them in understanding the expert's testimony on the subject. 67 S.W.3d 3, 56-57.

As in *Coulter*, Defendant here appears to be arguing that the gun discharge was accidental and so the amount of pressure required to discharge the gun would be relevant under IRE 401. Furthermore, many courts have held that jury experiments are proper, so long as they are used only to evaluate evidence that is properly before the jury. If the gun is admitted into evidence, then that evidence is properly before the jury and therefore the jury experiment of dry-firing the gun would be proper.

Defendant argues that the gun that is proposed to be introduced into evidence is not the actual weapon that was involved in this case. Response to State's Pretrial Motion, p. 2. That concern was addressed by counsel for the State at the August 14, 2012, hearing on these motions. It would be the actual weapon, and not a similar weapon that would be sought to be introduced as evidence by the State, and which the State now asks that the jurors be allowed the opportunity to dry-fire.

Defendant further contends that the ease of pulling a trigger depends on a variety of factors, the recreation of which cannot be perfected by different people in a jury. At oral argument, counsel for Defendant clarified this point arguing that the jurors

would neither have had the Defendant's degree of intoxication nor degree of adrenaline as a result of the situation. Such argument misses the point. The opportunity to dry-fire the actual weapon is really clarification of other evidence, that being testimony about the force needed to pull the trigger. The opportunity to dry-fire the actual weapon is not requested and is not being allowed as an attempt to create exactly what the Defendant experienced on the day in question. Counsel for Defendant also argued that different jurors will have different degrees of force, depending on hand strength, arthritis, and other factors. While it is true that each juror's hand strength may well differ from that of the Defendant on the day in question, the argument again misses the point. The opportunity to dry-fire the actual weapon is allowed so that each juror has the opportunity to understand each side's expert testimony as to how much pound force is needed to pull the trigger, and not to show how difficult or easy pulling the trigger was for this Defendant on the day in question. The cases researched make no mention of other extrinsic factors. *Coulter* did not address potential differences in perception because the key point of that case was whether the trigger pull of the gun was relevant and whether the experiment would assist the jury in understanding and testing the veracity of the expert's testimony. 67 S.W.3d 3, 56-57. With regard to potential unfair prejudice, confusion of the jury and misleading the jury, *Coulter* and the other cases mentioned herein stand for the idea that, generally, experiments performed by the jury on evidence that is properly before it are valid, and thus are not substantially outweighed by unfair prejudice. This Court finds the trigger pull of the gun will be relevant in this case, and the experiment would assist the jury in its understanding of the testimony. Thus, it is proper to allow the prosecution to give each juror the opportunity to dry-fire the actual weapon used in the alleged crime during its case in

chief. While each individual juror has the opportunity to pull the trigger, no juror will be required to do so. The actual weapon will need to be disabled prior to the dry-firing as long as such disabling does not affect the trigger mechanism force. While the actual weapon, if offered and received into evidence at trial, will accompany the jury into the jury room, there will need to be a lock on the gun for safety of the jury and to preclude individual jurors from repetitively dry-firing the gun so as to preclude uncontrolled juror experiments which might occur outside the courtroom and to preclude any undue emphasis on the dry firing that occurred in the courtroom.

The State's motion to allow the jury to dry fire the gun also contained an alternative motion, to allow Idaho Forensic Services to demonstrate how a trigger pull poundage is determined. State's Pretrial Motion and Notice of Hearing, pp. 1-2. The fact that this Court has ruled that each juror will have the opportunity to dry fire the weapon used, does not foreclose testimony about trigger pull force.

C. Autopsy Photographs.

The threshold question regarding admissibility of evidence is whether the proposed evidence is relevant under IRE 401. It is well established in Idaho that where allegedly inflammatory evidence is relevant and material as to an issue of fact, the trial court must determine whether the probative value is substantially outweighed by the danger of unfair prejudice under IRE 403. *State v. Winn*, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992). The determination of whether to admit evidence challenged on the ground that it is more prejudicial than probative is clearly within the trial court's discretion. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991). With regard to homicide cases, the trial court has discretion to admit into evidence photographs of the victim as an aid to the jury in arriving at a fair understanding of the evidence, as proof of

the corpus delicti, the extent of the injury, the condition of the body, and for their bearing on the question of the degree and atrociousness of the crime. *State v. Beam*, 109 Idaho 616, 620, 710 P.2d 526, 530 (1985). The mere fact that the photographs depict the actual body of the victim and the wounds inflicted on the victim and may tend to "excite the emotions of the jury" is not a basis for excluding them. *Winn*, 121 Idaho 853, 828 P.2d 882. The Idaho Supreme Court has upheld the admission of photographs depicting bruises and abrasions on the victim's body. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985).

With regard to repetition of photographs, it is recognized that there may be some degree of repetition with some photographs, but where photographs give somewhat different views of the injuries, their inflammatory effect would be minor when considered with other photographs of the body. *State v. Beason*, 95 Idaho 267, 277, 506 P.2d 1340, 1350 (1973).

With regard to the cumulative issue regarding the autopsy photographs, the Idaho Supreme Court has held that a jury is entitled to have a full and complete description of the events surrounding the commission of a crime. *State v. Sanchez*, 147 Idaho 521, 528, 211 P.3d 130, 137 (Ct. App. 2009). The Idaho Court of Appeals has gone so far as to state that "it should be presumed that a person capable of serving as a juror in a murder case can, without losing his or her head, bear the sight of a photograph showing the body of the decedent." *Sanchez*, 147 Idaho 528, 211 P.3d 137. In *Sanchez*, the Idaho Court of Appeals upheld that the number of admitted photographs of the decedent's body, twenty-eight in number, was not an abuse of discretion by the trial court due to the nature of the alleged death (torture). 147 Idaho 528, 211 P.3d 137. The Idaho Court of Appeals held that the trial court's taking into

consideration the number of injuries and the nature of the case to allow multiple photos, some zooming in on specific areas, was not an abuse of discretion. *Sanchez*, 147 Idaho 528, 211 P.3d 137.

The general rule regarding the admissibility of autopsy photos can be summarized in the following quote from *State v. Martinez*, 92 Idaho 183, 439 P.2d 691 (1968).

> Photographs of the victim in a prosecution for homicide, duly verified and shown by extrinsic evidence to be faithful reproductions of the victim at the time in question are, in the discretion of the trial court, admissible in evidence as an aid to the jury at arriving at a fair understanding of the evidence, proof of the corpus delicti, extent of injury, condition and identification of the body, or for their bearing on the question of the degree or atrociousness of the crime, even though such photographs may have the additional effect of tending to excite the emotions of the jury.

Martinez, 82 Idaho 183, 188, 439 P.2d 691, 696.

In this case, the prosecution seeks to enter into evidence nineteen photographs from the alleged victim's autopsy. State's Pretrial Motion and Notice of Hearing. At oral argument on August 14, 2012, that number was whittled down to nine, with one additional photograph (sought to be admitted at trial) admitted for purposes of the hearing only. While some of the photographs depict the similar images, none of the photographs are exactly the same. There are photographs from different angles, on different parts of the alleged victim's body, as well zoomed-in photographs and photographs depicting measurements. As the State has not written any briefing on the issue of the photographs, it is difficult to determine exactly what the significance of each individual photograph is and what each individual photograph is specifically meant to depict. Save for the new photograph submitted at oral argument, none of the photographs are overly gruesome, as they were taken during the autopsy and none appear to be inflammatory in nature.

Assuming the appropriate foundation is laid at trial, all nine photographs we be admitted. With cropping of the new photograph submitted at oral argument on August 14, 2012, that photograph will be admitted.

III. ANALYSIS OF THE DEFENDANT'S MOTIONS.

A. Motion for Change of Venue.

1. Standard of Review.

Idaho Criminal Rule 21(a) governs a motion for change of venue. I.C.R. 21(a). I.C.R. 21(a) states that "The court upon motion of either party shall transfer the proceeding to another county if the court is satisfied that a fair and impartial trial cannot be had in the county where the case is pending. I.C.R. 21(a). Such a motion is subject to the discretion of the trial court. *State v. Yager*, 139 Idaho 680, 687, 85 P.3d 656, 663 (2004).

> A motion to change venue pursuant to Idaho Criminal Rule 21(a) is addressed to the discretion of the trial court. *State v. Yager,* 139 Idaho 680, 687, 85 P.3d 656, 663 (2004); *State v. Winn,* 121 Idaho 850, 856, 828 P.2d 879, 885 (1992); *State v. Needs,* 99 Idaho 883, 890, 591 P.2d 130, 137 (1979). Therefore, this Court employs an abuse of discretion standard when reviewing a district court's ruling on a motion to change the venue. *State v. Sheahan,* 139 Idaho 267, 278, 77 P.3d 956, 967 (2003); *State v. Jones,* 125 Idaho 477, 484, 873 P.2d 122, 129 (1994). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

State v. Hadden, 152 Idaho 371, ___, 271 P.3d 1227, 1232 (Ct.App. 2012).

2. Analysis of Motion for Change of Venue.

The validity of a court's decision to try a case in a particular venue is tested by whether, in the totality of existing circumstances, juror exposure to pretrial publicity

resulted in a trial that was not fundamentally fair. *State v. Hyde*, 127 Idaho 140, 145, 898 P.2d 71, 76 (Ct. App. 1995). Publicity by itself does not automatically require a change of venue. *State v. Hadden*, 152 Idaho 371, ___, 271 P.3d 1227, 1233 (Ct. App. 2012). It is sufficient for the defendant to show there was a reasonable likelihood prejudicial news coverage prevented a fair trial in violation of the Sixth Amendment to the United States Constitution. *State v. Hall*, 111 Idaho 827, 829, 727 P.2d 1255, 1257 (Ct.App. 1986).

When a trial judge finds a reasonable likelihood that qualitative or quantitative elements of pretrial publicity have affected prospective jurors' impartiality, then the balance falls in favor of assuring a fair trial. *Hall*, 111 Idaho 830, 727 P.2d 1258. It is important that the trial courts take "strong measures to ensure that the balance is never weighed against the accused." *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507. 1522 (1966).

There are a number of factors to consider in determining whether a reasonable likelihood that pretrial publicity adversely affected juror impartiality existed, including: 1) the existence of affidavits indicating prejudice or an absence of prejudice in the community where the trial took place, 2) the testimony of the jurors at jury selection regarding whether they had formed an opinion based upon pretrial publicity, 3) whether the defendant challenged for cause any of the jurors finally selected, 4) the amount of time elapsed between the pretrial publicity and the trial, and 5) the nature and content of the pretrial publicity. *State v. Needs*, 99 Idaho 883, 890, 591 P.2d 130, 137 (1979).

Regarding the first factor, Defendant has at the time of the August 14, 2012, hearing, filed no affidavit other than his own. At the August 14, 2012, hearing, Defendant furnished the affidavit of David Keyes, the publisher of the two papers in

question, who stated that in July, 2012, (the month the most detailed story ran) the Bonner County Daily Bee had a circulation in Boundary County of 137 and the weekly Bonners Ferry Herald had a circulation of 2,474. Affidavit of David Keyes, p. 2, ¶¶ 3-4. However, there are 10,831 people in Boundary County. US-Places.com. Thus, there is a good percentage of potential Boundary County jurors who have not seen any of the newspaper accounts of this case.

The second and third factors listed in *Needs* are events that would occur (or not) at the actual trial, presently scheduled for August 27, 2012. There is a reason for this.

> Preliminarily, it is important to note that a motion for change of venue is *premature* prior to *voir dire* of prospective jurors. After *voir dire* is conducted, the defense may make a motion for change in venue or venire, and the trial court should grant it only if the moving party can show *actual prejudice* in impaneling the jury.

William J. Brunson, Daphne A. Burns, Robin E. Wosje, Presiding Over a Capital Case, a Benchbook for Judges, National Judicial College, pp. 61-62, § 3.12 (2009) *citing Commonwealth v. Rolison,* 374 A.2d 509 (Pa. 1977), *cert. denied sub nom. Rolinson v. Pennsylvania,* 434 U.S. 871 (1977). (italics in original).

Regarding the fourth criteria, nearly two months will have passed from the time of the July 5, 2012, article, and the August 27, 2012, trial.

Regarding the fifth criteria, in evaluating the nature and content of pretrial publicity, the Court is concerned with the accuracy of the pretrial publicity, the extent to which the articles are inflammatory, inaccurate or beyond the scope of admissible evidence, the number of articles, and whether the jurors were so incessantly exposed to such articles that they had subtly become conditioned to accept a particular version of the facts at trial. *Hadden*, 152 Idaho ___, 271 P.3d 1257*, Hall*, 111 Idaho 829-30, 727 P.2d 1257-58.

Analyzing all of these criteria, the motion for change of venue must be denied at the present time.

B. Motion to Continue Trial.

As mentioned above, Defendant's Motion to Continue Trial requests the trial be continued until after the November 6, 2012, election, due to the fact that Tevis Hull, the deputy prosecuting attorney assigned to this case, is running for Prosecutor in Bonner County. Motion to Continue Trial, p. 1; Affidavit of John A. Funkhouser, pp. 1-2, ¶¶ 3, 5. Defendant believes that Hull will use this trial as a campaign boost in the upcoming election. Defendant's Motion to Continue, pp. 1-2; Affidavit of John A. Funkhouser, p. 2, ¶ 5. At oral argument, Hull indicated, as an officer of the court, that he and his office had nothing to do with the news stories, and that his decisions regarding this case had nothing to do with the upcoming election.

Defendant's "beliefs" are not sufficient evidence. Even if Defendant had submitted evidence, counsel for the State has essentially rebutted such. From a factual standpoint, the motion to continue the trial must be denied. From a legal standpoint, even if there were some motivation from the State to prosecute the case due to an upcoming election, how could that be legally relevant? This alleged crime occurred a year before any election. The Information was filed March 1, 2012, likely before any candidate filing was filed. The trial in this matter was scheduled on March 23, 2012. The Motion to Continue was not filed until August 7, 2012. Had there been legitimate concerns about a need to continue the trial, one would have expected them to have been raised prior to twenty-days out from the trial that had been scheduled for over four months.

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C. Motion in Limine.

As mentioned above, Defendant's Motion in Limine requests counsel and all witnesses be prohibited from referring to the homicide as a "murder," the weapon as a "murder weapon," and Defendant as "murderer" during the trial. Motion in Limine-Use of Word Murder/Murderer, p. 1. Defendant claims that using such words will deny him the right to a fair trial and the presumption of innocence because it will allow the prosecutor in imply expression of a personal belief as to the Defendant's guilt. Motion in Limine-Use of Word Murder/Murderer, pp. 2-3. The primary case cited by Defendant, *State v. Albino,* 130 Conn.App. 745, 758-60, 24 A.3d 602, 612-614 (Conn.App. 2011), (Motion in Limine-Use of Word Murder/Murderer, p. 3) is helpful, but not squarely on point. That case indicates that when self-defense is alleged, use of the words "murder" and "murderer" and "murder weapon" would be inappropriate. However, in the present case, counsel for Defendant, at the August 14, 2012, hearing, stated self-defense is not an issue in the present case. Instead, the Defendant's defense is that the death was an accident. However, it is not appropriate for the words "murder" and "murderer" and "murder weapon" to be used by either counsel in opening statements, closing arguments, and in asking questions, and it is not appropriate that those words not be used by witnesses when testifying at trial **unless** they are testifying about what they might have said at an earlier time or may have heard someone else say at an earlier time. For example, apparently there is a 911 tape where the Defendant says he wants to report a murder. If allowed in as evidence, such will not be redacted as it was a statement made at an earlier time. It is also appropriate to use the word "murder" when describing the alleged crime, the elements of the alleged crime and the charging instruction.

IV. ORDER.

IT IS HERBY ORDERED THAT the Plaintiff's Motion to Reconstruct the scene is GRANTED under the terms discussed above.

IT IS FURTHER ORDERED that Plaintiff's Motion to allow the jury to dry fire the alleged weapon at trial, GRANTED under the terms discussed above.

IT IS FURTHER ORDERED that assuming the appropriate foundation is laid at trial, all nine photographs we be admitted, and with cropping of the new photograph submitted at oral argument on August 14, 2012, that photograph will be admitted as well.

IT IS FURTHER ORDERED that Defendant's Motion for Change of Venue is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Continue Trial is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion in Limine is GRANTED to the extent described above.

DATED this 16th day of August, 2012

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2012 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Serra Woods/Linda Payne
Prosecuting Attorney - Tevis Hull/John Douglas

CLERK OF THE DISTRICT COURT
BOUNDARY COUNTY

BY:_____
Deputy