

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GABRIEL FERRIS,

Defendant-Appellant.

UNPUBLISHED

August 6, 1999

No. 193744

Saginaw Circuit Court

LC No. 95-010303 FC

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

After a jury trial, defendant appeals as of right from his conviction of first-degree felony murder,¹ MCL 750.316; MSA 28.548. The trial court sentenced defendant to life in prison without the possibility of parole. We reverse and remand for a new trial.

In June 1974, the twenty-one year-old victim was found strangled in a bedroom of the home where she resided. It was apparent from the existence of bruises, swelling and lesions that force had been used on the victim. From these facts and the presence of a small cut in an outer fold of the victim's vagina, a medical examiner concluded that the victim had been raped at or near the time of her death. An unidentified substance, described by the medical examiner in his autopsy report as thick and creamy, containing a lone sperm cell was found inside the victim's vagina. Prior to her death, the victim had dated defendant and potentially several others. Based on hair samples and fingerprints taken from the crime scene, the police over an approximate twenty-year period had investigated several suspects, including defendant. However, defendant was not charged with the victim's murder until 1995.²

The evidence against defendant consisted of two fingerprints found on a dresser located in the bedroom where the victim was discovered, testimony regarding defendant's prior acts of violence against his ex-wife, and several statements attributed to defendant. Leroy Hoefling testified that he had resided with defendant during a period from late 1974 until early 1975. According to Hoefling, defendant had made calls to the police because "he wanted to know how close they were getting to him," and defendant had revealed that "when he was making love to her, he didn't mean to do it." Hoefling also remembered that he and defendant were drinking alcohol or consuming drugs during these

conversations. Linda Fairbanks, a former girlfriend of defendant's, testified that in 1976, while she, defendant and two others were drinking alcohol or smoking marijuana, defendant talked about the victim, then got upset and nervous and repeated several times, "I was coming, I didn't mean to do it." Patricia Skeba, who was present on this occasion, and who also remembered smoking marijuana, recalled that during the course of a conversation regarding the victim's murder defendant stated that he needed to find the victim's killer before he died. According to Skeba, defendant then might have slipped and said the killer did not mean it. Defendant, while tense and hyperventilating, also allegedly indicated that the victim had been raped before and knew not to fight it because it would hurt her, so she just laid there and accepted the fact that she was being raped, and the killer was coming but wanted more excitement so he started choking her to make her struggle and before he knew it she was dead. Skeba explained that she was uncertain whether defendant confessed or whether he put himself in the killer's place. Rodney Mays testified that while he and defendant were in jail in 1995, defendant told him about the twenty-year old murder of a former girlfriend who had had over 150 lovers. Defendant explained that he had "choked the f***** b*****" because he was tired of the victim "f***** over his feelings" and because it was easier to get rid of her than all of the other lovers. Defendant also allegedly indicated his belief that although he had done wrong, the Lord would still be with him.

Throughout his police interviews and testimony at trial, defendant denied raping or killing the victim. Defendant acknowledged that he and the victim had a relationship, that they had engaged in sexual intercourse on many occasions, and that he had been at the crime scene on many occasions. Defendant was married on June 13, 1974, and alleged that at the time of the victim's murder in Saginaw, the early morning hours of June 15, 1974, he and his wife were honeymooning in Tawas. Defendant's ex-wife stated at trial that she and defendant had gone to Tawas on June 14, 1974, but that she had awoken shortly after 10 p.m. that evening to find defendant in front of her fully dressed. The ex-wife remembered that defendant told her he wanted to go for a walk, and that she then went back to sleep. She stated that she awoke around sunrise and heard a car pull up, that defendant then came up the stairs, and that she noticed that defendant had blood lightly splattered on his shirt and bigger splotches on the top of his pants. Defendant explained to her that he had hit a rabbit with the car and had to pull it out of the wheel well. However, the ex-wife also acknowledged at trial that she had previously provided the police with a different story.³ At trial, two witnesses testified that they recalled seeing defendant at a Saginaw bar on the evening of June 14, 1974, but both witnesses acknowledged previously having been unable to tell the police whether defendant was at the bar that evening.

Defendant first contends that the prosecutor improperly allowed Mays, the fellow inmate, to falsely testify that he had no expectation of leniency. A prosecutor has an affirmative duty to correct a witness' false statement that he was not promised consideration for his testimony. *People v Woods*, 416 Mich 581, 601; 331 NW2d 707 (1982). The Supreme Court has determined that in addition to actual promises of leniency, a witness' reasonable expectations of leniency must be disclosed. *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976). Mere future possibilities of leniency do not require disclosure. *Id.* at 174. The Court distinguished between offers of leniency that were communicated to the witness before his testimony, and those offers and possibilities of leniency that remained solely within the prosecutor's mind. Offers of which a witness is aware create expectations that may bear on his credibility and bias. *Id.* at 174.

In this case, even though at the time Mays testified there was no formal promise of leniency from the prosecutor, there was evidence that Mays had an expectation that if he testified to the prosecutor's satisfaction, the prosecutor would be lenient in handling Mays' pending charges. Mays' trial on false pretenses charges was adjourned twice, and at one adjournment hearing, at which Mays was present, the prosecutor advised the court that "it is going to be worked out," and that he would not discuss plea agreements until Mays testified. Although Mays testified that he did not have any expectations of leniency, his attorney testified that he had informed Mays of the prosecutor's comments regarding the potential for leniency, which was dependent on Mays' testimony in defendant's murder trial. Therefore, Mays' testimony that he expected no leniency was false. The prosecutor's arguments that he had not yet decided exactly what plea to suggest or whether there would even be an agreement, depending on Mays' testimony, are not determinative of whether Mays possessed a reasonable expectation of leniency because he had communicated the probability of leniency if Mays cooperated. Because the prosecutor thus knew that Mays was giving false testimony at defendant's trial when he stated that he had no expectations of leniency, the prosecutor had an affirmative duty to disclose the expectation of leniency. *Id.* at 173-174.

Although the prosecutor improperly failed to disclose Mays' reasonable expectation of leniency, this failure may constitute harmless error. A prosecutor's failure to correct the witness' false statement that he expected no leniency requires a new trial only when the false testimony could in any reasonable likelihood have affected the judgment of the jury. *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986). Defense counsel cross-examined Mays at length regarding his criminal history. Through this questioning, the jury was made aware that Mays had much experience with the criminal justice system, that Mays had previously pleaded guilty to several prior felonies pursuant to plea bargains with the prosecutor, that Mays had previously acted as a paid police informant, and that at the time of defendant's trial Mays was facing a pending felony charge that potentially carried with it a life sentence. We conclude that the record thus contained a fair disclosure of the facts that may have motivated Mays in giving his testimony, and that, viewing this alleged error standing alone, the jury was not likely misled by Mays' denial that he expected some deal to be made in his pending case. *People v Mata (On Remand)*, 80 Mich App 204, 209-210; 263 NW2d 332 (1977). Given our resolution of defendant's other issues, however, we need not determine the extent to which this error was harmless.

Defendant next claims that the trial court erroneously failed to sua sponte provide the jury with an instruction concerning the alibi defense. Generally, a defendant's failure to request an instruction in the trial court waives appellate review absent manifest injustice. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). Manifest injustice occurs where the omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). The Supreme Court has stated, however, that in any case in which an alibi defense is raised, the trial court should instruct the jury on alibi, even absent a request by the parties, to obviate any confusion over the defendant's burden of proof on the issue. *People v Burden*, 395 Mich 462, 467; 236 NW2d 505 (1975). Yet the failure to give an unrequested alibi instruction does not constitute reversible error so long as the court gives a proper instruction on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt. *Id.* In the instant case, the trial court did instruct the jury regarding the elements of felony murder, the prosecutor's

burden of proof and the definition of reasonable doubt. Therefore, we conclude that any error by the trial court in omitting an alibi instruction was by itself harmless.

Defendant further argues that the trial court improperly admitted evidence of his prior abuse of his former wife. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), the Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime; (2) relevant to an issue or fact of consequence at trial; and (3) sufficiently probative to prevail under the balancing test of MRE 403.

The prosecutor argued that evidence of defendant's past assaults on his former wife, including grabbing her around the throat, choking her and raping or attempting to rape her, which were similar to the alleged rape and strangulation of the victim in this case, was relevant with respect to *modus operandi* identity. The Court in *VanderVliet* held that *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), "identifies the requirements of logical relevance when the proponent is utilizing a *modus operandi* theory to prove identity" (emphasis in original). *VanderVliet*, *supra* at 66. *Golochowicz* stated:

It is because of the combined value of those two factors, the unique and uncommonly distinctive style employed by the defendant in committing the "substantially proved" uncharged similar offense, and the same distinctive *modus operandi* employed in the charged offense, that the jury is permitted to infer, if it believes the evidence, that both crimes were the handiwork of the same person, the defendant. [*Golochowicz*, *supra* at 311.]

Applying this test, we cannot conclude that forcing women to engage in sexual intercourse by choking them qualifies as a "unique and uncommonly distinctive" characteristic of such a crime, or is "so unusual and distinctive as to be like a signature." *Id.* at 310-311. Moreover, regarding *VanderVliet* prong three, the limited amount of evidence regarding the rape, which was the crime underlying the felony murder conviction, increases the likelihood that the evidence of a prior rape or attempted rape was unfairly prejudicial. The jury could have easily given undue weight to this prejudicial testimony and found that defendant, a bad guy who had previously assaulted his wife, likely killed the victim while raping her. Therefore, we conclude that the prior acts evidence was inadmissible under the prosecutor's identity theory.

In its brief on appeal, the prosecution also argues that the evidence was admissible to show intent, perhaps meaning motive.⁴ Motive is another permissible purpose for admitting prior acts, and has been defined by this Court as “that which incites or stimulates a person to do an act.” *People v Hoffman*, 225 Mich App 103, 106; 570 NW2d 146 (1997). This Court in *Hoffman* required some evidence establishing the defendant’s motive connecting the defendant’s prior acts to the crime charged. *Id.* at 106-110. In that case, the defendant’s prior, extremely misogynistic acts and statements were properly introduced to show that his attack on the victim, his then-girlfriend, was also motivated by the same expressed hatred of women that had previously inspired him to brutalize former girlfriends. *Id.* In this case, defendant’s ex-wife testified that defendant had, on somewhere between a few and twenty occasions, placed his hands around her throat and choked her, thrown her about and demanded sex, all in an effort to control her. A retired Saginaw police detective testified that during a 1976 interview, defendant acknowledged on several occasions slapping and choking his ex-wife in an effort to control her. However, in the absence of any indication that defendant in the instant case raped and killed the victim in an effort to control her, this evidence would impermissibly go toward proving only defendant’s propensity to assault women. *Hoffman, supra* at 107. At trial, defendant did not dispute intent or motive, he claimed he was elsewhere at the time of the victim’s murder. Therefore, his assaultive conduct toward his wife is relevant only to establish in the eyes of the jury an inference that he acted in conformity with that conduct in attacking the victim.

Even assuming that the prior acts were admissible to establish defendant’s motive for raping and killing the victim, however, the evidence regarding defendant’s assaults against his ex-wife unfairly prejudiced him. Considering the almost total lack of physical evidence linking defendant to the rape or murder, the ambiguous nature of some of defendant’s statements regarding the crimes, and the weak sources of many of these statements, the evidence of defendant’s past acts was a very important addition to the prosecutor’s case. In light of the weakness of the prosecutor’s other evidence, the danger that the jury would improperly utilize the evidence of defendant’s past acts as character evidence of his guilt of the instant offenses substantially outweighed the evidence’s relatively weak probative value concerning defendant’s alleged motive. MRE 403; *People v Crawford*, 458 Mich 376, 398-399; 582 NW2d 785 (1998). Nor was the trial court’s admission of the prior acts evidence harmless in this case. Again, with the physical evidence regarding the victim’s rape so inconclusive, the jury could have easily given the prejudicial prior acts testimony undue weight to support its conclusion that defendant killed the victim while raping her, thus raising defendant’s conviction to the life offense of first-degree felony murder. *Id.* at 399-400. Because the jury rejected the first-degree premeditated murder charge, a strong possibility exists that without the evidence of defendant’s prior violent acts, the jury would have acquitted defendant or found him guilty of a lesser crime. Therefore, because the trial court abused its discretion in admitting the evidence of defendant’s prior acts, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), we must reverse defendant’s convictions and remand for a new trial.

Defendant also contends that the trial court erred in its determination that the jury’s verdict was not against the great weight of the evidence. The trial court in ruling on defendant’s motion for new trial applied the standard for reviewing motions for directed verdict. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). Because the trial court simply denied defendant’s motion pursuant to an inapplicable standard of review without providing for

our review the bases for its decision, we would remand this case to the trial court so that it may rule on defendant's motion for new trial pursuant to the appropriate standard of review. See *People v Lemmon*, 456 Mich 625, 642, 647; 576 NW2d 129 (1998). In light of our disposition of other issues raised by defendant, however, a remand simply for this review will be unnecessary.

Next, defendant claims that his trial counsel was ineffective for failing to request an alibi instruction. To justify a reversal based on ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To overcome the presumption of sound trial strategy, the defendant must show that his counsel's conduct deprived him of a substantial defense that would have affected the outcome of the proceeding. *Id.*

Defense counsel's failure to request an alibi instruction did not prejudice defendant. First, defendant had a very weak alibi defense. Defendant had married within days of the victim's murder, and he alleged that he remained in Tawas with his wife during the late evening and early morning hours during which the victim was murdered. However, defendant's ex-wife's testimony at trial did not establish with any degree of certainty that defendant remained with her at the time of the victim's murder, and two other witnesses testified that they saw defendant in Saginaw on the night of the murder. Second, as discussed above, the trial court's instructions adequately informed the jury regarding the elements of the charged crimes and the prosecutor's burden of proof. Therefore, we conclude that defendant's alibi claim did not constitute a substantial defense, and that defense counsel was not ineffective for failing to request an alibi instruction.

Lastly, defendant argues that his trial counsel rendered ineffective assistance because he made no effort to ascertain defendant's fertility status or to present evidence concerning defendant's fertility to the jury. Defendant's fertility status was relevant to the instant case because the autopsy report, prepared after an examination of the victim, described a "thick, creamy exudate" located in her vagina. The medical examiner who performed the autopsy testified that, although he had performed no conclusive testing regarding the exact nature of the substance, he did examine the substance under a microscope and located only one degenerated sperm. Thus, defendant contends the fact he has tested as fertile⁵ should have been provided to the jury because it would have created reasonable doubt regarding his identity as the murderer. The parties devoted significant energy during the *Ginther* hearing arguing whether the substance found inside the victim was in fact semen and attempting to explain the absence of sperm. However, no conclusive evidence exists regarding the true nature of the substance found inside the victim,⁶ or, assuming the substance was semen, whether the depositor was sterile.

Although we review claims of ineffective assistance under the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), we cannot conclude that defense counsel's failure to investigate or pursue the sterility issue at defendant's trial constituted sound trial strategy. First, defense counsel's explanations for his failure to pursue the sterility issue were objectively unreasonable. We note initially that defense counsel acknowledged at the *Ginther* hearing that prior to defendant's trial he had

possessed certain documents prepared in 1974 and 1975, including a police report and the autopsy report, indicating that the police were searching for a sterile suspect, and that he “was aware of the statements regarding the semen.”⁷ Defense counsel explained, however, that he believed raising the sterility issue would potentially result in the discovery of the missing slides of the substance found inside the victim. According to defense counsel, he feared that the prosecution would analyze the slides for a DNA match, and that the slides would thus provide incriminating evidence against defendant, who had failed a lie detector test.⁸ Given the very probative and damaging nature of a positive DNA identification connecting defendant to the murder, defense counsel’s fear that the prosecutor might uncover the missing slides may at first glance seem reasonable. Yet, one must also consider that the prosecutor in this case possessed a very limited amount of physical evidence linking defendant to the crime. We must assume that if the prosecutor’s office had access to the slides, it would have already attempted to strengthen its case by analyzing the slides for a DNA comparison. Therefore, given the likelihood that the prosecutor would have already utilized the slides if they were obtainable, defense counsel’s alleged fear that if he referred to the sterility issue he would somehow prompt the prosecutors into locating the lost slides was unwarranted. Considering also that defense counsel’s introduction of proof of defendant’s fertility would have placed on the prosecutor the burden of explaining away beyond a reasonable doubt the discrepancy between the quantity of sperm in defendant’s semen and in the substance found in the victim’s vagina, we also conclude that defense counsel’s trial strategy was unreasonable.⁹

Defense counsel alleged that he also decided not to pursue the sterility issue because he knew that defendant was very sexually active, yet lacked children. Therefore, defense counsel feared that defendant might be sterile, and that the prosecutor would discover this incriminating information should defendant’s sperm be tested. Defense counsel’s apprehension that defendant might be sterile because defendant had not to his knowledge fathered children ignores other possible explanations for defendant’s apparent lack of children, including the fact that defendant or his sexual partners may have utilized some form of birth control. Had defendant’s apparent lack of children truly concerned defense counsel, he could simply have asked defendant whether he had ever fathered children before further weighing the option of testing defendant’s sperm.¹⁰

Finally, defense counsel explained that he decided to forego semen testing because he believed that even if the testing established defendant’s fertility, this fact would not have been particularly useful in light of the facts that defendant had a habit of “pulling out” during intercourse before ejaculation, and that the medical examiner was biased against the defense and would likely have explained away the absence of semen in the victim’s body. However, it was pure speculation on the part of defense counsel to assume that the medical examiner would come up with some way to explain the discrepancy between defendant’s fertility and the absence of sperm in the substance taken from the victim’s vagina. Even had the medical examiner theorized some explanation, including that defendant habitually pulled out while having intercourse, his theories would not have eliminated completely the exculpatory nature of the sterility evidence, but only weakened it. The worst case scenario for the defense would have involved the jurors listening to the competing theories and drawing their own conclusions, perhaps disbelieving defendant or, given the autopsy finding of a large quantity of a creamy substance located near the victim’s cervix, perhaps disbelieving that the perpetrator of the crime had pulled out.

Therefore, given the potential probative value of the fertility evidence, defense counsel's decision to forego pursuit of the sterility issue on the basis of these unfounded, speculative fears was objectively unreasonable. *Pickens, supra*.

The trial court incorrectly concluded that the omitted sterility evidence would not have helped defendant's case because the medical examiner could not conclusively opine whether the perpetrator was sterile. Had defense counsel presented evidence of defendant's fertility, the jury would still have heard about the substance found in the victim's vagina and about the medical examiner's finding of only one degenerate sperm in his sample of the substance. That the medical examiner could not conclusively testify that the perpetrator was sterile does not alter the fact that, hearing the evidence regarding the lone degenerate sperm found inside the victim, in conjunction with the evidence that one drop of normal semen contains hundreds of thousands of sperm and that defendant likely produced normal semen in 1974, might reasonably have led the jurors to conclude that defendant did not rape the victim. The jury's conclusion that defendant had not raped the victim would have eliminated the possibility of a felony murder conviction, thus altering the outcome of the case. *Daniel, supra*.

A reasonable likelihood exists that the case would have had a different result if the sterility evidence had been provided to the jury. The evidence implicating defendant in the victim's rape was weak.¹¹ In light of the fact that the jury acquitted defendant of the first-degree premeditated murder charge, proof that defendant raped the victim was vital to the jury's conclusion that defendant was guilty of first-degree felony murder. If the jury had known that a smear taken from the victim's vagina showed the absence of sperm and that defendant was fertile, they might reasonably have concluded that the evidence of defendant's guilt on the rape charge was not strong enough to support a conviction.¹² Because this reasonable probability undermines our confidence in the outcome of defendant's trial, we must reverse and remand for a new trial. *Pickens, supra* at 314.

Finally, we find that the cumulative effects of the following errors deprived defendant of a fair trial: (1) the prosecutor's failure to correct Mays' testimony that he had no expectation of leniency; (2) the improper admission of defendant's assaultive conduct toward his ex-wife, which occurred after the victim's murder; (3) the trial court's failure to instruct the jury regarding alibi; and (4) defendant's trial counsel's failure to explore the fertility issue. Given the lack of physical evidence connecting defendant to the crime and the weak nature of some of the statements implicating defendant, these errors almost certainly affected the outcome of this case. *People v Bahoda*, 448 Mich 261, 292-293 n 64; 531 NW2d 659 (1995).

We reverse and remand for a new trial.¹³ We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Hilda R. Gage

¹ The victim was raped and murdered in June of 1974. The jury found defendant guilty of felony murder and rape under the applicable rape law of 1974. However, the trial court determined that it would violate double jeopardy principles to sentence defendant for both convictions because rape is a lesser included offense of felony murder, and therefore vacated the rape conviction.

² A signed but unsworn affidavit for a search warrant contained in the lower court file indicates that after a 1994 confirmation that defendant's fingerprints were found at the crime scene and reinterviews with many witnesses, including defendant's ex-wife, a police detective spoke with the prosecutor who on January 12, 1995 authorized an arrest warrant for defendant.

³ In her first statement to the police, the ex-wife said that she and defendant went to bed at approximately 1 a.m. on June 15, 1974, and she neglected to mention defendant's bloody clothes. She testified that she was mistaken about the time at first and that she forgot about the rabbit. Also in her first statement, she said she did not wake up on June 15, 1974 until around noon, which was consistent with defendant's statements to the police that he woke up early and waited while she slept late.

⁴ Although defendant's ex-wife believed that he had assaulted her intending to control her, intent to control was not an element of the crimes for which defendant was on trial. Therefore, the evidence regarding his assaults against his ex-wife could not prove his intent with respect to the victim. It is possible that the prosecution was referring to motive, which instead of focusing on result, focuses on the reason a person does an act. *People v Hoffman*, 225 Mich App 103; 106; 570 NW2d 146 (1997). At trial, the prosecutor explained that he was offering the evidence to show defendant's "[i]ntent, plan, scheme, you know . . . we have a choking in this particular case, *in an effort to control the victim.*" [Emphasis added.]

⁵ At the *Ginther* hearing [*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)], defendant produced evidence indicating that a test had established his fertility.

⁶ Conflicting testimony was presented at the *Ginther* hearing with respect to whether the medical examiner had ever performed an acid phosphate test that had conclusively identified the substance as semen. The medical examiner explained that he had provided to the state crime laboratory slides of the swabs he had taken from the victim, and that therefore he had thrown away his own slides. At trial, a former state crime laboratory trace evidence analyst testified that he had received vaginal swab slides from the medical examiner and attempted to test them for a blood grouping, but that the slides were unsuitable for any identification purposes. The slides provided to the state crime laboratory were apparently lost at some point during the twenty-two years between the crime and defendant's trial. At the hearing, the medical examiner testified that the substance could have been one of many things other than semen.

⁷ A 1975 police report prepared by Saginaw Police Detective Robert Carlson indicated that the medical examiner had informed the police that while the victim had engaged in intercourse within twenty-four hours of her death, "no sperm [was] present in the vaginal swab." Detective Carlson's report also cited the medical examiner as having stated that "the victim did not have any sperm in her but that she had a large amount of prostate secretion and also deep penetration. The subject that raped her did have a climax." Furthermore, according to a June 25, 1974 state police evidence transfer report, the medical examiner had informed the police of the presence of one lone sperm inside the victim, and that "the secretions however are from a person with no sperm."

⁸ At the *Ginther* hearing, defendant denied ever taking a polygraph examination, while defense counsel stated that he was absolutely positive defendant had failed a polygraph examination. Defense counsel explained that he still remembered the unusual circumstance of sharing a car ride and dinner with a murder suspect who had just failed a polygraph examination.

⁹ At a minimum, defense counsel reasonably could have explained to defendant the risks involving potential DNA evidence and asked him if, in light of this information, he wanted to submit to a semen analysis. Defendant denied at the *Ginther* hearing that defense counsel had ever discussed with him the possibility of testing defendant's sperm, and stated that he would have definitely agreed to semen testing. Defense counsel could not specifically recall discussing with defendant the possibility of testing defendant's semen for sperm content, but believed that they would have discussed the matter.

¹⁰ Defendant testified that although his paternity had never been legally established, he believed he had fathered at least one child in the late 1960's.

¹¹ The only physical evidence linking defendant to the rape consisted of two fingerprints found on the dresser located in the bedroom where the victim was found, a room in which defendant had been many times.

¹² In its July 29, 1998 opinion denying defendant's motion for new trial based on ineffective assistance of counsel, the trial court relied on a misinterpretation of the medical examiner's testimony. The court mistakenly understood the medical examiner to have said that whoever had sex with the victim *on the night of her death* was likely not sterile. The court believed that the medical examiner had stated "that the fact that [the medical examiner] found one degenerated sperm would imply that the last man having sexual intercourse with the victim was in fact *not* sterile." [Emphasis in original.] A review of the medical examiner's testimony, however, reveals that what he essentially stated was that the one sperm he had located in the substance was degenerate, was likely several days old, and was therefore unconnected with the victim's rape and murder. The medical examiner concluded *that the person who had left the degenerate sperm several days earlier* was likely not sterile.

¹³ Although unnecessary to our disposition of defendant's appeal, we have reviewed defendant's pro se supplemental brief on appeal and identified no further errors that would require reversal.