

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD CLEO CHAMBERS,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 232026

Kalamazoo Circuit Court

LC No. 00-000751-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of first-degree murder, MCL 750.316. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecution's expert witness' testimony regarding the DNA evidence found on the victim's jeans was improperly admitted and outcome determinative. Because defendant did not object at trial, this issue is reviewed only for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The *Carines* Court explained:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.* (citations omitted; alteration in original).]

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Even if we assume error with regard to the introduction of the DNA evidence, the error was not outcome determinative and did not result in the conviction of an actually innocent man.

Defendant argues that it was outcome determinative because this case was prosecuted twenty-five years after the murder as a result of advances in DNA technology, the prosecutor conceded he was not presenting a strong case, the prosecutor mistakenly stated in closing argument that the DNA was found in the victim's body, and because the jury was out for many hours. Therefore, defendant contends that the DNA evidence must be presumed to have been persuasive to the jury. We disagree.

There was no evidence that this case was reopened or prosecuted just because of the DNA evidence and the prosecution's statement during a pretrial motion hearing that the proofs were not strong was irrelevant. Also, there was no evidence to support a correlation between the length of time the jury deliberated and the weight the jury gave the DNA evidence as it related to defendant. Furthermore, while the prosecutor's statement that the DNA found "in her body" was clearly a misstatement, we believe that it did not prejudice defendant to the extent of being outcome determinative. The jury was instructed that arguments are not evidence and that it must determine the facts; jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Moreover, the DNA evidence was but one piece of evidence. While the other evidence suggesting defendant's guilt was circumstantial, it was substantial. There was testimony that the victim said that a man named "Floyd" could get her drugs, and further evidence that the victim was a police drug informant, which activity made her fearful for her life. The victim had expressed a specific fear of defendant, including a fear that defendant would kill her. Moreover, the victim expressed that she had a relationship with defendant in which she repeatedly suffered mental, sexual, and physical abuse. The victim had received a threatening note with defendant's prints on it. Paper similar to that of the note and a pen with the same type of green ink used to write the note were found at defendant's residence, and defendant's roommate's impressed writing was found on the note. Also, there was evidence indicating that defendant wrote the note.

The manner in which the victim was killed was consistent with the manner in which defendant had committed prior crimes, save for the escalation of violence. The type of assault, weapon used, location of the crimes, race of the victims, and the manner of tying up the victims were all similar so that it could be inferred that defendant committed the present offense. Additionally, there was evidence that defendant told a cellmate that the victim was dead two days before the body was discovered. Initially, defendant denied even knowing the victim. However, in a written statement presented to the jury, defendant admitted to having been intimate with the victim, and that he thought he had sex with her before she disappeared, thereby providing evidence that would simply be corroborated by any DNA evidence. Finally, the prosecutor's expert testified that the DNA evidence could not exclude defendant and others as the donor, but the evidence could not definitively include defendant as the source of the samples removed from the victim. Therefore, we hold that the error was not outcome determinative. Because defendant was not prejudiced by the error, his ineffective assistance of counsel claim is also meritless. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant next argues that the victim's statements of fear were inadmissible hearsay. An evidentiary ruling is reviewed on appeal for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). However, if a decision regarding the admissibility of evidence involves a preliminary question of law, review is de novo. *Id.* We hold that the victim's statements were properly admitted under MRE 803(3), the state of mind exception.

Statements showing the state of mind of the declarant are admissible when that state of mind is pertinent to the matters at issue. MRE 803(3); *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2002). Defendant argues that the victim's state of mind was not an issue in this case because he did not assert the defense of self-defense or accident, and, therefore, hearsay statements relating to the victim's state of mind were inadmissible. However, these are not the only circumstances in which a homicide victim's state of mind is "at issue."

The question is whether the victim's state of mind is relevant to a matter at issue. A homicide victim's state of mind can be relevant to issues such as defendant's motive, deliberation, premeditation, or marital discord. *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995); *Ortiz, supra* at 310 (murder victim's statements concerning the ending of the marriage with the defendant and the tension between the victim and the defendant was relevant to motive); *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996) (victim's fear relevant to her habits regarding whether she would have gotten out of her car before defendant arrived home).

Here, the victim's statements regarding her fear of defendant were admissible as relevant to defendant's motive in relation to discord in the relationship between defendant and the victim. The victim told one witness that she and defendant had a girlfriend-boyfriend type relationship, and that defendant was worse than her previous boyfriend, having "mentally, physically, and sexually abused her almost from the time they started seeing each other." The victim's statements of fear combined with the alleged status of their relationship were relevant to a possible motive and explanation for why defendant would kill the victim, i.e., a volatile domestic situation filled with discord and tension.

Another witness testified that the victim was a drug informant who worked with his squad and was fearful of defendant. Evidence was presented that the victim feared for her safety as a result of her informant activities, and other testimony suggested that defendant was involved in drug deals with the victim. Therefore, the victim's statements were relevant to another possible motive defendant had for killing the victim.

Because we conclude that the victim's hearsay statements were admissible under MRE 803(3), defendant's assertion that his right to confrontation was violated is without merit. Where statements fall within a firmly rooted hearsay exception, they presumptively have sufficient indicia of reliability to fulfill the Confrontation Clause guarantees. *Ortiz, supra* at 310. MRE 803(3) is such an exception. *Ortiz, supra* at 310-311.

Defendant also argues that the trial court erred in admitting evidence of prior bad acts involving robbery and sexual assault. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court

acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) governs admission of evidence of bad acts, and it provides:

(1) 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.

The trial court allowed the other acts evidence for identification purposes only. If the bad acts evidence is offered to establish identification through a system in doing an act, (1) there must be substantial evidence that the defendant committed the bad act, (2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or system, (3) it must be material to the defendant's guilt of the charged offense, and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982).¹

In this case, there was substantial evidence that defendant committed the prior bad acts. All four women made positive identifications of defendant as the perpetrator and defendant pleaded guilty in two of the victims' cases. There was also sufficient indicia of identity. The weapon used, location of the crimes, race of the victims, and the manner of tying up the victims were all similar. Also, there was evidence of robbery and sexual assault in this case, as was present in all the prior bad acts. While we recognize that there were some dissimilarities, a mere difference of opinion on a close evidentiary question is not sufficient to find an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The other acts evidence was also material to defendant's guilt. There must be a "relationship between the [challenged] evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford, supra* at 387. Because there were no witnesses to the murder and defendant denied involvement, the identity of the murderer was extremely relevant to this case. The other acts evidence tended to show that defendant was the person who murdered the victim.

Additionally, we believe that the probative value of the other acts evidence outweighed its prejudicial effect, given that identification was the key issue in this case. The trial court issued a limiting instruction to the jurors, cautioning them that the other acts evidence could be considered for identification purposes only, which lessened the prejudicial effect of the evidence.

¹ We recognize that the Supreme Court enunciated a different test in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). However, this test did not supplant *Golochowicz* when the other acts were being admitted to prove identity. *Id.* at 66; *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

Therefore, we hold that the trial court did not abuse its discretion in admitting the other acts evidence.

Moreover, defendant's argument that certain crime scene photographs should not have been used to establish the link between this offense and the prior acts is meritless because the proper foundation was laid for their admission. The photographer testified that he took the photographs in 1975 and that they accurately depicted the crime scene. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992).

Defendant further argues that his due process rights were violated because his jury venire was not drawn from a fair cross section of the community, improperly excluding African-Americans. Defendant only presents this argument because "if his recollection serves him correctly," there were only two African-Americans in his jury venire. However, defendant has not proven that African-Americans are consistently underrepresented in the jury venires of Kalamazoo County, nor that any underrepresentation was systematic. *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000). "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Id.* at 526, quoting *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate, but rather must be shown to be the result of a problem inherent in the selection process. *Williams, supra* at 526-527.

Lastly, we hold that none of defendant's ineffective assistance of counsel claims have merit. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Toma, supra* at 302-303.

First, defendant contends that his trial counsel was ineffective for failing to object when members of the victim's family, who were in the courtroom, began crying. There is nothing in the record indicating that the victim's family was disruptive to the trial.

Second, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to object to the testimony of one of the victims who gave 404(b) evidence because the case for which defendant was prosecuted in which this person was the victim was reversed on appeal. Defendant's assertion that this violated the Double Jeopardy Clause is meritless because the Double Jeopardy Clause protects against multiple convictions for the same crime. *People v Harding*, 443 Mich 693, 715-716; 506 NW2d 482 (1993). In this case, defendant was being tried for a different offense. An attorney is not ineffective for failure to make a futile objection. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998). Third, defendant's trial counsel was not required to object to the destruction of certain physical evidence, which had been destroyed twenty-two years before trial. Testimony indicated that the evidence was destroyed three years after the crime due to its odor. There was no evidence to suggest that it was destroyed for any improper reason.

Fourth, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to call as character witnesses women, who were sexual assault and robbery victims, that he was helping as part of his church recovery program. Defendant has not

overcome the presumption that this was sound trial strategy. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Fifth, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to object to the admission of evidence referring to defendant's possession of various knives. The knives were properly admitted because they were relevant to the case, given the injuries the victim sustained, and the fact that they were evidence in another case which was subsequently reversed is irrelevant. MRE 401. Similarly, defendant's remaining ineffective assistance of counsel arguments are without merit because the testimony was relevant and not overly prejudicial. An attorney is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof