# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 8, 2006 |
| v | No. 259903<br>Oakland Circuit Court |
| CORAL EUGENE WATTS,<br><br>Defendant-Appellant. | LC No. 04-196617-FC |

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his conviction of first-degree premeditated murder in the December 1, 1979 death of Helen Dutcher. MCL 750.316(1)(a). The prosecution presented the testimony of one eyewitness, Joseph Foy, who identified defendant as the person who killed Dutcher by stabbing her multiple times. The trial court also ruled the prosecution could present evidence under MRE 404(b) that defendant attacked 17 other women as evidence of defendant's motive (animus toward women), intent (premeditation and deliberation), and scheme, plan, or system in committing murder. We affirm.

## I. Factual and Procedural Background

The other acts evidence consisted of defendant's admitting to 12 murders of young women in the state of Texas between September 1991 and May 1982, and one murder of a woman on October 31, 1979 in Wayne County, Michigan. In addition, the prosecution presented evidence through the testimony of three survivors and defendant's admissions to Texas police officers that defendant attempted during 1982 to murder four other young women in Texas. The last attempted murder occurred on May 23, 1982 in Harris County, Texas. Defendant was arrested as a result of that attack, and on August 10, 1982, pleaded guilty to burglary of a habitation pursuant to a plea bargain with Harris County prosecutors that included a sentence recommendation of sixty years.[1] The prosecution also promised immunity from prosecution in return for defendant confessing to the Texas murders. Harris County assistant district attorney

[1] Defendant was sentenced to 60 years imprisonment but appeals and subsequent changes in Texas law advanced his release date from his Texas sentence to May 6, 2006.

Ira Jones and one of defendant's attorneys, Zinetta Burney, stated the terms of the immunity agreement during the August 10, 1982 Texas plea proceeding:

> MR JONES: Your Honor, the plea bargaining between the Defendant and the State is that the State has agreed to recommend 60 years in the Texas Department of Corrections for offense which the Defendant has plead to and in exchange for that the Defendant has agreed he will lead the State of Texas, being the Houston homicide detectives, to all of the graves of individuals that he knows of here in Houston, Texas. He will also assist the Houston Police in their investigation in resolution of a number of unsolved murders in Houston. Likewise, he has agreed he will lead the police to graves and assist in clearing the offenses in the cities of Austin, Galveston, Texas and the cities of Ann Arbor, Michigan; Kalamazoo, Michigan; Detroit, Michigan, and Windsor, Ontario, Canada.
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> * * *
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> MS. BURNEY: One other thing further I think should be in the record that as a result of his assistance, if any of the bodies are turned up or further charges, there will be no prosecution.
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> MR. JONES: It is our agreement, with the Defense, the Defendant will not he prosecuted as to the results or his divulging location of his bodies or cooperation with the police authorities in those named cities so long as the named cites bind themselves in writing to nonprosecution and it is agreed between us he will not be prosecuted in Houston or Harris County for his information in the discovery of these bodies or the resolution of these murders and will not be so long as these other governmental entities bind themselves in writing to nonprosecution, otherwise, the Defendant will not cooperate with them prior to their binding themselves. [Plea Tr, August 10, 1982, pp 5-7.]

Beginning the same day as his plea, and over the next few days, defendant confessed to the Texas murders. On August 13, 1982, then Wayne County prosecuting attorney William C. Cahalan wrote to the Harris County district attorney's office and offered immunity to defendant in return for his statement regarding the October 31, 1979 murder in the City of Grosse Pointe Farms, Michigan, of Jeanne Clyne. On August 19, 1982, Detective Earl Field of the Grosse Pointe Farms police department interviewed defendant, who confessed to the Clyne murder.

Before trial, the prosecution brought a motion in limine seeking an order allowing admission of the other acts evidence. MRE 404(b)(2). The motion detailed the proposed other acts evidence, asserted that the use of defendant's admissions was not prohibited by the nonprosecution agreements, and that the other acts were admissible for proper purposes subject to a limiting instruction. Defendant also filed a motion in limine, requesting that in the event the trial court granted the prosecution's motion, the court preclude evidence of the circumstances of defendant's admissions, i.e., that he was granted immunity.

The trial court issued its written opinion and order on October 8, 2004, agreeing with the prosecution that the other acts evidence was not barred by the nonprosecution agreements. Further, the trial court reasoned that the prosecution's stated purposes in seeking to admit the

other acts evidence - - to prove motive, intent, and scheme, plan, or system - - were proper and specifically permitted by MRE 404(b). The court found, "that the other acts evidence does tend to establish that Defendant hated women and is relevant to prove Defendant's motive for allegedly attacking Dutcher." Although noting that only one proper purpose is necessary to admit other acts, the trial court also agreed with the prosecution that the other acts evidence was relevant "to show that Defendant acted with premeditation and deliberation, and that he planned to kill his victims from the time he identified them." With respect to using the other acts to show defendant's scheme, plan, or system, the trial court rejected defendant's argument that the other acts were not sufficiently similar to the charged offense to be admissible. To complete its analysis, the trial court ruled that the other acts evidence should not be excluded on the basis of the danger of unfair prejudice. The court reasoned the evidence was not marginally probative but rather "compellingly powerful evidence" of motive. Accordingly, the trial court ruled the danger of unfair prejudice did not substantially outweigh its probative value. The trial court further ruled it would instruct the jury to limit the use of the evidence to its proper purposes.

The trial court also granted defendant's motion in limine, ruling that the prosecution would not be permitted to show the circumstances of defendant's statements unless defendant sought to impeach the evidence. But, the court ruled it would permit the prosecution to elicit from witnesses testifying about defendant's statements that defendant was not asked about committing any crimes in Oakland County.

A jury trial was conducted between November 8, 2004 and November 17, 2004. After the jury began its deliberations, the foreperson sent a note to the trial court that one of the jurors "casually mentioned that he visited the crime scene." The trial court and the parties all agreed to remove the juror from the jury and replace him with the alternate juror who had been sequestered with a deputy sheriff. The trial court denied defendant's motion for mistrial on the basis that the excused juror might have tainted other members of the jury, ruling it had no information the excused juror had said anything to taint the jury. The jury returned its verdict of guilty of first-degree premeditated murder. Defendant now appeals by right.

## II. Evidentiary Issues

### A. Standard of Review

We review the admission or exclusion of evidence by the trial court for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A trial court abuses its discretion when its decision is so palpably and grossly contrary to fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but its defiance. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id*. Even if preserved, nonconstitutional evidentiary error will not merit reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Questions of law affecting the admissibility of evidence are reviewed de novo. *Id*. at 488.

An unpreserved claim of evidentiary error is reviewed for plain error. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999). To obtain relief a defendant must persuade the Court that an error occurred, which was plain, clear or obvious, and which affected

the defendant's substantial rights because it affected the outcome of the proceedings. *Id*. Reversal is warranted only when plain error results in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of guilt or innocence. *Id*.; *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

B. *Miranda*

Defendant first argues that the other acts evidence introduced through statements he made to the police should have been suppressed as the product of custodial interrogation without defendant having been advised of and waiving his rights as enunciated in *Miranda v Arizona*, 384 US 436, 467-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Because defendant did not object on this basis in the trial court it has not been preserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We conclude that plain error warranting reversal has not occurred.

The Fifth Amendment precludes a person from being compelled to be a witness against himself in a criminal trial. US Const, Am V. To ensure the protection of the Fifth Amendment right to be free from compelled self-incrimination during the inherently coercive environment of custodial interrogation, the United States Supreme Court articulated the rule that the police must advise a suspect in custody that he has the right to remain silent, that anything he says may be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him before any questioning. *Miranda, supra* at 467-479; *People v Daoud*, 462 Mich 621, 632-633; 614 NW2d 152 (2000). "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda, supra* at 444. Generally, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his so-called *Miranda* rights. *Dickerson v United States*, 530 US 428, 435; 120 S Ct 2326; 147 L Ed 2d 405 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

The *Miranda* warnings are designed to protect a suspect's Fifth Amendment right against compelled self-incrimination from being eroded by the inherently coercive environment of custodial interrogation. "The principal rationale of the requirement that *Miranda* warnings be given is to guard against the possibility that government agents might compel an individual to make self-incriminating statements while in custody." *People v Honeyman*, 215 Mich App 687; 694; 546 NW2d 719 (1996). Thus, when there is no nexus between the reason the person is in custody and the interrogation such that the custodial setting is utilized to facilitate a statement, *Miranda* is inapplicable. *Honeyman, supra* at 694-695. Here, although defendant was in custody for one offense, the custodial setting was not used as a coercive tool to extract defendant's statements as to other offenses.

More important, the facts of this case clearly demonstrate that the custodial setting did not compel defendant's statements to the police. Rather, defendant bargained with the prosecutor through counsel to give the statements in return for immunity from prosecution for the offenses he confessed. Further, when defendant made his statements to the police, he was represented by *two* attorneys, and both were present while defendant spoke to the police. One of the primary *Miranda* rights is to have counsel present during custodial interrogation. "If [during questioning] the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the

attorney and to have him present during any subsequent questioning." *Miranda, supra* at 474. Indeed, the *Miranda* Court recognized that the presence of counsel dispels the compelling atmosphere of custodial interrogation to the point of obviating the need for the familiar *Miranda* warnings. "The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." *Id*. at 466.

Because the custodial setting here was not used to extract the statements at issue from defendant, and because he was represented by counsel when he voluntarily gave his statements, plain error warranting reversal has not been established by the lack of *Miranda* warnings.

C. Immunity

We conclude the immunity agreement defendant entered with Texas authorities and immunity extended by the Wayne County prosecutor do not bar the use of defendant's statements as evidence in this Oakland County prosecution. Defendant misplaces his reliance on MCL 767.6 and *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999) to argue to the contrary. Defendant was not granted immunity under MCL 767.6 or any other statutory provision that required defendant to waive his privilege against self-incrimination. Instead of formal or statutory immunity, this case involves nonprosecution agreements commonly referred to as "informal immunity" or "pocket immunity." See *United States v McFarlane*, 309 F3d 510, 513 (CA 8, 2002), and *United States v Turner*, 936 F2d 221, 223 (CA 6, 1991). Informal immunity agreements grow out of the authority of a prosecutor as an executive officer within a particular jurisdiction having the discretion to decide whether and against whom criminal charges will be sought, dismissed, or plea bargained. See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115; 215 NW2d 145 (1974), and *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672; 194 NW2d 693 (1972). Thus, a prosecutor or comparable officer in another jurisdiction may enter into an agreement with a suspect to forego prosecution of a particular offense or offenses (transactional immunity), or to not to use evidence gained by the suspect's cooperation in a later prosecution against the suspect (use immunity), in return for testimony, or cooperation or a guilty plea in another case. See *United States v Eliason*, 3 F3d 1149, 1152 (CA 7, 1993); see, also, *State v Edmonson*, 714 So 2d 1233, 1238 (La, 1998).

In contrast to a formal grant of statutory immunity, informal immunity agreements are contractual in nature and do not generally bind prosecuting authorities who are not a party to the agreement. *Id*. at 1237, citing *Turner, supra*. "Like a plea agreement, an immunity agreement is contractual in nature and [is] interpreted according to contract law principles." *United States v Black*, 776 F2d 1321, 1326 (CA 6, 1985). The Eighth Circuit Court of Appeals explained:

> When a defendant enters an informal immunity agreement with the government rather than asserting his Fifth Amendment privilege against being compelled to incriminate himself, "the scope of informal immunity is governed by the terms of the immunity agreement." *United States v Luloff*, 15 F3d 763, 766 (8th Cir, 1994). *This is true because an immunity agreement is likened to a contract between the government and the defendant, a concept universally recognized by courts faced with enforcing such agreements.* See, *id.*, *United States v Crawford*, 20 F3d 933, 935 (8th Cir, 1994) (holding that immunity agreements are analogous

> to plea agreements and are enforced under principles of contract law, within the constitutional safeguards of due process); *United States v Conway*, 81 F3d 15, 17 (1st Cir, 1996); *United States v Cantu*, 185 F3d 298, 302 (5th Cir, 1999); *United States v Brown*, 979 F2d 1380, 1381 (9th Cir, 1992); *United States v Nyhuis*, 8 F3d 731, 742 (11th Cir, 1993), *cert. denied*, 513 US 808; 115 S Ct 56; 130 L Ed 2d 15 (1994). [*McFarlane, supra* at 514 (emphasis added).]

Applying contract principles to the Texas immunity agreement, we find it plainly provides defendant with transactional immunity from prosecution in the jurisdiction of Houston or Harris County, Texas. The scope of the immunity is also stated to be "the discovery of these bodies or the resolution of these murders." Thus, the Harris County assistant district attorney promised defendant he would not be prosecuted for murders for which he leads police to the victim's bodies or otherwise "resolves." The nonprosecution agreement could extend beyond Houston because defendant "agreed he will lead the police to graves and assist in clearing the offenses in the cities of Austin, Galveston, Texas and the cities of Ann Arbor, Michigan; Kalamazoo, Michigan; Detroit, Michigan, and Windsor, Ontario, Canada." But immunity does not apply in other jurisdictions unless defendant confesses to an offense, and the other jurisdiction has agreed in writing not to prosecute.

Defendant argues that the Texas immunity agreement must have included use immunity otherwise defendant's Texas lawyers were constitutionally ineffective. This claim is without merit. Use immunity is required only when a person is compelled to waive his Fifth Amendment privilege against self-incrimination. Thus, in the face of the assertion of the privilege against self-incrimination, immunity to compel testimony must be "immunity from use and derivative use [that] is coextensive with the scope of the privilege against self-incrimination." *Kastigar v United States*, 406 US 441, 453, 460-61; 92 S Ct 1653; 32 L Ed 2d 212 (1972). Such immunity precludes "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." *Id*. The fatal flaw in defendant's argument that the Texas agreement should have included use immunity is that defendant was not compelled to waive his Fifth Amendment privilege against self-incrimination. Rather, defendant bargained with Texas authorities to make his statements regarding the murders he perpetrated in return for a promise not to be prosecuted for those offenses. Use immunity must arise either from the government's promise made not to use the evidence or from the defendant's being granted immunity after he invoked the privilege against self-incrimination. *Eliason, supra* at 1153. Here, the Texas authorities promised only that defendant would not be prosecuted for the murders he confessed, and defendant was not compelled to testify after having invoked his right against self-incrimination.

For these reasons, the Texas immunity agreement did not preclude the use of defendant's statements regarding the Texas murders and assaults in this Oakland County prosecution. Accordingly, the trial court did not abuse its discretion in so ruling.

The trial court's decision to admit defendant's statements regarding the 1979 murder of Jean Clyne is more problematic. Then Wayne County Prosecutor William Cahalan specifically extended use immunity to defendant in return for giving a statement regarding that offense. Prosecutor Cahalan wrote:

> If your office, Mr. Watts and [defendant's] attorney are in agreement with providing such an interview, the Wayne County Prosecutor's Office will agree not to use any statement obtained during this interview in any prosecution of Mr. Watts for the Clyne homicide. Furthermore, we will agree not to use any information obtained from Mr. Watts' statement or evidence developed from information contained in his statement, against Mr. Watts in any future prosecution.

Applying contract principles, the trial court ruled that neither Oakland County nor the state of Michigan was bound by the Wayne County agreement because they were not parties to it. The court also noted that the state of Michigan, through the Attorney General's supervisory relationship to litigation involving the state, never indicated the state as a whole would be bound by the agreement. See *In re Certified Question*, 465 Mich 537, 545-548; 638 NW2d 409 (2002).

The trial court correctly ruled on this issue. Michigan's statutory scheme in general restricts a county prosecutor's authority to crimes occurring within the county's geographic boundaries.[2]

> The prosecuting attorneys shall, *in their respective counties*, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interested. [MCL 49.153 (emphasis added).]

Applying MCL 49.153 in an analogous situation, this Court has held that a Wayne County assistant prosecutor possessed no authority to enter a plea bargain in an Oakland County criminal prosecution. *People v Stackpoole*, 144 Mich App 291, 300-301; 375 NW2d 419 (1985). More on point, other jurisdictions applying similar state statutory schemes have ruled that one county prosecutor has no authority to enter an immunity agreement purporting to bind another county prosecutor in the same state. See *State v Barnett*, 124 Ohio App 3d 746; 707 NE2d 564 (1998), and *Staten v Neal*, 880 F2d 962 (CA 7, 1989) (applying Illinois law).

Moreover, under contract principles, neither the AG nor the Oakland County prosecutor was a party to the Wayne County immunity agreement, so they are not bound by the agreement from using defendant's admissions regarding the Wayne County murder in the Oakland County murder prosecution. See *Edmonson, supra* at 1237 ("informal [immunity] agreements are contractual in nature and do not as a general proposition bind prosecutorial authorities who are not a party to the agreement"), and *Turner, supra* at 223 (Informal immunity agreements "are contractual in nature and do not bind other parties not privy to the original agreement." *Id*., citing *United States v Peister*, 631 F2d 658, 662 (CA 10, 1980), *cert den* 449 US 1126; 101 S Ct 945; 67 L Ed 2d 113 (1981)). Further, the plain and unambiguous language of the agreement bound only the Wayne County prosecutor's office from using defendant's admission: "the *Wayne County Prosecutor's Office* will agree not to use any statement obtained during this interview in any prosecution of Mr. Watts for the Clyne homicide. Furthermore, *we* will agree

[2] Several venue statutes regarding unique situations provide exceptions not applicable here.

not to use any information obtained from Mr. Watts' statement or evidence developed from information contained in his statement, against Mr. Watts in any future prosecution." In context, as used in Prosecutor Cahalan's letter "we" can only refer to the immediately preceding "Wayne County Prosecutor's Office."

Finally, even if the trial court erred in not excluding the evidence of defendant's admissions regarding the Wayne County murder on the basis of use immunity, because we conclude the evidence of the other 16 murders and assaults was properly admitted under MRE 404(b), the error would be harmless under either the standard for ordinary trial error (more probable than not that the error was not outcome determinative), *Lukity, supra* at 495-496, or the standard for non structural constitutional error (harmless beyond a reasonable doubt), *Carines, supra* at 774.

D. MRE 404(b)

Defendant argues that the trial court abused its discretion admitting the other acts evidence under MRE 404(b). He contends that because the prosecutor offered the evidence to prove identity through modus operandi, it must satisfy the test enunciated in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), which requires: (1) substantial evidence that the defendant committed the similar act, (2) some special quality of the other acts that tends to prove the defendant's identity, (3) the evidence be material to the defendant's guilt, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998). We disagree.

In general, all relevant evidence is admissible; irrelevant evidence is not. MRE 402; *Starr, supra* at 497. But evidence of a person's character or a trait of character is generally inadmissible to prove action in conformity with the trait of character. *Id*. at 494; MRE 404(a), (b)(1). Thus, the general rule is that "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The evidence, however, may be admitted under MRE 404(b)(1) to show "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. . . ." To be admissible under MRE 404(b)(1), other acts evidence: (1) must be offered for a proper purpose, i.e., to prove something other than propensity to commit like acts, (2) must be relevant under MRE 402, as enforced through MRE 104(b); and (3) the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. *Knox, supra* at 509; *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). "Finally, the trial court, upon request, may provide a limiting instruction under Rule 105." *Id*. at 75.

In *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000), our Supreme Court reviewed the use of other acts evidence for the purpose of showing scheme, plan, or system. The Court, citing *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), noted it had ruled that other acts evidence is not limited to establishing identity or intent, but rather, other acts evidence "that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed." *Sabin, supra* at 61-62. The Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Id*. at 63. But

more than similarity between the charged and uncharged acts is necessary to establish the existence of a scheme, plan, or system. *Id*. at 64. Thus, there must not merely be a similarity in the results, "but *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 in Wigmore). "'To establish the existence of a common design or plan, the common features must indicate *the existence of a plan rather than a series of similar spontaneous acts*, but the plan thus revealed need not be distinctive or unusual.'" *Sabin, supra* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 402; 867 P2d 757 (1994) (emphasis added).

In *Knox*, our Supreme Court noted that its decisions in *Crawford, VanderVliet*, and *Sabin* "continue to form the foundation for a proper analysis of MRE 404(b)." *Knox, supra* at 510. The trial court did not abuse its discretion in applying the principles discussed in these cases and finding sufficient common features in the other acts that are naturally explained as manifestations of a general plan rather than a series of similar spontaneous acts. *Sabin, supra* at 65-66. Specifically, the trial court found the following common features that were evidence of a scheme, plan, or system:

> (1) Watts would follow or stalk his female victim; (2) the victim was alone; (3) the victim was generally a younger woman (between the ages of 19 and 36, with one victim who was 44); (4) Watts would use his Pontiac Grand Prix to identify his victim and position himself for the attack; (5) Watts would strike without warning, at random, acting to kill his victim quickly, through strangling or stabbing, without provocation or any familiarity with his victim; (6) Watts would not sexually assault his victims; and (7) he often took some personal item as a memento, not because the item had value, but because it was associated with the victim. [Trial court opinion and order, 10/8/2004, p 10.]

The scheme, plan, or system the trial court determined was revealed by the other acts was not necessarily "distinctive or unusual." *Sabin, supra* at 66. Yet, it does possess some unique elements, such as, the use of a particular car to stalk victims, rapid attacks, killing by various means available, and lack of the usual motives for such random attacks - - sex or theft. We cannot conclude that the trial court abused its discretion when keeping in mind that the appellate function is not to decide the issue de novo but to determine whether the trial court's decision was so palpably and grossly contrary to fact and logic that it evidences the perversity of will rather than the proper exercise of judgment, *Hine, supra* at 250, and that "a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id*.

Likewise, the trial court did not abuse its discretion in finding the other evidence relevant to the proper purpose of showing a motive for the murder. "Proof of motive in a prosecution for murder, although not essential, is always relevant" *People v Rice* (*On Remand*), 235 Mich App 429, 442; 597 NW2d 843 (1999); see, also *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995), holding that in a circumstantial murder trial, evidence of motive is highly relevant. In considering admissibility of other acts evidence, the trial court found instructive this Court's decision in *People v Hoffman,* 225 Mich App 103; 570 NW2d 146 (1997). In that case, this Court affirmed the admission of other acts evidence tending to establish that defendant hated women as evidence of the defendant's motive for committing an assault with intent to commit murder. *Id*. at 104. The evidence consisted of "testimony from two women whom [the]

defendant had allegedly assaulted and battered and to whom he had expressed his general hatred toward women." *Id*. The *Hoffman* Court, in turn relied on a New Jersey appellate decision that affirmed the admission evidence of racial animus as motive to "'to explain an otherwise inexplicable act of random violence.'" *Hoffman, supra* at 109, quoting *New Jersey v Crumb,* 277 NJ Super 311, 317; 649 A2d 879 (App Div, 1994). The *Hoffman* panel opined: "Similar to the evidence of racism in *Crumb,* evidence that defendant hates women and previously had acted on such hostility establishes more than character or propensity. Here, the other-acts evidence was relevant and material to [the] defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim." So, too, the other acts evidence here showed motive to explain what otherwise might seem to be an unexplainable, vicious murder.

The trial court also did not abuse its discretion in admitting the other acts evidence for the purpose of showing intent, the necessary element in a charge of first-degree murder of premeditation and deliberation. Contrary to defendant's argument, the testimony of eyewitness Foy by itself could not establish that element because it was susceptible of being explained as a sudden affray between lovers or strangers. The admission of the other acts evidence showing scheme, plan, or system permitted the inference that defendant stalked Dutcher in his Pontiac and deliberately, with premeditation, killed her.

We also find that the trial court did not abuse its discretion in concluding that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. MRE 403. The trial court correctly reasoned the evidence was not marginally probative but rather powerful evidence of motive, and more specifically of premeditation and deliberation. The evidence operated not through a direct propensity of showing defendant killed on other occasions so he killed in this instance, but through the inferences that defendant killed for a reason (motive) and while using a particular method (scheme, plan or system), which together also was probative of premeditation and deliberation. Moreover, the trial court instructed the jury to limit the use of the other acts evidence to its proper purposes. MRE 105; *VanderVliet, supra* at 75. The trial court did not abuse its discretion.

Defendant's reliance on the "special quality" test of *Golochowicz* is misplaced because the evidence was properly admitted for proper purposes other than identity. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes." *Sabin, supra* at 56. Further, in considering the admissibility of evidence under MRE 404(b), a proponent of the evidence need only establish that the evidence is relevant to one proper, noncharacter purpose to secure its admission. *Starr, supra* at 501. Accordingly, even if the evidence was not admissible under *Golochowicz* to directly prove identity, error warranting reversal did not occur.

E. Hearsay/Confrontation Clause

Defendant next argues that portions of the other acts evidence consisted of inadmissible hearsay, such as vital statistics of murder victims and testimony regarding crime scenes. Defendant asserts this violated his constitutional right of confrontation. We hold defendant has waived this argument.

Defendant did not properly preserve a hearsay objection either by raising it in the trial court or by identifying it in his statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Defendant's failure to preserve and properly present this claim, and his less than cursory treatment on brief constitutes abandonment of the claim. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004), and *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

F. Hallway Demonstration

During the presentation of the defense case, defense counsel set up a demonstration in the hallway outside the courtroom to impeach eyewitness Foy. Defendant now argues it was a marginal demonstration and that plain error occurred when defense counsel did not object to testimony noting differences between the actual time and place when the crime occurred and the hallway demonstration. In essence, defendant argues that the trial court abused its discretion by allowing the demonstration rather than permitting a view of the scene. We disagree.

Error warranting reversal did not occur because a party cannot obtain relief on appeal for an alleged error at trial to which the complaining party "contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46, 597 NW2d 176 (1999). Here, defendant cannot introduce evidence at trial and claim on appeal that error occurred in its admission. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

G. DNA Evidence

Next, defendant argues that plain error occurred at trial when DNA evidence was admitted in evidence without a proper foundation that the police testing procedures and statistical data were reliable. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783; 685 NW2d 391 (2004). Defendant contends that the improper admission of the DNA evidence violated defendant's substantial rights because it established "the res gestae and thereby convicting the defendant." In addition, defendant argues that defense counsel was ineffective for failing to object to the lack of foundation for the DNA evidence. We disagree.

The prosecution used the DNA evidence to establish that blood found on and around Dutcher's body was in fact that of the victim. Although we agree with plaintiff that a sufficient foundation for the admission of this evidence was established, defendant cannot satisfy his burden of establishing the prejudice necessary to warrant reversal even if plain error occurred. Defense counsel cross-examined the prosecution's expert as follows:

> *Q.* Did you find DNA from anybody, any other foreign DNA at all.
>
> *A.* No, I did not.
>
> *Q.* So, basically, what you are here to tell the jury today is that you tested all this blood and we know that Helen Dutcher's blood was found at the scene of her murder.
>
> *A.* That is correct.

*Q*. And, there is no other blood or DNA from any other human being at all, nothing else?

*A*. Not in the samples that were submitted to me, no.

* * *

*Q*. So, just to make sure we are clear about this. Nothing linking Coral Watts, from your point of view.

*A*. Not in the samples that were submitted to me, no.

So, in the span of a few questions, defense counsel, without objecting to the expert's qualifications, the PCR methodology, the procedures and equipment actually employed, or the database underlying the statistical analysis, established that the prosecution had absolutely no physical evidence linking defendant to the murder of Helen Dutcher. Consequently, defendant cannot establish he was prejudiced by the admission of the DNA evidence. So, even if evidentiary error occurred in the admission of the DNA evidence, and the error was preserved, it would not warrant reversal. *Lukity, supra* at 495-496. Likewise, defendant has failed to establish either outcome-determinative error or overcome the presumption that counsel's tactics constituted sound trial strategy. Thus, defendant's ineffective assistance of counsel claim fails. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001).

III. Ineffective Assistance of Counsel

Defendant argues that although his primary defense was identification, his counsel was constitutionally deficient by not raising insanity as an alternative defense. We conclude defendant has failed to overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance and that under the circumstances might be considered sound trial strategy.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Appellate review of a claim of ineffective assistance involves a determination (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by the defective performance. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

Although the issue defendant presents on appeal is whether defense counsel was constitutionally ineffective, the body of his argument is no more than an argument for a remand to the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973) so that he can search for a basis to establish his ineffective assistance of counsel claim. But this Court has already denied defendant's motion to remand, which asserted the same arguments. Unpublished order of the Court of Appeals issued September 7, 2005 (Docket No. 259903). Defendant asserts the same factual predicate regarding his claim of ineffective assistance in his brief on appeal as he asserted in his motion for remand. Specifically, defendant refers to his own apparent unsworn statements to the author of the presentence information report

that "he had been diagnosed with schizophrenia in 1982," and that he "use[d] . . . marijuana from 1973 to 1975." To establish his claim of ineffective assistance of counsel, defendant must show both (1) he could have presented a viable insanity defense at trial (prejudice) and (2) either counsel failed to reasonably investigate the defense or unreasonably failed to pursue it (serious error rather than reasonable trial strategy). See *Strickland v Washington*, 466 US 668, 687, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *LeBlanc, supra* at 578.

With respect to whether defendant could have presented a viable defense at trial, he must have some evidence that at the time of the offense he had both a mental illness and lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or conform his conduct to the requirements of the law. MCL 768.21a(1).[3] We find that defendant's claim that he is now entitled to an evaluation under MCL 768.20a(3) is mistaken. The statutory scheme is clear. An accused who desires to raise the defense of insanity at trial must give notice of his intent to do so "not less than 30 days before the date set for the trial of the case." MCL 768.20a(1). The notice of insanity defense triggers a requirement that the accused "undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel, as applicable." MCL 768.20a(1). Thereafter, both the defendant and the prosecution have the right to an independent evaluation. MCL 768.20a(3). See *Toma, supra* at 292, n 6. Here, defendant never invoked this process by giving notice before trial of an intent to raise insanity as a defense. The purpose of the statute is "to give an indigent criminal defendant the opportunity to prepare a defense of insanity at public expense," *People v McPeters*, 181 Mich App 145, 151; 448 NW2d 770 (1989), not to afford an opportunity to go fishing for post-conviction relief.

The real questions raised by defendant's claim of ineffective assistance of counsel is what information defense counsel possessed when preparing for trial and whether strategic choices counsel made based on that information were objectively unreasonable under prevailing professional norms. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland, supra* at 691. Here, while defendant moved to remand for a *Ginther* hearing, he neither supplied his own affidavit nor the affidavit of defense

[3] Both plaintiff and defendant mistakenly assume that had defendant asserted insanity as a defense at trial he would have had the burden of establishing that affirmative defense by the preponderance of the evidence. But this Court has held that the application of MCL 768.21a, as amended by 1994 PA 56, to offenses occurring before the effective date of its amendment violates the Ex Post Facto Clauses of the federal and state constitutions, US Const, art I, § 9, cl 3; Const 1963, art 1, § 10. *People v McRunels*, 237 Mich App 168; 603 NW2d 95 (1999). Before October 1, 1994, a defendant in a criminal proceeding was presumed sane but once any evidence of insanity was introduced the prosecution bore the burden of establishing defendant's sanity beyond a reasonable doubt. *People v Stephan*, 241 Mich App 482, 488-489; 616 NW2d 188 (2000); *People v Bailey*, 142 Mich App 571, 572-573; 370 NW2d 628 (1985). The definition of legal insanity was substantially the same in 1979 as it is currently. See *People v Crawford*, 89 Mich App 30, 35; 279 NW2d 560 (1979).

counsel to shed any light on these questions. Thus, defendant failed to comply with MCR 7.211(C)(1) by providing an offer of proof regarding the facts to be established on remand.

"The role of defense counsel is to choose the best defense for the defendant under the circumstances." *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). Moreover, counsel has broad discretion in making strategic trial choices. *Id*. Thus, appellate scrutiny of counsel's decisions must be highly deferential. *Strickland, supra* at 689. Here, the available record reveals that counsel effectively pursued the defense of misidentification. Indeed, defendant concedes on appeal that identification was his primary defense. Nevertheless, defendant contends he could have also pursued the inconsistent defense of insanity without undermining his primary defense by convincing the trial court permit a bifurcated trial. Although, this Court has held it within the trial court's discretion to bifurcate a trial, those cases uphold trial courts in denying such requests by defendants. See *People v Furman*, 158 Mich App 302, 320; 404 NW2d 246 (1987), and *People v Meatte*, 98 Mich App 74, 79; 296 NW2d 190 (1980). As this Court has noted, "[t]he right of a defendant to raise alternative defenses does not imply a concomitant right to sketch each defense on the clean slate of a naive jury." *Id*.

A defendant presenting a claim of ineffective assistance must overcome the strong presumption that counsel's representation was within the wide range of reasonable professional assistance and that under the circumstances might be considered sound trial strategy. *LeBlanc, supra* at 578, citing *Strickland, supra* at 689. Counsel is not ineffective when choosing one defense over another, particular when in counsel's professional judgment one of the defenses has a greater chance of success in light of available evidence. *People v Lloyd*, 459 Mich 433, 449; 590 NW2d 738 (1999); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). In the absence of any evidence to the contrary, this Court must presume that defense counsel's decision to pursue defendant's primary defense of misidentification was a matter of reasonable professional judgment and sound trial strategy. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Bailey*, 175 Mich App 743, 747; 483 NW2d 344 (1989). Consequently, defendant has failed to overcome the strong presumption that counsel's representation was constitutionally adequate.

## IV. Mistrial

Defendant argues that the trial court abused its discretion by not granting his motion for mistrial after it was revealed a juror visited the crime scene. "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). To warrant reversal, the court's ruling "must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *Id*.

Here, the trial court properly removed the wayward juror and substituted an alternate juror with the consent of both the prosecutor and defendant. Defendant offers no argument on how a lone removed juror's unauthorized view of an area where the crime had occurred years ago caused him prejudice. Nor has defendant offered any argument regarding what prejudicial information this juror could have possibly learned that could have been passed to other jurors to deny defendant a fair and impartial trial. Defendant has simply failed to satisfy his burden of persuasion that the circumstances regarding the removed juror create an inference that

defendant's right to a fair and impartial trial was prejudiced. We conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter