STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIMON AMINGO WRIGHT,

Defendant-Appellant.

UNPUBLISHED
December 3, 1996

No. 179564
LC No. 93-007400

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317; MSA 28.549, and one count of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant thereafter pleaded guilty to being a fourth-offense habitual offender, MCL 769.12; MSA 28.1084. Defendant was sentenced as a habitual offender on the underlying convictions to a term of fifty-five to one hundred years' imprisonment. Defendant appeals as of right. We affirm and remand.

This appeals arises out of an August 1992 murder. A pair of pants, a shirt and a pair of boots were found at the crime scene. The approximately ninety-two-year-old victim also sustained bite marks on her breasts and face. Shortly after the murder, photographs were taken and impressions were made of the bite marks by Dr. Allan Warnick, a forensic dentist. However, the case remained open because the police had no significant suspects.

In early April 1993 defendant's brother, Ernest Wright, allegedly gave an oral statement to Sergeant Carl Frederick, the homicide officer in charge of investigating the murder. This oral statement was allegedly recorded in a memorandum typed by Sergeant Frederick and signed by Ernest Wright. The typed memorandum states, in relevant part, (1) that Ernest Wright had previously asked defendant about the killing of an old woman, and that defendant had laughed and not denied the killing; (2) that Ernest Wright identified a photograph of the jeans and boots recovered from the crime scene as similar

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

to jeans and boots owned by defendant, and; (3) that Ernest Wright's mother told Ernest Wright that telling the police of defendant's involvement in

the murder was wrong, and that she would have defendant put away if Ernest Wright did not speak to the police.

Based, in part, upon the statement of Ernest Wright, the police obtained a search warrant to take photographs and dental impressions of defendant's teeth. After comparing the photographs and impressions of defendant's bite mark to the photographs and impressions of the bite marks on the victim's breasts, Dr. Warnick concluded that the pattern of bite marks on the victim were highly consistent with defendant's bite-mark impressions. Defendant was charged with the victim's murder.

At trial and over defense counsel's several objections, the prosecutor called Ernest Wright as a witness. Ernest Wright admitted talking to Sergeant Frederick in early April 1993, and identified his signature on the typed memorandum. However, Ernest Wright denied several times that he verbally gave the police any information concerning defendant. Ernest Wright could not explain how his signature got on the typed statement except to state that he had only signed blank sheets of paper with his name pursuant to his doctor's order to keep pressure on his finger, which had been injured in a knife attack the previous day. After being shown the typed memorandum, the prosecutor impeached Ernest Wright by asking whether he had made the various statements set forth in the memorandum that incriminated defendant. Specifically, Ernest Wright denied that he had been asked by Sergeant Frederick the question "'Did you ever ask Simon about killing the old woman?'" and that he had answered "'Yes. We were at home, and I asked him if he killed the woman, and he just laughed about it. He never did deny it. He just laughed.'". Ernest Wright denied that he had told Sergeant Frederick that "'Simon had a pair of boots and a pair of jeans like the ones in the picture.'" Finally, Ernest Wright denied that he had been asked the question "'[W]hen you called the Homicide Section last night, did your mother try and stop you?'" and that he had answered "'Yes, she told me not to tell on Simon because it was a terrible thing to do. . . . She said if I didn't tell the police about the murder, she would have Simon put away.'"

Before Sergeant Frederick testified, defense counsel objected on the ground of hearsay to any testimony Sergeant Frederick might give concerning the prior statement of Ernest Wright. This objection was overruled by the trial court. The trial court also denied defense counsel's request for an immediate instruction cautioning the jury that it could only use Sergeant Frederick's testimony to determine the credibility of Ernest Wright's testimony, and not as substantive evidence against defendant.

Sergeant Frederick testified that Ernest Wright gave an oral statement, that Ernest Wright read over and signed the typed memorandum of the statement, and that he (Sergeant Frederick) did not see Ernest Wright signing blank sheets of paper. The prosecutor led Sergeant Frederick apparently word for word through relevant parts of the typed memorandum. Specifically, Sergeant Frederick responded affirmatively when asked by the prosecutor whether he had asked Ernest Wright the question "'[D]d you ever ask Simon about killing the old woman?'" Sergeant Frederick testified that Ernest Wright had answered "'Yes, we were at home and I asked him if he killed the woman, and he just laughed about it. He never did deny it. He just laughed.'" Sergeant Frederick responded affirmatively when asked by

the prosecutor whether he had asked Ernest Wright the question "'Do you recognize any of the articles in the photos?'" Sergeant Frederick testified that Ernest Wright had answered "'Yes. Simon had a pair of booths [sic] and a pair of jeans like the ones in the picture.'" Finally, Sergeant Frederick responded affirmatively when asked by the prosecutor whether he had asked Ernest Wright the question "'[W]hen you called the Homicide Section last night, did your mother try and stop you?'" Sergeant Frederick testified that Ernest Wright had answered "'[Y]es. She told me not to tell on Simon because it was a dirty thing to do. She said if I didn't tell the police about the murder, she would have Simon put away.'"

Dr. Warnick, the forensic dentist, testified concerning the various procedures he used to compare the photographs and impressions of defendant's bite mark with the photographs and impressions of the bite marks on the victim's breast. Dr. Warnick concluded that there was no one in the Detroit Metropolitan area of four million persons that would "even be close" to the unique pattern of defendant's bite mark, and that "there is probably no one in the world that would have this unique dentition." Dr. Warnick based these conclusions on his professional training and the following statistics concerning bite marks from a 1984 article in the Journal of Forensic Science by Dr. Rosen, a board-certified forensic dentist:

> The article states if you have five unique points, that the chance of another individual making that same mark is 4.1 billion to one. He also states, and this is back from '84. If you had eight points, that no other person in the world would be making this point.

During final instructions, the court specifically cautioned the jury that it could not use the evidence of Ernest Wright's prior statement to the police to determine whether the elements of the crime had been proven, but rather that this evidence could only be used to determine whether Ernest Wright had testified truthfully in court.

On appeal, defendant argues that the trial court erred in admitting Dr. Warnick's testimony concerning bite marks, including his testimony with respect to statistical probabilities, without conducting a *Davis-Frye*[1] hearing. We disagree. In *People v Marsh*, 177 Mich App 161, 167; 441 NW2d 33 (1989), this Court held that "the admissibility of a dental witness' bite-mark analysis does not depend on meeting the *Davis-Frye* standard" because "the scientific procedures used, such as x-rays, impressions and photographs, are not novel and . . . may be submitted to the jury to see the comparison for itself." We further conclude that the court did not err in admitting the statistical evidence underlying Dr. Warnick's opinion testimony that defendant was the person who made the bite marks on the victim. The court reasoned that defendant's challenge to the statistical evidence went to the weight the jury could accord this evidence. We agree. See, e.g., *People v Chandler*, 211 Mich App 604, 611; 536 NW2d 799 (1995) (Challenges to DNA statistical evidence are relevant to weight, not admissibility); see also MRE 703; *People v Caulley*, 197 Mich App 177, 195; 494 NW2d 853 (1992) (The policy behind MRE 703 is to allow into evidence all probative facts underlying an expert's opinion, including the opinions of other experts).

Next, defendant argues that the lower court erred in admitting Sergeant Frederick's testimony concerning the prior statement allegedly made by Ernest Wright. Defendant characterizes this testimony as inadmissible hearsay. Defendant also argues that the trial court erred in refusing defense counsel's request for a cautionary instruction concerning the proper use of Sergeant Frederick's testimony at the time he testified.

At the time of defendant's trial, MRE 613 (prior statements of witnesses) provided as follows:[2]

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.

> (b) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement, not to prove the contents of the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

In *People v Stanaway*, 446 Mich 643, 650-651; 521 NW2d 557 (1994), the defendant, Brian Stanaway, was charged with three counts of third-degree criminal sexual conduct. The complainant was a fourteen-year-old girl. *Id*. at 651. Before trial, the defendant's nephew, Donald Stanaway, allegedly gave the police a statement indicating that the defendant had told him (the nephew) that the defendant had had sex with a young girl. *Id*. at 690. At trial, the prosecutor called the defendant's nephew, who denied ever giving a statement to the police concerning the defendant. *Id*. at 689. The nephew further testified that he had been out of town when the crime occurred. *Id*. The prosecutor then called a police officer, who testified that the nephew had told him (the officer) that the defendant had told the nephew that the defendant had "'screwed a young girl . . . .'" *Id*. at 690. The defendant was convicted as charged. *Id*. at 653.

Our Supreme Court held that the defendant's nephew was improperly impeached:

> The only relevance Donald Stanaway's testimony had to this case was whether he made the statement regarding his uncle's alleged admission. The witness had no direct knowledge of any of the alleged incidents and was out of town at the time they would have occurred. While prior inconsistent statements may be used in some circumstances to impeach credibility, MRE 613, this was improper impeachment. The substance of the statement, purportedly used to impeach the credibility of the witness,

went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801.

While the prosecutor could have presented defendant's alleged admission by way of the nephew's statement, he could not have delivered it by way of the officer's testimony because the statement would be impermissible hearsay. See *People v Carner*, 117 Mich App 560, 571; 324 NW2d 78 (1982). Likewise, a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial. *People v Bennett*, 393 Mich 445; 224 NW2d 840 (1975). Here the prosecutor used the elicited denial as a means of introducing a highly prejudicial "admission" that otherwise would have been inadmissible hearsay. The testimony of Officer Peters was that Donald Stanaway said that Brian Stanaway said that he had sex with a young girl. This would have been clearly inadmissible with Donald Stanaway's denial. It is less reliable in the face of the denial. Absent any remaining testimony from the witness for which his credibility was relevant to this case, the impeachment should have been disallowed. [*Id*. at 692-693.]

Our Supreme Court reversed the defendant's convictions on the ground that the improper hearsay evidence was prejudicial and, therefore, did not constitute harmless error. *Id*. at 695.

In *Jenkins*, the defendant was charged with the first-degree murder of the victim of a drive-by shooting. *Jenkins*, *supra* at 251-252. Shortly thereafter, Reginald Pennington gave Sergeant Gale a signed statement that immediately before the incident he (Pennington) had seen the defendant riding in a gold Sunbird toward the crime scene, and that gunfire erupted immediately after the vehicle left his sight. *Id*. at 252. At trial, only one witness testified that the defendant was the gunman who shot from the passenger seat of a gold or brown automobile. *Id*. Pennington, when called as a prosecution witness, testified that he did not see a gold Sunbird going past his house before he heard the shots, and that he could not remember whether he saw the defendant in a gold Sunbird on the day of the killing. *Id*. When examined by the prosecutor concerning his prior statement, Pennington acknowledged giving a statement to Sergeant Gale, but denied seeing the defendant in a gold Sunbird just before he heard the shots. *Id*. After being given the opportunity to read the signed memorandum of his statement, Pennington testified that his memory was not refreshed concerning whether he had seen the defendant in a gold Sunbird shortly before the gunshots. *Id*. at 252-253. The prosecutor impeached Pennington over defense objections by asking him whether he had made the various incriminating statements set forth in the memorandum. *Id*. at 253. Over further defense objections, the prosecutor questioned Sergeant Gale, who was permitted to read excerpts from the signed memorandum of Pennington's statement word for word. *Id*. at 253-254. The defendant was convicted of assault with intent to murder and felony-firearm. *Id*. at 251.

On appeal, the defendant argued that the trial court had erred in permitting the impeachment of Pennington and the testimony of Sergeant Gale. *Id*. at 251. Our Supreme Court disagreed, in part, and

held that Pennington was properly impeached.[3] Our Supreme Court also held that the prosecutor had laid a proper foundation to impeach Pennington with the extrinsic evidence of Sergeant Gale's testimony by showing Pennington the signed memorandum of Pennington's statement and asking Pennington whether he remembered making the statement. *Id*. at 256. However, our Supreme Court further held that the admission of Sergeant Gale's reading of the statement word for word without a proper foundation being established for admission of the memorandum as past recollection recorded was nevertheless error because it constituted inadmissible hearsay where Sergeant Gale had not related what he had heard, but rather had offered an extrajudicial statement (the signed memorandum) to prove the truth of the thing said, i.e., that Pennington had spoken the words imputed to him. *Id*. at 257. The Court stated that Sergeant Gale could have testified from memory about what Pennington had stated, or, if Sergeant Gale could not recall the conversation, he could have been shown the memorandum to refresh his memory, and, if his memory was not then refreshed, the memorandum could then have been introduced into evidence and read to the jury provided a proper foundation was laid. *Id*. at 258.

Our Supreme Court alternatively held that even if Sergeant Gale's reading from the memorandum did not constitute hearsay, the court nevertheless abused its discretion in permitting Sergeant Gale to read from the memorandum of Pennington's statement under circumstances creating an unacceptable risk that the jury would accept the contents of the memorandum as substantive evidence. The Court noted that:

> Pennington did not provide testimony tending in any way to exculpate Jenkins. He, rather, disappointed the prosecutor in failing to provide inculpatory testimony. Pennington's inconsistent statement is, I believe we all agree, admissible only to show that Pennington made the inconsistent, and not as substantive evidence that Jenkins was in the Sunbird, driving to the scene of the killing shortly before the shots were heard.
>
> Since the inconsistent statement is not substantive evidence, it could only be used for impeachment: to cause the jury to disbelieve Pennington's claim that he did not remember seeing Jenkins in the gold Sunbird on the day of the shooting. The admission of the entire statement, and that is what in effect occurred, was unnecessary to achieve this end. It served only one purpose—to impermissibly provide inculpatory testimony to bolster the relatively weak identification testimony of but one witness, whose integrity was put in question by another witness.
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> This Court has recognized the danger "that not the sworn testimony given in court, but the unsworn, extrajudicial statements made by witnesses will be used to convict a respondent."
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> As the United States Court of Appeals for the Fourth Circuit stated:
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> "We must be mindful of the fact that prior unsworn statements of a witness are mere hearsay and are, as such, generally inadmissible as affirmative proof. The introduction of such testimony, even where limited to impeachment, necessarily

> increases the possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to the jury, it is often difficult for them to distinguish between impeachment and substantive evidence."
>
> In this case, where the prosecution presented to the jury a verbatim recitation of damning out-of-court statements by Pennington, special care should have been taken to ensure that "impeachment by prior inconsistent statement may not be permited where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."
>
> Casting doubt on Pennington's testimony by showing that he had made inconsistent statements in the past did not justify Gale reading Pennington's prior statement word for word to the jury. Proper impeachment could have been accomplished by asking Gale to testify from memory whether Pennington reported seeking defendant in the car at the time, and whether he thought Pennington was intoxicated when he made the statement. [*Id*. at 261-262 (quoting *United States v Morlang*, 531 F2d 183, 190 (CA 4, 1975).]

Our Supreme Court stated that its concern that the jury had accepted the prior statement as substantive evidence was further increased by the prosecutor's rebuttal argument, in which the prosecutor contended that immediately after the shooting Pennington had identified the defendant as the shooter, and the trial court's failure to instruct the jury on the proper use of the evidence at the time Sergeant Gale read Pennington's statement. *Id*. at 262-263. The Court reversed the defendant's convictions on the ground that the erroneous admission of Segeant Gale's testimony did not constitute harmless error. *Id*. at 264.

In this case, Ernest Wright allegedly could identify the pants and boots found at the crime scene as pants and boots similar to pants and boots owned by defendant, and testify to a response made by defendant when asked about the killing. This testimony was relevant and admissible evidence. MRE 401, 801. In order to elicit this evidence, the prosecutor could have asked Ernest Wright at trial whether he could identify the pants and boots depicted in the photographs, and what, if anything, he had heard defendant ever say about the killing. If Ernest Wright had then testified that he could not identify the clothing and that he had not heard defendant utter an incriminatory response, the prosecutor could have properly impeached defendant with his prior written statement. MRE 607.

However, this scenario is not what happened in this case. Rather, like *Stanaway*, the prosecutor treated Ernest Wright's testimony as relevant only with respect to whether Ernest Wright had made a prior statement to the police. Like *Stanaway*, in this case "[t]he substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case [identity]. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made." *Id*. at 692-693. Thus, like *Stanaway*, we conclude that the impeaching evidence in this case served the improper purpose of proving the truth of the matter asserted. *Id*. at 693. A prosecutor may not use an elicited denial as a springboard for introducing

substantive evidence under the guise of introducing the denial. *Id*. Accordingly, we conclude that under *Stanaway*, Ernest Wright was improperly impeached by inadmissible hearsay. *Id*.

Moreover, even if we were to conclude that (1) no error occurred under *Stanaway*; (2) that the prosecutor properly impeached Ernest Wright under *Jenkins*, and; (3) that the prosecutor laid a proper foundation to impeach Ernest Wright's testimony with extrinsic evidence (Sergeant Frederick's testimony), we nevertheless conclude that the admission of Sergeant Frederick's testimony in this case constituted error under *Jenkins*. First, it appears that Sergeant Frederick read word for word from the typed statement of Ernest Wright without a foundation being established for introduction of the statement as past recollection recorded. The reading of the statement, therefore, constituted hearsay because Sergeant Frederick was not relating what he had heard, but rather was offering an extrajudicial statement to prove the truth of the thing said—that Ernest Wright had spoken the words imputed to him. *Jenkins, supra* at 256-257.

Second, even if Sergeant Frederick's reading of the statement did not constitute hearsay, the court abused it's discretion in permitting him to read from the typed memorandum of Ernest Wright's statement under circumstances creating an unacceptable risk that the jury would accept the contents of the memorandum as substantive evidence. Like *Jenkins*, Ernest Wright disappointed the prosecutor in failing to provide inculpatory testimony. *Id*. at 261. Like *Jenkins*, Ernest Wright's inconsistent statement was admissible only to show that Ernest Wright made the inconsistent statement and not as substantive evidence that the clothing found at the crime scene belonged to defendant or that defendant had made an incriminating response. *Id*. Like *Jenkins*, because the inconsistent statement is not substantive evidence, it could only be used for impeachment, i.e., to cause the jury to disbelieve Ernest Wright's claim that he had not identified defendant's clothing to the police or hear defendant utter an incriminating response. *Id*. Like *Jenkins*, the word-for-word admission of the statement was unnecessary to achieve this end. *Id*. Rather, like *Jenkins*, it served only one purpose—to provide inculpatory evidence. *Id*.

Like *Jenkins*, the court failed to take special care to ensure that the impeachment by prior inconsistent statement was not employed as a subterfuge to get before the jury inadmissible evidence where the court only gave the jury a limiting instruction during final instructions and refused to give defense counsel's requested cautionary instruction at the time of Sergeant Frederick's testimony. Finally, like *Jenkins*, our review of the following excerpts of the prosecutor's closing argument further indicates that the prior statement of Ernest Wright was used a substantive evidence:

> In this case Simon Wright would have walked away from this crime possible, and no one would have know it was him, but for Ernest Wright. So Ernest Wright is a significant witness, even though he comes in here, and he tells that you he [sic] didn't know how his name got on this statement, and I would urge you to remember collectively the testimony that he gave you.
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> * * *
>
> There was no mistake that Ernest Wright gave this information, and that probably at the time that did, he thought what any decent, law abiding person would think is that this just wasn't right.

> Ms Scott [another witness] told you that all Gladys Reynolds [the victim] wanted to do was live. And it is signficant that when he called the Homicide Section, he was asked, did your mother try and stop you, and he said yes. She told me not to tell on Simon because it was a dirty thing to do. But she said if I didn't tell the police about the murder, she would have him put away.
>
> Well, luckily he came forward, and it is interesting that when Simon Wright was asked, did you kill that woman, he didn't say anything under a situation where perhaps a normal person would have denied it. What he did was when faced with the horrible knowledge that his brother was asking him if he killed the woman, he just looked at him and he laughed.
>
> Simon Wright's clothing was identified, and Mr. Ernest Wright was able to say these are shoes that look like the shoes that my brother wore. And the photographs that were shown to him were placed on evidence so that you can take these in, and they are compatible with the evidence that is in there, and you are certainly welcome to look at that because it was marked as evidence.
>
> I feel that Ernest Wright would have denied that he was even present there if this picture hadn't been taken. It is a difficult thing to come and testify against your brother in such a horrible case. It is a hard thing for that family to have to deal with the fact that they, for most of their lives, were living with a monster, but that's what happened here.
>
> So I would like for you to take that into effect when you judge Mr. Ernest Wright's testimony. And what I think that you should get from his testimony is that when he came in to tell the police this, he wasn't the person that was in trouble. He wasn't a person that was implicated with this murder. He was a person that was coming forther with evidence because he thought it was important, because he thought whoever did this, someone that he knew, his brother, and he should be taken off the street.

Because we have concluded the improper impeachment occurred in this case under either *Stanaway* or *Jenkins*, we must next determine whether the errors were harmless.

In determining whether a preserved nonconstitutional[4] evidentiary error requires reversal under MCL 769.26; MSA 28.1096, this Court must engage in a comparative analysis of the likely effect of the error in light of the other, remaining evidence. *People v Mateo*, 453 Mich 203, 206, 214; ___ NW2d ___ (1996). The statute "should be viewed as a legislative directive to presume the validity of verdicts and to reverse only with respect to those errors that affirmatively appear to undermine the reliability of the verdict." *Id*. at 211. As stated by our Supreme Court in *Mateo*:

> "As for some types of error, such as the erroneous admission or exclusion of evidence, overwhelming evidence of guilt will ordinarily lead to the conclusion that the error was harmless. It would take evidence of an extraordinary quality to conclude that its erroneous admission or exclusion may have contributed to the verdict where the government had before the jury other evidence that could clearly and positively establish guilt." [*Id*. at 214 (quoting 3 LaFave & Israel, Criminal Procedure, § 26.6(b), p 269).]

Reversal of a verdict is not required unless the error is harmful or prejudicial. *Id*. at 212, 215. The inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id*. at 215. The reviewing court is not to apply the standard for preserved constitutional error of harmless beyond a reasonable doubt. *Id. at 206*. However, in *Mateo*, our Supreme Court held that it was unnecesarry to reach the question of the appropriate test a reviewing court must use in determining the harmlessness of preserved nonconstitutional error, i.e., whether it was (1) highly probable or (2) more probable than not that the error contributed to the verdict, or (3) whether there was a reasonable likelihood that the error affected the defendant's substantial rights, because it concluded that there did not affirmatively appear to have been a miscarriage of justice in any event where this Court had correctly found overwhelming evidence of guilt. *Id*. at 207, 218, n 17.

In this case, *Stanaway* and *Jenkins* were decided before *Mateo*. Nevertheless, in *Stanaway* and *Jenkins*, like *Mateo*, our Supreme Court engaged in a comparative analysis of the likely effect of the evidentiary errors in light of the other evidence in those cases. In *Stanaway*, the Court noted that the case came down to a credibility contest between the defendant and the complainant, and that the improperly admitted prior statement (that the defendant had said that he had had sex with a young girl) had the effect of a confession of great probative weight, particularly where it was delivered by a police officer. *Stanaway, supra* at 695. The Court concluded that the evidentiary error was not harmless because "[a]ny nagging doubts the jury may have had about whether these sexual incidents took place between the complainant and the defendant were likely erased by the words he purportedly uttered to his nephew." *Id*. In *Jenkins*, our Supreme Court held that the evidentiary errors were not harmless because the testimony of the sole eyewitness who implicated the defendant in the shooting was inconsistent and conflicted with other testimony, and that such testimony, but for the errors respecting the witness' (Pennington's) prior statement, might have led the jury to view the eyewitness "in an unfavorable light and question the value of his testimony." *Jenkins, supra*. at 264-265.

Unlike *Stanaway* and *Jenkins*, this case did not boil down to a credibility contest between conflicting eyewitness testimony concerning the identity of the perpetrator with the testimony of one side being improperly bolstered by erroneously admitted evidence. Rather, in this case, apart from the improperly admitted evidence, physical evidence identifying defendant as the killer was admitted. Dr. Warnick testified that he used several different methods of comparing the bite marks found on the victim with defendant's bite mark, including photographs, overlay procedures, accurate impressions and molds of defendant's teeth and the victim's breasts, and electron microscope examination of the impressions and molds. This evidence was highly relevant to the sole issue in this case—identification. Moreover, this evidence had much weight in light of defendant's particularly unique bite mark and the abundance of

evidence that defendant's unique bite mark matched the bite marks found on the victim, Accordingly, we conclude that the government had before the jury overwhelming evidence that clearly and positively established defendant's identity as the killer. *Mateo, supra* at 214. Thus, unlike *Stanaway* and *Jenkins*, it does not affirmatively appear that the erroneous admission of evidence in this case caused a miscarriage of justice. *Mateo, supra* at 207.

We next consider the issues raised by defendant concerning the search warrant used to obtain defendant's dental impressions and other dental work. At the hearing below on this issue, the affiant, a police officer, testified that his affidavit was based, in part, on Ernest Wright's prior statement, which was made in the affiant's presence. Although Ernest Wright denied at this hearing that he made the prior statement, Ernest Wright identified his signature on the typed document memorializing these statements. The trial court believed the affiant that the statements were made by Ernest Wright and did not believe Ernest Wright's contrary testimony. We conclude that defendant has failed to show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit. *Chandler, supra* at 612.

A search warrant may issue on the basis of an affidavit that contains hearsay. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). In this case, the affidavit contained affirmative allegations from which the magistrate could conclude that the persons named in the affidavit spoke with personal knowledge of the information. MCL 780.653; MSA 28.1259(3); *Harris, supra*. After reviewing the statements set forth in the affidavit supporting the search warrant, we are satisfied that a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Chandler, supra*. Accordingly, the trial court's refusal to suppress the evidence of defendant's dental impressions and other dental work did not constitute legal or factual error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

The lower court did not abuse its discretion in denying defendant's motion for a mistrial. Although the gym shoes that were placed in the jury room was an obvious irregularity, defendant has failed to show how he was prejudiced by the error, especially in light of the fact that the jury was instructed to disregard the gym shoes. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Guenther*, 188 Mich App 174, 187; 469 NW2d 59 (1991).

The trial court did not abuse its discretion in the admitting photographs of the victim's body. *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995). The prosecutor's opening statement and remarks when the photographs were shown to the jury did not deny defendant a fair trial. *McElhaney, supra* at 283.

The trial court did not abuse its discretion in limiting the scope of defense counsel's cross-examination of witness Arnold. *People v Morton*, 213 Mich App 331, 539 NW2d 771 (1995). Defense counsel was permitted to question Arnold concerning whether she knew if any young men who had ever stayed with the victim had been accused of breaking into the victim's home or whether she had information about any recent break-ins. Defense counsel's offer of proof that the victim had been

assaulted in 1987 by a man named Keith Munson did not concern the credibility of witness Arnold and was only marginally relevant to this case. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). We find no error.

Defendant's sentence does not impermissibly exceed his life expectancy. A defendant has a reasonable prospect of living into his early nineties. *People v Kelly*, 213 Mich App 8, 12; 539 NW2d 538 (1995). In this case, defendant, an habitual offender, will be eligible for parole when he is eighty-five.

Finally, we conclude that defendant's two convictions of second-degree murder for the killing of a single individual violate the constitutional guarantees against double jeopardy. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). Accordingly, we vacate one of defendant's second-degree murder convictions and remand for the sole purpose of permitting the trial court to amend the judgment of sentence to reflect that defendant was convicted of one count of second-degree murder. The trial court shall ensure that the amended judgment of sentence is transmitted to the Department of Corrections. We do not retain jurisdiction.

Affirmed and remanded.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] *Frye v United States*, 54 App DC 46; 293 F 1013 (1923); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955).

[2] In 1995, amendments rephrased the Michigan Rules of Evidence in gender-neutral language. No substantive changes were made.

[3] Specifically, our Supreme Court held that Pennington was properly impeached under the version of MRE 607 in effect at the time of trial, which barred the prosecution from impeaching its own witness unless (1) the prosecutor was required to call the witness, or (2) the witness' testimony was unexpected and actually injurious to the prosecutor's case. Our Supreme Court stated that Pennington's testimony had been actually injurious to the prosecution's case and there was no indication that the prosecution had expected Pennington to change his story. *Id*. at 255-256. We also note that this version of MRE 607 was in effect at the time of the defendant's trial in *Stanaway*. See *Stanaway, supra* at 692, n 51.

In this case, MRE 607 provided as follows at the time of trial: "The credibility of a witness may be attacked by any party, including the party calling him." However, we believe the amendment to MRE 607 has no bearing on our analysis in this case. As noted by our Supreme Court in *Stanaway*, "[b]ecause the new rule [the current version of MRE 607] would be applied in the event of a new trial,

the fact of impeachment alone is not dispositive of this issue [whether the witness was improperly impeached], but the manner of impeachment must be analyzed." *Id*. at 693, n 51

[4] In *Stanaway*, our Supreme Court stated as follows:

> Although not briefed or argued by the parties, we would note that where there is trial error in admitting hearsay testimony not admissible under the Michigan Rules of Evidence, there may be an issue regarding whether we must determine if the evidentiary ruling implicated constitutional error under the Confrontation Clause, US Const, Am VI and Const 1963, art 1, § 20, in order to properly assess harmless error. In *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970), the Supreme Court held that it is not a Sixth Amendment violation where hearsay was improperly admitted but the declarant testified and was therefore available for cross-examination. Where the declarant can be cross-examined about the prior inconsistent statement, there is no Confrontation Clause violation because the literal right to confront the witness has been satisfied. [*Stanaway, supra* at 694, n 53.]

In this case, defendant has raised no claim that the erroneous admission of evidence in this case constituted constitutional error. Thus, we decline to consider this issue.