STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2002
v	No. 225194 Saginaw Circuit Court
JEFFREY ALLEN GROSS, Defendant-Appellant.	LC No. 98-016407-FC

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(b), and child enticement, MCL 750.350. Defendant was also found guilty of kidnapping, MCL 750.349, which the trial court merged into the felony-murder conviction at sentencing. We affirm.

Defendant alleges numerous evidentiary errors. The admission of evidence by a trial court is reviewed for an abuse of discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

First, defendant contends that photographs of the murder victim were irrelevant and prejudicial. We disagree. The photographs corroborated the testimony of the medical examiner and were thus relevant. *People v Doyle (On Remand)*, 129 Mich App 145, 156; 342 NW2d 560 (1983). Photographs are not rendered inadmissible merely because they are gruesome and shocking; rather, relevant photographs should be excluded only where they could lead the jury to convict on passion alone. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). The challenged photographs did not rise to this level.

Defendant next alleges that items seized from him in the execution of a search warrant should not have been admitted into evidence. Although some of the items were irrelevant and should have been excluded, we find the error to be harmless. The challenged evidence was clearly not outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The victim's body was found in defendant's camper, defendant's fingerprints were found on a candy wrapper in the victim's pocket, and he confessed to the crime twice.

Defendant also challenges the admissibility of portions of the trial testimony—a question asked to a police officer by the prosecution and testimony from another witness about statements

made by defendant. The challenged testimony established motive, which is always relevant in a murder trial. *People v Mihalko*, 306 Mich 356, 361; 10 NW2d 914 (1943). Moreover, the testimony was not unduly prejudicial. MRE 403. The testimony regarding defendant's statements also established defendant's state of mind, which is admissible where relevant to the issue of intent. *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), affirmed 437 Mich 149; 468 NW2d 487 (1991).

Defendant next contends that the prosecution shifted the burden of proof. We find this claim to be without merit, because the challenged comments constituted valid commentary on the evidence, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), and the court gave an appropriate limiting instruction with respect to the weight given to the attorneys' remarks, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant next challenges the admissibility of testimony regarding a similar incident in 1994, alleging that the evidence was inadmissible under MRE 404(b). We disagree. Relevant evidence of other acts is inadmissible only where offered solely to show conformity with a specific character trait. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). Other acts are admissible where a four-part test is satisfied. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). First, the evidence must be offered for a non-propensity purpose, including intent or motivation, a common plan or scheme, or absence of mistake. *Id*. at 55. Second, the proposed evidence must be relevant. *Id*. Third, the probative value cannot be substantially outweighed by the possibility of undue prejudice. *Id*. at 55-56. Fourth, the court must provide a limiting instruction on request. *Id.* at 56.

The prosecution offered the challenged testimony on grounds of motive or intent and similar plan or scheme. *Id*. at 66-69. The testimony was relevant to whether defendant had trapped the victim; forcible confinement is an element of kidnapping, MCL 750.349. *People v Wesley*, 421 Mich 375, 389; 365 NW2d 692 (1984). The testimony in *Sabin*, that the defendant had sexually assaulted the witness, was far more prejudicial than the instant testimony, yet the Court found that the danger of undue prejudice did not substantially outweigh the probative value. *Sabin (After Remand), supra* at 71. Similar testimony was held admissible under MRE 404(b) in *People v Starr*, 457 Mich 490, 500-504; 577 NW2d 673 (1998). The trial court here gave the jury a limiting instruction regarding the evidence. The trial court did not abuse its discretion in allowing the testimony. *Taylor, supra* at 60.

Defendant next alleges that he received ineffective assistance of counsel because his trial counsel failed to move for the suppression of evidence seized from defendant in the execution of a search warrant, and failed to move for a change in venue. Whether defendant was denied effective assistance of counsel is a constitutional question that this Court reviews de novo. *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797 (1994). Defendant must overcome a presumption that his counsel rendered effective assistance, *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989), and that the assistance received constituted sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). Defendant must establish: (1) that his counsel's performance was below an objective standard of professional reasonableness; and (2) a reasonable probability that without counsel's error the result would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 502 (1995).

Defense counsel's decision not to move for the exclusion of evidence is within the realm of trial strategy and will not support a claim of ineffective assistance. *People v Armstrong*, 100 Mich App 423, 426; 298 NW2d 752 (1980). An attorney's decision whether to move the court for a change of venue also constitutes a matter of trial strategy. *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981). Defendant's allegations of juror prejudice do not rise to the level required under Michigan law, *People v Jendrzejewski*, 455 Mich 495, 498-505; 566 NW2d 530 (1997), cert den 522 US 1097, 118 S Ct 895, 139 L Ed 2d 880 (1998), nor does the media coverage seem to have been as potentially prejudicial as in *People v DeLisle*, 202 Mich App 658, 662-663; 509 NW2d 885 (1993), where we held that once the jury has sworn to impartiality, we presume that they honor the oath. *Id*. at 663. Defendant offers nothing to indicate that this oath was broken. Thus, the first prong of the *Stanaway* test has not been met. *Stanaway, supra* at 687-688.

Defendant next contends that the trial court violated the principle of double jeopardy under *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). We disagree. The trial court stated at sentencing that the kidnapping conviction, MCL 750.349, merged into first-degree felony murder, MCL 750.316(b). This satisfies *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2000). The trial court held that child enticement, MCL 750.350, as a separate and distinct offense, did not merge into felony murder, a proposition in accord with *People v Rollins*, 207 Mich App 465, 470; 525 NW2d 484 (1994).

Defendant finally contends that his *Miranda*[1] rights were violated. There are two prongs of a *Miranda* waiver: the waiver must have been voluntary; and it must have been knowing and intelligent. *People v Daoud*, 462 Mich 621, 639; 614 NW2d 152 (2000). We find that both have been satisfied. Defendant also alleges that his father asserted his *Miranda* rights for him, but that no counsel had been retained. The police must inform a defendant when retained counsel is attempting to contact a defendant, whether counsel is present at the station or not. *People v Bender*, 452 Mich 594, 614; 551 NW2d 71 (1996). Because no retained counsel attempted to contact defendant, *Bender, supra* at 614, is inapplicable. Additionally, we decline defendant's invitation to extend the holding of *Bender, supra* at 614, to include situations like the present.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 602; 16 L Ed 2d 694 (1966).