STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 2010
v	No. 291790 Genesee Circuit Court
IVAN LEE PAGE, Defendant-Appellant.	LC No. 07-021714-FC

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted for the first-degree premeditated murder, MCL 750.316(1)(a), of Deena Brown. He was sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in granting the prosecutor's motion to introduce MRE 404(b) evidence. We disagree. A trial court's decision whether to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The trial court granted the prosecution's motion to admit MRE 404(b) evidence concerning the deaths of Patricia Peeler and Lisa Price. The court determined that the evidence was relevant, it was admissible for the proper purpose of establishing identity as well as a common scheme, plan, or method of committing murder, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

To be admissible under MRE 404(b),[1] other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its

[1] MRE 404(b)(1) provides:

> 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

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probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

We are persuaded that the trial court did not err in finding that the other acts evidence was admissible to show a common plan, scheme, or system. Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the charged and other acts are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system; they need not be part of a single continuing conception or plot. *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000). Although general similarity does not alone establish a plan, scheme, or system, if there is such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan, the evidence is properly admitted. *Id*. Distinctive and unusual features are not required to establish the existence of a common plan or scheme. *Id*. at 65-66.

Here, defendant was charged with the first-degree murder of Deena Brown. Brown was a known prostitute whose body was found in a school parking lot in Flint. Her shirt was pulled up to her neck and she was wearing no shoes and only one sock. The cause of death was ligature strangulation and the manner of death was homicide. Defendant's DNA was found on the sweatshirt that was tied around Brown's neck, causing her death.[2] The other acts evidence concerned the deaths of Peeler and Price. Price, a prostitute, was found under a tree in a residential neighborhood in Flint. Price was nude except for a sweatshirt and bra, which were pulled up around her neck. The cause of Price's death was manual strangulation and the manner of death was a homicide. Defendant's semen was found in Price's vagina and rectum. Finally, the body of Peeler, a prostitute, was found near the sidewalk in a residential neighborhood in Flint. Peeler was nude except that she had on one shoe. Defendant's semen was found in Peeler's vagina. One medical examiner opined that cocaine intoxication was the cause of death, while another opined that asphyxia by smothering was the cause of death.[3]

The similarities attendant to the deaths of these three women are striking and support the conclusion that the evidence was properly admitted to demonstrate a common plan, scheme, or system of committing murders. All three women were prostitutes. All three were found in a relatively open area in Flint in varying degrees of undress. There was evidence that all three died of asphyxiation/strangulation. All three had defendant's DNA on them, or in Brown's case, on a

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> 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.

[2] Additionally, DNA found on Brown's underwear was a potential match with defendant.

[3] Dr. Ljubisa Dragovic, pathologist, opined that Peeler died of asphyxia by smothering. Dr. Terry Krznarich, pathologist, initially opined that Peeler died of cocaine intoxication, but then indicated that nothing in his findings contradicted a cause of death of asphyxia by smothering. When Dr. Krznarich was asked whether he agreed with Dr. Dragovic's opinion that Peeler's cause of death was asphyxia by smothering, Dr. Krznarich responded in the affirmative.

sweatshirt tied around her neck. We conclude that the other acts evidence was highly probative, and its probative value was not outweighed by the danger of unfair prejudice, particularly where the trial court instructed the jury regarding the limited purpose for which the challenged evidence was admitted. The trial court did not err in admitting the evidence.

Furthermore, the trial court did not err in finding that admission of the evidence was also supported under the identity-via-modus-operandi theory. When other acts evidence is offered to identify the defendant through modus operandi: (1) there must be substantial evidence that the defendant committed the similar act, (2) there must be some special quality of the act which tends to prove the defendant's identity, (3) the evidence must be material to the defendant's guilt, and (4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998).

Regarding whether there was substantial evidence that defendant committed the murders of Peeler and Price, defendant's DNA was found on their bodies. There was evidence that both died of strangulation. Jerome Currie, defendant's jail cellmate, testified that defendant remarked to him that he (defendant) liked to "choke hos [sic]" and he "killed those ho's [sic], but they can't prove it; and the jury ain't gonna believe it because they ho's [sic] or prostitutes." The evidence tends to strongly link defendant to the murders of Peeler and Price. Also, the distinctive similarities, discussed above, in all three deaths tend to evince defendant's distinctive signature. Finally, the other acts evidence is material to defendant's guilt in the instant case, and the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice, particularly where the trial court gave a limiting instruction. Accordingly, the trial court did not err in admitting the evidence for the purpose of proving identity via modus operandi.

Next, defendant contends that the prosecutor engaged in repeated instances of misconduct that deprived him of a fair trial. We disagree. This Court reviews a defendant's unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Defendant first points out that the prosecutor elicited testimony from the officer in charge that the police had allegedly considered and eliminated all other suspects and investigated all leads until dead ends were reached. The prosecutor also referenced this testimony in her closing argument. According to defendant, the elicitation of this testimony, as well as the closing argument remarks, were improper because the police did not actually investigate all reasonable leads. Assuming that the police did not in fact investigate all reasonable leads, the prosecutor would not be at fault in eliciting the challenged testimony unless she knew that she was eliciting perjured testimony. See *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998) (stating that the prosecutor's duty is to correct perjured testimony; she may not knowingly use false testimony to obtain a conviction). Defendant presents no evidence suggesting that the prosecutor knowingly elicited perjured testimony.

Assuming, arguendo, that the prosecutor knowingly presented perjured testimony, defendant cannot demonstrate outcome determinative error in light of the strong, untainted evidence against him. The day before Brown's body was found, she was with defendant in defendant's house. Lee Plum testified that, after he and Brown had sex in a bedroom of defendant's house, defendant ranted and raved regarding Brown having sex in his home.

Defendant then took Brown into another room for about 30 seconds. Upon their exit of the room, Brown approached Plum, told him to come back for her and mentioned something about 911. The next day, Brown was found dead in a school parking lot. The cause of death was strangulation, and the sweatshirt tied tightly around Brown's neck was the cause of the strangulation. Defendant's DNA was found on the sweatshirt, and defendant could not be excluded as a potential match for the DNA found on Brown's underwear. The other acts evidence further implicated defendant. Peeler and Price were prostitutes, like Brown, whose bodies were found in the same general geographic location as Brown. Defendant's DNA was found on Peeler and Price, too. The evidence supports a finding that Peeler and Price died of asphyxia and manual strangulation, respectively. Currie testified that defendant remarked to him that he (defendant) liked to "choke hos [sic]" and he "killed those ho's [sic], but they can't prove it; and the jury ain't gonna believe it because they ho's [sic] or prostitutes." Because a reasonable probability does not exist that defendant would have been acquitted had the alleged prosecutorial misconduct never occurred, defendant's claim fails.

Next, defendant argues that the prosecutor improperly vouched for the truthfulness of the prosecution's witness, Plum, by implying that she had a special knowledge of that to which Plum testified. During her closing argument, the prosecutor remarked that Plum "didn't embellish and he could have," Plum "doesn't make up stuff. Doesn't give you the perfect story. He tells you what he can remember and what happened. . . . He didn't embellish a thing," and Plum "had no reason at all to come in here to tell you anything but the truth." A prosecutor may not vouch for the credibility of her witnesses by implying that she has some special knowledge of their truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But a prosecutor may comment on her own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Id*. It seems that the prosecution's remarks were more along the lines of an argument that Plum was worthy of belief, rather than a personal guarantee of Plum's credibility. The challenged remarks do not necessarily intimate that the prosecutor had some sort of special knowledge regarding Plum's truthfulness. The prosecutor was pointing out that Plum's testimony was not "perfect" in the sense that Plum admitted to being a crack user, admitted to having sex with Brown within a few minutes of meeting her on the eve of her death, and indicated that he was unsure about various details concerning the time that he, defendant, and Brown were together in defendant's house on the eve before Brown was found dead. One could reasonably infer that Plum was being truthful in his testimony considering Plum's willingness to share unflattering details about himself and his admission that he was uncertain about various details concerning defendant's interaction with Brown on the night in question. We do not believe that the challenged remarks constitute misconduct. Even if they did, defendant cannot demonstrate prejudice, as discussed above.

Next, defendant alleges that the prosecutor improperly appealed to the jury's sympathy during her closing argument. The prosecutor stated that Brown, Peeler, and Price "maybe didn't have a lot of dignity in life," defendant "gave them no dignity in death," and "justice demands" that defendant be found guilty. Arguments which are little more than an appeal to the jury's sympathy for the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Although the prosecutor's remarks, particularly the one concerning the victims not having dignity in life, might be construed as an improper appeal to the jury's sympathy, we do

not believe that the comments were so inflammatory as to prejudice defendant, particularly where the jury was instructed to not allow sympathy to play a role in its verdict.

Next, defendant argues that the prosecutor improperly suggested to the jury during closing argument that her burden of proof was less than guilt beyond a reasonable doubt. The prosecutor stated: "This trial, ladies and gentlemen, is about the road to the truth. Don't get off on exits, the dead ends. *Look at what the evidence is, not what it isn't*." Defendant asserts that the prosecutor's comment deprived defendant of his right to be acquitted on the basis of a lack of evidence. We are not persuaded that the comment, "[l]ook at what the evidence is, not what it isn't," conveyed to the jury that it was prohibited from acquitting defendant on the basis of a lack of evidence on the prosecutor's part. Rather, it seems that the challenged remark was an attempt to focus the jury's attention to the actual evidence in the case, rather than on side issues or theories not supported by the evidence. There was no prejudicial error here, particularly where the jury was instructed that the burden of proof was guilt beyond a reasonable doubt.

Finally, defendant argues in his standard 4 brief that the prosecutor knowingly presented false evidence when she elicited trial testimony from Jeffrey Nye, forensic scientist and DNA expert, that defendant could not be excluded as a potential match for the DNA found in Brown's underwear. Defendant contends that the prosecutor knew that this testimony was perjured because Nye had testified at the preliminary examination that defendant was excluded as a possible DNA match with regard to Brown's underwear. Defendant is correct in that there is a discrepancy between Nye's preliminary examination testimony and his trial testimony. At the preliminary examination, Nye testified that defendant was "excluded" as a possible match to the DNA on Brown's underwear. At trial, Nye testified that defendant could *not* be excluded as a potential match to the DNA found on Brown's underwear. Defendant does not elaborate on why he believes that the prosecutor is at fault for Nye's inconsistent testimony. The prosecutor does have a duty to correct perjured testimony; she may not knowingly use false testimony to obtain a conviction. *Lester*, 232 Mich App at 276-277. Although the prosecutor elicited trial testimony from Nye that contradicted his preliminary examination testimony, it is not clear that the prosecutor knowingly presented perjured testimony. It is possible that Nye changed his mind about the possibility of whether defendant could be a DNA match or that Nye simply misspoke at the preliminary examination. Defense counsel could have impeached Nye on this point, but failed to do so. In any event, to the extent that the prosecutor did knowingly present perjured testimony, there was no outcome determinative error, for the reasons discussed above.

Finally, defendant asserts that his trial counsel was ineffective. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective

assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first claims that his counsel was ineffective for failing to object to various instances of alleged prosecutorial misconduct. As discussed above, either there was no prosecutorial misconduct, or, to the extent that there was, no prejudice resulted. A failure to pursue a meritless objection does not constitute ineffective assistance of counsel. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Insofar as misconduct did occur, defendant cannot establish that, had counsel objected to the misconduct, there is a reasonable probability that the outcome of the trial would have been different.

Defendant also claims in his standard 4 brief that his counsel was ineffective for failing to hire a DNA expert to challenge the prosecution's DNA evidence. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure to call a witness constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Not considering the inconsistent testimony regarding whether defendant's DNA was found on Brown's underwear, it was uncontroverted that defendant's DNA was found on the sweatshirt tied around Brown's neck, in Price's vagina, and in Peeler's vagina. Defendant does not suggest that the DNA evidence was faulty in some way, nor does he elaborate upon how a DNA expert would have bolstered his defense. A defense DNA expert would most probably have had to make some critical concessions regarding the strong likelihood that defendant was a match for the DNA found on the victims. Accordingly, defendant cannot demonstrate that, had his counsel presented the testimony of a defense DNA expert, there is a reasonable probability that defendant would have been acquitted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly