STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY R. ROSENCRANTZ,

Defendant-Appellant.

UNPUBLISHED
February 9, 1999

No. 199298
Genesee Circuit Court
LC No. 96-053799 FC

Before: MacKenzie, P.J., and White and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), one count of assault with intent to murder, MCL 750.83; MSA 28.278, kidnapping, MCL 750.349; MSA 28.581, and carrying a concealed weapon, MCL 750.227; MSA 28.424. The trial court sentenced defendant to forty to sixty years' imprisonment for the two CSC convictions, fifty to seventy-five years' imprisonment for the assault with intent to murder conviction, life imprisonment for the kidnapping conviction, and forty months' to five years' imprisonment for the CCW conviction. Defendant appeals as of right. We affirm.

At approximately 1:00 a.m. on October 9, 1991, several hours after smoking crack cocaine and visiting friends, the victim went to a pay phone to call her daughter for a ride home. The daughter refused. As the victim was explaining her situation to an acquaintance, a white man she identified as defendant drove up and the acquaintance arranged for a ride for her. Defendant's car was a red compact with a passenger door that did not work and was a different color. The back seat was full of tools, clothes, and beverage cups. Defendant was wearing a light blue tee-shirt, jeans, and white tennis shoes.

Eventually, defendant stopped following the victim's directions to her house and took a dirt road to a secluded area. Defendant ordered the victim out of the car and poked her in the leg with a knife. She ran away at least twice, but defendant caught her each time, hitting and kicking her. He then ordered her to remove her pants and he tore off her sweater. Defendant first penetrated the victim's vagina. He then turned her over and anally penetrated her while stabbing her in the head, neck, back, and side, and repeating, "This is the way I like it." When the victim began to scream, defendant

grabbed her hair and slit her throat from the middle to the ear on both sides. He then turned the victim around and stuck the knife in her stomach, slitting her body open from her throat to her pelvic region and from side to side in the stomach area. When the victim played dead, defendant got up and started singing and skipping around. He eventually drove off, but then drove back again and shook the victim's body, apparently to make sure she was dead. After he left, the victim crawled off and was found approximately one-half-mile away several hours later. The attending surgeon stated that in addition to her multiple cuts, slices, and slashes, the victim had thirty stab wounds.

Another individual, Evan Wade Howard, was originally charged as the assailant based at least in part on the victim's identification of him at a lineup. The charges were dropped, however, after DNA testing eliminated him as the source of the semen recovered from the victim's body. On October 6, 1994, the victim was shown a photographic lineup and picked out defendant as her assailant.

Other circumstantial evidence linked defendant to the assault. Three witnesses, including Alta Lara, testified that in 1991, defendant drove a cluttered red Mazda with a malfunctioning, different colored passenger door. Lara also testified that one night in early October, 1991, defendant came to the Quick-Stop store where they both worked with blood spatters on his light blue or gray shirt and tennis shoes. He said he had been in a fight with someone who was stealing the radio from his car. Monica Martinez testified that defendant usually carried a hunting or fishing knife in a sheath on his hip. A DNA expert testified that defendant's DQ-Alpha gene type matched that of the sperm cells recovered from the victim, meaning that he could not be eliminated as the source of the sperm. The particular gene type appears in five percent of the Caucasian population. Using another system of DNA testing that examines five genetic markers, defendant's markers also matched those of the sperm cells. The frequency of that particular array of markers is one in 34,000 members of the Caucasian population. Shaun Hansen testified that while in jail in July, 1996, defendant told Hansen that he cut a woman while he had sex with her and then left her for dead in a field. Finally, Elaine Lasky testified that in 1995, she got into defendant's vehicle and asked him if he was "out partying tonight." Defendant pulled a knife and said, "My first party I slit the bitch's throat from ear to ear," and ran the knife twice across Lasky's throat. As he ran the knife from Lasky's chest down to her stomach, he added, "I disemboweled" her.

On appeal, defendant first contends that he was denied effective assistance of counsel when his attorney failed to impeach Lara with Quick-Stop records showing that she worked at the store in 1990 as opposed to 1991. We disagree. To establish ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable and that the defendant was prejudiced by counsel's deficient performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). Even assuming counsel's performance was objectively unreasonable, defendant has failed to establish that he was prejudiced by counsel's performance. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Here, the theory that Lara was employed at the Quick-Stop store in 1990 rather than 1991 was presented to the jury by way of other evidence. Lara's testimony was largely cumulative of other testimony, and defendant was tied to the

crime without her testimony. In light of the other evidence suggesting that defendant was the person who assaulted the victim, counsel's failure to produce Lara's employment record was not outcome-determinative and did not result in an unfair or unreliable trial. We decline to reverse on this basis.

Defendant also contends that he was denied effective assistance of counsel when his attorney failed to move to suppress evidence derived from a blood sample on the grounds that the affidavit supporting the search warrant[1] did not establish probable cause and contained false statements and omissions.

Intrusions into the human body are on an equal plane with searches of dwellings and thus, absent exigent circumstances, are subject to the warrant requirement. *Schmerber v California*, 384 US 757, 770-771; 86 S Ct 1826; 16 L Ed 2d 908 (1966); *People v Marshall*, 69 Mich App 288, 298-300; 244 NW2d 451 (1976). Further, such intrusions are forbidden absent probable cause – warrant or no warrant. *Marshall, supra* at 298. Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched. *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992). Reviewing courts must read the warrant and underlying affidavit in a common-sense and realistic manner, giving deference to a magistrate's determination that probable cause existed. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). This deference requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the probable cause finding. *Id*. There is a presumption of validity regarding the affidavit supporting a search warrant. *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978). To mandate an evidentiary hearing under *Franks*, a challenger's attack on the truthfulness of factual statements[2] made in an affidavit must be more than conclusory, must be supported by more than a mere desire to cross examine, and there must be allegations of deliberate falsehood or of reckless disregard for the truth, accompanied by an offer of proof. *Franks, supra* at 171-172. Further, if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. *Id*; *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

Defendant identifies one instance of alleged false information in the affidavit, i.e., that it states that on November 15, 1993, he was working in Clio when he was actually working in Durand. Defendant argues that the affiant knew this statement was false because the affiant had made a police report about two weeks before executing the affidavit that stated that from November 15 to 24, 1993 defendant worked on a job in Durand, Michigan. However, because the Musk murder occurred on November 14, 1993, we conclude that defendant's whereabouts the day after the Musk murder were not material to a finding of probable cause, and defendant is thus not entitled to a *Franks* hearing on this basis. *Stumpf, supra* at 224. Defendant also argues that the affidavit, which stated that he had been arrested July 8, 1994 for the attempted murder of a woman, omitted that no such charge was ever proven. Defendant has not shown that the omission was made knowingly and intentionally, or with reckless disregard for the truth, or that inclusion of the omitted information in the affidavit would erode the magistrate's finding of probable cause. *People v Chandler*, 211 Mich App 604, 613; 536 NW2d 799 (1995).[3] A *Franks* hearing is therefore not required. *Stumpf, supra* at 224-225.

Defendant's claim that the affidavit did not establish probable cause also fails. The affidavit stated that a man was seen talking with Musk at the convenience store where she was working during the early hours of November 14, 1993; that a man was later seen leading a woman from the store with a lock hold around her neck; and that a witness stated that the man seen in the store looked exactly like defendant, whom the witness had seen on television in connection with a different case. Hair similar in color to defendant's was found on Musk's body, a red plastic electrical wire nut was found near Musk's clothes and defendant was known to have had a bag of such nuts in his car, and defendant's employer informed police that defendant had access to tools that could have been used in Musk's murder and to wide masking tape as found on Musk's body. From this information, a reasonably cautious person could conclude that there was a substantial basis for the probable cause finding. *Sloan, supra* at 168. Because a suppression motion would have been futile, trial counsel's failure to bring such a motion on the grounds asserted did not constitute ineffective assistance of counsel. *People v Gist,* 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next argues that the magistrate erred in approving a search warrant for the withdrawal of defendant's blood because there is no statutory authorization for seizures of blood from criminal suspects. This argument was not raised in the trial court. It is accordingly not preserved for appellate review. *People v Rollins,* 207 Mich App 465, 470-471; 525 NW2d 484 (1994).

Defendant argues that the trial court erred in allowing witness Elaine Lasky to testify that, as defendant told her that he slit a woman's throat and disemboweled her, he demonstrated by running his knife across Lasky's throat and down her body. The trial court allowed Lasky's testimony as a party admission under MRE 801(d)(2)(A). Defendant contends that MRE 801(d)(2)(A) would only allow into evidence defendant's utterances, not his conduct with the knife. We disagree. MRE 801(d)(2)(A) provides that a statement is not hearsay if it is offered against a party and is the party's own statement. MRE 801(a) includes in the definition of "statement" nonverbal conduct intended as an assertion. Lasky's testimony reflected defendant's nonverbal explanation of what he did to the victim in this case. The nonverbal conduct was thus a form of communication falling within MRE 801(d)(2)(A). Allowing the testimony resulted in no clear abuse of discretion. *People v Coleman,* 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant further asserts that the evidence constituted improper similar acts/propensity evidence. However, Laskey's testimony concerning the knife was confined to defendant's assertions regarding what he had done with the knife on a prior occasion.

Defendant next identifies three instances of alleged prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant first contends that the prosecutor unfairly added Shaun Hansen as a surprise witness. MCL 767.40a(3); MSA 28.980(1)(3) requires the prosecutor to send to a defendant, not less than thirty days before trial, a list of the witnesses the prosecutor intends to produce at trial. MCL 767.40a(4); MSA 28.980(1)(4) allows a prosecutor to add or delete individuals from the witness list at any time upon leave of the court and for good cause shown. If this statute is violated, the defendant must show prejudice from the violation before he is entitled to relief. *People v Hana,* 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). In

this case, the prosecutor explained why the witness was not added within the thirty-day period. He informed defense counsel about the witness as soon as he learned the nature of the witness's statement to the police. Because the prosecutor's actions were within the scope of MCL 767.40a; MSA 28.980(1), we no find prosecutorial misconduct.

The second instance of prosecutorial misconduct alleged by defendant is that the prosecutor gave an argumentative opening statement. Defendant did not object to the opening statement, precluding appellate review unless the prejudicial effect could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Swartz*, 171 Mich App 364, 369; 429 NW2d 905 (1988). Although defendant is correct that opening statement is the appropriate time to state the facts to be proven at trial, *People v Robbins*, 132 Mich App 616, 620; 347 NW2d 765 (1984), the few cases discussing remarks made in opening statement indicate that, like closing argument, prosecutors are given latitude in their presentation of the case. See, e.g., *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996); *Swartz, supra;* and *People v Coddington*, 188 Mich App 584, 602-603; 470 NW2d 478 (1991). The remarks about which defendant complains were not so inflammatory as to taint the jury, and any prejudice arising from their argumentative nature could have been cured with an instruction. We therefore decline to further review this claim.

Defendant also asserts that the prosecutor improperly questioned Monica Martinez, without giving notice under MRE 404(b)(2), about whether she had seen defendant carry a knife. Again, defendant did not object to the questioning on this basis. Furthermore, defendant has presented no authority in support of this argument and we conclude that any prejudicial effect could have been cured by a cautionary instruction. *Swartz, supra*. Reversal on this ground is not warranted.

Defendant contends that his kidnapping conviction must be reversed because there was insufficient evidence of asportation. Michigan's kidnapping statute encompasses six forms of conduct, each of which constitutes the crime of kidnapping. *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984). In this case, the jury was presented with the forcible confinement formulation of the crime. The elements of forcible confinement kidnapping were set forth in *Wesley, supra* at 388, as follows:

> (1) a forcible confinement of another within the state,
>
> (2) done wilfully, maliciously, and without lawful authority,
>
> (3) against the will of the person confined or imprisoned, and
>
> (4) an asportation of the victim which is not merely incidental to an underlying crime *unless* the crime involves murder, extortion or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction. [Emphasis in the original.]

In *People v Hodges*, 179 Mich App 629, 634; 446 NW2d 325 (1989), this Court took note of the *Wesley* Court's formulation of the asportation element and held that, because an underlying charge of

assault with intent to commit murder is a crime involving murder, movement of a victim incidental to an assault with intent to commit murder is sufficient asportation to support a kidnapping conviction. Here, defendant does not dispute his movement of the victim during the criminal transaction, but instead claims that the movement was not in furtherance of a kidnapping. However, because defendant was charged with, and convicted of, assault with intent to murder, asportation incidental to the assault was sufficient to support his kidnapping conviction under the holdings of *Wesley* and *Hodges*.

Defendant next claims that a rug that was recovered from the area where the assault took place was improperly destroyed by the police. A Michigan State Police forensic crime laboratory scientist testified that he examined the rug and recovered trace evidence (glass, fibers, animal hair, a button, and a temple to a pair of eyeglasses), but none of the trace evidence could be connected to Evan Wade Howard, defendant, or the victim. The rug was then destroyed. Defendant argues that the destruction of the rug precluded his examination of the item, which might have produced valuable evidence. The argument is without merit. Where the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless the defendant can show bad faith on the part of the police. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989), citing *Arizona v Youngblood*, 488 US 51; 109 S Ct 333, 337; 102 L Ed 2d 281 (1989). See also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). The defendant bears the burden of showing that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). In this case, defendant has not shown that the police acted in bad faith in destroying the carpet. The rug was large, the trace evidence had been gleaned from it, and the trace evidence could not be connected to the case either to incriminate or exonerate defendant or anyone else. The trace evidence was preserved and was admitted into evidence by defendant. Under these circumstances, reversal is not required.

Defendant argues that reversal is required because the officer-in-charge testified that he investigated Evan Wade Howard and determined that he was not a viable suspect, and further testified that he had investigated other possible subjects. Defendant asserts that this testimony violates the rule of law that witnesses are forbidden from expressing opinions as to the guilt or innocence of the accused. See, e.g., *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Because defendant did not object to the officer's testimony, the claim is not preserved for review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). In any event, testimony that certain suspects were eliminated is not the equivalent of offering an opinion that defendant is guilty, and defendant used the evidence that the victim had wrongly identified Howard as her assailant to suggest that she had also wrongly identified defendant. Again, reversal is not warranted.

Defendant next identifies four instructional errors that he contends require reversal. First, he assumes that Lasky's testimony was admitted under MRE 404(b) and contends that the court erred in failing to give a limiting instruction that her testimony should only be considered for the purpose of showing identity. However, defendant did not request such an instruction, nor did he object to the instructions as given. In fact, counsel expressed satisfaction with the instructions. The claim is therefore not preserved for review and relief should be granted only if necessary to avoid manifest injustice.

People v Van Dorsten, 441 Mich 540, 544-545; 494 NW2d 737 (1993). It is not. As noted above, Lasky's testimony concerned a party admission under MRE 801(d)(2)(A), so that there was no need to limit the testimony as defendant urges.

Second, defendant argues that the trial court erred in failing to give a special instruction on the dangers that the victim misidentified defendant, patterned after *People v Franklin Anderson,* 389 Mich 155; 205 NW2d 461 (1973). Again, however, defendant failed to request such an instruction and expressed satisfaction with the instructions as given, necessitating relief only to prevent manifest injustice. There was no manifest injustice here. The instructions as given adequately apprised the jury of the possibility of misidentification.

Third, defendant challenges the court's instruction that a prior inconsistent statement of defendant's ex-wife could only be considered for impeachment purposes. Defendant claims that the instruction singled out the witness and applied equally to defendant's aunt. Again, defendant did not object to the instruction. In any event, defendant's ex-wife was the only witness the prosecutor impeached with a prior inconsistent statement (the prior statement of defendant's aunt was used to refresh her memory); there was no instructional error.

Fourth, defendant claims that the trial court's instruction concerning reasonable doubt was erroneous because it failed to include the concept of guilt to a moral certainty which was contained in the former jury instructions. Once again, defendant did not object to the instructions as given, precluding appellate review unless necessary to avoid manifest injustice. Once again, it is not. The instruction given by the trial court was drawn from CJI2d 3.2, which no longer requires the "moral certainty" language of the former instruction and which this Court has held adequately presents the concept of reasonable doubt to the jury. *People v Sammons,* 191 Mich App 351, 372; 478 NW2d 901 (1991).

Defendant argues that, in addition to his claims of ineffective assistance of counsel discussed above, nine further instances of ineffective assistance require reversal. We disagree. Defendant first contends that counsel was ineffective for failing to call a witness to rebut the prosecution's DNA evidence and for failing to call an expert on eyewitness identification. Trial counsel's failure to call witnesses is presumed to be trial strategy. *Mitchell, supra* at 163, 165-166. The exception to this rule is when the failure to call the witnesses would deprive the defendant of a substantial defense. *People v Hoyt,* 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant has not carried his burden of showing that defense counsel's failure to produce these witnesses was not a matter of trial strategy or deprived him of a substantial defense.

Defendant next claims that counsel should have moved in limine to exclude questions designed to elicit evidence that defendant had carried a knife in the past, on grounds of either relevance or that the inquires were intended to prejudice the jury by innuendo. Martinez testified that when she visited Michigan for short periods in 1990 and 1991 she did not see defendant carry a knife. She testified that she did not tell Officer Tull that defendant always had a knife, but had told Tull that she had seen defendant with a knife and that defendant used it for hunting and fishing. We conclude that Martinez' testimony, which was brief and made clear that she had only seen defendant for two weeks in 1991 and

had not seen him carry a knife at that time, was not highly prejudicial to defendant, and also conclude that a motion in limine on the ground of relevance would have been futile. *Gist, supra* at 613.

Defendant further argues that counsel was ineffective for failing to object to the court's jury instructions. As noted above, however, there was no instructional error. Counsel is not ineffective for failing to make a futile objection. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

With regard to the destroyed blue rug, defendant contends that counsel should have requested a jury instruction that, if produced, the evidence would have been favorable to the defense. Even if such an instruction should have been requested, it cannot be said that the omission was outcome determinative or rendered the proceedings unfair or unreliable. The jury was aware of the absence of bloodstains on the rug, and the trace evidence found on the rug was introduced into evidence by defendant. Given the other evidence tending to establish defendant's identity as the assailant, it is improbable that telling the jurors that they could infer that the rug harbored overlooked trace evidence favorable to defendant would have led to a different result.

Defendant contends that counsel was ineffective in failing to object to testimony that the police had investigated other possible suspects and determined that the investigations were not worth pursuing. Again, this was a matter of trial strategy. Defense counsel was able to use the information that the victim incorrectly identified Evan Wade Howard, and perhaps others, to undermine her identification of defendant. Defendant has not established that defense counsel's performance was deficient or that he was deprived of a fair trial because of counsel's failure to challenge this testimony.

Defendant asserts that counsel was ineffective in failing to elicit from Shaun Hansen that defendant had shown him the police report prepared in conjunction with this case. Defendant reasons that if counsel had done so, he could have suggested to the jury that Hansen learned of the details of this case from the report, rather than from defendant. Again, this was a matter of trial strategy. Once it was decided that Hansen could testify as to what defendant told him, questioning Hansen about the contents of the police report could only damage – not advance – defendant's cause.

Defendant next argues that counsel was ineffective for not cross-examining the victim, a native of Korea, more vigorously. Specifically, he contends that counsel should have been more aggressive in pointing out certain discrepancies between her statement to the police and her trial testimony. Once more, this was a matter of trial strategy. The victim's condition when she was found was graphically described to the jury and her extensive injuries were undisputed, making her a sympathetic witness. Her testimony was emotional and her command of the English language was not outstanding. Defense counsel was faced with the task of cross-examining the victim thoroughly, but without appearing to bully her or parse her statements. He brought out her drug addiction, the fact that she had smoked cocaine hours before the assault, and her misidentification of Evan Wade Howard. He also brought out that the victim had resumed using cocaine about a month before trial. Some of the discrepancies cited by defendant came out through the testimony of other witnesses, and other discrepancies are minor. Under these circumstances, defendant has not overcome the presumption that counsel provided effective

assistance. Compare *People v Caballero*, 184 Mich App 636, 639-640; 459 NW2d 80 (1990); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Finally, defendant claims that counsel was ineffective in failing to impeach Elaine Lasky with the testimony of the police officer who responded when she was assaulted in 1995. This appears to be an argument that defense counsel should have called the responding officer in the Lasky case as a witness in this case. Again, the decision to call a witness is a matter of trial strategy. *Mitchell*, *supra* at 163, 165-166. Nothing in the record suggests that the officer's testimony would have had a reasonable probability of affecting the outcome of the trial in this case. Once more, defendant has failed to overcome the presumption that counsel was effective.

Defendant maintains that the cumulative effect of the alleged errors requires reversal. However, because we have found no errors, there can be no cumulative error. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Defendant next contends that he must be resentenced because his maximum sentences violate the prohibition against indeterminate sentences that exceed an offender's life expectancy, citing *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). The essential holding of *Moore*, however, was that the *minimum* sentence of a defendant convicted of a crime punishable by life or a term of years must not be so lengthy as to preclude parole. 432 Mich 326. In any event, the holding of *Moore* was implicitly overruled by *People v Merriweather*, 447 Mich 799 527 NW2d 460 (1994). *People v Kelly*, 213 Mich App 8, 13; 539 NW2d 538 (1995). The claim is without merit.

Defendant's final contention is that his sentence, which exceeded the guidelines' recommended minimum sentence range, was an abuse of discretion under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. Departures from the sentencing guidelines' recommended range may be justified where the guidelines do not adequately account for important and compelling factors. *People v Duprey*, 186 Mich App 313; 463 NW2d 240 (1990). This is especially true in extreme cases because the guidelines do not account for sentences given for particularly serious conduct. *Merriweather*, *supra* at 807. Here, the trial judge's deviation was based primarily on the atrocity of the crime; he stated that this was the most cruel and inhuman case he had seen in his nineteen years on the bench. The victim in this case suffered multiple, life-threatening wounds. Defendant tortured, sliced, and raped the victim as she begged to be spared so she could attend her grandson's birthday party. He left her for dead, after singing and dancing around her body. Moreover, he left her in an isolated area at night with her windpipe cut so she could not yell for help. Subsequently, defendant raped and cut another woman. Given the outrageous nature of this case, coupled with defendant's subsequent criminal conduct, the sentence was proportionate. Compare *People v Johnson*, 202 Mich App 281, 291-292; 508 NW2d 509 (1993); *People v Redman*, 188 Mich App 516, 517-518; 470 NW2d 676 (1991).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Helene N. White
/s/ Michael R. Smolenski

[1] The search warrant and affidavit pertain to a different case, involving the death of Wanda Lynn Musk.

[2] The *Franks* rule has been extended to material omissions from affidavits. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

[3] *Chandler* was questioned on other grounds in *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996).