**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 26, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2011AP1028-CR** **Cir. Ct. No. 2007CF357**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES E. EMERSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PETERSON, J. James Emerson appeals a judgment of conviction, entered on a jury verdict, for first-degree intentional homicide. He also appeals an order denying postconviction relief. Emerson argues the circuit court erred by denying his trial counsel's motion to withdraw, by selecting jurors from a

non-racially diverse county, and by admitting other acts evidence. He also asserts that his trial counsel was ineffective in numerous ways and that he was deprived of a fair sentencing hearing because of statements made by the victim's family. We affirm.

## BACKGROUND

¶2 On December 4, 1999, three joggers found Rhonda Mertes's body near an abandoned building in Wausau. An EMT testified there was a large amount of blood around the body, an "obvious deformity in her head," and a bloody rock near her. A detective testified Mertes's clothes were ripped, her pants were around her legs, and he believed she had been sexually assaulted. The medical examiner concluded that the cause of death was "multiple blunt force trauma to the head" and that the body also showed "trauma to the neck, with injuries consistent with strangulation, and multiple bruises … to the extremities."

¶3 The night before she was killed, Mertes had been at a number of bars. A bar owner saw Mertes leave his bar around 2:10 a.m. Approximately fifteen people left the bar at this time, including Emerson.

¶4 Emerson and others were interviewed by police, and DNA tests were conducted on items gathered at the crime scene. However, police made no arrests.

¶5 In 2005, police resubmitted crime scene evidence to the crime lab. A November 2005 crime lab report indicated Mertes's underwear and fingernail clippings contained Y-STR DNA evidence.[1] Police then re-interviewed

[1] A forensic scientist from the state crime laboratory testified that the Y-STR analysis is a DNA typing system that allows typing of the Y chromosome, which is only present in males. He explained it is common to refer to male DNA as Y-STR DNA.

individuals and asked for DNA samples. Emerson was re-interviewed and gave samples.

¶6 An FBI forensic DNA examiner testified that Emerson could not be excluded as the source of two Negroid hairs found in the victim's pubic hair combings. A forensic scientist from the crime laboratory testified that the DNA found on Mertes was analyzed against samples from Emerson and seventy-two other people. The tests eliminated everyone but Emerson as a possible source of the DNA.

¶7 Emerson was arrested in May 2007 and charged with first-degree intentional homicide. The State filed a motion in limine seeking to introduce other acts evidence. The State sought to introduce evidence showing Emerson had aggressively pursued other females at night, when they were isolated from others, to engage in sexual activity. The circuit court granted the State's motion in part, allowing the State to introduce two other acts incidents.

¶8 Emerson moved for a change of venue due to pretrial publicity. The court granted Emerson's motion and determined the jury panel would be selected from Iowa County.

¶9 At the beginning of a pretrial hearing held on the Friday before the scheduled start of trial, Emerson's counsel moved to withdraw. Counsel explained that, while meeting with Emerson that morning, Emerson had become "extremely angry, loud, stood up, and was basically in a threatening position." Counsel believed the attorney-client relationship had been damaged.

¶10 Emerson told the court he and his attorney had a disagreement, but he denied acting in a threatening manner. When asked if he would be able to

continue to work with his counsel, Emerson responded, "I feel in my heart, no, that he wouldn't work effectively for me."

¶11 The court denied the motion to withdraw and refused to adjourn the trial. The court found counsel had been representing Emerson for an extended period of time and there had been no indication the attorney-client relationship prevented counsel from effectively representing Emerson. The court found counsel was prepared to try the case and determined there would not have been a motion to withdraw if Emerson had not acted out toward counsel. Finally, the court noted that the murder occurred in 1999, the case had been pending since 2007, and, in September 2008, trial had been adjourned at the request of the defense. The court reasoned that the victims had a right to closure and Emerson's actions did not justify a delay.

¶12 A jury found Emerson guilty of first-degree intentional homicide. The court sentenced him to life imprisonment without the possibility of parole. Emerson moved for postconviction relief. Following a two-day postconviction hearing, the court denied his motion.

## DISCUSSION

### I. Trial counsel's motion to withdraw

¶13 Emerson first argues that the circuit court improperly determined he had forfeited his right to counsel. However, the circuit court never determined Emerson forfeited his right to counsel. In fact, Emerson remained represented by counsel throughout the entire proceeding.

¶14 Instead, Emerson's objection to the court's refusal to discharge his attorney is more properly framed as whether the court erred by denying his

attorney's motion to withdraw. Whether counsel should be relieved and a new attorney appointed is a matter within the circuit court's discretion. ***State v. Johnson***, 50 Wis. 2d 280, 283, 184 N.W.2d 107 (1971). The court "must consider, among other things, the reason for the request, the state of the proceedings, the amount of preparation that has been completed, the cost to the public and the need to avoid delay." ***State v. Coleman***, 2002 WI App 100, ¶38, 253 Wis. 2d 693, 644 N.W.2d 283 (citation omitted). Additionally, the court must consider whether the attorney-client relationship remains viable. ***State v. Cummings***, 199 Wis. 2d 721, 749, 546 N.W.2d 406 (1996). There must be good cause to warrant substitution of appointed counsel. ***State v. Clifton***, 150 Wis. 2d 673, 684, 442 N.W.2d 26 (1989).

¶15 Emerson argues the court's pretrial inquiry into the withdrawal request was inadequate because the court made its determination without holding an evidentiary hearing. He contends the withdrawal motion was not dilatory or due to his misconduct—rather, it was premised on a complete breakdown in the attorney-client relationship. As a result, he asserts the court should have granted the withdrawal motion.

¶16 At the postconviction hearing, counsel testified that on that morning, Emerson acted out toward him because Emerson wanted the trial adjourned. Counsel testified that after the court denied the motion and it became clear to Emerson that the trial would not be adjourned, the two "got along fine." Emerson, however, testified that on that morning counsel told him he had no defense and, if Emerson did not plead guilty, counsel would withdraw. Emerson testified that during the trial, "[t]here was no communication" between himself and counsel.

¶17 The court found Emerson incredible, noting that his testimony directly contradicted the court's observations of "active[] and meaningful[]" communication between Emerson and counsel during jury selection. The court found Emerson "instigated the scene in the jail … because he wanted an adjournment, didn't think one would be granted upon request, so he did something to try to get his attorney to withdraw so that the trial would be postponed." The court concluded:

> [T]he defendant's actions on January 23, 2009, were taken with the intent to gain the adjournment he sought by causing his attorney to withdraw. At that juncture, [counsel] was prepared to go to trial. [Counsel] testified that what happened on January 23, 2009, did not change his readiness to go to trial and did not change his tactics for trial nor did it lessen his effort he put into the case or his approach to the case.
>
> This was a dilatory tactic by the defendant. It was meant to get an adjournment. It did not ultimately affect [counsel's] approach to the case.
>
> I find there was no good cause to grant the motion to withdraw, which is consistent with what was originally determined by the Court.

¶18 We conclude the court properly exercised its discretion. *See* ***Clifton***, 150 Wis. 2d at 683 (holding the court appropriately denied defendant's motion for substitution because it was made on the morning of trial, counsel was prepared, and any conflict was self-induced by the defendant).

## II. Jury venire

¶19 Emerson, who is African American, next argues the court erred by selecting the jury panel from Iowa County, which has a small population of African Americans. He asserts that, because the victim was white, he was

prejudiced by being forced to go to trial with jurors from a county with a low African American population.

¶20 Emerson relies on ***State v. Mendoza***, 80 Wis. 2d 122, 258 N.W.2d 260 (1977). In that case, our supreme court held the circuit court erred by sua sponte moving the trial from Milwaukee County to Monroe County when the defendant wanted the trial to remain in Milwaukee County. ***Id.*** at 130-31, 145.

¶21 In this case, unlike ***Mendoza***, Emerson moved for a change of venue. He did not want jurors selected from Marathon County because of the pretrial publicity. The court granted his motion and selected jurors from Iowa County. Although Emerson argues the court erred by selecting a jury panel from Iowa County, Emerson never objected to Iowa County and therefore forfeited his argument on appeal. *See* ***Behning v. Star Fireworks Mfg. Co.***, 57 Wis. 2d 183, 187, 203 N.W.2d 655 (1973) (failure to make a timely objection generally constitutes waiver). Moreover, at the postconviction hearing, the circuit court found that both Marathon County and Iowa County "are significantly similar in terms of percentage of African American makeup." We conclude the circuit court did not err by changing venue to Iowa County.

## III. Other acts evidence

¶22 Emerson argues the court erred by admitting other acts evidence. The decision whether to admit other acts evidence is left to the discretion of the circuit court. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). When considering whether to admit other acts evidence, courts apply the three-step analytical framework set forth in ***Sullivan***, 216 Wis. 2d at 772-73. Courts

must consider whether: (1) the evidence is being offered for an acceptable purpose under WIS. STAT. § 904.04(2)[2]; (2) the evidence is relevant; and (3) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading of the jury or by considerations of undue delay, waste of time or needless presentation of the evidence. ***Id.***

¶23 Here, the State moved to introduce evidence that, in 1996, Emerson approached Jennifer N. with a shovel handle outside a bar and asked her for oral sex. Jennifer, who was alone, refused and tried to get away from Emerson. She was very frightened.

¶24 The State also moved to introduce evidence that, in 2000, Emerson approached Rebecca L. and Vanessa M. outside a Wausau nightclub and "tried to convince the two women to accompany him alone to an isolated location, namely a motel, so that he could have sexual intercourse" with them. The State alleged Emerson was aggressive and touched the two women intimately without their permission.

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[2] WISCONSIN STAT. § 904.04(2) provides, in relevant part:

> (2) OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶25 The court granted the motion to admit these other acts incidents.[3] In regard to the Jennifer incident, the court concluded the evidence was offered to show Emerson's motive, specifically "that he found it sexually arousing to engage adult females away from a group setting and proposition them to go with him and have sexual encounters in a more secluded place." The court determined the evidence was relevant because it occurred approximately three years before Mertes's murder and was "only a matter of blocks" from where the current incident occurred. The court noted that, similar to the allegations surrounding the current case, Jennifer was alone, Emerson propositioned her, and the inference was that he attempted to get her to go to a secluded place. The court concluded the danger of unfair prejudice did not outweigh the evidence's probative value because both Emerson and Mertes were outside a bar shortly after closing, and the other act evidence helped establish a motive for attempting to get Mertes to go to a secluded place.

¶26 As to the Rebecca and Vanessa incident, the court concluded the evidence was offered to show Emerson's motive for approaching Mertes and getting her to go to a secluded area for sexual activity. The court found the evidence was relevant because the incident occurred approximately five months after Mertes's murder and was "close in place and circumstances." The court noted that similar to the situation with Mertes, Rebecca and Vanessa were leaving a bar early in the morning when Emerson approached them. Finally, the court

[3] The State also moved for admission of two other acts involving Emerson. The court refused to admit these acts, reasoning they were "too dissimilar to the charge now before the court to survive a [***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998)] analysis."

concluded the probative value of the evidence was not substantially outweighed by any undue prejudice.

¶27 On appeal, Emerson argues the evidence should not have been admitted because, at trial, "it became abundantly clear that the 'other bad acts' were significantly different than the crime charged against Mr. Emerson." Specifically, he contends that the Jennifer incident "consisted almost entirely of offensive speech uttered to [Jennifer] by the accused ...." He points out that he did not touch Jennifer, she was younger than Mertes, and Emerson and Jennifer were strangers. Other than pointing out these differences, Emerson does not address the court's reasoning for admitting the evidence—specifically, that propositioning a female who is by herself established a motive for why he would attempt to get Mertes to go to a secluded place. We will not develop an argument for him.

¶28 Emerson also contends the Rebecca and Vanessa evidence should not have been admitted because he did not know them, they were together when he propositioned them, and a hotel is different from an outside abandoned area. While these differences may slightly diminish the relevance, Emerson again fails to address the court's reason for admitting the evidence. Moreover, Emerson fails to explain how propositioning two women for sexual activity is dissimilar from propositioning one woman for sexual activity. Thus, Emerson has failed to demonstrate the court erroneously exercised its discretion.

## IV. Ineffective assistance of counsel

¶29 Emerson next argues his trial counsel was ineffective in multiple ways. To succeed on an ineffective assistance of counsel claim, Emerson must prove his counsel's representation was deficient and he was prejudiced by his counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668,

687 (1984). In order to prove deficient performance, Emerson must establish that his counsel's conduct falls below an objective standard of reasonableness. *See* ***id.*** However, there is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶30 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We accept the circuit court's factual findings unless they are clearly erroneous; however, the ultimate determination of whether counsel's performance was deficient and whether it prejudiced the defendant is a question of law we review independently. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

Attorney-client relationship

¶31 Emerson first asserts trial counsel was ineffective for allowing the attorney-client relationship to degenerate. Specifically, he contends counsel destroyed the attorney-client relationship by falsely accusing Emerson of threatening counsel. Emerson, however, overlooks that the circuit court, as the finder of fact, accepted trial counsel's version of events and found Emerson instigated the scene at the jail because he wanted an adjournment and was trying to get his attorney to withdraw. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987) (credibility of witnesses is in province of circuit court). Counsel was not deficient because Emerson threatened him.

Communication with Emerson

¶32 Emerson contends trial counsel was ineffective because counsel failed to adequately communicate with him. Specifically, Emerson argues that counsel did not spend enough time in the jail with him and that Emerson spent too much time meeting with the defense investigator instead of counsel.

¶33 Emerson offers no explanation for why counsel was deficient for not meeting with him enough or how any deficiency resulted in prejudice. As the circuit court recognized at the postconviction hearing, Emerson "never gives any specific example of what they needed more time to talk about or when more time was specifically need[ed]." The circuit court found counsel made an appropriate strategic decision about how much time he spent with Emerson and how much time Emerson spent with the defense investigator. Emerson does not explain why the circuit court's determination was incorrect. We conclude Emerson has not shown counsel was ineffective for failing to spend enough time with him.

Donna Witucki's suicide

¶34 Emerson argues counsel was ineffective for failing to file a motion in limine to exclude reference to the suicide of his former girlfriend, Donna Witucki. He also asserts counsel was ineffective for failing to object to the suicide references at trial.

¶35 At the postconviction hearing, the circuit court found that some references to the suicide were relevant and would have been admitted. Specifically, the court found Timothy Sliwicki's testimony that Emerson told Sliwicki that Emerson killed Mertes, that he told Witucki he killed Mertes, and that Witucki became upset and committed suicide was properly

admitted. The court determined other references to the suicide that corroborated Sliwicki's statement would also have been admitted.

¶36 Additionally, the court concluded that, although some suicide references did not relate to the Sliwicki evidence, counsel had strategic reasons for not objecting to that evidence. Specifically, during one of the police interviews played for the jury, Emerson discussed dating Witucki and explained that, although things were great at first, the couple eventually struggled with her mental health issues—she attempted suicide and Emerson felt he could not leave her. Counsel testified at the postconviction hearing that he did not object because he believed the evidence was sympathetic to Emerson. The court agreed and found the evidence allowed the jury "to hear from the defendant, without him testifying, and did show the jury struggles in his life, commitments he had made, and sacrifices he had engaged in."

¶37 Emerson only asserts counsel should have objected to or filed a motion in limine in regard to the suicide references. Emerson, however, fails to explain how a motion in limine or objection would have been successful when the circuit court found Sliwicki's testimony and corroborating evidence would have been admitted. He also does not explain why counsel was deficient for allowing the jury to hear the remaining suicide references in an attempt to gain juror sympathy. We agree with the circuit court that the references involving Sliwicki's statements were properly admitted and counsel had strategic reasons for not objecting to the remaining statements. Counsel was not ineffective in regard to references to Donna Witucki's suicide.

Reviewing exhibits

¶38 Emerson contends counsel was ineffective for failing to adequately review exhibits 119, 148, and 150 prior to trial. These exhibits are police interviews with Emerson.

¶39 At the postconviction hearing, the circuit court found that trial counsel testified he had reviewed exhibit 119. As a result, the court reasoned "there is no merit to the proposition that [defense counsel] was not 'adequately' familiar with the buccal swab interview." Emerson does not explain why the court's factual determination is incorrect. We conclude counsel was not ineffective in regard to exhibit 119.

¶40 As to Emerson's assertion that counsel failed to adequately review exhibits 148 and 150, Emerson offers no argument as to why counsel's performance in respect to exhibits 148 and 150 was deficient[4] or why he was prejudiced. We will not consider his conclusory assertions. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not address undeveloped arguments.).

Emerson's presence at individual voir dire

¶41 Emerson argues counsel was ineffective for moving to excuse Emerson from individual voir dire. The circuit court, however, denied counsel's motion. Emerson cannot show he was prejudiced by this motion.

[4] We observe that in his statement of facts, Emerson states counsel objected to exhibit 150 on the basis that he had not seen the portion of the video about to be played for the jury. The court gave counsel time to review the challenged portion of exhibit 150, and counsel subsequently withdrew his objection.

Other acts evidence

¶42 Emerson argues counsel was ineffective because he failed to move for a mistrial after the other acts evidence was admitted. Emerson offers no argument to support this assertion, and we will not consider it. *See* ***id.*** at 646-47. Moreover, we have already rejected Emerson's argument that the court erroneously admitted the other acts evidence. *See* ***supra***, ¶¶27-28.

Prospective jurors

¶43 Emerson asserts counsel was ineffective for not moving to strike the jury panel and to strike certain jurors for cause.[5] He first argues counsel should have moved to strike the jury panel because some of the jury questionnaires contained allegedly racist responses. At the postconviction hearing, counsel testified he did not move to strike the jury panel because most jury questionnaires did not exhibit racial prejudice. On appeal, Emerson fails to explain why counsel was deficient for failing to move to strike jurors who did not exhibit racial prejudice. We conclude Emerson's trial counsel was not ineffective for failing to strike the entire jury panel.

¶44 Emerson next argues counsel erred by failing to move to strike for cause eight jurors who Emerson deems racist. At the outset, we observe that the circuit court found counsel did move to strike one of the listed jurors for cause and

[5] In his reply brief, Emerson also contends counsel was ineffective for failing to move for a change of venue due to Marathon County's lack of racial diversity. We decline to address this argument. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (We need not address arguments raised for the first time in a reply brief.).

the court granted that motion. Our review of the record confirms the court's determination.

¶45 As for the remaining seven jurors, the court concluded that, although the jurors "gave responses in their questionnaires and had experience in their respective lives that raised appropriate questions[,]" after individual voir dire, the jurors were correctly not struck for cause. The court reasoned:

> [T]he jurors were capable of basing their verdict solely on the evidence, willing to afford the defendant his right to the presumption of innocence, willing to put the State to its burden of proof beyond a reasonable doubt, and willing to find the defendant not guilty unless the State … proved its case at trial.

¶46 On appeal, Emerson does not refute—or even mention—the circuit court's factual determination that the jurors were capable of basing their verdict solely on the evidence and putting the State to its burden of proof. Based on the court's determination, we conclude counsel was not ineffective for failing to move to strike these jurors for cause.

DNA expert witnesses

¶47 Emerson argues counsel was ineffective for failing to effectively undermine the State's DNA experts during cross-examination and for failing to communicate with or call as a witness defense expert Dr. Alan Friedman. Specifically, Emerson faults the "brevity" of counsel's cross-examination and argues that counsel failed to establish, either through cross-examination or through direct examination of Dr. Friedman, that there were a vast number of other individuals who could have contributed to the DNA found on Mertes.

¶48 The circuit court found counsel's strategy was to establish that the major weakness in the Y-STR DNA evidence was that generations of paternally related males share the same DNA. As for the mitochondrial DNA evidence, the court found counsel's strategy was to attack the integrity of the evidence that was ultimately tested by the FBI. The court determined these were valid trial strategies and counsel was not ineffective.

¶49 Emerson fails to address the circuit court's postconviction findings and fails to explain why the strategy counsel used was deficient. To the extent he is asserting another defense would have been more effective, "counsel's strategic decision will be upheld as long as it is founded on rationality of fact and law." ***State v. Wright***, 2003 WI App 252, ¶35, 268 Wis. 2d 694, 673 N.W.2d 386. We agree with the circuit court that trial counsel's strategy in regard to the DNA evidence was not deficient.

¶50 As to Emerson's assertion that counsel was ineffective for failing to adequately communicate with Dr. Friedman and to call him as a witness, Emerson does not explain what additional meetings with Dr. Friedman would have accomplished, and the circuit court found "everything [Dr. Friedman] testified to [during the postconviction hearing] was brought out at trial and argued at trial ...." We conclude counsel was not ineffective in regard to Dr. Friedman.

Prosecutors' use of the word "match"

¶51 Emerson asserts counsel was ineffective for failing to object to the prosecutors' opening statements and closing arguments—specifically, when they stated DNA "match[ing]" Emerson's was found on Mertes. Emerson contends this terminology was improper because his DNA was only consistent with and did not "match" the DNA discovered on Mertes.

¶52 Although one prosecutor used the word "match" during his opening statement, he also explained that the Y-STR DNA "tells you that it's either James Emerson ... or somebody paternally related to James Emerson." As for the mitochondrial DNA, the prosecutor stated that, out of all the people in the mitochondrial database, only one other person, someone of Hispanic nationality, shared Emerson's profile. Further, although another prosecutor used the word "match" during her closing argument, she also made it clear that it was not an absolute "match" in the sense that the DNA belonged to no other person but Emerson. Rather, the prosecutor stated the Y-STR DNA is paternally related and Emerson told police none of his paternal relatives had ever visited Wisconsin. The prosecutor then stated the mitochondrial DNA, which is maternally related, "also connects Mr. Emerson to the homicide." She argued that "[c]ommon sense tells you the DNA results limited these results to James Emerson or his brothers who never came to Wisconsin."

¶53 Although Emerson's trial counsel did not object to the prosecutors' "match" references, he refuted these assertions in his opening statement and closing argument. In his opening statement, counsel pointed out that the Y-STR DNA report says that the "result will be shared by all paternally related male relatives[.]" In his closing argument, counsel reminded the jury that the Y-STR DNA is the same for all paternally related males, which was more than Emerson and his immediate family and could be "second cousins, third cousins, fifth cousins, eighth cousins …." He also reminded the jury that the mitochondrial DNA evidence "would not even have to be a black man. The frequencies, for instance, for a black person would be one in 385 persons; Hispanic individual, approximately one in 250; white person, one in 500; but it could be a Hispanic person, it could be a white person."

¶54 To the extent counsel should have objected to the prosecutors' use of the word "match," the prosecutors' and counsel's opening statements and closing arguments clarified that the DNA found on Mertes was not an absolute "match." Thus, Emerson cannot establish that any error was prejudicial.

Gina Krueger's testimony

¶55 Emerson argues counsel was ineffective for calling Gina Krueger as a witness to establish that he missed no work after Mertes was killed. Specifically, Emerson asserts counsel was ineffective because the jury learned through Krueger that Emerson purchased a new company jacket several days after the murder. He contends a new jacket purchase is highly incriminating because the evidence showed he was out on the night Mertes was killed and her murder was bloody.

¶56 Although Krueger testified Emerson purchased a new company jacket shortly after the murder, she also testified that Emerson's employer did not require workers to wear company jackets and that the availability of colors had changed since Emerson last purchased a jacket. Moreover, the circuit court found trial counsel had strategic reasons for putting Emerson's work history into evidence. The court noted that, because of the brutal nature of the murder, police believed the perpetrator could have been significantly wounded, and Krueger's testimony established that shortly after the murder, Emerson was at work, free to be viewed by co-workers, and ultimately, no one viewed any injuries on Emerson. We conclude counsel was not deficient for calling Krueger as a witness.

Cumulative effect

¶57 Emerson argues he was prejudiced by the cumulative effect of all the aforementioned errors because they establish Emerson's trial counsel "was

unprepared, uncommitted, and outright adverse and hostile to his own client." We disagree. None of the alleged errors Emerson outlined undermine our confidence in the jury's verdict. We conclude Emerson's trial counsel was not ineffective.

## V. Sentencing hearing

¶58 Finally, Emerson argues he was deprived of a fair sentencing hearing because of the victim statements made by Mertes's relatives. Some of the victim statements were passionate and heated, and Mertes's brother's statement was peppered with profane language and described his hatred of Emerson and the punishment he wished to inflict on Emerson.

¶59 At the postconviction hearing, the court addressed Emerson's claim, and concluded that:

> The simple fact of the matter before the Court is this: In fashioning the defendant's sentence, the Court did not take into account the statements the defendant now puts into question.
>
> The sentencing transcript, which I have just summarized, shows no indication whatsoever that the statements in question entered into the ultimate determination made by the Court. Accordingly, they did not result in prejudice to the defendant, and the request for a new sentencing in this case is denied.

¶60 On appeal, Emerson does not explain why the court was incorrect in its determination that it did not rely on the victim's family's statements when fashioning its sentence. He also does not point to anything in the record that shows the court relied on these statements when sentencing Emerson. We conclude the circuit court properly denied Emerson's claim for a new sentencing hearing.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.