STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERALD LEROY WINGEART,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 240697
Shiawassee Circuit Court
LC No. 01-006417-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Almost thirty years after the disappearance, rape, and murder of the twenty-year-old victim in 1973, the prosecution, in 2001, charged defendant with first-degree murder on the theories of premeditation, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b). The jury convicted defendant of first-degree murder under both theories and, having vacated one of the convictions, the trial court sentenced defendant to mandatory life imprisonment without parole. Defendant appeals as of right. We affirm.

On January 27, 1973, the victim left her home to go shopping. On the way, she experienced car trouble, so after stopping at a gas station for assistance, she drove to her in-laws' residence, got her father-in law's pickup truck, and proceeded to shop at a number of stores. The truck was found in the Yankee Plaza parking lot in Owosso. Some of the victim's keys were on the floorboard and some were on the ground. Searches for the victim were unsuccessful.

On March 4, 1973, an eleven-year-old boy found the victim's body, which was identified through dental records and fingerprints, over fourteen miles north and west of Owosso in the woods near a trail. The victim had sustained three gunshot wounds. She was shot twice in the head and once in the back, and .22 caliber bullets were recovered from her body. The date and time of death could not be determined.

On June 9, 1974, a rusted Rohm .22 caliber revolver believed to be the murder weapon was recovered submerged in water on a dam in a river in Owosso. Specifically, the gun was found between 100 and 150 feet north of the M-21 bridge of the Shiawassee River. The police ascertained that a pawnshop in Arizona sold the gun to Robert Shaw, but at that time could not locate the buyer. Because of the rusted condition of the gun, no fingerprints were recovered, and because of the inoperable condition of the gun, it could not be determined through test firing whether the bullets in the victim came from the gun found. Years later, on August 25, 1976, a

couple of boys found the victim's wallet in Owosso on the west riverbank on the south side of the M-21 bridge over the Shiawassee river.

Throughout the many years of investigation, the police investigated numerous suspects. But many suspects were excluded for various reasons, including DNA analysis. In 1994, DNA analysis indicated that the sperm taken by vaginal swab from the victim's body matched defendant's DNA profile and defendant was charged and tried for murdering the victim. After deliberations, the jury rendered its verdict, finding defendant guilty of first-degree felony murder and first-degree premeditated murder. At sentencing, the trial court vacated the premeditated murder conviction and then sentenced defendant to life imprisonment without parole for the felony murder conviction. This appeal ensued.

Defendant first argues that the trial court erred in admitting testimony about defendant's involvement in a prior rape, which occurred in 1961, approximately twelve years before the offense leading to the instant conviction. According to defendant, the evidence of the prior crime was improperly admitted under MRE 404(b) because it was too dissimilar compared to the charged offenses and any probative value was outweighed by its unfairly prejudicial impact.

We review a trial court's decisions concerning the admission of bad acts evidence for an 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. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) provides in pertinent part:

> (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.

Recently, in *People v Knox*, 256 Mich App 175, 182; 662 NW2d 482 (2003), this Court reiterated the three factors that must be present for prior-bad-acts evidence to be admissible:

> First, the evidence must "be offered for a proper purpose under Rule 404(b)." Second, the evidence must "be relevant under Rule 402 as enforced through Rule 104(b)." And third, "the probative value of the evidence [must not be] substantially outweighed by unfair prejudice." Additionally, if the trial court admits the evidence, "the trial court may, upon request, provide a limiting instruction to the jury." [*Id.*, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

See also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). In *Crawford, supra*, our Supreme Court utilized this test and explained that

> [u]nder this formulation, the prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded. Where, however, the evidence also tends to prove some fact other than character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence. [*Id.* at 385.]

The *Crawford* Court noted that "the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded...." *Id.* at 390.

Before trial in the present case, the prosecution filed a notice of intent to use other acts evidence as required by MRE 404(b)(2) concerning testimony of the victims of a 1961 robbery and rape and requested an evidentiary hearing to determine its admissibility. Defendant responded by moving to exclude such testimony on the basis that no relevant or sufficient nexus exists between the dissimilar prior convictions and the charged offenses. After a hearing, the trial court determined that the prosecution could introduce the other acts evidence and that an appropriate limiting instruction would be given by the court, if requested.

At trial, before the victims of a 1961 robbery and rape testified about the details of these crimes for which defendant previously was convicted, the trial court instructed the jury that the testimony was to be considered for only the limited purposes of whether defendant had a reason or motive to commit the charged crimes or whether defendant used a plan, scheme, or system, but not for any other purpose.[1] Thereafter, the victims of the 1961 robbery and rape testified to what occurred on the evening of July 8, 1961.

On that date, around midnight, the nineteen-year-old male victim, who was driving with the girl he was dating, the nineteen-year-old female victim, pulled over on a fairly remote rural gravel road to talk and have some time alone. Defendant pulled up, stopped his car, exited the vehicle with a .22 rifle, and told the victims to get out of their car. While the victims were exiting their car, defendant fired a shot into the bushes. Defendant tossed a rope to them and told the female to tie up the male, but she encountered difficulty due to her blindness. Defendant then told the female to go to the back of the car and when she complied, defendant tied up the male. Defendant told the female to get in the car, but the male protested, so defendant told the female to lie down beside the male. Defendant tied the female's hands behind her back. Defendant took the male's wallet. The female's purse was in the car. Defendant mentioned that he had robbed a bank and needed a car to get away. Defendant moved both of the cars, transferred property from his car into the male's car, then drove the male's car a bit up the road and returned. Defendant exited the male's car, grabbed the female, forced her into the car, and drove away at a high rate of speed. After driving awhile, defendant stopped on a gravel road,

[1] Defendant noted on the record his continuing objection to this evidence.

removed the female's panties, and unsuccessfully attempted to penetrate her. Defendant then drove further down the gravel road, stopped the car, told the female to stand against an embankment, and engaged in sexual intercourse with the female, who had not been sexually active prior to that time, whose hands were tied behind her back, and who could not see to run. From defendant's comments, the female believed that defendant would kill her. He told her to go up over the embankment and lay down, which she did; defendant tied her legs. Defendant drove away, turned around and drove past her again. Defendant did not return her panties to her. At the time of the incident, the female victim was approximately 5 feet, 5½ inches tall, blond, weighing 116 to 118 pounds. At the conclusion of the trial, the trial court again instructed the jurors similarly to as it had before this testimony, but added that the evidence may be used for the additional purpose of identifying the perpetrator of the charged crimes.

Defendant now argues, as he did before the trial court, that the evidence of the 1961 robbery and rape was too dissimilar from the incident for which defendant stood charged with first-degree murder to be admissible at trial. According to defendant, the common plan or scheme rationale fails because of the dissimilarity of the incidents and the twelve years separating them. Defendant further argues that the lack of information about what actually occurred in the charged incident prevents the conclusion that the incidents were meaningfully similar, noting that "[t]he closest similarities were the rough similarities in appearance of the victims and in the absence of underwear," and that the dissimilarities render improper the motive and identity rationale. Further, defendant asserts that the probative value of the challenged testimony, if any, was outweighed by its unfairly prejudicial impact.

We first address whether the prior bad acts evidence was properly admitted for the purpose of common plan, scheme, or system, which is one of the proper non-character purposes for the proposed evidence that the prosecution proffered at the evidentiary hearing. In *Sabin, supra*, our Supreme Court explained that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts," *id.* at 64; rather, the added element is "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations," *id.* at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted). Further, the plan, scheme, or system, need not be unusual or distinctive. *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002); *Sabin, supra* at 65-66.

Here, the same defendant was involved; the 1961 incident included kidnapping, the 1973 incident evidenced signs of kidnapping; both incidents involved sexual penetration, and while murder was the outcome in the 1973 incident, the fact that the female victim in 1963 was blind can support an inference that killing was unnecessary with respect to the threat of visual identification. Although the prosecution did not charge defendant with rape, that a rape occurred was part of its theory of the case, i.e., that rape was the reason for the kidnapping and murder. Further, defendant robbed the 1961 victims and the present victim's purse was missing, her wallet being found years later in a river. Additional common features included the use of a gun, moving the victim to a different location, the similar age and physical characteristics of the

victims,[2] and, as was evidenced at trial, the failure to return the victims' panties. We acknowledge the dissimilarities noted by defendant, including the prior incident being "a rape incidental to a robbery of two people at night in a secluded area in a different part of the state, perpetrated with a long gun, and in which both victims were tied [up] and ultimately left alive," as well as the time span between the incidents. However, given the similar features, we cannot say that the trial court abused its discretion in determining that the incidents shared sufficient common features to infer a plan, scheme, or system to do the acts. Like the *Sabin* case, the present case "is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts." *Sabin, supra* at 67. The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.*

But we agree with defendant that the purposes of motive and identity were not properly relevant for admission of the prior bad acts testimony. The prosecution represented to the trial court, and argued to the jury, that the motive for defendant's crime was to abduct with the desire to obtain sexual gratification, which is indistinguishable from the "lustful disposition" rule that our Supreme Court has not adopted. *Sabin, supra* at 68. Here, as in *Sabin*, "[t]o accept the prosecutions theory of logical relevance would allow use of the evidence for the prohibited purpose of proving defendant's character to show that he acted in conformity therewith during the events underlying the charged offense." *Id.*

Likewise, the 404(b) evidence falls short of showing the perpetrator's identity. When using modus operandi to prove identity, more than just a similarity must exist between the charged offense and the bad acts. Both must have "such unique, uncommon, and distinctive characteristics as to suggest the handiwork or signature of a single actor, the defendant." *People v Golochowicz*, 413 Mich 298, 319; 319 NW2d 518 (1982).[3] This requirement is not met here.

Although we agree that not all of the theories presented by the prosecution were proper for admitting the 404(b) evidence, "only one needs to be a proper, noncharacter reason that compels admission for the testimony to be admissible." *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Having determined that the trial court did not abuse its discretion in determining that the bad acts evidence was admissible under a permissible theory of plan, scheme, or system, we turn to the question whether the trial court abused its discretion in determining that the danger of unfair prejudice did not outweigh the probative value of the evidence. The trial court found the evidence probative, as it "put [the police] on the trail to the

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[2] The twenty-year-old victim of the 1973 incident was approximately five feet, five inches to five feet, nine inches tall, 120 to 125 pounds, with blond hair and blue eyes. The nineteen-year-old victim of the 1963 incident was approximately 5 feet, 5½ inches tall, blond with blue-green eyes and weighing 116 to 118 pounds.

[3] Although in *VanderVliet, supra*, the Supreme Court rejected the *Golochowicz* test as the standard for determining the admissibility of other bad acts evidence, it stated that *Golochowicz* provided the proper analysis for determining logical relevance when the prosecution utilizes the modus operandi theory to prove identity. *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995), citing *VanderVliet, supra* at 65-66.

defendant," and the trial court conducted the appropriate MRE 403 balancing test. "[A]ll evidence is somewhat prejudicial to a defendant--it must be so to be relevant." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). The similarity of the incidents and acts of the perpetrator supports the trial court's conclusion and the trial court's repeated limiting instructions to the jury, specifically stating that the evidence may not be used to show that defendant is a bad person or is likely to commit crimes, MRE 404(b), protected defendant's right to a fair trial. *Id.* Thus, the trial court did not abuse its discretion in admitting the evidence concerning the 1961 robbery and rape.

Defendant further challenges the trial court's instructions to the jury, asserting that even if the common plan, scheme, or system rationale is appropriate, defendant is entitled to relief because the jury was improperly instructed that it could use the bad acts evidence for the purposes of motive and identity. We review de novo a claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* "The defendant's conviction will not be reversed [for error in jury instructions] unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002), citing MCL 769.26; *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Having examined the nature of the error in light of the weight and strength of the untainted evidence, including the particularly persuasive DNA evidence, and taking into consideration that the MRE 404(b) evidence was properly before the jury as to defendant's plan, scheme, or system, we conclude that it does not affirmatively appear that it is more probable than not that the error was outcome determinative. *Riddle, supra*; see *Sabin, supra*. Defendant is entitled to no relief.

In a related argument, defendant argues that prosecutorial misconduct denied him a fair trial. We disagree.

We review de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Rice, supra* at 434. Review of prosecutorial misconduct issues is done on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The pertinent portion of the record must be examined and the prosecutor's remarks must be evaluated in context. *Id.*

Defendant claims that the prosecutor engaged in misconduct by eliciting and using irrelevant and inadmissible details of the 1961 rape, including inflammatory testimony that the female victim was a virgin before the rape and that it caused her pain. Defendant contends that the prosecutor "played to the hilt" the entire prior rape conviction, reminding the jurors of that conviction through testimony of police officers, admitting into evidence a mug-shot of defendant taken in connection with the 1961 case, and referencing the prior conviction in opening statements and in closing argument. Specifically, defendant takes issue with the prosecutor's comments during closing argument that "[t]wenty-eight years after her death, [the 1973 victim] was able to speak to you. She spoke to you through the voice of [the 1961 female victim]. [The

1961 female victim] gave you testimony that was so revealing, it gave you a glimpse into the mind of a rapist and a killer" and that "[w]e can only imagine what that 19-year-old, blue-eyed, blond-haired [1961 victim] felt when this man said to her, I see this has never happened before. I'll make sure it never happens again."

A prosecutor is not required to confine her arguments to the blandest of all possible terms. *Aldrich, supra* at 112. But a prosecutor may not intentionally inject into trial inflammatory arguments with no apparent justification except to arouse prejudice. *People v Bahoda*, 448 Mich 261, 271; 531 NW2d 659 (1995). While the prosecutor's statements in this case could arguably be considered inflammatory, we find no error warranting reversal. As we have already determined, the trial court did not abuse its discretion in admitting evidence of the 1961 incident. During argument, the prosecutor utilized this evidence to infer defendant's intent in the 1973 incident and this evidence supported the prosecution's theory of the case. The challenged comments were brief in the context of the prosecutor's closing argument and were not so inflammatory as to cause prejudice. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Moreover, on multiple occasions the trial court instructed the jury that the evidence concerning the 1961 robbery and rape could be considered only for certain purposes and the trial court also instructed the jury that the attorneys' statements and arguments are not evidence. Under these circumstances, we conclude that defendant was not denied a fair trial.

Defendant further asserts that the prosecutor engaged in misconduct by "purport[ing] to testify to alleged in-court behavior by the defendant that only she apparently saw" on the basis of the following comments:

> She [the victim of the 1961 incident] told you how she knew she was going to be raped when he said I'm going to get what every man wants. During the beginning of [her] heart-wrenching and heart-felt testimony, the defendant snickered, much as he must have snickered back in 1961 when he was arrested and booked for rape.

Defendant promptly objected. In response, the trial court stated that the jury will be the judge of the evidence, which comes from witness testimony and the exhibits. While a prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), we find the trial court's handling of the matter sufficient to diminish any prejudice from the prosecutor's comment. In other words, any error was cured when the trial court immediately instructed the jury that testimony comes from the witness stand and evidence includes the exhibits, and later instructed the jury that the attorneys' statements and arguments are not evidence.

Defendant also asserts that the prosecutor mischaracterized key facts during closing argument when claiming that a witness testified that defendant came to his house to shoot target practice with a handgun that looked similar to the weapon presented by the prosecution as the murder weapon. Although a prosecutor may not make a statement of fact to the jury that is not supported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), a prosecutor is free to argue the evidence and all reasonable inferences arising there from as they relate to the prosecution's theory of the case, *Bahoda, supra* at 282; *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, although the witness testified that he could not tell if it was the gun that the prosecution presented as an exhibit, the witness did testify that

defendant brought a small handgun to his house. The prosecutor's comment to the jury was that defendant brought "a gun similar to this one" to engage in target practice. Where the witness did testify that "it [the gun] was small like that," we find that the prosecutor's comments were not improper. *Bahoda, supra*; *Schutte, supra*. In sum, defendant was not denied a fair trial on the basis of prosecutorial misconduct.

Next we address defendant's argument challenging the trial court's admission of hearsay evidence pursuant to MRE 804(b)(6) (now MRE 804(b)(7)), the catchall exception to the hearsay rule applicable when the declarant is unavailable. Defendant contends that the trial court's admission into evidence of a letter and of an ATF agent's out-of-court statements violated the rules of evidence and defendant's constitutional rights of confrontation and cross-examination of adverse witnesses. The letter was written by a detective sergeant in Florida and addressed to a Michigan state police lieutenant colonel. The letter summarized the detective sergeant's conversation with an individual who had owned a pawnshop in Arizona, but had since moved to Florida, concerning who purchased the weapon believed to be used in the 1973 incident from his pawnshop in Arizona in the 1960's. The ATF agent's statements dealt with his tracing of the serial numbers of the weapon.

We review a trial court's evidentiary decisions for an abuse of discretion. *Lukity, supra* at 488. We review de novo the constitutional issue regarding defendant's right of confrontation. See, generally, *Lilly v Virginia*, 527 US 116, 118; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

At the time, MRE 804(b)(6) provided in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness ... A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

See, generally, *People v Katt*, 468 Mich 272, 289-293; 662 NW2d 12 (2003). A hearsay statement under this rule of evidence must show a particularized guarantee of trustworthiness. *Id.*; *Smith, supra* at 688; *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997). When making this determination, the totality of the circumstances should be considered. *Katt, supra* at 290-291; *Welch, supra* at 467-468. In *People v Lee*, 243 Mich App 163; 622 NW2d 71 (2000), this Court summarized some factors used to establish the indicia of reliability for purposes of the catch-all exceptions:[4]

[4] The *Lee* decision dealt with MRE 803(24), the catchall exception to the hearsay rule applicable when the availability of the declarant is immaterial, which is comparable to MRE 804(b)(6), now (7).

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*Lee, supra* at 178 (citations omitted).]

Here, regarding the letter, the record demonstrates that the author of the letter could confirm his signature, but had no recollection of the investigation or information contained in the letter. The person with whom the author of the letter had spoken, the pawnshop owner, and whose hearsay was recorded in the letter could not travel for health reasons and had no reason to fabricate the information that he told to the police. The letter was written in 1974, before defendant was a suspect. With regard to the ATF agent's statements, a detective sergeant with the state police testified before trial that he contacted the ATF agent, but the ATF agent had no independent recollection of running the trace, and the detective sergeant further testified that there is no paperwork concerning the gun because paperwork is only retained for twenty years.

Considering the totality of the circumstances as to both, we find that the statements in question had particularized guarantees of trustworthiness, were offered as evidence of a material fact, were more probative on the topic for which they were offered than other evidence that could have been procured, especially in light of the passing of time between the murder and the charging of defendant, and there is no indication that the general purposes of the rules or the interests of justice were not served by the admission of the statements. *Katt, supra*; *Smith, supra*; *Welch, supra*. It does not appear that cross-examination would have been of more than marginal utility. *Welch, supra*. Consequently, the trial court did not abuse its discretion in admitting the challenged evidence, nor was defendant denied his constitutional rights.

Next, defendant challenges the admission of identification testimony, asserting that the testimony was tainted by an unfairly suggestive pretrial identification from a newspaper photograph. Specifically, defendant argues that a witness' identification of defendant from a post-arraignment newspaper photograph in March 2001 as the person he saw at the Yankee Plaza on January 27, 1973, the date the victim failed to return home from her shopping excursion, was unduly suggestive and lacked a sufficient independent basis for admissibility. In essence, defendant asserts that the in-court identification made by that witness should not have been permitted without a showing of an independent basis for the identification. Defendant also argues that his trial counsel was ineffective for failing to request a *Wade*[5] hearing and for failing to challenge the admissibility of that testimony.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it constitutes a denial of due process of law. *People v Williams*, 244 Mich

[5] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

App 533, 542; 624 NW2d 575 (2001). "In order to challenge an identification on the basis of lack of due process, 'a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). If the procedure was impermissibly suggestive, the identification evidence is inadmissible unless an independent untainted basis for the in-court identification can be established. *Id*. at 542-543. See *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977).

Here, the witness testified that on January 27, 1973, the day the victim disappeared, he saw defendant in a car with a woman in the parking lot by the Yankee Store. According to the witness, he got a "funny feeling" and debated whether to get the car's license plate number. The witness did not contact the police when, a couple days after making his observations, he learned of the victim's disappearance. However, in March 1974, after reading an article about the incident, he went to the state police post. There, he told the desk officer that he might have information on the victim's case. The witness gave a brief description of the man he saw and asked to talk to the detective. Although the police took his name, address, and phone number, the witness never heard from the police. The witness testified that he did not contact the police again until April 2001, approximately twenty-seven years later, when he called a detective after seeing defendant's photograph in the paper in March of that year, after defendant's arraignment. Under these circumstances, we conclude that there was no improper pretrial identification procedure used by the prosecution. Because defendant has failed to identify any improper pretrial identification procedure, his argument is without merit.[6] See *Williams, supra*. Moreover, to the extent that defendant asserts that the witness relied on the photograph for his in-court identification, the record demonstrates otherwise. See *Kurylczyk, supra* at 313 ("[T]he publication of photographs of a defendant does not taint a subsequent lineup where the witness' identification is not unduly influenced by the published photographs."). Further, defendant has failed to demonstrate that his trial counsel failed to provide effective assistance. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

Defendant next argues that he is entitled to a new trial because the destruction of the trial exhibits deprives him of meaningful appellate review. However, after defendant had filed his appellate brief, the prosecution provided reproductions of almost all of the exhibits. In light of this circumstance, at oral argument defendant waived this issue, and thus we need not review it.

Defendant further argues that the cumulative effect of the errors at trial denied him a fair trial. We disagree. The cumulative effect of error may be so prejudicial as to require reversal on the basis of the denial of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). "[T]he effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id*. We are not persuaded that any of the errors

[6] See *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995) (where a witness failed to identify the defendant at a pretrial lineup, but later made an in-court identification, this was a credibility, not admissibility, issue properly left for the jury's determination).

that defendant proffers affected the outcome of the trial, nor that in combination such alleged errors denied defendant a fair trial.

Finally, in a Standard 11 brief, defendant challenges the sufficiency of the evidence presented concerning the underlying felony for the felony-murder conviction, i.e., "forcible-confinement kidnapping."[7] We have reviewed the evidence presented and we are satisfied that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of kidnapping were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). Although defendant provides different scenarios that could be construed from the evidence that the prosecution presented at trial, our role is not to second-guess the jury's conclusions, but merely to determine whether there is evidence which, if believed, would support the conviction. In the case at bar, there was.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

[7] A person can be convicted of kidnapping if it is proven beyond a reasonable doubt that he willfully, maliciously and without lawful authority, forcibly or secretly confined or imprisoned any other person within this state against his will or forcibly seized or confined, or inveigled or kidnapped any other person with the intent to cause such person to be imprisoned in this state against his will. MCL 750.349; *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984). "Although not mentioned in the statute, asportation of the victim is a judicially required element of the crime of kidnapping by forcible confinement or imprisonment." *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998), citing *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994).